



Handwritten text in a decorative border along the left edge, likely a library or archival stamp. The text is written in a stylized, possibly Gothic or similar historical script, but is largely illegible due to fading and the texture of the paper. Some characters are difficult to discern, but they appear to be arranged in a single vertical line.

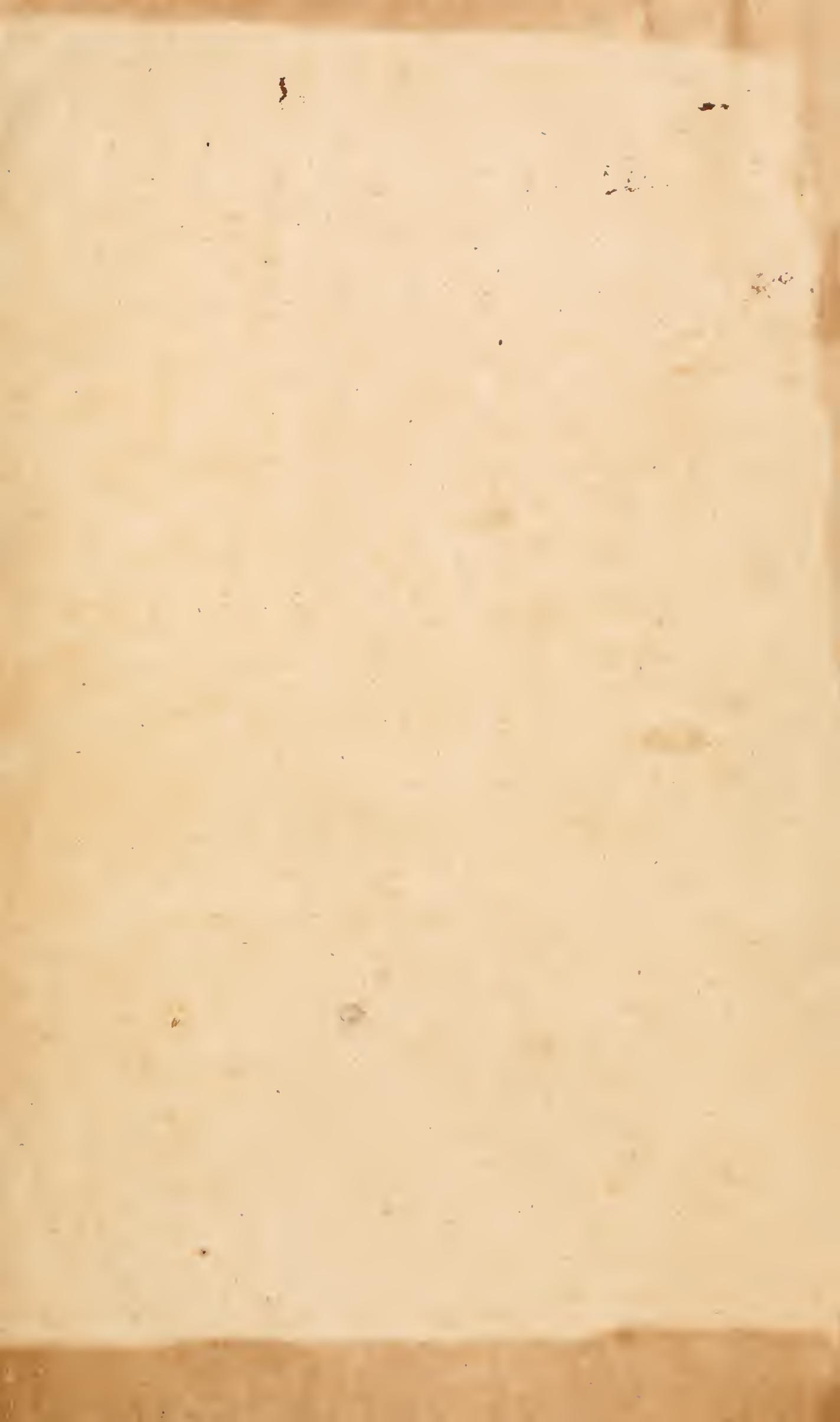


John Quincy Adams.



ADAMS 50.2

U.S.



John Harris

A
NEW ABRIDGMENT
OF THE
LAW.

By a GENTLEMAN of the *Middle Temple*.

V O L. IV.

In the SAVOY:

Printed by CATHERINE LINTOT, Law-Printer to the King's most Excellent Majesty;
For D. BROWNE, J. SHUCKBURGH, and J. WORRALL, near *Temple-Bar*; T. OSBORNE, in *Gray's Inn*; C. HITCH and L. HAWES, JAMES RIVINGTON, and J. FLETCHER, R. BALDWIN, J. RICHARDSON, and T. LONGMAN, in *Pater-Noster Row*; JOHN RIVINGTON, in *St. Paul's Church-Yard*; W. JOHNSTON, in *Ludgate-Street*; and P. DAVEY B. LAW, in *Ave-Maria-Lane*; and T. CASLON, against *Stationers-Hall*.
MDCCLIX.

ADVERTISEMENT.

THE Gentleman, who published the Three former Volumes of this Work, was at one Time of Opinion, that the whole might very well be comprized in Four; and the Advertisement, that it would be so, was, by his Direction, prefixed to the first of them: but, as he proceeded in the Execution of his Plan, he found that four Volumes would not, without confining it too much, be sufficient.

If it be considered, that the third Volume brings this Abridgment no lower than the Title *Piracy*, the Necessity of having two others will immediately appear. One of these being finished, it has been thought proper to offer it to the Publick, and not to make Gentlemen wait for this, till the other, which is in great forwardness, can be published.

A

T A B L E

O F T H E

Several T I T L E S,

W I T H T H E I R

D I V I S I O N S.

V O L. IV.

Pleas and Pleading. Page 1.

(A) **T**HE *several Parts and the Order of Pleading.*

(B) *The Declaration: And herein,*

1. The Nature thereof; and therein of adding several Counts in the same Declaration.
2. Who may join or be joined in the same Declaration.
3. What Matters may be joined in the same Declaration.
4. Of the Declaration's agreeing with the Writ.
5. Of the Sufficiency and Certainty required in the Declaration; and therein of Matters of Inducement, and that which is the Gift of the Action: *And herein,*
 1. Where by the Declaration it must appear that the Plaintiff hath a Right.
 2. Where the Plaintiff must shew that he hath performed what was requisite on his Part.
 3. Where general Allegations in the Declaration are sufficient; and therein of Mis-recitals and Omissions.
 4. Where the Averments must be positive and express in the Declaration.

[a]

5. Of

A Table of the several T I T L E S,

5. Of the Certainty required in the Description of the Thing declared for.
 6. Of the Declaration's being good in Part and void in Part.
- (C) *Of Impar lance: And herein,*
1. Of the Nature thereof, and the several Kinds.
 2. What the Defendant must do before any Impar lance.
 3. What he is to plead after the general Impar lance.
 4. What may be pleaded after the special Impar lance.
 5. In what Cafes the Courts exercise a discretionary Power in granting or refusing an Impar lance.
- (D) *Of making Defence; and herein of the Difference between full and half Defence.*
- (E) *The several Kinds of Pleas: And herein,*
1. Of Pleas to the Jurisdiction; *and therein,*
 1. To what Courts to be pleaded, and of the Difference between a Plea to the Jurisdiction and a Claim of Conufance.
 2. The Manner and Time of Pleading to the Jurisdiction.
- (F) *Of Pleas in Abatement: And herein,*
1. Of Pleas in Difability of the Person of the Plaintiff.
 2. Of Pleas in Difability of the Person of the Defendant; and therein of Privilege.
 3. Of Misnomer and the want of Addition.
 4. Of Abatement by reason of Coverture.
 5. Of Abatement by the Death of Parties.
 6. Where a Defect in the Writ shall abate it.
 7. Where the Writ's not agreeing with the Count shall abate it.
 8. Where the Writ is abated *de facto*, or is only abatable.
 9. Where the Writ shall abate *in toto*, or in Part only.
 10. In what Cafes the Defendant hath it in his Election to plead in Abatement or in Bar.
 11. Pendency of another Suit or Action how to be pleaded in Abatement.
 12. What shall be said a Plea in Bar or in Abatement; and therein of the Conclusion proper to each Plea.
 13. Pleas in Abatement how restrained.
 14. Of the Judgment in a Plea in Abatement, and how far peremptory.
 15. Foreign Plea.
- (G) *Of Pleas in Bar and in Chief: And herein;*
1. Of the General Issue, and how formed.
 2. Immaterial and informal Issues; and where aided.
 3. Of special Pleas; and therein of Pleas amounting to the General Issue, and of Matters which may be pleaded or given in Evidence.
 4. Of sham Pleas, and the Consequence of false Pleading.
- (H) *Traverse: And herein,*
1. The Nature thereof.
 2. In what Cafes a Traverse is permitted.
 3. In what Cafes a Traverse is necessary.
 4. Whether there may be a Traverse upon a Traverse.
 5. To what Point the Traverse shall be taken; and therein what Matters are traversable, and of the Manner of taking thereof.
- (I) *Pleas in Bar, their Sufficiency and Certainty: And herein,*
1. That the Plea must be proper to, and adapted to the Action.
 2. That the Plea must be good in Substance; and therein of Matter of Inducement; and that which is the Gift of the Defence.
 3. Of general Pleading to avoid Prolixity; and therein of affirmative and negative Pleas.

With their D I V I S I O N S.

4. Of Surplufage and Repugnancy in Pleading.
 5. That the Pleading ought to be direct and not argumentative.
 6. Negative Pregnant.
 7. That Things must be pleaded according to their Operation in Law.
 8. of Colour in Pleading.
 9. Of pleading Non-tenure and Disclaiming.
 10. Pleading *Hors de son fee*.
 11. Estoppels in Pleading.
 12. Pleading with a *Profert*, and demanding Oyer : *And herein*,
 1. In what Cafes there must be a *Profert* or *Monstrans de fait*.
 2. Of demanding Oyer.
 13. Pleading a Recovery in a former Action.
- (K) *Duplicity in Pleading : And herein*,
1. The Reason why Duplicity is a Fault, and the Manner of taking Advantage thereof.
 2. What shall be said Duplicity in Pleading.
 3. Of pleading double by Leave of the Court.
- (L) *Departure in Pleading*.
- (M) *Repleader*.
1. Of the Nature of a Repleader, and Manner of awarding it.
 2. A Repleader in what Cafes to be awarded.
 3. Repleader at what Time to be awarded.
- (N) *Demurrer*.
1. The Definition and Nature of a Demurrer.
 2. The Manner and Form of demurring ; and therein of joining in Demurrer, and waiving thereof.
 3. What Facts are admitted by a Demurrer.
 4. How far a Judgment on a Demurrer is peremptory.
 5. Of the Difference between a general and special Demurrer.
 6. What Things are good on a general Demurrer, that would be otherwise on a special one.
 7. Demurrer to Evidence.
- (O) *Plea at what Time to be put in, and the Ceremony requisite therein*.
- (P) *Continuance and Discontinuance in Pleading*.
- (Q) *Pleas Puis darrein continuance*.
- For more of Pleadings, *vide* the Division *Pleadings* under many Titles.

Premunire. Page 145.

- (A) *What Offences come under the Notion of a Premunire*.
- (B) *Of the Punishment therein*.

Prerogative. Page 149.

- (A) *When the King commences his Reign, and the Ceremony requisite therein*.
- (B) *Of the King's Prerogative as universal Occupant : And herein*,
1. That he is universal Occupant, and intitled to all derelict Lands.
 2. Of his Prerogative in Escheats.
 3. Of his Prerogative in Seas and Navigable Rivers.
 4. Of his Prerogative in Swans and Royal Fishes.
 5. Of his Prerogative in *Beacons* and Light-Houses.
 6. Of his Prerogative in Wreck.
 7. Of his Prerogative in Relation to Coins and Mines.

A Table of the several TITLES.

8. Of his Prerogative in derelict Goods ; and therein of Waifs, Strays, and Treasure Trove.
 9. Of his Prerogative in Fines and Forfeitures.
- (C) *Of his Prerogative over the Persons of his Subjects : And herein,*
1. Who shall be said his Subjects.
 2. That he is intitled to the Service and Allegiance of his Subjects ; and therein of the Oaths enjoined them.
 3. That he may restrain his Subjects from going abroad ; and herein of the Writ *de Ne exeat Regno*.
 4. That he may command his Subjects to return home ; And therein of awarding a Privy Seal.
- (D) *Of the King as the Fountain of Justice, and intrusted with the Execution of the Laws : And herein,*
1. That all Civil Jurisdiction flows from the King.
 2. Of the King's Prerogative in Ecclesiastical Matters.
 3. Of his Prerogative in creating Officers.
 4. Of his Prerogative in making War and Peace.
 5. Of his Prerogative in taking Care of Infants, Ideots, Lunaticks and Charitable Uses.
 6. Of his Prerogative in Pardoning.
 7. Of Dispensations and *Non obstantes*.
 8. Of his Proclamations.
- (E) *How the Rules of Law differ with respect to the King and a private Person : And herein.*
1. Of what Things incapable from the Dignity of his Person and Office.
 2. What Things enure to him in his natural, what in his political Capacity.
 3. Of the Difference in the Rules of Law as directing the King's Property, otherwise than that of a Subject.
 4. That his Rights shall be preferred to the Subjects where they happen to meet.
 5. Of Acts of Parliament which extend to or bind not the King.
 6. That no Laches can be imputed to him ; and therein of the Maxim, *Nullum Tempus occurrit Regi*.
 7. Of his Prerogative in his Suits and Proceedings in Courts of Justice.
- (F) *Of the King's Grants and Letters Patents : And herein,*
1. What Things may the King grant ; *and therein,*
 1. Of Grants arising from his Prerogative of Power, and which are inseparably annexed to the Crown.
 2. Of Grants arising from his Interest.
 3. How far the King must have an Interest, in order to enable him to grant.
 4. Grants tending to a Monopoly ; and therein of Things of a new Invention.
 5. Grants of the sole Liberty of Printing.
 2. Of the Construction of the King's Grants and Letters Patents, as to their being good or void ; and herein of the King's being deceived in his Grant.
 3. Where the King's Grantee shall partake of his Prerogative.

Privilege. Page 215.

- (A) *The Duties and Offices from which certain Persons by reason of their Privilege are exempt.*
- (B) *The particular Privileges in Suits allowed Officers and Attendants in the Courts of Justice: And herein,*
1. What such Officers are that are intitled to Privilege.
 2. Of the Privilege and Protection allowed those whose Attendance is necessarily required.
 3. In what Cases this Privilege is to be allowed.
 4. Of claiming and allowing Privilege; and therein, that it must be set forth and pleaded.
 5. How privileged Persons are to sue and be sued.
 6. Whether there can be Privilege against Privilege.
- (C) *Privilege of Peers and Members of Parliament.*
1. Who such Persons are that are intitled to this Privilege.
 2. How far this Privilege extends to their Servants and Attendants.
 3. In what Cases this Privilege is to be allowed.
 4. Of the Commencement and Continuance of this Privilege.
 5. How Privilege is to be claimed and taken Advantage of.
 6. What shall be deemed a Breach of Privilege.
 7. Of the Proceedings in Courts by and against Persons intitled to Privilege of Parliament.

Prohibition. Page 240.

- (A) *What Courts may grant a Prohibition.*
- (B) *Whether the granting a Prohibition be discretionary or ex debito justitiæ.*
- (C) *Who have a Right to such Writ, and may demand it.*
- (D) *Who may join in such Writ.*
- (E) *Of the Suggestion and Manner of obtaining a Prohibition.*
- (F) *When to be granted absolutely, or hoc usque only, and therein of directing the Party to declare on his Prohibition.*
- (G) *Whether more than one such Writ is to be awarded.*
- (H) *At what Time to be granted; and therein in what Cases it may be granted after Sentence.*
- (I) *To what Courts a Prohibition may be awarded; and herein, that the Superior Courts are to determine the Boundaries of all Inferior Jurisdictions.*
- (K) *Prohibitions to Inferior Temporal Courts in what Instances to be granted.*
- (L) *Prohibitions to the Spiritual Court in what Instances: And herein,*
1. Where they meddle with a Matter purely Temporal.
 2. Where they determine on a Matter of Freehold.
 3. In what Cases a Prohibition lies when they determine on Criminal Offences.
 4. Where the Ecclesiastical Courts determine on Acts of Parliament.
 5. In what Cases they have a concurrent Jurisdiction, and may determine Incidents.
- (M) *The Offence of paying Disobedience to a Prohibition.*

Release. Page 263.

- (A) *Releases that are exprefs and by Deed. And herein,*
 - 1. Of the Words and Ceremony requisite in an exprefs Release.
 - 2. How far a Covenant or Agreement may operate as a Defeasance or Release.
 - 3. How far a Disposition by Will may operate as a Release.
- (B) *Release by Operation of Law, how created, and the Effect thereof.*
- (C) *Releases of Lands and Hereditaments, how they enure: And herein,*
 - 1. Of Releases that enure by way of *Mitter le Estate*.
 - 2. Releases by way of *Mitter le Droit*.
 - 3. Releases that enure by way of Extinguishment.
 - 4. Releases that enure by way of Enlargement: And therein of the modern Manner of Conveyancing by Lease and Release.
 - 5. What Estate or Interest passes by the Release: And therein of the Words requisite to an Enlargement.
- (D) *Who in Respect of their Right and Interest are capable of releasing.*
- (E) *Of Releases by Executors and Administrators.*
- (F) *How far the Husband's Release shall bind the Wife.*
- (G) *To whose Benefit a Release shall enure; and who shall be bound thereby tho' not a Party to the Release.*
- (H) *How far a Possibility or Contingent Interest may be released.*
- (I) *How the operative Words in a Release have been construed: And therein of the Words,*
 - 1. Claims and Demands, what are released thereby.
 - 2. By a Release of all Actions and Suits.
- (K) *Release, in what Cases restrained to the special Purpose for which it was given.*
- (L) *What Right and Interest shall be said to be released: And therein of Misrecitals and Exceptions in Releases.*

Remainder and Reversion. Page 292.

- (A) *Of what Things a Remainder may be made.*
- (B) *What Words are sufficient to create a Remainder.*
- (C) *What shall be a Reversion, and not a Remainder: And herein,*
 - 1. Where a Limitation to the Heirs of the Donee, or Heirs of his Body, shall vest in such Heirs by Descent or Purchase.
 - 2. Where a Limitation to the Heirs, or Heirs of the Body of a Stranger shall vest in such Heirs as a Remainder and by Purchase, or by Way of Limitation and Descent.
 - 3. Where by a special Description the Remainder shall vest by Purchase.
- (D) *Of the several Kinds of Remainders as distinguished into Remainders vested, or in Contingency and Abeyance.*
- (E) *What Estate is sufficient to support a Remainder.*
- (F) *Of the Continuance of the particular Estate, and when the Remainders is to commence.*
- (G) *Contingent Remainders, how prevented from rising or coming in Esse.*
- (H) *Of Remainders that arise on Conditions Precedent or Subsequent.*
 - 1. Of the Difference between a Condition and a Limitation, and in Case of the Condition when it precedes the Vesting of the Remainder as the Cause thereof, and is annexed to the first Estate, and when it is annexed absolutely without any Regard to the Remainder.
 - 2. Between

With their D I V I S I O N S.

2. Between a Deed and a Will, when in both the same Words of Condition are made use of for vesting the Remainder.
3. Between a Limitation over in Case of a Will, and where no Limitation is made over.
4. Between Remainders that are to arise upon Conditions agreeable to the Rules of Law, and such as are to arise upon Conditions repugnant and against the Rules of the Law.
5. Between such Words as actually make a Condition, and such as are only descriptive of the Manner when and how the Remainders are to arise.

(I) *In what Cases a Remainder or Reversion shall be subject to the Acts of Charges of the particular Tenant.*

(K) *To what Purposes the Remainder is accounted but as one with the particular Estate, and where they are regarded as several Estates.*

(L) *Of Cross Remainders, or those arising by Implication and Construction of Law.*

Rent. Page 334.

(A) *Of the several Kinds of Rents: And herein,*

1. Of Rent-Service.
2. Of a Rent-Charge.
3. Of a Rent-Seek.

(B) *Out of what Things a Rent may Issue.*

(C) *Upon what Conveyance a Rent-Service may be reserved.*

(D) *By what Words a Rent may be reserved or created.*

(E) *How several Rents may be reserved in the same Deed.*

(F) *Of the Days of Payment.*

(G) *To whom Rents may be reserved or granted.*

(H) *Of the Continuance of the Rent, and to whom to be paid, and therein of the distinct Interests of the Heir and Executors of the Lessor.*

(I) *Of the Recovery and Demand of the Rents: And herein,*

1. In what Cases a Demand is necessary.
2. The Time of Demand.
3. The Place where a Demand is to be made.

(K) *The several Remedies for Recovery of Rents: And herein,*

1. Of the Remedy by Distress.
2. Of the Remedy by Writ of Annuity.
3. Of the Remedy by Assise.
4. Of the Clause of Re-entry.
5. Of the **Nomine poenae**.
6. Of the Remedy by Action of Debt, and as grounded on several Acts of Parliament.

(L) *Rent when and how discharged, and therein of the Eviction of the Tenant.*

(M) *Of Apportionment, and therein of the Suspension and Extinguishment of of the Rent: And herein,*

1. In what Cases a Rent may be apportioned by the Act of the Parties, and herein of the Difference between a Rent-Service and a Rent-Charge.
2. In what Cases they may be apportioned by the Act of Law, or the Act of God.
3. The Manner of such Apportionment, and how the Tenant shall take Advantage of it.

Replevin

Replevin and Abowry. Page 372.

- (A) *The Nature and Description thereof.*
 - (B) *The different Kinds of Replevins; and therein of Replevin by Writ at Common Law, and by Plaint or Act of Parliament.*
 - (C) *Replevins, out of what Courts and by what Authority they issue; and therein of the Power and Duty of the Sheriff.*
 - (D) *Of the Pledges in Replevin, and the Proceedings against them.*
 - (E) *Of the Writs or Processes in Replevin: And herein,*
 - 1. *Of the original Writ of Replevin.*
 - 2. *Of the Withernam.*
 - 3. *Of the Writ of Second Deliverance.*
 - 4. *Of the Writ de proprietate probanda, and the Claim of Property.*
 - 5. *Of the Writ de returno habendo.*
 - 6. *Of Returns irrepleviseable.*
 - 7. *In what Manner the Sheriff is to return and execute such Processes.*
 - (F) *Of what Property and for what Things a Replevin lies.*
 - (G) *Replevin, for and against whom it lies.*
 - (H) *Of the Declaration in Replevin.*
 - (I) *Pleas in Replevin.*
 - (K) *Avowries in Replevin; and therein of what Seisin and Services, and the Certainty required therein.*
- Costs and Damages in Replevin. Vide Tit. Costs Letter (F).

Rescue. Page 396.

- (A) *What it is, and of what Things it may be.*
- (B) *In what Cases a Rescue may be justified.*
- (C) *Of the Offence of making a Rescue, and how the Offenders are to be proceeded against.*
- (D) *The Form of the Proceedings on a Rescous.*
- (E) *Of the Return of a Rescous: And herein,*
 - 1. *In what Cases the Sheriff may return a Rescous; and therein of the Difference between a Rescous on mesne Process and Execution.*
 - 2. *Of the Form of the Return, and for what Defects it may be quashed.*
 - 3. *Whether the Sheriff's Return of a Rescue be traversable.*

Scandalum Magnatum. Page 404.

- (A) *The Persons who may bring this Action.*
- (B) *For what Words it lies.*
- (C) *The Proceedings in this Action.*

Scire Facias. Page 409.

- (A) *The Nature of the Writ.*
- (B) *In what Cases it is a proper Remedy.*
- (C) *In what Cases necessary, and therein who are to be Parties to it, and of the Privity required herein: And herein.*

With their DIVISIONS.

1. Of the *Sci. Fa.* to revive Judgments, and after what Time necessary.
 2. Of the *Sci. Fa.* on Recognizances and Statutes.
 3. Of the *Sci. Fa.* on Letters Patent.
 4. *Sci. Fa.* by and against Executors and Administrators.
 5. By and against Heirs and Tertenants.
 6. By and against Husband and Wife.
 7. *Sci. Fa.* against Bail.
- (D) *The Form of the Writ and Proceedings, and how far it must pursue the Nature of the original Action.*
- (E) *Pleadings to a Sci. Fa.*

Sequestration. Page 424.

- (A) *The Nature and first Introduction of such Procefs.*
- (B) *In what Cases to be awarded: And herein,*
1. Against what Persons.
 2. To what Places,
 3. What Estate or Interest shall be liable to a Sequestration, and from what Time.
- (C) *Of the Power and Duty of the Sequestrator.*
- (D) *Sequestration, when determined.*

Sheriff. Page 429.

- (A) *The Nature of his Office.*
- (B) *Who are qualified or exempt from serving.*
- (C) *Manner of appointing him; and therein of his Oath.*
- (D) *That he must attend his Office singly, and cannot execute any other.*
- (E) *How long to continue in his Office, and by what determined.*
- (F) *That he must be resident in his County, and whether he hath any Jurisdiction out of it.*
- (G) *Cannot dispose of his Bailiwick.*
- (H) *Of the High Sheriff's Power and Duty in appointing an Under Sheriff and other Deputies: And herein,*
1. Of the Under Sheriff, and in what Manner appointed.
 2. Of Covenants between the High Sheriff, his Under Sheriff, and other Officers.
 3. Of Acts that may be done by either of them, or where the High Sheriff must himself be personally present.
 4. The Manner of appointing Bailiffs and other Officers, and therein of his being answerable for their Acts.
 5. Of his Jurisdiction over Gaols and Gaolers.
- (I) *Of the preceding and succeeding Sheriff, and therein of the Acts necessary to be done by each of them.*
- (K) *Where more than one Sheriff.*
- (L) *Of his Duty and Acts as a Judicial Officer.*
- (M) *Of his Duty and Acts as a Ministerial Officer: And herein:*
1. That he is the proper Officer to execute all Writs, except in Case of Partiality.
 2. That he cannot dispute the Authority by which they issue, nor any Irregularity in them.
- (N) *How he is to execute such Writ: And herein,*
1. That it must be without Favour or Oppression, and after such a Writ is actually taken out, and before it is returnable.
 2. Of his raising the *Posse Comitatus.*

A Table of the several TITLES,

3. Of breaking open Doors.
 4. Whether he can execute his Writ on a Sunday.
 5. In what Manner he is to do Execution.
- (O) *Of his Duty in admitting Persons to Bail; and therein of Securities taken for Ease and Favour.*

Simony. Page 465.

- (A) *In what this Offence consists.*
- (B) *Of Bonds of Resignation.*
1. How far they are good in Law.
 2. Of the Power exercised over them by the Court of Chancery.
 3. How far the Penalty is saved where the Ordinary refuses to accept a Resignation on such a Bond.
 4. Some Objections to those Bonds considered.
- (C) *Of the Forfeitures, Penalties, and Punishment incurred by this Offence.*
1. By the Incumbent.
 2. By the Patron.
 3. By the Ordinary.
- (D) *In what Cases and at what Time Advantage may be taken of the Forfeitures and Penalties.*
1. By the King.
 2. By other Persons.
- (E) *Of the Jurisdiction of Ecclesiastical Courts in this Offence.*
- (F) *Pleadings in Simony.*

Slander. Page 480.

- (A) *Where an Action upon the Case does in general lie.*
- (B) *Of Words that are actionable in themselves.*
1. Such as import the Charge of a Crime.
 1. Treason.
 2. Murder.
 3. Perjury.
 4. Forgery.
 5. Theft.
 6. Other Crimes.
 2. Such as charge the having a contagious Distemper.
 3. Such as slander a Title.
 4. Such as are spoken of Persons in Office.
 1. Of Judicial Officers.
 2. Of other Officers.
 5. Such as are a Disgrace in a Profession or Trade.
 1. To a Divine.
 2. To a Physician or Surgeon.
 3. To a Counsellor or Attorney.
 4. To other Artifts.
 5. To a Tradesman.
- (C) *Of Words which become actionable by reason of the special Damage received from them.*
- (D) *Certain Circumstances which are to be regarded in the speaking of Words in themselves actionable.*
1. The Time when spoke.
 2. The Place where.
 3. The Language they are spoke in.
 4. The

With their D I V I S I O N S.

4. The Occasion of speaking them.
5. The Design of the Speaker.
- (E) *Of Slander in a Course of Justice.*
- (F) *Of Words spoken in the past or future Tense.*
- (G) *In what Sense Words in themselves actionable must be affirmative.*
- (H) *Of the Certainty required in them.*
- (I) *Where the want of certainty is supplied.*
 1. By the apparent Intention of the Speaker.
 2. By Averment.
- (K) *In what Cases uncertain Words are to be construed in mitiori sensu.*
- (L) *Where they are not to be so construed.*
- (M) *Of adjective Words.*
- (N) *Of Words which import only an Intent to do an act.*
- (O) *Of Words in the Disjunctive.*
- (P) *Of repugnant Words.*
- (Q) *Of repeating Words which another has been heard to say.*
- (R) *Of subsequent Words.*
 1. Where they are explanatory.
 2. Where they are accumulative.
- (S) *Of pleadings in Slander.*
 1. In general.
 2. Where an Averment must be.
 3. Of the Colloquium.
 4. Of the Use of the Innuendo.
 5. What is a Justification of Words.
- (T) *In what kind of Slander the Spiritual Court has Jurisdiction.*
- (U) *Where a Prohibition will lie.*
 1. If actionable Words are coupled with such as are a mere Spiritual Defamation.
 2. Where any Temporal Damage is received from them.
 3. Where the Offence charged is not punishable in the Ecclesiastical Court.

For written Slander, *vide* Title *Libel*.

For Slander of Peers or the great Men of the Realm, *vide* Title *Scandalum Magnatum*.

Smuggling. Page 523.

- (A) *Of the Customs in general.*
- (B) *Of the origin of the Customs.*
- (C) *Of the ancient State of the Customs.*
 1. Of the Duties upon Wool, Wool-fells, and Leather.
 2. Of the Duty of Tonnage.
 3. Of that of Poundage.
- (D) *Of the present State of the Customs.*
 1. Of the Duty of Tonnage.
 2. Of that of Poundage.
 3. Of the Duties to which Aliens are liable.
- (E) *Of prohibited Goods.*
- (F) *Of the Penalties and Forfeitures incurred by Persons guilty of this Offence or illicit Practices which have a natural Tendency thereto.*
 1. From Ships at Sea.
 2. By the Shipping or unshipping Goods at any Port, Member or Wharf, not lawfully appointed for these Purposes.
 3. From Ships in Port inwards Bound:
 4. To Ships in Port outwards Bound.
 5. From or to coasting Vessels in Port.

A Table of the several T I T L E S,

6. In the Case of Certificate and prohibited Goods.
7. In divers other Cases.
- (G) *Of the corporal Punishments to which Persons guilty of this Offence or Practices thereto tending are liable.*
 1. Imprisonment.
 2. Whipping.
 3. Transportation.
 4. Death.

Sodomy. Page 569.

- (A) *What constitutes this Offence.*
- (B) *In what Manner it is to be punished.*

Soldiers. Page 571.

- (A) *Of inlisting Men.*
- (B) *In what Cases Soldiers are free from Arrest.*
- (C) *Of the quartering of Soldiers.*
- (D) *How Carriages for the Use of his Majesty's Forces are to be furnished.*
- (E) *Of Desertion.*
- (F) *Of the Punishments to which Soldiers are liable by martial Law.*
- (G) *Of the Civil Punishments to which Soldiers are liable.*
- (H) *Of the Liberty given to discharged Soldiers of exercising Trades.*
- (I) *Of divers Things not properly reducible under any of the foregoing Heads.*

Stamps. Page 595.

- (A) *Of the particular Stamp Duties to which certain Instruments, Writings and Things, are liable.*
- (B) *Of some Regulations that principally concern the Officers of the Stamp Duties.*
- (C) *What the Consequence is of Ingrossing or Writing any Matter or Thing liable to a Stamp Duty upon Vellum, Parchment or Paper, that has not been duly stamped.*
 1. To any Person so ingrossing or writing.
 2. To some particular Persons.
 3. To the Instrument or Thing so ingrossed or written.
- (D) *Of Regulations for preventing Frauds to the Prejudice of the Stamp Duties.*
 1. By writing a second Matter upon the same Vellum, Parchment or Paper, before it has been a second Time duly stamped.
 2. In the Manner of writing certain Matters.
 3. In legal Proceedings.
 4. In News Papers, Almanacks and Pamphlets.
 5. In the Money or other Consideration given with Apprentices.
 6. In Cards and Dice.
 7. In other Cases.
- (E) *Of the Jurisdiction given to Justices of the Peace in pecuniary Penalties for Offences against the Statutes imposing Stamp Duties.*
- (F) *Of the corporal Punishments to which Persons guilty of Offences against the said Statutes are liable.*

Statutes.

Statutes. Page 633.

- (A) *Of some Requisites which are essential to the Validity of a Statute.*
 - (B) *Of those Things which are incidental to an Act of Parliament.*
 - (C) *From what Time a Statute begins to have Effect.*
 - (D) *How long an Act of Parliament continues in Force.*
 - (E) *Of the vast Power of an Act of Parliament.*
 - (F) *Of publick and private Statutes.*
 - (G) *Of affirmative and negative Statutes.*
 - (H) *Whose Province it is to construe an Act of Parliament.*
 - (I) *Rules to be observed in the Construction of Statutes.*
 - 1. Words and Phrases, the Meaning of which in a former Act of Parliament have been ascertained, are, when used in a subsequent Act, to be understood in the same Sense.
 - 2. In the Construction of any Part of a Statute, every other Part thereof must be considered.
 - 3. Where divers Statutes relate to the same Thing, they must all be taken into Consideration in construing any one of them.
 - 4. The Common Law is much to be regarded in the Exposition of Statutes.
 - 5. The Intention of the Makers thereof must, in the Construction of an Act of Parliament, be attended to.
 - 6. Statutes are to be construed according to Equity.
 - 7. Such Acts of Parliament, as are of publick Concern, ought to have a liberal Construction.
 - 8. Remedial Statutes must be expounded liberally.
 - 9. Penal Acts of Parliament are to be strictly construed.
 - 10. Divers other Rules to be observed in the Construction of Statutes.
 - (K) *How Persons guilty of Disobedience to an Act of Parliament may be punished.*
 - (L) *Of pleading Statutes.*
 - 1. Of publick Statutes.
 - 2. Of private Statutes.
 - 3. The general Rules which must be observed in pleading Acts of Parliament.
 - 4. Some Rules, for pleading Statutes, which relate to particular Parts of the Pleadings.
 - 5. Of Mis-recital of Statutes in Pleading.
 - 6. Of Surplusage in reciting an Act of Parliament pleaded.
- For the Method of passing Bills in Parliament, *vide Title Court of Parliament.*

Summons and Severance. Page 660.

- (A) *The Necessity of a Judgment of Severance in many Cases.*
- (B) *By whom a Judgment of Severance may be given.*
- (C) *Where a Summons must issue before a Judgment of Severance can be had.*
- (D) *At what Time Judgment of Severance must be prayed.*
- (E) *Who may have a Judgment of Severance.*
- (F) *In what Actions Judgment of Severance may be.*
- (G) *Where the Writ abates, notwithstanding there has been a Judgment of Severance.*
- (H) *The Consequence of a Judgment of Severance to the Party severed.*

Superfedeas. Page 667.

- (A) *Of the different Kinds of Superfedeas.*
- (B) *Who may grant a Superfedeas.*
- (C) *Where a Writ of Superfedeas may be awarded.*
- (D) *In what Cases some other Writs are by Implication of Law a Superfedeas.*
 - 1. *How far a Writ of second Deliverance is in itself a Superfedeas.*
 - 2. *Where a Writ of Habeas corpus ad faciendum & recipiendum is an implied Superfedeas.*
 - 3. *In what Cases a Certiorari is a Superfedeas in Law.*
 - 4. *Where a Writ of Error is in itself a Superfedeas.*
- (E) *Of some Requisites which are necessary to the making a Writ of Error a Superfedeas in itself.*
 - 1. *It must be allowed.*
 - 2. *Bail must be put in to it.*
 - 3. *It must be proceeded in without Delay.*
- (F) *To what Time a Writ of Error does as a Superfedeas relate.*
- (G) *What the Effect of a Superfedeas is.*
- (H) *How Disobedience to a Superfedeas may be punished.*

Surety of the Peace. Page 686.

- (A) *In What Cases a Justice of Peace may ex officio take Surety of the Peace.*
- (B) *Who may require Surety of the Peace.*
- (C) *Against whom Surety of the Peace may be demanded.*
- (D) *In what Cases Surety of the Peace ought to be granted.*
- (E) *Of the Manner of granting Surety of the Peace from the Court of Chancery.*
- (F) *How Surety of the Peace is granted by the Court of King's Bench.*
- (G) *Of the Manner of granting Surety of the Peace by a Justice of the Peace.*
- (H) *Of the Forfeiture of a Recognizance for keeping the Peace.*
- (I) *In what Manner a Recognizance for keeping the Peace may be discharged.*

Surety of the good Behaviour. Page 696.

- (A) *In what Cases Surety of the good Behaviour may be demanded where Surety of the Peace cannot.*
- (B) *What will amount to the Forfeiture of a Recognizance for being of good Behaviour, which would not have been a Forfeiture of one for keeping the Peace.*

E R R A T A.

- Page 567. l. 18. *For had been guilty read had been charged with having been guilty.*
- 536. l. 39. *For 12 C. 2. c. 4. read 12 C. 2. c. 4. twelve Pence.*
- 569. l. 18. *For have transmitted read have been transmitted.*
- 653. l. 5. *For the only and read the Vulgar and.*

Pleas and Pleading.

PLEADING in general signifies the Allegations of Parties to Suits when they are put into a proper and legal Form; and are distinguished, in respect to the Parties who plead them, by the Names of Bars, Replications, Rejoinders, Surrejoinders, Rebutters, Surrebutters, &c. and though the Matter in the Declaration or Count does not properly come under the Name of Pleading, yet being often comprehended in the extended Sense of the Word, we have considered it under this Head.

Pleading in Strictness is no more than setting forth that Fact which in Law shews the Justness of the Demand made by the Plaintiff, or the Discharge and Defence made by the Defendant; and herein no greater Certainty is required than is sufficient to bring on a Trial without inveigling Judge or Jury; and it seems, that originally Pleadings were so formed, and were very plain and concise; but in Progress of Time Pleaders, yea and Judges, became too curious in them, so that the Art and Dexterity of Pleading, which in its (a) Use, Nature and Design was only to render the Fact plain and intelligible, and to bring the Matter to Judgment with convenient Certainty, began to degenerate from its primitive Simplicity and true Use, and end in a Piece of Nicety and Curiosity, which how it hath improved therein in latter Times, the Length of the Pleadings, the many unnecessary Repetitions, and the many Miscarriages of Causes upon small and trivial Objections, do but too sufficiently testify.

(a) Recommended by Littleton as the most honourable, laudable and profitable Thing in the Laws of England.

Litt. sect. 534. and by Lord Coke, *Co. Lit. 17. a. 168, 303.* 2 *Co. Tooker's Case*, and *Hob. 162, 292, 293.* — And it seems, that anciently Fines were imposed *pro stulte loquio*, or *stulte dicto*, which were Mulcts laid on Pleaders by the Courts for barbarous and disorderly Pleading. 2 *Inst. 123.*

Pleas were anciently (b) *Ore tenus*, and afterwards minuted down by the Prothonotaries, and entered of Record in the *Latin* Tongue, that being a dead Language, and least subject to Variation, to remain as Muniments and Precedents of the Law: That the Pleadings should be in *Latin* is expressly enacted by the 36 *E. 3. cap. 15.* which Statute was made to abolish a Law introduced by *William the Conqueror*, which ordained, that the Pleadings in the Courts of Justice should be in *French*.

10 *Co. 132.*
(b) And being so is the Reason that a Plea, whilst in Paper, may be amended. *Vide Title Amendment.*

But now by 4 *Geo. 2. cap. 26.* it is enacted, ' That all Writs, Processes, Pleadings, Rules, Indictments, Records, and all Proceedings in any Courts of Justice within *England*, and in the Court of Exchequer in *Scotland*, shall be in the *English* Tongue, and be written in such common Hand as Acts of Parliament are usually ingrossed in, the Lines and Words to be written at least as Close as the said Acts usually are, and not abbreviated; and all Persons offending against this Act shall forfeit 50 *l.* to any person who will sue for the same.

But by 6 *Geo. 2. cap. 14.* it is provided, ' That the above Penalty shall not be extended to the expressing the Names of Writs, or technical Words in the same Language, as hath been used, nor to Abbreviations used in the *English* Language.

- In Pleading there are several general Rules laid down in our Books; as,
- Co. Lit.* 303. That good Matter must be pleaded in right Form, apt Time and
Plew 65, 81. due Order, but that that, which is but Inducement or Conveyance to
Cro Jac. 362. the Substance, need not be so certainly alledged, as that which is the
 Git of the Plea.
- Co. Lit.* 303. That that which is apparent to the Court, and appears from a ne-
 7 *Co.* 40. cessary Implication in the Record, need not be averred.
- Dier* 16. That every Man's Plea shall be taken most strongly against himself,
Co. Lit. 303. as every Body is presumed to make the most of his own Case.
Hob 234
Latch 186.
- 2 Mod.* 5. That what the Parties have agreed in Pleading shall be admitted,
 though the Jury find otherwise.
- Vaugh.* 58, 60. That when a Man will recover a Thing from another, it is not
per Lord enough for him to destroy such Person's Title, but he must prove his
Vaughan. own a better, according to the Rule, *Melior est conditio possidentis.*
- Co. Litt* 285, That every Man shall plead such Pleas as are pertinent and proper
 303. for him, according to the Quality of his Case, Estate or Interest.
- Hob.* 164. *per* That the Law requires in every Plea two Things, the one, that it
Lord Hobart. be in matter sufficient, the other, that it be deduced and expressed ac-
 cording to the Forms of Law; and if either the one or the other of
 these be wanting, it is Cause of Demurrer.
- Dier* 66. That every Plea in Bar, being a Confession and Avoidance of the
Godb. 253. Plaintiff's Action, must be substantive and certain, with an Avoidance
 1 *Leon.* 78. of the Plaintiff's Demands, which he may traverse, and thereon go to
 Issue; because the Declaration of the Plaintiff stands confessed, as far
 as it is not avoided by the Defendant.
- 7 Co.* 25. *a.* That if a Count Avowry, which is in Nature of a Count, Repli-
 8 *Co.* 120. *b.* cation, &c. want (a) Form, or (b) omit Circumstance of Time,
Co. Lit. 303. Place, &c. they may be made good by the Plea of the adverse Party;
 (a) Duplicity but if they want Substance, they cannot be made good; so in such
 in the De- Cases the Bar may be made good by the (c) Replication, and the Re-
 claration plication by the Rejoinder, &c.
 cured by pleading
 over. 2 *Vent.* 222. (b) A Suit depending must shew in what Court, but cured by plead-
 ing over. 1 *Lev.* 195. — Not alledging *prout patet per recordum* cured by pleading over. 3 *Lev.* 311.
 In Debt for Rent, if no Place be assigned where the Lease was made, the Defendant in his Plea
 confessing the Lease makes the Declaration good. *Hob.* 82. (c) Fault in the Plea cured
 by the Replication. *Carth.* 66. — And that if a Man pleads over, he shall never take Advantage
 of any Slip committed in the Pleading of the other Side, which he could not take Advantage of
 upon a general Demurrer. *Salk.* 519. *Per Holt* Ch. J.
- Co. Lit.* 303. That all Pleas must be alledged directly, and not by way of Rehear-
Vide postea. fal; nor is it sufficient, that what ought to be expressly pleaded may
 be deduced by Argument from what is pleaded.
- 3 Leon.* 300. That in Matters triable by our Law, all Things issuable ought to be
 Laid down as specially alledged in order to have a convenient Trial; but in (d)
 a Rule by Matters Spiritual the Law is otherwise; because there is no Peril in
 Lord Ander- the Trial, and therefore if certain enough to ground a Certificate, it is
 son, cited in the Trial, and therefore if certain enough to ground a Certificate, it is
Show. P. C. sufficient.
 94.
 (d) Sentences in the Spiritual Courts may be alledged summarily; as that a Divorce was betwixt
 such Parties for such a Cause, and before such a Judge; but the Judge must be named, that the
 Court may write to him; and this is sufficient, it being to no Purpose to alledge them particularly,
 because the Forms of these Courts are different from those of the Common Law; and our Judges
 presume that they are observed by the Judges of those Courts. *Co. Lit.* 303.
- Vide postea.* That Surplusage does not vitiate, unless it be contrariant to the Mat-
 ter pleaded before.
- Co. Lit.* 303. That where one is authorised to do a Thing by Common Law, Sta-
 tute, Custom, Grant or Commission, he ought to shew, that he hath
 pursued the Substance of it accordingly.

That general Estates in Fee-simple may be generally alledged; as that *J. S.* was seised in Fee; but the Commencement of particular Estates must be shewed, because they could not originally commence without a Conveyance, which must be shewed, unless they be alledged by way of Inducement only.

Co. Lit. 121. a. 303.
But for this, and the pleading a *Que Estate,* vide *Bro.*

Tit. Que Estate. 18 Ed. 4. 10. Dier 238. b. Cro. Eliz. 22. Cro. Car. 190, 428. Cro. Jac. 673. Yel. 76. 1 Lev. 190. 1 Sid. 297. 2 Keb. 87, 96. Skin. 303. 2 Mod. 55. Raym. 389. 2 Salk. 562. Carth. 9, 208, 432, 444.

That Pleas ought to conclude properly, those to the Writ to conclude to the Writ, those in Bar to the Action; Estoppels must rely on the Estoppel.

Co. Lit. 303.

But for the better Understanding of these Matters, we must more particularly consider,

- (A) The several Parts and the Order of Pleading.
- (B) The Declaration: And herein,

1. The Nature thereof; and therein of adding several Counts in the same Declaration.
2. Who may join or be joined in the same Declaration.
3. What Matters may be joined in the same Declaration.
4. Of the Declaration's agreeing with the Writ.
5. Of the Sufficiency and Certainty required in the Declaration; and therein of Matters of Inducement, and that which is the Gift of the Action: And herein,
 1. Where by the Declaration it must appear that the Plaintiff hath a Right.
 2. Where the Plaintiff must shew that he hath performed what was requisite on his Part.
 3. Where general Allegations in the Declaration are sufficient; and therein of Mis-recitals and Omissions.
 4. Where the Averments must be positive and express in the Declaration.
 5. Of the Certainty required in the Description of the Thing declared for.
 6. Of the Declaration's being good in Part and void in Part.

- (C) Of Imparlance: And herein,

1. Of the Nature thereof, and the several Kinds.
2. What the Defendant must do before any Imparlance.
3. What he is to plead after the general Imparlance.
4. What may be pleaded after the special Imparlance.
5. In what Cases the Courts exercise a discretionary Power in granting or refusing an Imparlance.

- (D) Of making Defence; and herein of the Difference between full and half Defence.

(E) The

(E) The several Kinds of Pleas : And herein,

1. Of Pleas to the Jurisdiction; and therein,
 1. To what Courts to be pleaded, and of the Difference between a Plea to the Jurisdiction and a Claim of Co-nufance.
 2. The Manner and Time of Pleading to the Jurisdiction.

(F) Of Pleas in Abatement : And herein,

1. Of Pleas in Disability of the Person of the Plaintiff.
2. Of Pleas in Disability of the Person of the Defendant ; and therein of Privilege.
3. Of Misnomer and the want of Addition.
4. Of Abatement by reason of Coverture.
5. Of Abatement by the Death of Parties.
6. Where a Defect in the Writ shall abate it.
7. Where the Writ's not agreeing with the Count shall abate it.
8. Where the Writ is abated *de facto*, or is only abatable.
9. Where the Writ shall abate *in toto*, or in Part only.
10. In what Cases the Defendant hath it in his Election to plead in Abatement or in Bar.
11. Pendency of another Suit or Action how to be pleaded in Abatement.
12. What shall be said a Plea in Bar or in Abatement ; and therein of the Conclusion proper to each Plea.
13. Pleas in Abatement how restrained.
14. Of the Judgment in a Plea in Abatement, and how far peremptory.
15. Foreign Plea.

(G) Of Pleas in Bar and in Chief : And herein,

1. Of the General Issue, and how formed.
2. Immaterial and informal Issues, and where aided.
3. Of special Pleas ; and therein of Pleas amounting to the General Issue, and of Matters which may be pleaded or given in Evidence.
4. Of sham Pleas, and the Consequence of false Pleading.

(H) Traverse : And herein,

1. The Nature thereof.
2. In what Cases a Traverse is permitted.
3. In what Cases a Traverse is necessary.
4. Whether there may be a Traverse upon a Traverse.
5. To what Point the Traverse shall be taken ; and therein what Matters are traversable, and of the Manner of taking thereof.

(I) Pleas in Bar, their Sufficiency and Certainty: And herein,

1. That the Plea must be proper to, and adapted to the Action.
2. That the Plea must be good in Substance; and therein of Matter of Inducement, and that which is the Gift of the Defence.
3. Of general Pleading to avoid Prolixity; and therein of affirmative and negative Pleas.
4. Of Surplusage and Repugnancy in Pleading.
5. That the Pleading ought to be direct and not argumentative.
6. Negative Pregnant.
7. That Things must be pleaded according to their Operation in Law.
8. Of Colour in Pleading.
9. Of pleading Non-tenure and Disclaiming.
10. Pleading *Hors de son fee*.
11. Estoppels in Pleading.
12. Pleading with a *Profert*, and demanding Oyer: And herein,

1. In what Cases there must be a *Profert* or *Monstrans de fait*.
2. Of demanding Oyer.

13. Pleading a Recovery in a former Action.

(K) Duplicity in Pleading: And herein,

1. The Reason why Duplicity is a Fault, and the Manner of taking Advantage thereof.
2. What shall be said Duplicity in Pleading.
3. Of pleading double by Leave of the Court.

(L) Departure in Pleading.

(M) Repleader.

1. Of the Nature of a Repleader, and Manner of awarding it.
2. A Repleader in what Cases to be awarded.
3. Repleader at what Time to be awarded.

(N) Demurrer.

1. The Definition and Nature of a Demurrer.
2. The Manner and Form of demurring; and therein of joining in Demurrer, and waiving thereof.
3. What Facts are admitted by a Demurrer.
4. How far a Judgment on a Demurrer is preemptory.

5. Of the Difference between a general and special Demurrer.
6. What Things are good on a general Demurrer, that would be otherwise on a special one.
7. Demurrer to Evidence.

(O) Plea at what Time to be put in, and the Ceremony requisite therein.

(P) Continuance and Discontinuance in Pleading.

(Q) Pleas Puis darrein continuance.

(A) Of the several Parts, and the Order of Pleading.

Doct. pl. 84.
Co. Lit. 17. a.
Flow. 84.
Vide the next Title.

THE first Thing in Pleading is the Plaintiff's Count or Declaration, in which he sets forth the Causes of his Complaint particularly, and thereby explains his Writ; and this he must do in such a Manner, as to make it appear to the Court there is sufficient Foundation for his bringing the Action; and all Essentials, or whatever is of the Substance of the Action, must be alledged, that the Court may be enabled to give Judgment for him in Case a Verdict should be found in his Favour.

The next Thing is the Defendant's Plea or Bar: Pleas are variously distinguished; the more general Division of them is that of being Dilatory or Peremptory; or they are, *1st*, Pleas in Abatement; *2dly*, Such as suspend the Action; or, *3dly*, Such as bar the Plaintiff for ever. And as the Plaintiff's Declaration must set forth all Essentials necessary to maintain it; so the Defendant's Bar must be substantially good and certain, with an Avoidance of the Plaintiff's Demands, which the Plaintiff may traverse, and thereon go to Issue.

Vide under the Division Departure in Pleading.

The Replication is the Plaintiff's Answer to the Defendant's Plea, which fortifies and supports his Declaration; the Rejoinder is the Defendant's Answer thereto; so of Surrejoinders, Rebutters, Surrebutters, &c. in which the material Thing is, that they pursue what hath been at first alledged and insisted upon, otherwise it will be a Departure in Pleading; as if a Matter be pleaded at Common Law, this can't be maintained by a Custom; as in Covenant on an Indenture of Apprenticeship to serve seven Years, the Breach assigned was, that he did not serve, &c. the Defendant pleaded Infancy; the Plaintiff replied the Custom of *London*, and adjudged a Departure. So an Action at Common Law can't be made good in the Replication by an Act of Parliament; but if one pleads a Statute, and the other says it is repealed, he may reply that it is revived by another, for this fortifies the first Matter.

Pasch. 22
Car. 2. in
B. R.
2 Sand. 80.
1 Sid. 444.
1 Mod. 43.
2 Keb. 612,
619. S. C.
Richards v.
Hodges.

In Debt upon a Bond, conditioned to save a Parish harmless concerning a Bastard Child which the Obligor was forced to father, he pleads *Non damnificatus*; they reply, that the Child was ready to starve, and that therefore they put it out to nurse, which cost them 4*l*. Defendant rejoins, that he was ready to pay the Money and save the Parish harmless; upon this they demurred, and had Judgment, because the Rejoinder is a Departure; for the Defendant ought to have taken

taken Issue on the Child's being ready to starve; for if the Plaintiffs had once Cause of Expence about the Child, and were thereupon actually damnified, the Defendant's being ready to pay the Money will not save the Condition of the Bond.

When the Plaintiff replies, surrejoins, &c. and it thereby appears, 8 Co. 133. b. that he has no Cause of Action, he shall never have Judgment, tho' the Bar or Rejoinder be insufficient, nor can any Admittance of the adverse Party make it good, for the Court ought to judge on the whole Record; as in Debt on a Bond for Performance of Covenants, the Defendant pleads Performance generally, where some of the Covenants are in the Negative, whereby his Plea is insufficient; if the Plaintiff reply, and shew a Breach, which of his own shewing is no Breach, Judgment shall be given against him; for on the whole Record it appears he has no Cause of Action.

But if the Bar be insufficient in Substance, or amounts to a Confession of the Point of the Action, and the Plaintiff in his Replication 8 Co. 133. b. shews no Matter against himself but Matter explanatory, or perhaps 9 Co. 110. not material, the Declaration being good the Plaintiff shall have Judgment for the Insufficiency of the Bar, without any Regard to the Replication; as if the Defendant plead a Grant by Letters Patent in Bar which are not sufficient, yet the Plaintiff in his Replication shews another Clause in the said Letters Patent, which is not material, the Defendant demurs, the Plaintiff shall have Judgment. Hob 14, 199.

If the Plaintiff make a Title in his Replication, but does not plead as he ought, especially in Point of Trial, the Rejoinder admitting this, and tending Issue upon another Matter, makes it good. 1 Lev. 31.

The Order of Pleading is, 1. To the Jurisdiction of the Court. 2. To the Person of the Plaintiff, and next of the Defendant. 3. To the Count or Declaration. 4. To the Writ. 5. To the Action of the Writ. 6. To the Action it self in Bar thereof. 3 Lev. 244.

This has been settled as the most natural Order of pleading, because by this Order each subsequent Plea admits the former; as where the Defendant pleads to the Person of the Plaintiff, he admits the Jurisdiction of the Court; for it would be nugatory to plead any Thing in that Court that has no Jurisdiction in the Case; when he pleads to the Count he allows that the Plaintiff is able to come into that Court to implead him, and that he may there be properly impleaded; but in pleading to the Count he does not admit the Writ to be good, yet if the Count be vicious, the Writ is consequently destroyed; for tho' the Writ in it self may be good, yet it is ill pursued; but in pleading to the Writ he admits the Form of the Count to be sufficient in Form, if the Writ be good; since it is not to any Purpose to object to the Form of such Writ, if the Form of the Count be thereupon insufficient; but if the Count be in Substance variant, the Defendant may shew it at any Time in Arrest of Judgment; because the Court has no Authority to proceed in a Matter of Substance different from the original Writ. 1 Lev. 195.

If a Man pleads to the Action of the Writ, he allows both the Form of the Count and of the Writ; for he admits, that if the Form of the Writ and Count were adapted to the Plaintiff's Case, that such Form is good and sufficient; since to object to the Action not agreeing with the Plaintiff's Case does admit, that if it be ruled by the Court that it does, that the Plaintiff has before the Court a Count in Form sufficient. Co. Lit. 303.

If the Defendant pleads in Bar to the Action, he admits the Form of the Writ and Count, for he answers to the Right in Demand, and puts that Right in Issue, and thereby admits, that there is a sufficient Form to put it in Issue; and therefore though a Man pleads *Non assumpsit* Hob. 71, 72.

assumpsit modo & forma, yet the *Modo & forma* does not traverse the Form of the Writ or Count, but the Substance of the Promise; which is the true Reason why another Promise may be given in Evidence different in Time and Place from that mentioned in the Declaration, though not different in Substance.

(B) The Declaration: And herein,

1. The Nature thereof; and therein of adding several Counts in the same Declaration.

THE (a) Declaration is an Explanation of the Plaintiff's Writ, in which he expresses at large his Complaint, setting forth the Nature and Quality of his Case more fully than in the Writ; and as it is the Foundation of his Suit, the Law requires that it contain Certainty and (b) Truth, that the Defendant may be able to make a proper Answer thereto, and the Court be enabled to give a right Judgment thereon.

Ploet. 84. 1 Lit. Reg. 414. (a) In English it is called Declaration, Count from the French, and *Narratio* in Latin. *Co. Lit. 17. a. 303. Doct. pl. 85.* — and is the same with what the Civilians call a Libel. *Co. Lit. 17. a.* (b) Must establish a Title in the Plaintiff, as well as destroy the Defendant's; for the Rule is, *Melior est conditio possidentis.* *Vaugh. 58, 60.*

The Plaintiff having set forth the Causes of Complaint, particularly the Conclusion of his Declaration is, *Et inde producit Sextam*, which was proffering to the Court the Testimony of the Witnesses or Followers; for according to *Fleta* the (c) ancient Law was *Quod nullus Liber Homo ponatur ad Legem nec ad Juramentum per Simplicem Loquelam sine Testibus fidelibus ad huc ductis, &c.*

(c) And from this it hath been said, the Practice of annexing Affidavits to Bills in Chancery hath been introduced. — But this Method in Declarations is now disused. *Doct. pl. 85.*

1 Lil. Reg. 411. 7 Co. 25. An *Audita Querela* and a *Scire Facias* are in the Nature of a Declaration, for they do set forth at large the Cause of the Plaintiff's Action as a Declaration doth.

Doct. pl. 85. The Gift, and every Thing that is of the Essence of the Plaintiff's Action, must be set forth in the Declaration; and herein we may lay it down as a general Rule, that that seems properly to be the Essence of the Action without which the Court could have no sufficient Grounds to give Judgment; and this is to be determined in every Action according to its Nature.

If the Declaration be not a sufficient Foundation to give Judgment, this may be moved in (d) Arrest of Judgment after Verdict, because Judgment cannot be given when it appears, that, though the Fact be found for the Plaintiff, yet he has not sufficient Cause of Action.

(d) But Mistakes in the Declaration cannot be taken Advantage of in a Plea in Abatement, but the Defendant must demur to it. *1 Salk. 212.* — But if the Declaration varies from the Writ the Defendant may plead it in Abatement; for he has abated his own Right by prosecuting it in a different Manner. *Cro. Eliz. 722. Cro. Jac. 654. 1 Fon. 304.*

Doct. pl. 84. The Declaration may be General or Special; as in Debt upon an Obligation the Plaintiff may declare on the Penalty generally, or may set forth the Condition at his Election.

Kelw. 68. If there are three in Execution jointly at the Suit of *A.* and all escape, in Debt for the Escape, the Plaintiff may declare for the Escape

of all, and it will not be double, though the Escape of any one of them will be (a) sufficient to intitle him to the Action.

a Cause of Action to 40s. and proves 30s. this is sufficient; per Hale. But in the Book there is a *Quere de hoc*, being special. 2 Lev. 85.

If in an *Indebitatus Assumpsit* the Plaintiff declares for 100*l.* received to the Plaintiff's Use, and also upon an *Infimus Computasset* for another 100*l.* the same Day, and the Defendant pleads that the said several Sums of 100*l.* are for one and the same Cause of Action, and likewise that the Sum demanded is satisfied; this on Demurrer will be good; for though it is frequent to lay a Declaration for a Debt several Ways in an *Assumpsit*, and it is not a good Plea to say that the several Sums are but only for the Sum first mentioned, and so go on no further; yet when the Defendant pleads over, that the very Sum demanded is satisfied, it is a good Plea; and if the two several hundred Pounds were two distinct Sums, the Plaintiff might have replied so, and taken Issue thereupon.

In an Action for Money won at Play there were two Counts, one setting forth a special Agreement to play at such a Game, and mutual Promises of Payment, which was right; the other was, that in Consideration that the Plaintiff such a Sum had won of the Defendant at Play, he promised to pay it, which was adjudged ill, in that an *Indebitatus* will not lie for Money won at Play; it was likewise held, that any Thing in the first Count which was right could not (b) help any Defect in the second; for though they both were put in one Declaration, yet they were as distinct as if they had been in two several Actions.

and affirmed as to another. 1 Salk. 24. & vide *Firest.* 148.

The Plaintiff declared, that whereas the Defendant for 120 Weeks Diet then past, had promised to pay him 7*s.* per Week, and that the Plaintiff *postea*, ff. 6 *Maii* 1695. having found the Defendant Diet 120 Weeks then past, the Defendant promised to pay the Worth, and that it was worth 7*s.* per Week; upon *Non Assumpsit*, and Verdict *pro Querente*, it was moved in Arrest of Judgment, that the Weeks in the *Quantum meruit* are not said to be *aliæ* than those laid in the special Promise; *sed non allocatur*; for they do not appear necessarily to be the same, and without Necessity the Court will not intend them so.

The Plaintiff after Plea pleaded, or after the End of the second Term, shall not add a new Count to his Declaration (as an *Indebitatus Assumpsit*, or the like) under Pretence of amending his Declaration.

2. Who may join or be joined in the same Declaration.

Regularly, where two or more are jointly intitled, or have a joint Interest, they may join in the same Action or Declaration; as if two are joint Owners of a Sum of Money, and travelling together they are robbed on the Highway, they may join in an Action against the Hundred, otherwise if the Sums are several and several Properties.

So 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.*

If *A.* deliver 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) If one declares for an Escape in

Raym. 449. Sheldon v. Clippham.

6 Mod. 128. Smith v. Ainsley adjudged.

(b) That a Judgment cannot be reversed as to one Count,

1 Salk. 213. West v. Troles.

Dier 370. pl. 59. 2 Leon. 12. Dier 351. pl. 23. Sed quere hoc.

1 Bulst. 68. Hard. 321.

ther *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, and by the latter Book they cannot both join.

Stiles 56 203. 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 adjudged by three Judges against one; who said, they are several Promises, *viz.* to deliver to each severally their own Cattle, and so there must be two several Actions.

3 *Lev.* 362. 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 falsely 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 Action for this false Return; for the *Mandamus* and the whole Prosecution and Charge thereof was joint; and this is no Office of Profit, nor Action brought for that, but for the unjust Return.

3 *Lev.* 363. 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, (a) all the Inhabitants may join in one Action against him.

(a) Upon a joint Grievance all Parties may join in a Writ; upon the Statute of Beau-pleader the whole Hundred or County may join. *F. N. B.* 270. — So one Writ *de essend' quiet' de toloneo*, or one *Monstraverunt*, lies for all the Tenants in Antient Demesne. *F. N. E.* 15. *Bro. Joinder in Action*, 81.

Fitz. Joinder in Action, 17. But if one Man calls two other Men Thieves, and shews in certain of what, &c. they shall not join in one Action against him, for the Wrong done to one is no Wrong to the other; so in false Imprisonment, Assault and Battery; for the Battery done to one cannot be the same as that done to another.

1 *Sid.* 438. If a Man hath Cause of Action against two, he may in (b) some Cafes sue them jointly, or separately, at his Election; 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 damnified *C.* in their taking.

(b) Where two were made Defendants in the Declaration, the one, that he might make no Defence; and so the Plaintiff intitled to Costs, though Nonsuit or a Verdict against him as to the other. *Comb.* 364.

Latch 262. If two Men procure another to be indicted falsely for a common Barrator, he may have an Action upon the Case against them both; though in Strictness the Procurement of one is not the Procurement of the other; so in Maintenance and Trespafs, and yet the Maintenance or Trespafs of one is not the Maintenance or Trespafs of the other.

Stile 153. But a Man cannot declare against one Defendant for an Assault and Battery, and against the other for taking away his Goods; because the Trespafs are of several Natures, and against several Persons.

Palm. 313. So 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.

Cro. Fac. 647.

1 *Bulst.* 15.

3. What Matters may be joined in the same Declaration.

Here we may observe, that personal Actions are such as arise *ex contractu*, such as Debt and Detinue; or such as arise *ex delicto*, as Trespasses founded on Force, which are Trespasses *Vi & armis*; or upon a particular Fraud, which are Actions on the Case; which Division hath given the Rule of what (a) may be contained in the same Declaration.

(a) That where several Actions

are brought for several Things of the same Nature, the Court may compel the joining of them in one. *Comb. 244.*

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 of 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*; and therefore the true Reason why Actions may or may not be joined arises from the Difference of the Proceſs, and the Fines paid on taking out the Original, and not on the Difference of the Defendant's 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.

Reg. 95, 139.
1 Vent. 366.

Hence it hath been adjudged, that 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 comprized in the same Writ; so Debt upon a Lease and for Cloaths may be joined, but Debt and Account cannot be joined.

Bro. Joinder in Action, 97.
Cro. Car. 20, 316.
1 Keb 147.
1 Vent. 366.
Raft. Ent. 150, 174.

So several Wrongs or Trespasses may be joined, because they may be comprized 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 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.

8 Co. 87.
Fenk. 211.
Raym. 233.
3 Lev. 99.

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 Account, which cannot be joined.

1 Lev. 101.
1 Sid. 244.
1 Keb. 59.
Skin. 66.
Carth. 189.

1 Salk. 10. 5 Mod. 90. 3 Mod. 322.

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.

3 Lev. 99.
Bage v. Bromwell.

In an Action upon the Case, the Plaintiff declares, that whereas *accommoდასტ* to the Defendant a *Gelding ad equitandum 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

Cro. Car. 20.
White v. Riden.
this Case the Plaintiff had Judgment, being after

a Verdict; but said by *Hobart*, the Defendant might have demurred for the Doubleness of the Declaration.

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 good, because it contains distinct Matters; for Part is founded upon the Contract, and Part upon the Tort, which are several Causes of Action.

Hob. 249.
1 *Evans* 235.
But *Winch*
doubting
hereof, the Damages being found severally, the Plaintiff released those for the Battery, and had Judgment for the Ejectment.

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

Allen 9. &
vide Stile 43,
202.

It hath been held, that an Action will lie for entering the House of the Plaintiff, breaking his Chests and carrying away his Goods, and beating his Servant, *per quod servitium amisit*; for a general Action of Trespas and a special Action upon the Case may be joined in one Action.

Carth. 113.
Drake v. Coop-
adjudged.

In Trespas *quare vi & armis* the Defendants entered his Close, containing 100 Acres, &c. (in which a Fair Time out of Mind had been kept on *Michaelmas* Day) & *adtunc & ibidem fregerunt & dirulser'* divers Booths, &c. *ibidem crect'* by the Plaintiff for exposing Wares and Merchandizes to Sale there brought by Persons thither resorting, *nec non eo quod* (these Defendants) *adtunc & ibidem impediverunt & disturbaverunt* the Plaintiff in erecting other new Booths, &c. for the Sale of Merchandize; by Reason whereof the Plaintiff lost all the Profits of Piccage and Stallage. Upon not guilty pleaded the Plaintiff had a Verdict, and on Motion in Arrest of Judgment it was objected to the Declaration, that the latter Part thereof, *viz.* the Disturbance in building new Booths, sounds altogether in Case and not in Trespas, and therefore incompatible with the first Part of the Declaration, which is Trespas *vi & armis*, and that these several Matters require several Judgments; the first a *Capiatur*, but the last a *Misericordia* only, and therefore could not be joined in one Declaration. *Sed per Cur.* The Disturbance, &c. is laid only in Consequence of the first Trespas, &c. and it is of the same Effect as a *Per quod* in a Declaration, which is often used in Actions of Trespas *vi & armis*, to let in the consequential Damages, &c. and one Plea goes to the Whole; for if the Defendant had pleaded a License from the Plaintiff to enter the Close, that would have been a good Justification of the Trespas.

4. Of the Declaration's agreeing with the Writ.

Doct. pl. 84.
1 *Lill. Reg.*
411.

The Count or Declaration is an Exposition of the Plaintiff's Writ, and must regularly agree therewith; and herein the general Rule is, that every Thing that comes within the Compass of the Writ may be comprehended within the Declaration, but the Declaration cannot be extended beyond the Writ; for original Writs, issuing out of *Chancery*, are the Grounds and Foundations of the Proceedings of the Courts into which they are returnable; and such Proceedings must be conformable to the Authority given them; whatever therefore may be comprized in the Writ, however multifarious, may be comprized in one Declaration; but whatever cannot be contained in one Writ, cannot be comprehended in the Declaration.

Doct. pl. 84.

The Writ may be general, according to Law, but the Declaration special; as where a Statute gives an Action, but does not prescribe any Form of the Writ, the Writ framed by the Common Law will serve, and the special Matter may be set forth in the Declaration.

So if Lands are given to a Woman *quandiu sola fuerit*, or to a Man *D. R. pl. 85. quandiu se bene gesserit*, in Waste, the Writ shall be general *quod tenet pro termino Vitæ*, and the Count special.

If a Man bring an Original in Trespass against one, and declares against him with a *simul cum*, he abates his own Writ; but the Defendant cannot take Advantage of it without demanding Oyer; if the Writ be against two, the Plaintiff may declare against one of them with a *simul cum*.

If Lands be demised for Term of Half a Year or a Quarter of a Year, &c. and the Lessee commit Waste, the Lessor shall have a Writ of Waste against him, and the Writ shall say, *quod tenet ad Terminum annorum*, but the Declaration must be special, according to the Case.

So if a Clerk that is donative be disturbed in a *Quare Impedit* by the Patron, for this Disturbance to his Church donative the Writ shall say, *quod permittat eum Presentare ad Ecclesiam*, &c. and the Declaration shall be special.

Where the (a) Title is of one Sort of Action, there the Declaration can never change it to another; but it may make a fatal Variance between the Writ and the Declaration.

Queritur in placito transgressionis pro eo quod, &c. yet may it be a Declaration in Case, notwithstanding the Recital of the Bill be *in placito transgressionis*, for that will serve indifferently for Trespass or Case. *Cro. Car. 325. Tyffin v Wingfield.*—But for this *vide Hob. 180. Allen 84. Cro. Car. 254. 2 Rol. Rep. 49. 1 Vent. 19.*

5. Of the Sufficiency and Certainty required in the Declaration; and therein of Matters of Inducement, and that which is the Gift of the Action: And herein,

1. Where by the Declaration it must appear that the Plaintiff hath a Right.

It is a general Rule in Pleading, that the Declaration must shew a Title in the Plaintiff; and that it is regularly true, that if the Plaintiff will himself discover to the Court any Thing, whereby it may appear that he had no Cause of Action (c) when he commenced it, his Writ shall abate.

Cro. Eliz. 111. 2 Leon. 20. 1 Leon. 87. (c) Where the *Tesse* of the Original was before the Day of Payment in the Condition of the Bond, upon which Action was brought; and this, tho' after Verdict, was adjudged Error. *Cro. Eliz. 325. Moor 598. Buckley v. Williamson, & vide Cro. Eliz. 565.*—So in Case for scandalous Words, the Day was alledged before the Words spoken. *1 Rol. Abr. 792.*—So in *Assumpsit*, where it appeared by the Declaration, that Action was brought before Cause. *Cro. Jac. 574 5.*—In Ejectment, if by the Declaration it appears, that the Defendant was ejected after the Lease made, it is sufficient, tho' no certain Day is alledged in which he was ejected, for the Day is not material, being before the Action brought. *Cro. Jac. 311.*—In Ejectment the Plaintiff declared, upon a Lease made *12 Jun' habend' a dicto duodecimo die Jun', virtute cuius* he entered, and that *postea, scilicet eod' 12o die Jun'* the Defendant ejected him; and because the Plaintiff by his own shewing entered as a Disseisor, and the Defendant ejected him before he had Title, after a Verdict and Judgment for the Plaintiff in Ireland, upon a Writ of Error here it was reversed. *3 Mod. 195. Evans v. Croker, & vide Comb 83. Like Point.*—Where the Declaration being of the Term generally shall refer to the first Day. *6 Mod. 287.*—That some Day must be alledged before the Action brought. *5 Mod. 287.* And note; if the Cause of Action arises on some Day within the Term of which the Declaration is delivered, the Declaration must be of some Day in the Term after the Cause of Action accrued.

Hence it hath been adjudged on the Statute of Hue and Cry, that it is not sufficient for the Plaintiff to declare that the Goods were in his Custody, but he must alledge that they belonged to him; but that in the Case of a Carrier, he may maintain an Action against the Hundred, setting forth the Custom by which he is chargeable.

So in an Action upon the Case, the Plaintiff cannot declare, *quod cum* the Defendant was indebted to him such a Sum, the Defendant in Consideration thereof *super se assumpsit* to pay, &c. without shewing the Cause of the Debt.

10 Co. 77. a. But for this 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 Eulst. 207. Cro. Jac. 397. Hard. 132.—But 171, per Croke and Chamberlam, there is a Diversity where the Promise is to pay at a Day to come, and where not; for a Promise to pay at a Day to come implies a Forbearance in the mean Time; and vide 1 Rol. Rep. 396.—And that such a Declaration is not made good by Verdict. Cro. Car. 6, 31. 1 Sid 182. 1 Brownl. 14. Popb. 31. Jenk. 293.—Where the Plaintiff declared, that the Defendant was indebted to the Testator of the Plaintiff in 20 l. *quas illi solviffe debuit secundum agreementum inter eos habit*; and the Judgment was stayed after Verdict, for that the Agreement might be by Deed. 2 Lev. 162.

But if in an *Assumpsit* the Plaintiff declares, that whereas the Defendant was indebted to him in 30 l. the Defendant, in Consideration that the Plaintiff had given Day to the Defendant until, &c. did assume and promise to pay, &c. this is a good Declaration, without shewing for what the Defendant was indebted, for the Debt is not in Question; and though it be true, there must be a Debt to make this a good Consideration, yet that is allowed in the Promise being actual.

Hob. 18. Woolaston v. Webb, adjudged after Verdict; & vide Like Point Cro. Jac. 397, 548, 593. Moor 853. pl. 1167. 3 Bulst. 206, 207. 1 Rol. Rep. 379, 380. Godb. 13. Hob. 216. 1 Rol. Abr. 19.

So if in an *Assumpsit* the Plaintiff declares, that whereas the Defendant had received 24 l. of several Persons, to the Use of the Plaintiff, in Consideration thereof the Defendant did assume and promise to pay, &c. This is a good Declaration, without shewing of what Persons in particular he received the Money, because the Consideration is executed, and not traversable.

If in an *Assumpsit* the Plaintiff declares, that the Defendant, in Consideration of, &c. *inter alia* did assume to pay, &c. This has been held no good Declaration; because he ought to set forth the whole Promise, which is intire.

But 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 promised 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 computi* are reduced to a Sum certain; and thereupon being indebted to the Plaintiff, it is sufficient to ground an Action.

In *Assumpsit* the Plaintiff declared, that the Defendant was indebted 20 l. *pro Præmio* upon a Policy of Insuranc upon such a Ship, and the Defendant demurred specially, because he did not shew the Consideration certainly what the *præmium* was, or how it became due; *sed non allocatur*; for this is as good as an *Indebitatus pro quodam salario*, which has been adjudged good.

In *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 (a) Record or Specialty, but

In *Assumpsit* will be no Bar to an Action of Debt grounded on a Record or Specialty. Cro. Car. 6. 1 Lev. 155. Cro. Eliz. 242.

Moor 854
pl. 1168.

Allen 5. &
vide March
100.

Cro. Car. 116.
Hetl. 106,
113. S.C. and
Popb. 177.
Latch 141.
Palm. 442.
Felv. 70.
1 Rol. Rep.
396. S. P.

2 Lev. 153.
Fawk v. Pin-
sack.

Carth. 276.
adjudged.
1 Vent. 44. S.P.
1 Sid. 425.
S. P.
2 Keb. 552.
S. P.
1 Mod. 8. S.P.
(a) For Dam-
ages reco-
vered in an

but only upon simple Contract; and any general Words by which that may be made to appear are sufficient.

If the Bailiff of a Liberty declares, that the Franchise and Liberty of returning and executing all Writs, Bills and Receipts out of the King's Courts belongs to him; and that the Defendant, without his License, and against his Consent, executed a *Fieri Facias* within the said Liberty: This is a good Declaration, without setting forth any Title, or that he enjoyed the said Liberty by Grant or Prescription; adjudged upon Demurrer to such a Declaration; for the Court held, that if the Defendant had taken Issue, it would have been incumbent on the Plaintiff to prove a Title.

So in an Action for stopping an usual and convenient Way to his the Plaintiff's Lands, the Declaration was held good without shewing a Title.

So in an Action on the Case for diverting a Water-Course, the Plaintiff declared, that the Defendant *multitose, &c. infregit* a certain Mill Dam, & *perinde* did divert the Water-Course *ab antiquo & solito cursu erga* the Corn Mill of the Plaintiff, by Reason whereof he lost the Profits of his said Mill; but did not set forth that Water used to turn his Mill, or that he had any other Profit thereof, or that the Water-Course was *Antiquus aque Cursus, &c.* Yet the Declaration was held good; the Court being of Opinion, that the (a) Possession alone was sufficient to maintain an Action against a Wrong-Doer, and that this was of the same Nature with an Action of Trespass. But Holt Ch. J. said, that if the Cause had been tried before him, the Plaintiff should have proved his Mill to be an ancient Mill, otherwise he should have been Nonsuit.

Action, *vide Palm. 200. 4 Co. Lutterell's Case, and*

In *Affumpfit* it was, in Consideration he had permitted the Defendant to take the Profits of such Lands for seven Years last past, at his Instance and Request, the Defendant promised to pay him as much as they were worth; and it was moved in Arrest, &c. that the Plaintiff had not set forth a Title here as he should have done; but *per Cur.* it is well enough; and to maintain such an Action as this upon Evidence, an actual Promise must be proved.

An Action upon the Case was brought for stopping a Way which the Defendant had from such a Place over *Black Acre*, where the Nuisance is, unto such a Field by Name; and it was ruled to be good, without shewing what Interest he had in that Field, for it shall be intended to be a common Field; but otherwise had it been *usque ad talem Clausum*, there he ought to shew what Interest he has in the Close.

In an Action upon the Case, supposing that he was seised in Fee of the Manor of *H.* and of a Fair to be held there every Ascension-Day, and that the Defendant disturbed him to take Toll, &c. the Defendant pleaded Not guilty, and found against him; it was moved in Arrest of Judgment, that the Declaration was not good, because he does not shew a Title to the Fair by Grant or Prescription, and therefore no Cause of Action, but *per Cur.* not necessary, because only a Conveyance to the Action, and is not any Claim thereof as to the Right, as in a *Quo Warranto*, and the Declaration, without special Title therein comprized, is good.

In Debt upon a Lease, the Defendant may declare *quod dimisit*, and need not alledge a Seisin in himself when he made the Lease.

In Debt against Lessee for Years for the Arrearages of Rent reserved upon it, he needs not declare that the Lessee entered, for the Contract is the Ground of the Action.

2. Where

1 Show. 17.
Cary v. Baccus.

2 Jon. 157.
Hart v. Basset.
Carth. 85.
S. C. cited.

Carth. 84.
1 Show. 64.
3 Mod. 48.
3 Lev. 133.
S. C.
Hebblethwait v. Palms.

(a) Where in several Cases Possession without Property is sufficient to maintain an Title *Trespass.*

1 Lev. 179.
1 Sid. 279.
2 Keb. S. S. C.
3 Cro. Eliz.
859. S. P.

Noy 86.

Cro. Fac. 43.
Dent v. Oliver
adjudged. &
vide Cro. Fac.
86, 123.

210. 48.

4 Leon 13.

2. Where the Plaintiff must shew, that he hath performed what was requisite on his Part.

7 Co. 10.
1 Lil. Reg.
418.

It is laid down as a general Rule, that in all Cases where an Interest or Estate commences upon Condition, be the Condition or Act to be performed by the Plaintiff, Defendant, or any other, and be it in the Affirmative or Negative, there the Plaintiff ought to shew it in his Declaration, and aver the Performance of it; for the Interest or Estate commences in him upon the Performance of the Condition, and not before. But when the Interest or the Estate passes presently, and vests in the Grantee, and is to be defeated by Matter *ex post facto*, or Condition subsequent to the Condition to be performed in the Affirmative or Negative, or to be performed by the Defendant or any other; there the Plaintiff may count generally, without shewing of any Performance; and this shall be pleaded by him who is to take Advantage of it.

7 Co. 10.
Dec. pl. 85.

As if an Annuity of 10*l.* *per Ann.* be granted to a Man when he shall be promoted to a Benefice, in his Demand of it he must shew that he is promoted; but if it be granted until he be promoted, there he shall have a Writ of Annuity; and he need not say that he is not yet promoted, because the Annuity precedes, and the Promotion is subsequent.

1 Sand. 319,
320.

If by the same Deed each Party is to do something advantageous to the other, and on which there is not a mutual Remedy, the Plaintiff in his Declaration must aver, that he hath performed what was to have been done by him.

2 Mod. 309.
5 Co. 10.
Cro. Fac. 645.
3 Lev. 41.
1 Show. 391.
Comb. 265.
Vide Title
Covenant.

But where there are reciprocal Covenants, and on which each Party may bring his Action, it is held, that in assigning a Breach the Plaintiff need not shew a Performance on his Part; and on this Reason, that each hath a Remedy, it is held, that reciprocal Covenants cannot be pleaded one in Bar of another.

1 Sand. 319.
Cordage v. Cole.
1 Lev. 274.
1 Sid. 423.
Raym. 183.
2 Keb. 542.
S. C.

As where a Writing was drawn in these Words; *It is agreed that A. shall pay to B. 770*l.* 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 tendering any Conveyance of his Land, brings an Action of Debt upon the Bill; and 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 not conveying the Land.

Hob. 83.
Nikols v.
Rainbred, and
Hob. 106. S.P.
That where
there are
mutual Pro-

J. S. brought an *Assumpsit* against *J. D.* declaring, that in Consideration *J. S.* promised to deliver the Defendant to his own Use a Cow, the Defendant promised to deliver him 50*s.* Adjudged, that the Plaintiff need not aver the Delivery of the Cow, because it was (*a*) Promise for Promise.

misses, the Plaintiff need not aver a Performance on his Part. *Yelv.* 134. 1 *Mod.* 62. 1 *Rot. Rep.* 336. 1 *Vent.* 41. *Hard.* 102. *March* 75. *Cro. Eliz.* 703. 1 *Lev.* 20, 293. *Cro. Eliz.* 137. 1 *Leon.* 186. (*a*) That both Promises ought to be made at the same Time, otherwise they will be *Nuda pacta*. *Hob.* 88. *Cro. Eliz.* 137. 1 *Leon.* 186.

2 Sand. 107.

In Debt on an Obligation for Payment of Money, so soon as several Bills of Costs are settled, it ought to appear by the Declaration that the Bills were settled, or that there was some Default in the Defendant by which Means they could not.

3. Where general Allegations in the Declaration are sufficient; and therein of Self-recitals and Omissions.

Although the Plaintiff must set forth in his Declaration every material Thing, and without which he could not be intitled to his Action; yet herein the Law requires no greater Certainty, than the Nature of the Thing is capable of; and therefore, if a Contract be made in general Terms, the Declaration upon such Contract may be in the same Terms: As if the Plaintiff declare, that whereas the Defendant was possessed of the sixth Part of a Ship, and it was agreed, the Defendant should by Writing sell his Interest to the Plaintiff for 600*l.* and that the Plaintiff should pay 20*l.* in Hand, and the Residue *supra executionem* of the said Writing; and that in Consideration the Plaintiff had paid the 20*l.* and assumed to perform the Agreement on his Part, the Defendant did assume to perform it on his Part; *præd' tamen* the Defendant had not performed the Agreement on his Part: This being on a mutual Promise, the Breach is well assigned in the Words of the Promise.

3 Lev. 319.
Keech v. Knight.

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 should want, the Defendant assumed and promised to pay, &c. and avers, that he found him Necessaries amounting to such a Sum, &c. This is a good Declaration, without shewing in particular what those Necessaries were, being in the Words of the Contract; and the Adding the Particulars would make the Record too prolix.

3 Bulst. 31.
Crips v. Bainton.
1 Rol. Rep. 173. S. C.

In *assumpsit* for Labour and Medicines in curing the Defendant of a Distemper, &c. who pleaded *infra ætatem viginti & unius annorum*; the Plaintiff replied, it was for Necessaries generally; and upon Demurrer to this Replication it was objected, that the Plaintiff had not assigned in certain how, or in what Manner the Medicines were necessary; but it was adjudged that the Replication in this general Form was good.

Carth. 110,
111. Huggins v. Wiseman.
3 Lev. 170.
S. P.
3 Mod. 69, 70.
& vide Cro. Jac. 486. cont.

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* 100*l.* And adjudged upon Demurrer that it was good, without shewing what the Goods were, for the Penalty of the Obligation is to be recovered upon any Breach; but *per Cur.* it would be otherwise in (a) Covenant where there is to be a Recompence for the Damages.

1 Lev. 94.
French v. Pierce.

veral Breaches may be assigned; otherwise in Debt upon an Obligation conditioned Covenants. *Cro. Car.* 176. & vide *Tit. Covenant*, and the Statute 8 & 9 *W. 3. cap.* 10.

(a) In an Action of Covenant to perform

In an Action of Covenant, the Agreement was to pay Rents at several Days during the Term; Plaintiff assigns Breach, that he did not pay the several Rents at the several Days during the Term: This was urged to be double, uncertain, and naught; but the Court held, that in Covenant the Plaintiff may assign the Breach as general as the Covenant, tho' it includes 20 Matters; and that here it might be intended that no one Rent was paid upon any one Day during the Term.

1 Lev. 78.
1 Keb. 371,
468, 490.
Conyers v. Smith.

In Covenant by a Master against his Servant, on a Covenant not to buy or sell without the Master's Leave within two Years; the Breach assigned was, that he had *diversis diebus & vicibus*, between such a Day and such a Day, sold to *H* and to several other Persons unknown, Goods to the Value of 100*l.* After Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Breach was uncertain as to

1 Salk. 139.
Farrow v. Chelmer.

Time and Persons; but the Court held it certain enough, and that in Covenant it is sufficient to assign a general Breach.

Cro. Jac. 298. If a Breach of Covenant is sufficiently alledged, the Plaintiff need not conclude *Et sic non tenuit Conventionem in hac, &c.* for that is but Repetition.

9 Co. 60. between *Bradshaw v. Salmon.* 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 Notice of the Lessor than of the 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.

shew that 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. *Raym.* 14, 15.

1 Jon. 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 upon this Covenant the Plaintiff assigns for Breach, that *A.* took the Profits, *Et (b) non permittit B.* to enjoy, &c. This Breach is well assigned; for the taking the Profits by *A.* is a special Disturbance.

Symons v. Smith. *Cro. Car.* 176. *S. C.* adjudged, *Et vide Hard.* 132, 133. (*b*) But *Non permittit* only is too general. *3 Co.* 39. *b.* 91. *b.* *Et 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 Et usum* of *C.* and in an Action upon this Covenant *B.* assigns the Breach in not paying the Rent to him, *ad opus Et usum* of *C.* This Breach is well assigned in the Words of the Covenant, though a negative Pregnant.

Boscawin v. Cook, adjudged upon a special Demurrer. *2 Mod.* 158. *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; otherwise it shall not be intended.

Cro. Car. 262. In Trover for a Bond the Plaintiff need not shew the Date; for the Bond being lost or converted, he may not know the Date; and if he should mistake it, it would be a Failure of his Suit. *Chambers,* adjudged, after a Verdict for the Plaintiff, and affirmed upon a Writ of Error. *Cro. Jac.* 638. *S. P.* adjudged upon Demurrer. *Hard.* 111. Like Point in Trover for Letters Patent. *1 Brown. Ent.* 356. a like Precedent. *Vid. Ent.* 265. a like Precedent.

Palm. 523. If in an Action upon the Case against a Lighterman the Plaintiff declares the Defendant so negligently governed his Lighter, that it took Water, and spoiled the Goods of the Plaintiff *ad damnum, &c.* the Declaration is good, without a more special Allegation how they were spoiled.

Symonds v. Darknol. *Palm.* 523. So it hath been held, that a Declaration against a Lighterman is good, though not alledged in the Declaration that he is a common Lighterman; as also against a Carrier, without alledging that he is a common Carrier.

1 Sid. 245. *S. P.* yet said to be the best Way to recite it. *Cro. Car.* 219. A Statute which does not give the Action, but is only in Affirmance of the Common Law, need not be recited; as on the Statute of *Marlbridge* the Plaintiff may declare, that his Father was seised in Fee of certain Lands, and died seised; and that the Lands descended to him; and the Defendant had occupied them as Guardian in Socage, without any Recital of the Statute.

In an Action of Debt for an Escape of one in Execution, it is not sufficient to shew only that a *Capias ad satisfaciendum* issued, by Virtue of which he was taken, &c. but the Plaintiff must shew how he recovered Judgment, and thereupon a *Capias ad satisfaciendum* issued, &c. for as to the Judgment the Defendant may plead *Nul tiel Record*; and though, if there was no Judgment, the Sheriff was bound to execute the Writ, and perhaps might be fined for the Escape, yet if there was no Judgment, there was no Debt or Duty to the Plaintiff.

1 Sand. 38.
39. Jones v. Pope.
1 Lev. 191.
2 Keb. 93.
1 Sid. 305. S.C.
— That the Cause for which arrested must Declaration,

be shewed and proved. 2 Lev. 85. — But for what is necessary to be shewed in the

If in an Action for the Escape of B. against the Warden of the Fleet, the Plaintiff declares, that B. was committed in Execution to him, he must conclude *prout patet per recordum*; for that is triable by the Record, tho' said to be helped by the Defendant's pleading, that he suffered him to escape with the Leave of the Plaintiff.

3 Lev. 393.
Norden v. Fox,
Et v de Lut.
111. and
5 Mod. 8, 9.
that where a Matter of

Record is the Foundation or Ground of the Suit of the Plaintiff, or of the Substance of the Plea, there it ought to be certainly and truly alledged; *aliter* where it is but Conveyance; as in Escape, the not concluding *prout patet per recordum*, not being of the Git of the Action, is aided.

In an Action for an Escape on mesne Process, the Plaintiff must not only shew, that *ad largum ire permisit*, but also that *Non comperuit ad diem*; because the Party beingailable, the Sheriff might lawfully suffer him to go at large; tho' in such Action upon an Escape after Execution, it is sufficient to shew that *ad largum ire permisit*.

Noy 72.
Vide Title
Escape.

In Action for the Escape of one committed by Commissioners of Bankrupt, for refusing to answer Interrogatories, the Plaintiff set forth, that upon the Petition of him and other Creditors, the Lord Chancellor by Commission *dedit potestatem plenam* to the Commissioners *vigore statuti* to examine, &c. and that the Commissioners offered him Interrogatories, &c. And though it was objected, that the Office of the Chancellor is ministerial only, and that it is the Statutes which give the Power, and it was not shewn what the Interrogatories were; yet the Declaration was adjudged good; for it is *per commissionem dedit, &c. vigore Statuti*; and it shall be intended that the Interrogatories are lawful till the contrary appears.

Moor 834.
2 Bulst. 236.
1 Rel. Rep. 47.

In Debt upon an Assignment of a Bail-Bond, taken by the Sheriff who had arrested the Defendant on a *Capias*; it was objected, that the Plaintiff had not in his Declaration set forth the *Capias*, or the *Teste*, or Return of any *Capias*; and this on a special Demurrer was held fatal, it being the *Capias* that gives Life to the Bond.

1 Mod. Cases
78. Tucker v.
Goldburne.

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.* &c. this is a good Declaration, though nothing is shewn to have been awarded on the other Side; for it is sufficient (a) for the Plaintiff to set forth that Part of the Award that intitles him to his Action.

1 Leon. 72.

(a) The Plaintiff may declare, &c.

that *inter alia* it was awarded; per Lit. Rep. 312. But 1 Mod. 36. per *Tavisdan cont'*; but for this vide Tit. Award.

If in an *Assumpsit* the Plaintiff declares, that the Defendant, in Consideration that the Plaintiff would forbear him one Week, assumed, &c. and avers, that he did forbear him for one Week, but says not one Week following; yet this is a good Declaration, for it must necessarily be intended so.

Cro. Eliz. 272.
Tenacy v.
Brown.

Yelv. 49. Allen v. Randall. If in an *Assumpsit* the Plaintiff declares, that whereas there was a certain Bargain between the Plaintiff and the Defendant for certain Woods, for which the Defendant was to pay 20*l.* at a Day after; and that the Defendant, in Consideration that the Plaintiff *asportaret sufficientem hominem fore Obligat'* to the Defendant for the Payment of the said 20*l.* did assume and promise that the Plaintiff should enjoy the said Wood, &c. and the Plaintiff doth aver *quod asportavit B. sufficientem hominem fore obligat'* to the Defendant, &c. yet this is no good Declaration; 1st, Because it is not shewn (a) how he was sufficient; so that it may appear to the Court to be according to the Agreement; 2^{dly}, Because it is not in Fact shewn that B. (b) did become bound, or that *obtulit se obligari*, and perhaps he came to be bound, but being there refused.

(a) *Vide Heb. 69, 70, 77. 1 Mod. 77.*
(b) In an Action upon a Promise to repay Money

laid out, or to be laid out, for Goods for the Use of the Defendant, the Plaintiff need not aver, that the Goods came to the Hands of the Defendant. 1 *Bulst.* 169. adjudged.

Yelv. 110. Lord Mor-dant v. Walden adjudged. If in an *Assumpsit* the Plaintiff declares, that his Father was seised of the Manor of D. and of divers Lands, &c. in D. in Fee, and in Consideration that the Plaintiff, together with his Father *sigillaret quandam Indenturam per quam* his Father *Bargainizaret*, &c. the said Manor and Lands, the Defendant did assume, &c. and alledges, that the Plaintiff such a Day *sigillavit Indenturam prædict'*; yet the Defendant, &c. This is no good Declaration; for *diversa Terras & tenementa in D.* are uncertain, and comprehend not all his Lands in D. and therefore the Plaintiff ought to have shewed in certain, and particularly what Lands were comprized within the Indenture.

Yelv. 111. ad-judged.
(c) The Plaintiff declared, that whereas *quædam pars domus, &c.* was out of Repair,

the Defendant, in Consideration that the Plaintiff would repair *eandem partem* of the said House, assumed and promised, &c. and avers, that he did repair *eandem partem*; and though it was objected, the Plaintiff should have shewed which Part of the House was out of Repair, yet after a Verdict it was adjudged for the Plaintiff. 2 *Leon.* 53. 3 *Leon.* 91.

Yelv. 111. per Cur'.

But if a perfect Indenture in Date, in the Nomination of the Parties and Limitation of the Land, had been mentioned before, it had been sufficient to say, that they sealed *Indenturam prædict'*, because by the Premises it appears there was *in facto* a true and perfect Indenture.

Raym. 203, 204.

The Plaintiff declares, whereas he and the Defendant were joint Executors, and the Defendant had received all the Estate of their Testator, and the Plaintiff threatened to sue the Defendant for one Moiety, the Defendant, in Consideration the Plaintiff would forbear, &c. and would shew an Account concerning the Testator's Estate, did assume, &c. and the Plaintiff avers, that he did shew *quodam Computum*; and though not said *Computum prædict'*, yet after a Verdict for the Plaintiff it was adjudged for him.

3 *Bulst.* 35.
Lee v. Adams, adjudged after Verdict for the Plaintiff.

If in an *Assumpsit* the Plaintiff declares, that the Defendant, in Consideration that the Plaintiff would lease certain Lands to the Defendant, rendering 10*l. per Ann.* the Defendant did assume and promise to, &c. and avers, that he did make a Lease of the said Lands, but does not say that it was rendering 10*l. per Ann.* This is no good Declaration.

If in an *Assumpsit* the Plaintiff declares, that whereas the Defendant had committed a Felony, and thereupon had requested the Plaintiff to do his Endeavour (a) to procure a Pardon for the Defendant; and thereupon the Plaintiff, by all the Means he could, and many Days Labour, did his Endeavour to obtain a Pardon for the said Felony, viz. in riding and journeying, at his own Charge, from *London* to *N.* where the King was, and so to and from *New-market* to obtain a Pardon, &c. This is a good Declaration, (b) though nothing in particular is laid to be done, but only riding up and down, and nothing done when he came there; for an Endeavour in general is expressly laid, and Particulars ought to be set forth for Form's Sake only; for though upon the Trial he could have proved no riding nor journeying, yet any other effectual Endeavour, according to the Promise, would have served.

Hob. 105, 106.
Lampugh v. Blaitbwait, adjudged *per totam Curiam,* *præter Warburton;* and the rather, because it was after Verdict.
Moor 866.
1 Brownl. 7.
S. C.
(a) *Stile 465.*
Like Point, where the Defendant

did his Endeavour to reconcile Differences, &c. (b) But if the Plaintiff declares, that the Defendant, in Consideration the Plaintiff had done him *Multa beneficia,* assumed and promised, &c. this is not good. *1 Vent. 27.* *1 Sid. 413.* adjudged, after Verdict for the Plaintiff; & *vide 2 Keb. 552.*

In *Assumpsit* the Plaintiff declared, that in Consideration the Plaintiff would deliver all the Corn in a certain Barn, the Defendant did assume and promise, &c. and avers, that he did deliver all the Corn in the Barn, but does not shew that there was any Corn there; and it was agreed *per Curiam,* that had this been on a Demurrer, the Declaration would not be good; but that being after a Verdict, upon *Non assumpsit* pleaded, by which Issue it is admitted there was Corn there; it was adjudged for the Plaintiff, and afterwards affirmed upon a Writ of Error.

1 Rol. Rep. 382.

If in an *Assumpsit* the Plaintiff declares, that whereas *J. S.* had acknowledged himself to be indebted to the Plaintiff in 10*l.* for divers Trespasses, which 10*l.* the Plaintiff at the Defendant's Request had accepted; and that the Defendant, in Consideration the Plaintiff would acquit and discharge the said *J. S.* of the said Debt, and would permit the said *J. S.* to carry out of the Plaintiff's House certain Goods, did assume and promise to pay the said 10*l.* to the Plaintiff; and alleges *in factis,* that he did acquit and discharge the said *J. S.* and did permit the said *J. S.* to carry away the said Goods: This is no good Declaration, because he doth not shew how he did acquit the said *J. S.* for it could not be without Deed, which ought to have been particularly shewed; and though the Performance of the other Part of the Consideration is sufficiently averred, yet that will not help it.

Cro. Jac. 503.
Leneret v. Rivett adjudged.

If in an *Assumpsit* the Plaintiff declares, that whereas there was a certain Discourse between the Plaintiff and Defendant concerning a Marriage to be had between the Nephew of the Plaintiff and the Niece of the Defendant; and thereupon the Defendant, in Consideration the Plaintiff would do his endeavour, and labour to persuade his Nephew to marry the Niece of the Defendant, did assume and promise to pay to the Plaintiff, &c. and avers, that such a Day, and divers other Days and Times *omnibus modis quibus poterat Conatus fuit & elaboravit suadere* his said Nephew to marry the Defendant's said Niece, &c. This is a good Declaration, without shewing in particular how he did his Endeavour; for if he should set forth his several Speeches to his Nephew in the Praise of the young Lady, or the Advantages of a married Life, &c. the Record would be too long.

Raym. 400.
Aglionby v. Towerfon adjudged, after Verdict for the Plaintiff.
Moor 595.
Like P. adjudged.

4. Where the Averments must be positive and express in the Declaration.

Co. Lit. 303. The Declaration must contain such certain Affirmation, that it may
Plew. 128. be traversed; for if there be no certain Affirmation to make the De-
Cro. Jac. 361. claracion it self traversable, it will not be cured after a Verdict, be-
 362. cause it is a Defect in Substance; as if the Declaration be *quod cum*
 2 *Bull.* 214. the Defendant (a) assaulted him, and the Defendant pleads Not guilty,
Yelv. 121. here is nothing put in Issue, for the Pleadings have affirmed nothing;
Cro. Eliz. 33, 44^l. and though the Defendant be found guilty, yet cannot the Plaintiff
Co. Ent. 161. have Judgment, because nothing is positively affirmed: But if the
 2 *Sand.* 319. Plaintiff declares *quod cum* the Defendant *concessit se teneri*, or *quod*
 (a) 2 *Lev.* *cum Mutuatus fuisset & non solvit*, or *quod cum dimisit*, the Defendant
 206. *ejecit*; in these Cases there is a positive Charge upon the Defendant;
 and the *quod cum* being a Branch of the whole Period, and making one
 Sentence with the latter Part of it, it is a positive Affirmation, and
 therefore being equally positive, it is equally traversable with the latter
 Part, and therefore a Man may plead *Non est factum*, *Non Mutuatus*, *Non*
dimisit; because, though these come under the *quod cum*, yet, taken
 together with the rest of the Sentence, being positive, they make sub-
 stantive Issues of themselves.

1 *Lutw.* 535, If on a Demise the Plaintiff declares, *quod cum per quandam Indentu-*
 877. & *vide* *ram testat' existit quod dimisit*, this hath been held ill after a Verdict;
 1 *Lev.* 12, 75. because there is no positive Affirmation that there was a Demise; and
 1 *Sand.* 275. so he hath not set forth a Demise in a Manner that it might be tra-
 versed, for the Traverse must be of the Demise, and not of the In-
 denture; but if in Covenant he declares, *quod cum per quandam Indentu-*
ram testat' existit, that the Defendant did covenant, this, with a *Pro-*
fert, is good; because when he says the Indenture attests that he did
 covenant, this is a certain Allegation there was such an Indenture,
 and the Indenture only is traversable on the Issue of *Non est factum*.

1 *Sand.* 116. So it hath been held, that *Licet* is an Affirmation; for what is con-
 1 *Lev.* 194. tained under it, as *Licet ad hoc faciend' sapius requisit'*, is a positive Af-
 2 *Vent.* 278. firmation that there was a Request.
Dier 257.

Carth. 216. In the Debt on the Statute 12 *Car.* 2. for selling Wine without a
 1 *Shorv.* 337. License, the Plaintiff began his Declaration by Way of Recital, *pro*
Mullacke qui *eo, viz. quod cum* the Defendant at several Times, between such a Day
tam v. Speer- and such a Day, had sold Wines by Retail by the Pint, &c. on the
ing. General Issue pleaded, and Verdict for the Plaintiff, it was moved in
 Arrest, that the Declaration was not positive, but by Way of Recital
 only, and so doth not directly charge the Defendant with the Crime
 intended; *sed per Curiam* the Plaintiff had Judgment; for all the Pre-
 cedents in the like Cases are after this Manner; as in Debt upon the
 Statute of Tithes, &c. Moreover this is an Action of Debt, wherein
 the Offence is only an Inducement to the Action; for it is the Non-
 payment of the Penalty which is the original Cause.

Salk. 636. In Trespass the Plaintiff declared *quare vi & Armis Clausum fregit*,
Hove v. Chap- and after Verdict for the Plaintiff Judgment was arrested; for *quare* is
man. not positive but interrogatory, and much worse than *quod cum*.

For this *vide* It hath been held a good Declaration to say, *quod defendens quendam*
 1 *Rol. Abr.* 4. *canem ad mordendum oves consuctum Scienter retinuit*, without saying, *quod*
Cro. Car. 254, *retinuit quendam canem sciens canem prædict' ad mordendum oves consuctum*,
 487. I
 2 *Sid.* 127. for

4 *Co.* 18. *Dier* 25, 256. *Allen* 92. 2 *Bull.* 291. 3 *Bull.* 76. 1 *Sid.* 21. 1 *Rol. Rep.* 43, 193.—
 In case for selling two Oxen, affirming they were his, the Defendant's, whereas in Truth they were
 the Property of *J. S.* without alledging, that he *Sciens* they were the Property of *J. S.* yet the
 Declaration was held good. *Carth.* 90.

for this is tantamount, for the Word *Scienter* goes to all the precedent Matter; and the Court said, the *Sciens* was not traversable, but ought to be proved in Evidence, and that otherwise the Action did not lie.

In Debt upon an Obligation, the Condition whereof was to perform all Covenants comprized within certain Indentures, bearing even Date with the said Obligation, and, in Truth, both Obligation and Indentures were without Date; and it was held, that the Plaintiff ought to have averred a Date of the Obligation, and that the Indentures bore equal Date therewith. Noy 21.

If in an *Assumpsit* the Plaintiff declares, that whereas it was agreed between the Plaintiff and one *A.* that the said *A.* should lease a certain House to one *B.* for seven Years; and it was also agreed, that *B.* during the said Term, should repair the House with Tile and Slate only, and thereupon an Indenture was drawn; but because there was a Covenant therein, that *B.* should be bound to all Manner of Reparations, *B.* refused to seal the said Indenture, and the Plaintiff refused to seal a Bond for Performance, &c. and further shews, that in the said House there was a great Wall, Part whereof was ruinous, and likely to fall during the said Term; and that the Defendant, in Consideration that the said *B.* would seal the said Indenture, and the Plaintiff would seal the said Bond, did assume and promise, that he the said Defendant would maintain and uphold the said Wall *durante predicti termino 7 Annorum*, and avers, that the said *B.* the said Indenture, and the Plaintiff the said Bond, did thereupon seal; and in fact says, that the said Wall, during the said Term, did fall, &c. This is no good Declaration, because not expressly averred that *A.* did demise the said House; and if there was no Demise, it was not possible for the Defendant to repair it during the Term; and, for any Thing that appears, the Indenture was sealed only on the Part of the Lessee, and not on the Part of the Lessor. Yelv. 18.
Soprani v.
Skurro ad-
judged.

If in an *Assumpsit* the Plaintiff declares, that whereas the Defendant had distrained six Oxen of the Plaintiff's for a Quit-Rent due to the Bailiffs of *B.* and thereupon the Defendant, in Consideration that the Plaintiff would pay the Money for the Redemption of his said Cattle, did assume and promise, upon Request, to shew to the Plaintiff, or to such other Person or Persons as he should name, a sufficient Record to charge the said Lands with the said Quit-Rents; and alledges, that he appointed *B.* to see the said Record, and requested the Defendant to shew it *B.* accordingly; but that the Defendant had not shewed to the said *B.* any sufficient Record to charge the said Lands: This is a good Declaration; for though the Sufficiency of the said Record is not triable *per Pais*, and the Plaintiff might have averred a Breach generally, *scilicet*, that he did not shew any Record, yet this is sufficient and most proper for the Plaintiff to lay the Breach according to the Promise; and in this Case the Defendant may plead, that he did shew *tale Recordum* reciting it, and conclude, which was sufficient; and thereupon the Plaintiff may demur, and put the Sufficiency thereof to the Judgment of the Court. Yelv. 38. Hey-
ford v. Reeve
adjudged.

If in an *Assumpsit* the Plaintiff declares, that the Defendant, in Consideration of, &c. assumed and promised to take the Son of the Plaintiff to be his Apprentice for seven Years, and to find him Meat, Drink and Apparel, &c. during the Term, and avers, that he did not find him Meat, Drink and Apparel, &c. but does not aver that he did put him, or that the Defendant did accept him as his Apprentice: This is no good Declaration; for it ought to appear that he was his Apprentice, or else the Defendant was not bound to provide for him. Cro. Jac. 406.
3 Bulst. 221.
1 Rol. Rep.
414. Talkern
v. Wrigg.

If

1 *Mod.* 169. If in an *Assumpsit* the Plaintiff declares upon a Promise made by the Defendant, to pay 50s. to the Plaintiff when the Defendant should have received the Money, and avers that the Defendant hath received the Money, but yet hath not paid, &c. This is no good Declaration, because it doth not appear how much Money the Defendant hath received, and perhaps he hath not received so much as 50s. and tho' the Promise is general, yet the Breach ought to be laid so as to be adequate to the Consideration.

Litch 203. If in an *Assumpsit* against an Executor the Plaintiff declares, that by two Judges against one, after Verdict. the Testator of the Defendant, in Consideration of, &c. did assume and promise that he would leave to the Wife of the Plaintiff as good a Portion as he should give to any of his Children; and avers, that the Testator to such a Daughter *dedit* such a Portion, but did not leave, &c. This is no good Declaration, because it does not appear when he did give this Portion, and perhaps it might be before the Promise.

5. Of the Certainty required in the Description of the Thing declared for.

For this *vide* Tit. *Trespafs.* (a) That where the Thing is well described, the Court ought not to be too strict in scanning the Words; and that if the Thing is so described, that the Jury may know what is meant thereby, it is well enough. *Stile* 136, 235.

The Law requires no greater Certainty than the (a) Nature of the Thing will admit of; as where an Action is brought for Things not subject to Distinction by Number, Weight or Measure; as in *Trespafs* for breaking his Close with Beasts, and eating his Peas, without saying how much; yet this Declaration hath been held good, because no body can number or measure the Peas that Beasts can eat.

For this *vide* Tit. *Trover and Conversion.* So where there are several Parts which compose an aggregate Body, there it is sufficient to mention the Body, and it is not necessary to ascertain the several Parts; as *Trover* for a Ship and Sails is good, because the Sails go to make up the aggregate Body; but if it had been for Sails only, it would not have been good without specifying the Number and Quality; so *Trover* lies for a Library of Books.

Raym. 2. *Seaman v. Barns* adjudged. If in *Trover* the Plaintiff declares for two Pair of Pot-Hooks, &c. and Hangers; this Declaration is not good, because of the Uncertainty of the Word Hangers; and they cannot be intended such upon which the Pot-Hooks used to hang, because they do not immediately follow the Word Pot-Hooks; but there are several other Words between.

Vide Tit. *Trover.* So *Trover* for a Beam, and Scales and Weights, is not good for the Weights, because there may be more or less of the Weights used with the Scales, and therefore altogether uncertain as to the Quantities or Weights of them.

2 *Sand.* 74. If in *Trover* the Plaintiff declares *pro decem Paribus Velorum & tegulorum, Anglice* Curtains and Vallance; this is a good Declaration, and certain enough, and shall be intended for ten Pair of Curtains and ten of Vallance; and in such artificial Things there needs no other Description, than to name them by their usual Names by which they are commonly called, without shewing the Quantity of Yards or Stuff of which they are made.

Vide Tit. *Trover,* and the several Authorities there cited. Where a Thing is laid in the Declaration by Way of Aggravation, tho' such Allegation is uncertain, or that Circumstance is not proved to the Jury, yet this shall not arrest the Judgment; because the Git of the Action is the Thing it self in Demand, and the Aggravation is only the Manner of doing it; and though this may increase the Damage

mage something, yet it is not to be out of Proportion to the Thing in Demand; as if Trover be brought for a Box with Writings, and Charters or Vestments, this is good, because the Trover is for the Trunk, and for the Detention of the Goods therein, which are withheld by the Detention of the Trunk, but not for the Value of the Goods; and therefore antiently they held that Trover lay only for a Trunk locked, but now they admit it though the Trunk be not locked, because the Detaining is still the same.

In an Action upon the Case for setting a House on Fire, *per quod* (amongst divers other Goods) *ornatus & equis aratris & Carucis amisit* was held certain enough; so if he had mentioned only *diversa bona*; for when a Man's House is burnt, he cannot set forth the Certainty of the Goods he lost. 1 Keb. 825. Prior v. Dawkes.

But where in an Action on the Statute of *Hue and Cry* the Plaintiff declared that he was robbed of a certain Sum of Money, *ac diversa bona & Catalla in Custodia ipsius*, to the Value of 30*l.* and because he had not set forth the Goods particularly, and that he had not likewise alledged that they were his Goods, it was held, that as to this Part he could not have Judgment. 2 Sand. 379.

Declaration in Trespafs for breaking and taking away his Fish, without expressing either the Number or Nature of them, was held insufficient; but in an Indictment for taking Fish out of a Pond, the Number need not be expressed, for Damages are not to be recovered; but the Party is to be fined according to the Circumstances of the Fact, and not according to the Number of the Fish. 5 Co. 34. Playter's Case. 1 Vent. 272. & vide 1 Vent. 329.

So Trespafs *Quare arbores succidit ad Valentiam, &c.* was held insufficient for not expressing the Kind of Trees. 1 Vent 53.

6. Of the Declaration's being good in Part and void in Part.

It seems to be now agreed, that if a Declaration be good in Part, though bad as to another Part, that the Plaintiff is intitled to Judgment; for so much as is well alledged, especially if it be not of an (a) intire Demand; also where the Jury finds greater Damages than the Party declares of, the Court may, to prevent Error, give Judgment for so much as the Party declares of, *nullo habito respectu* to the rest; also the Party may (b) release the Overplus, and take Judgment for the rest. 1 Rol. Abr. 784, 785. 10 Co. 115. Y. l. v. 45. 2 Show. 103. (a) Vide 1 Vent. 27. Hob. 178, 189. — That if one brings an Action for

two Things, and of his own shewing it appears, that he cannot have an Action for one of them, or a better Writ, there the Writ shall be well for that Part for which it is good. 11 Co. 45. Godfrey's Case. (b) Where the Plaintiff may release Damages for Part, and take Judgment for the rest, vide F. N. B. 107. Moor 281. 1 Leon. 92. 2 Bulst. 280. 1 Brown. 235. Stile 364. Hard. 58.

As where the Party avowed for 5*l.* Rent, and a *nomine Pænæ* for Non-payment at the Day, but laid no actual Demand of the Rent, the Avowry was held naught as to the *nomine Pænæ*, because it could not be forfeited without a Demand of the Rent; yet he had Judgment for the Return of the Cattle, because he had a lawful Cause to distrain for Rent arrear, and the Demands were several. Hob. 133. Howel v. Sambeck.

So where the Plaintiff brought an Action of Debt for 40*l.* upon the Statute of Usury, and declared, that the Defendant *corruptive* did lend 40*l.* *cont. formam statuti*, and such a Day did also lend 20*l.* *contra formam*, &c. but did not say *corruptive*; upon *Nil debet* pleaded the Plaintiff had a Verdict, and it was moved in Arrest of Judgment that the Declaration was not good for the last 20*l.* because it wanted the Word *corruptive*; but notwithstanding the Court gave Judgment for what

the Plaintiff had well declared, and a *Nil Capiat per Billam* was entered as to the Residue.

Raym. 395. So if in Trespafs the Plaintiff declares for taking the Mare of the Plaintiff, and several Goods, but does not say of the Plaintiff, and thereupon the Defendant demurs, the Plaintiff may have Judgment for the Mare, and release the Action for the rest.

Hob. 178. So if an Action of Debt be brought upon several Bonds, and it appears that one is not due, the Plaintiff may recover the rest.

1 Sand. 286. In Ejectment, if (a) Part of the Things be well demanded, and others not, and a Verdict is given for the Plaintiff for the whole, and intire Damages, the Plaintiff may release all the Damages in that which (a) As in Ejectment of

Land, and a Free Fishery, because an Ejectment does not lie of a Free Fishery. *Cro. Jac.* 144, 146. *1 Rol. Abr.* 784.—So in an *Ejectione custodiae & hereditis*, where it does not lie of the Custody of the Heir, but of the Land only. *Dier* 369. *10 Co.* 130. *5 Co.* 108. *2 Bulst.* 28.—So in an Ejectment of a Messuage, Cottage and Tenement, if it be found for the Plaintiff, and one intire Penny Damages given to the Plaintiff for the whole, because an Ejectment does not lie of a Tenement, the Plaintiff may release all the Damages, for that it is intire, and have Judgment for all the Land, saving the Tenement. *Cro. Eliz.* 119. *3 Leon.* 128. *2 Bulst.* 28. *Stile* 30.

1 Rol. Abr. In a Writ of Debt for 100*l.* against an Executor, if the Plaintiff counts upon an Obligation for 99*l.* and upon a *Mutuatus* by the Testator for 20*s.* and upon the Issue the Jury find for the Plaintiff in the Whole, and assesses Damages intire, where it appeared no Action lay against the Executor upon the *Mutuatus* of the Testator; yet if the Plaintiff releases the 20*s.* and all the Damages, he may have Judgment for the Residue.

784. Asford's Case. In Debt for Rent the Plaintiff declared for more than was due upon his own shewing, and upon *Nil debet* pleaded the Plaintiff had Judgment, and Damages and Costs; and it was moved in Arrest of Judgment, that the Plaintiff had made an (b) intire Demand for Rent to a certain Sum, when it appeared that he could not have an Action for so much; yet the Court held that he might release the Surplus and Damages, and take Judgment for the Residue.

1 Rol. Abr. the Sum in Demand; and therefore ought at his Peril to declare for the true Debt; and the Reason why he ought to demand the very Sum is, because if he should do otherwise, and recover, he might afterwards bring an Action for the true Sum, and so the Defendant would be doubly charged; and therefore in Debt on a Bond, if the Plaintiff declares for less than is due, he shall never have Judgment. *2 Rol. Rep.* 54, 55. *5 Mod.* 213. cited.

Farefl. 69. per Holt Ch. J. Salk. 658. S. P. If there be a certain stated Sum specified in the Deed itself, that shall not be abridged by any *Remittitur* or Release of the Plaintiff; if he declare upon that Deed; as if a Man bring Debt upon a Bond of 30*s.* and declares upon a Bond of 20*l.* this will be bad; because he has brought his Action for more than is due, and this rests upon the Deed only, and the Sum in it does not amount to his Demand; but if the Action be brought upon a Deed which refers to a Matter of Fact, that makes the Duty more or less; if then the Fact which is referred to will intitle him to a less Sum only, and he demands more than the Fact which the Deed refers to upon (c) Computation will intitle him; there let him remit so much of his Demands as the Fact does not make out, it will be well, and he shall have Judgment for the rest; for that Fact which is not made out is not contradicted by the Deed.

(c) As in Debt for the Arrears of Rent, in which the Plaintiff declared for more Rent, and for a longer Time than upon his own shewing appeared to be due to him. *1 Sand* 282. *Dupper v. Baskerville*.—So where the Plaintiff declared for 100*l.* due for so many Years, and it appeared upon the Record in casting up the Sums, that he had declared for 8*l.* too much. *5 Mod.* 212. *Thwait & ux' v. Lady Asfield*. *Comb.* 365. S. C.

Assumpsit, and two several Counts laid, one was on a promissory Note, and the Plaintiff counted thereon as on a Bill of Exchange, upon the Custom of Merchants; on *Non assumpsit* intire Damages were given, and Judgment accordingly; and upon a Writ of Error brought in *B. R.* it was held *1st*, That the Plaintiff could not declare upon the promissory Note as upon a Bill of Exchange; and as there could be no such Count or Action, so there could be no such Damages. *2dly*, That they could not reverse the Judgment in Part, *viz.* as to the one Count, and affirm it as to the other; and denied *Jacob and Mill's Case*, *Hob. 6.* and took this Difference, *viz.* where the Judgment is partly by the Common Law, and partly by Statute, it may be reversed in Part, for that which was a Judgment at Common Law will remain a Judgment, and be compleat without the other.

Salk 24. Cutting v. Williams.

(C) Of Impar lance: And herein,

1. Of the Nature thereof, and the several Kinds.

(a) **I**mpar lance is, when one is to answer to the Action of another he desireth some Time to advise what he shall answer; and (b) it is nothing else but the Continuance of the Cause till a further Day.

2 Lil Reg 34. 2 Show. 316. (a) This Libertas inter-

loquendi has been thought to arise from a Notion of Religion, which is mentioned in *St. Matthew*, chap 5. verse xxv. *Agree with thine Adversary quickly whilst thou art in the Way with him*; they looked upon the Plaintiff at the Time of declaring to be in his Way towards Judgment; and that therefore, since the Defendant was ordered by the Precepts of Religion to agree with him, that there was a Necessity to give him Time for that Purpose, and therefore *Libertas loquendi* was entered on the Roll. (b) When the Defendant appears, and the Parties by Consent obtain a Day before the Declaration, this is called *Dies datus pro e partium*.—A Day given before the Count is called *Dies datus*, but when after it is called an Impar lance. *Hard 365, 366.* But for this Diversity between an Impar lance and the *Dies datus*, vide *Moor 79. pl. 209. 3 Leon. 14. N. Bendl. 153. pl. 214. Cro. Eliz. 74.0.*

In the Common Pleas they anciently proceeded by original Writs, which were Warrants out of Chancery for them to proceed; those always gave the Defendant Notice of the Cause of Action; and as he had a View of the Writ before he appeared, if he had any dilatory Plea he was to put it in immediately; but when he pleaded in Chief, and came in towards the End of the Term, they gave him Time to make his Defence, which was called Impar lance.

2 Show. 444. Skin. 2. Yelv. 211. 1 Lev. 197.

But in the King's Bench, when the Defendant comes in by *Latitat*, he does not know, till after his Appearance, for what the Plaintiff declares; and as he had not Sight of the Bill beforehand, he had Time allowed him to plead any Plea in Abatement, which is called a special Impar lance.

Cases in B. R. 529.

When the Common Pleas proceeded on *Clausum Fregit*, as the Defendant was under the same Disadvantages as when he was arrested on a *Latitat*, he had the same Privilege as to Time to make his Objections to the Declaration.

2 Show 310.

This begot the Distinction between general and special Impar lances, which latter is again distinguished into the general special Impar lance, and that which is still more special.

Cases in B. R. 529.

The general Impar lance is entered on the Impar lance Roll in the Words following, *Petit Licentiam Interloquendi*, which, in the King's Bench, and on *Clausum Fregit* in the *C. B.* is entered of Course, and is all that is done the first Term; but in special Originals, returnable in an

2 Lil Reg 36.

an

an issuable Term, the Courts have denied the Defendant Leave to imparl, in order to put off a Trial; also after this general Imparlanee, the Defendant cannot regularly plead any dilatory Plea.

The general special Imparlanee is entered thus, *Salvis sibi omnibus & omnimodis advantagiis & exceptionibus*; that which is more special is, *Salvis sibi omnibus advantagiis ad Breve, Billam five Narrationem*; (a) the general Imparlanee is of Course, but the special must be obtained from the Court.

(a) Mr. Justice Powel thus lays down the different Kinds of Imparlanees: There are two Sorts of Imparlanees; the one general, after which one cannot plead in Abatement at all; the other special, with a *Salvis sibi omnibus exceptionibus tam ad breve quam ad narr'*, after which one may plead in Abatement of the Writ and Count; and this Sort of special Imparlanee may be granted by the Prothonotary; there is another Sort of Imparlanee more special, with a *Salvis sibi omnibus exceptionibus & advantagiis quibuscunque*, which cannot be granted without Leave of the Court, and is discretionary, and after which one may plead to the Jurisdiction of the Court. *Cases in B. R. 529.*

2. What the Defendant must do before any Imparlanee.

If a Defendant pleads to the Jurisdiction of the Court, he must do it *instante* on his Appearance; for if he imparls, he owns the Jurisdiction of the Court by craving Leave of the Court for Time to plead in.

Dier 210.
7 H. 6 39.
22 H. 6. 7. a.
Palm. 406.
Latch 83.
Cro. Car. 9. *Stile 90.* *Hard. 365.*

But the Plea of Antient Demesne may be pleaded after Imparlanee; because the Lord may reverse his Judgment by Writ of Deceit, and it goes in Bar of the Action it self in that Court.

1 Sid. 318.
Cro. Car. 9.
& vide Tit.
Ancient Demesne.

The Defendant after Imparlanee pleaded to the Jurisdiction of the Court of B. R. that he was a Member of the Privy Chamber, and ought not to be sued in any other Court without the special Licence of the Lord Chamberlain of the Household for the Time being; this was held an ill Plea, and the Court offended thereat.

Raym. 34.

If the Defendant in a Plea of Land would have View, he must demand it before Imparlanee; for by imparling he undertakes to defend the Lands mentioned in the Plaintiff's Count, and it would be absurd in him to defend what he does not know.

Dier 210. pl. 26. That a View cannot be had, nor Non tenure, nor Jointenancy pleaded, after Imparlanee; but in *Fenk. 130.* it is said, a View may be had after Imparlanee.

If in (a) Dower the Defendant pleads *Semper paratus*, this must be before Imparlanee.

Dier 300.
Hob. 62.

(b) Error on a Judgment in Dower in *Durham*, where after Imparlanee the Defendant pleaded Detinue of Charters, and Judgment on Demurrer for the Plaintiff, and that Judgment affirmed in B. R. *1 Show. 271. Burdon v. Burdon.*

So Tender and *Uncore prist* must be pleaded before Imparlanee; for by craving Time he avers he is not ready, and therefore falsifies his Plea.

Dier 300.
Hob. 62.
1 Sid. 365.
1 Lutw. 238.
2 Mod. 62.

In *Assumpsit* for Goods sold the Defendant imparled specially, with a *Salvis sibi, &c.* in common Form, and afterwards he pleaded in Bar to the Action, that he tendered the Money demanded to the Plaintiff on the very Day on which he had laid his Request in the Declaration, and that from that Day forward *semper paratus fuit* to pay it, & *profert hic in Cur'*; and on Demurrer to this Plea, one Objection was, that this Tender could not be pleaded after an Imparlanee, being contradictory to that Part of his Plea, *viz. semper paratus*; and after several Debates,

Carth. 413.
Salk. 623.
Comb. 443.
S. C. Giles v. Hart.

the Plea was for this adjudged ill; and in this Case the Court held, that the special Impar lance made no Difference, as it appeared thereby that he was not *semper paratus*.

3. What he is to plead after the general Impar lance.

After a general Impar lance the Defendant can only plead in Bar to the Action, and cannot regularly plead any dilatory or Plea in Abatement; as Outlawry, Excommunication, Jointenancy, Misnomer or Non-tenure.

But though Outlawry after Impar lance cannot be pleaded in Abatement, yet if the Ground or Cause of Action be forfeited, as it is in Felony, it may be pleaded in Bar after Impar lance; so of a Debt certain and due to the Outlaw, which vests in the King by the Forfeiture; Outlawry in the Plaintiff may be pleaded after Impar lance, and the turning the Remedy from an Action of Debt to an Action on the Case (according to the modern Practice, to avoid the Law-Wager) whereby it becomes uncertain and sounds only in Damages, shall not de vest the King of what he was once lawfully possessed of.

So if one be excommunicated after the Term to which the Impar lance is, such Excommunication may be pleaded after Impar lance.

That the Demandant is an Alien may in a real Action be pleaded in Bar after Impar lance, as well as to the Writ before Impar lance.

After a general Impar lance (a) a Feme cannot plead Coverture in Abatement, but may plead it in Bar: But note, that if the Marriage was after the Cause of Action accrued, it must be pleaded in Abatement.

Baron and Feme, the Feme Tenant *per receipt* not allowed to impar lance.

So in an Action against an Executor, he may plead that he is not Executor in Bar after Impar lance, but not in Abatement.

In an Action of Debt, the Defendant pleaded an Attachment made in London after Impar lance, and adjudged ill.

4. What may be pleaded after the special Impar lance.

It is clearly agreed that all Pleas in Abatement, unless to the Jurisdiction, may be pleaded after the special Impar lance.

But it hath been doubted whether Privilege could be pleaded after the special Impar lance, because it is neither an Objection to the Writ, Bill or Count; but it seems to be now (b) settled that it may be pleaded after a special Impar lance, in as much as it does not oust the Court of their Jurisdiction, but is a Privilege which each Court allows to the Officers of another to be sued in their own Court.

An Action of Assault and Battery was brought against one of the Members of the University of Cambridge, and a general Impar lance given from one Term to another. The Chancellor of the University comes and claims Cognizance of Pleas by Virtue of a Charter in Q. Elizabeth's Time, whereby *Cognitio Placitorum*, with exclusive Words *non alibi*, &c. was given to the Court of the Vice-Chancellor to proceed *secundum legem & consuetudinem Universitatis*, in all Cases where any of the Body of that University should be Defendant, which Charter was confirmed by Act of Parliament, of which they produced a Copy; and whether this Claim, being made after Impar lance, should be received was the Question; and adjudged that it should not; and herein the Court held, that tho' the Crown might grant Cognizances,

yet it could not grant them with Power to proceed by any other Law than the Common Law; that as it was necessary to plead this Privilege, so there was the like Necessity to plead it according to the Rules of Law, which must be before a general Imparlancc.

Comb. 68. On a Plea to the Jurisdiction on special Privileges, it is usual to grant a special Imparlancc; as in the common Case of Conufance, &c. for *Oxford*, &c. but they cannot imparl generally.

5. In what Cases the Courts exercise a discretionary Power in granting or refusing an Imparlancc.

Skin. 2. vide supra. It is said, that where the Cause is by Original, it is a Favour of the Court whether they shall have an Imparlancc or not.

2 Show. 145. Also it is said, that on a special *Capias* in *C. B.* the Defendant shall plead the same Term (especially if it be an issuable Term) the Writ is returnable, without any Imparlancc, because the whole Case is set forth in the Writ; and an Imparlancc being only the better to inform himself of the Cause of Action in order to his Defence, there is no Occasion for it when he is sufficiently informed thereof by the special *Capias*.

Comb. 15. Want of an Imparlancc where allowable, if prayed, is Error; *secus* if not prayed.

Comb. 12. A second Imparlancc was moved for in a *Quo Warranto*, and said to have been granted in the Case of the City of *London*, but the Court denied it; for *Astry* said, that by the Course of the Court they were to have but the common Imparlancc; and the Court said, that being *ex gratia* they may grant or deny it as they please.

Cro. Fac. 429. If a Man plead by Force of an Indenture which is lost, and Affidavit made thereof, the Party shall be compelled by the Court to shew his Counterpart, and he plead thereto, otherwise the Court (a) may grant an Imparlancc.

(a) The Court would not grant the Defendant an Imparlancc, though he was sued upon a Bond of twenty-eight Years old, and could not see the Bond, but bid him pray Oyer of it, and plead, for the Antiquity of the Bond is no Cause of Imparlancc. *2 Lil. Reg. 35, 36.*

3 Salk. 186. It is said, that no Imparlancc is allowed in a *Homine Replegiando*, or in an Assise, unlets upon good Cause shewn; because it is *festinum remedium*.

1 Salk. 397. A bound by Recognizance to appear and answer to an Information, appeared and prayed an Imparlancc; the Attorney General said an Imparlancc is not to be denied, but asked how long he shall be allowed; and *per Cur.* an Imparlancc is a reasonable Time to advise; and these have been from one Return-Day to another, but now they are always from one Term to another in the Crown-Office; but by *Holt Ch. J.* it seems reasonable that the Defendant should have the same Time on such Appearance as if he had stood out, and come in upon Attachment or *Capias*, viz. the same Time that the Length of the Process would take up, and no more; for when he had come in upon that he must plead *Instante*.

6 Mod. 243. Heretofore, when one came in upon a Recognizance or *Habeas Corpus*, he was put to plead *Instante*, which was thought hard, and is therefore now redressed.

1 Sid. 325. In an Appeal of Murder the Appellant cannot imparl, but the Court may adjourn it by a *Dies datus* till such a Day.

(D) Of making Defence; and herein of the Difference between full and half Defence.

DEFENCE cometh from the Word *Defendo*, so called from the Manner of pleading, viz. *Venit & defendit*, and is twofold; 1. Half Defence, which is *Venit & defendit vim & injur.* 2dly, Full Defence, viz. *Venit & defendit Injur. quando, &c.*

Defence, says my Lord Coke, is what the Defendant ought to make immediately after the Count or Declaration; and in real Actions is thus, *Et predict' B. venit & defendit jus suum, &c.* In personal Actions is thus, *Et predict' B. venit & defendit vim & injuriam quando, &c. & damna & quicquid quod ipse defendere debet*; by the second Part of the Defence, *& damna, &c.* he affirms the Plaintiff is able to sue and recover Damages on just Cause; if the Defendant pleads in Disability of the Person, he must not make this Part of the Defence; by the last Part, viz. and all that which he ought to defend, when and where he ought, &c. he affirms the Jurisdiction of the Court; and therefore this Part must not be made when he pleads to the Jurisdiction.

Defence also, says he, is so necessary in all Cases, that though the Defendant appear and plead a sufficient Bar without making Defence, Judgment shall be given against him.

And therefore, where in Debt on an Obligation the Defendant *Venit & dicit*, that the Plaintiff was excommunicated, &c. without making Defence, &c. it was adjudged ill, and a *Respondeas Ouster* awarded.

But though this be a general Rule, and though the *Venit* is the Record of the Defendant's coming into Court, and is necessary to make him a Party; yet it hath been held that the *defend' vim & injur'* were not (a) used in *Clausum fregit* and Assaults, and that therefore the Want of them in those Cases is not fatal, though shown for special Cause.

Also where a Plea to the Jurisdiction was offered in an inferior Court, without making Defence, it was resolved not to be necessary where the Court have no Jurisdiction of the Matter, otherwise where not of the Person.

So where an Attorney of C. B. was sued in B. R. in Action *quittam*, for exercising the Office of Under-Sheriff longer than one Year, and he *venit & dicit*, and pleaded his Privilege, and held good without Defence.

In Ejectment the Defendant *venit & dicit* that the Land is Ancient Demesne, without making Defence; the Plaintiff demurred specially; and it was resolved that the Plaintiff may refuse the Plea for want of Defence; but that if he receives the Plea, he admits a Defence; as if one pleads Outlawry he ought to plead it *sub pede sigilli*, and if he does not so plead it, the Plaintiff may refuse it; but if he accept the Plea, he shall not demur for that Cause, for it is well enough if he allow it.

it is good without *Defendit vim & injuriam*, and that most of the Precedents were so. *North v. Hoyle*, S. P. resolved, and said, that the Precedents were both Ways.

Defence is never made in a *Scire Facias*.

(E) The

Co. Lit. 127. b.

Co. Lit. 127. b.
Lit. sect. 199.
1 Brownl. 75.

3 Lev. 240.
Hampson v. Bill.

Lutw. 9.

(a) As appears in the old Book of Entries, fol. 5, 15, 30.

1 Vent. 334.

Salk. 30.
Comb. 219.
S. C. *Kirkham v. Wheeler.*

1 Salk. 217.
2 Show. 386.
S. C. *Fervers v. Miller.*
Carth. 220,
221. S. C. adjudged; and that being a Plea to the Jurisdiction,

3 Lev. 182.

3 Lev. 182.

(E) The several Kinds of Pleas: And herein,

1. Of Pleas to the Jurisdiction; and therein,

1. To what Courts to be pleaded, and of the Difference between a Plea to the Jurisdiction and a Claim of Conusance.

Vide Tit.
Courts, Letter (D).

HERE it will be necessary to observe, that the Courts of *Westminster* are the superior Courts of the Kingdom, and have a Superintendency over all the other Courts by Prohibitions, if they exceed their Jurisdiction, or Writs of Error and false Judgment, if their Proceedings are erroneous, and have Conusance of all transitory Actions, except between the Scholars of *Oxford* and *Cambridge*; and every Thing is supposed to be done within their Jurisdiction, unless the contrary appears; but on the other Hand, nothing shall be intended within the Jurisdiction of an inferior Court but what is expressly alledged to be so; also such inferior Courts being bounded in their original Creation to Causes arising within the Limits of their Jurisdiction, if a Debtor, who has contracted a Debt out of such limited Jurisdiction, comes within it, yet they cannot sue for such Debt; and if any such Action be brought, the Defendant may plead to the Jurisdiction.

1 Sand 74.
1 Sid. 331.
Pearock v. Bell.

But there is a Distinction which is now fully established between the Counties Palatine and other inferior Courts, in this last Respect; 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; so that 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 hath been 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.

4 Co. 213.
1 Sid. 103.

In all Actions Transitory the superior Courts have a Jurisdiction, unless the Plaintiff by his Declaration 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 Cognizance; 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 cannot be hindered from proceeding.

4 Inst. 224.
1 Rol. Abr. 489.
Hard. 509.
(a) So Ancient Demesne, or held of the King's Manor, may be pleaded.

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 (a) Counties Palatine, they may plead their Jurisdiction when intrenched upon by the superior Courts; but where a Franchise, either by Letters Patent or by Prescription, hath a Privilege of holding Pleas within their Jurisdiction; if the Courts at *Westminster*

2

Herne's Pleader 7, 351. *Hanf.* 103. *Tho.* 2. *Rast.* 419.—So may the Jurisdiction of the Cinque Ports. 4 Inst. 224. But vide *Cavth.* 109. *Et quare*; 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 Conusance.—But in what Cases, in what Manner, Conusance is to be made, vide *Vol. 1. fol. 561.*

minster intrench on their Privileges, they must demand Conuſance; 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 conuened, 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 may be determined before him.

If the Plaintiff in his Declaration ſhews that the Action accrued in *Carth. 11,* a County Palatine, the Defendant cannot take Advantage of it in Ar- 354. reſt of Judgment, nor can he take Advantage of it by way of Demurrer, but muſt plead to the Jurisdiction of the Court; and here note, that where-ever the Defendant can plead to the Jurisdiction of the Courts at *Westminster*, there the Franchiſe may demand Cogniſance, but not *vice verſa*.

Alſo in ſuch Caſes as the Defendant may plead to the Jurisdiction of the Courts of *Westminster*, Leave muſt be obtained from the Court for that Purpoſe; (a) as was done in an Ejectment brought in B. R. for Lands in the County Palatine of *Lancaster*. *Paſch. 5 Geo. 2. in B. R. Jones v. Hammond.*

(a) So *Trin. 5 & 4 Geo. 2. in B. R. Truſtant v. Brockleburſt*, on the Demiſe of Lady *Lawley*, Leave was given to plead to the Jurisdiction for Lands lying in *Cheshire*.

As to pleading to the Jurisdiction of an inferior Court, herein we muſt again take Notice, that inferior Courts are bounded in their original Creation to Cauſes ariſing within ſuch limited Jurisdiction; ſo that if an Action is brought on a Promise in a Court below, not only the Promise but the Conſideration muſt be alledged to ariſe within its 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 on the Trial; and if the Plaintiff proves a Conſideration out of the Jurisdiction, it cannot be given in Evidence; and if it is, the Defendant's Counſel may tender a Bill of Exceptions; and upon ſuch Bill of Exceptions the Judgment will appear to be erroneous. *2 Inſt. 231. 1 Rol. Abr. 545 6.*

As in an Action in an inferior Court for calling the Plaintiff Whore, by which ſhe loſt her Marriage, it was adjudged, that the Loſs of the Marriage ſhould be laid within the Jurisdiction, the Words not being actionable without ſpecial Damage. *Raym. 63. 1 Lev. 69.] Sid. 85. —And 1 Salk. 404. S. P. ad-*

judged, the Loſs of the Marriage being held to be the Gift of the Action.

So 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 jur'*, &c. promiſed to pay him 10 l. &c. this is not ſufficient to intitle 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 but the Conſideration alſo. *1 Lev. 50. 1 Sid. 65. Ramsey v. Atkinſon.*

So in an *Indebitatus Affumpſit* 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. 1 Lev. 96.*

1 Lev. 104. So in Debt for Rent upon a Lease made *infra jur'* of an inferior
 1 Sid. 151. Court it must appear also, that the Lands lie within the Jurisdiction ;
 1 Vent. 2. S.C. for if Part of the Cause arises within the inferior Jurisdiction, and Part
 Drake v. without, the inferior Court ought not to hold Plea.
 Beare.

1 Sid. 151, But if that which is only Inducement, or Matter of Aggravation,
 180. be alledged to be out of the inferior Jurisdiction, this will not oust such
 1 Vent. 72. inferior Court of its Jurisdiction ; as 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.

Cro. Car. 570. So where in Case the Plaintiff declared in the Court of *Bath in*
 1 Jon. 450. *Com' Somerset*, that he was a Taylor, and that he used the said Art
 1 Rol. Abr. for several Persons inhabiting *tam infra civitat' prædict' quam alibi infra*
 546. S. C. *regnum Angliæ*, and the Defendant, to scandalize him in his said Art,
 Howel v. Ire- said these Words of him, *Thou hast stole as much Cloth out of my Suit and*
 land. *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, notwith-
 standing the Allegation, *quam alibi infra regnum Angliæ*, for that is
 only Matter in Aggravation of Damages.

1 Salk. 404. So in a Writ of Error of a Judgment in the Palace-Court in an
 6 Med. 223. Action on the Case, wherein the Plaintiff declared, that such a Day,
 S. C. Stan- in such a Parish in the County of *Middlesex*, he delivered to the De-
 man v. Davis. fendant (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 im-
 moderately that the Gelding was spoiled ; and it was objected as Er-
 ror, 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 Judg-
 ment was affirmed.

2 Inst. 229, The Defendant, when sued in an Inferior Court for a Matter not
 230. arising within its Jurisdiction, must plead to the Jurisdiction ; and if
 Raym. 189. such Plea be refused, the Courts above will grant an Attachment.
 1 Mod. 81.

(a) F. N. B. Also it hath been (a) held, that if the Defendant admits the Juri-
 45, 46. diction of such Inferior Court, the Courts above may grant (b) a Pro-
 2 Rol. Ab. 317. hibition ; but in the Case of (c) *Mendyke v. Stint* it hath been ad-
 (b) Where judged, that after Verdict and Judgment no Prohibition lies ; but in
 upon the this Case it was said, that if any Matter appears in the Declaration
 Statute which sheweth, that the Cause of Action did not arise *infra jurisdic-*
 Westm. 1. *tionem*, a Prohibition may be granted at any Time ; so if the Subject
 cap. 35. a Matter of the Declaration be not proper for the Judgment and Determi-
 Prohibition will be grant- nation of that Court ; or if the Defendant, who intended to plead to
 ed, vide the Jurisdiction, is prevented by any Artifice, or by the Attorney's re-
 1 Salk. 201, fusing to plead it, or if his Plea be not accepted, or is over-ruled ; in
 202. all these Cases a Prohibition will lie at any Time.
 (c) 2 Mod. 272, 272.

2 Inst. 312. If in the County-Court, or other Inferior Court, they shall divide
 a Debt of 20 *l.* into several Plaints, under 40 *s.* in such Case the De-
 fendant may plead the same to the Jurisdiction of the Court, or may
 have a Prohibition to stay that indirect Suit.

Carth. 189, But it hath been held, that no Action will lie for suing in a Court
 190. that hath no Jurisdiction of the Matter.

2. The Manner and Time of pleading to the Jurisdiction.

A Plea to the Jurisdiction is not properly a Plea in Abatement, tho' in its Consequence it be so; and therefore is to have its proper Conclusion; as *respondere non debet*, or *si curia cognoscere velit*, and not *quod billa cassetur*.

According to the Order of Pleading, the Defendant must first plead to the Jurisdiction of the Court, and this he must regularly do before Imparance; for by craving Leave to imparl he submits to the Jurisdiction, except where Ancient Demesne is pleaded, which may be done after Imparance, because the Lord might reverse the Judgment by Writ of Disceit; and it goes in Bar of the Action itself in that Court, because it is *coram non iudice*.

The Defendant must make (a) but half Defence, for if he makes the full Defence *quando*, &c. he submits to the Jurisdiction, the, &c. being *quando & ubi cur' consideraverit*.

(a) Where an Inferior Court hath no Jurisdiction of the Matter, it is not necessary to make any Defence at all. 1 Vent. 334.

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.

fitting, and Oath must be made of the Truth thereof; but in *Carth.* 402. it is held, that a Plea to the Jurisdiction need not be on Oath, as a Foreign Plea must.

He who pleads to the Jurisdiction, ought by his Plea to give Jurisdiction to some other Court.

(F) Of Pleas in Abatement: And herein,

1. Of Pleas in Disability of the Person of the Plaintiff.

THERE are several Disabilities to the Person of the Plaintiff which may be pleaded in (a) Abatement of the Writ, and which the Plaintiff must remove before he can intitle himself to any Answer; for in these Cases, by the ancient Law, he was said to lose *Liberam Legem*, because he was not *rectus in Curia* until he had removed such Impediment.

Word *Abater*, which signifies *destruere*, or *prostrare*. Co. Lit. 134. b.

1st, *Outlawry*; for until this is reversed, or the King has granted his Charter of Pardon, the Plaintiff is out of the Protection of the Law, because he would not be amenable and attendant to the Law, and ought not therefore to have any Privilege from it; but this 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.

2^{dly}, *Ex-*

Vide Tit. Ex-communicacion. 2dly, *Excommunication*, which is a good Plea, though the Plaintiff sue *in auter droit*, as Executor or Administrator, an excommunicate Person being excluded from the Body of the Church, and incapable to lay out the Goods of the Deceased to pious Uses; but when this is pleaded, the Bishop's Letter, under his Seal witnessing the Excommunication, must be shown; 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-summions or Re-attachment.

Vide Tit. Aliens. 3dly, *Alienage*; for by the Policy of our Law an Alien, unless naturalized by Act of Parliament, or made a Denizen by Letters Patent, can bring no Action, with this Difference, that an Alien Enemy, or one whose King is in Enmity with our's, cannot bring any Action, either real, personal, or mixed; but an Alien in League may maintain personal Actions, otherwise he would not be able to trade and merchandize amongst us.

Vide Tit. Præmunire. 4thly, *Præmunire*; when a Man has Judgment given against him on a Writ of *Præmunire Facias*, or is attainted of Treason or Felony, he is disabled to bring any Action.

Vide Tit. Papists and Popish Recusants. 5thly, *Popish Recusancy*; 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 seized into the King's Hands, his Heirs or Successors.

2. Of Pleas in Disability of the Person of the Defendant; and therein of Privilege.

Vide Tit. Privilege, and Tit. Abatement, Letter (C). The original Reason of Privilege arises from this, that Attornies and Officers, whose Attendance is required in those Courts to which they belong, should not be drawn into other Courts to the Prejudice of their Clients; for they cannot be supposed able to attend the Business of the Courts at *Westminster*, and a Suit brought against them in the Country; which was likewise a good Reason in Relation to the King's Bench, Common Pleas and Chancery, in their original Creation. For the King's Bench and Chancery being ambulatory with the King, *ubi tunc fuerit in Anglia*, if the Officers of each Court were drawn by Suits into the other, it might be a Prejudice to the Business of the Court.

1 Lutw. 44, 639. Vaugh. 155. 23 H. 6. 15. Bro. Traversé, 27. Whenever therefore an Attorney is sued out of his own Court, he shall say, that he is Attorney, &c. of another Court, and conclude with *unde non intendit quod eur, &c. hic placit' prædict' versus eum cognoscere velit aut debeat, &c.* But the Plaintiff may reply that he is a Husbandman, &c. in the Country, and traverse his being an Attorney.

1 Salk. 1. Pease v. Parsons. In an Action against B. an Attorney he pleaded *quod ipse est unus Attornat' eur. Domini Regis B. R.* without saying *fuit tempore Impetrationis Brevis*, and a *Respondeas Ouster* was awarded.

Lutw. 1667. (a) And in Pleading his Privilege must say, prout patet per recordum. 1 Salk. 1. An Attorney, although he doth not practise, yet he shall have his Privilege so long as he continues an Attorney on (a) Record.

Hob. 177. Gay's Case. 1 Salk. 2. S. P. This 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

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's is in his; and therefore the Cause is legally attached in the Court where the Plaintiff is an Officer.

2 Rol. Abr. 275.
Moor 556. &
2 Mod. 298.
2 Lev. 129.
Hamilton v. Jusf. Scroggs.

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, an Officer shall have his Privilege.

Dier 377. a.
pl. 30.
Goob. 10.
1 Vent 293.

Also the Plaintiff must have the same Remedy against the Officer in his own Court, as in that where he sues him; as if a Writ of Entry, or other real Action be brought against an Attorney, 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 Cognizance of real Actions.

58 H. 6. 29 b.
9 E. 4 35
Cro. Car. 585.
1 Leon. 189.
2 Leon. 156.

So if an Attorney of the Common Pleas be sued in an Appeal, he shall not have his Privilege; for his own Court hath not Cognizance of this Action, and by this Protection he should go unpunished.

1 Sand. 67.

So if Money be attached in an Attorney's Hands by foreign Attachment in the Sheriff's Court in London, he shall not have his Privilege, because in this Case the Plaintiff would be remediless; for the foreign Attachment is by the particular Custom of London, and does not lie at Common Law; but if the Attorney should have his Privilege, the Plaintiff should be without his Redress.

1 Sand. 67.
Turvil's Case.

Also an Attorney, or other 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 Commonwealth.

Hob. 44.
Bro. Superse-
deas, 1.
2 Rol. Abr. 274.
(a) But in an
Action qui
Lit. Reg. 7:

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

If an Attorney of the Common Pleas be in Custodia Maresballi for want of Bail, at the Suit of A. he may plead his Privilege; for though he be taken upon Bill of Middlesex or Latitat, where in a common Person's Case being so brought in, he is to answer to the Plaintiff's Demand lodged against him by Bill, and not to the Process that brought him in; yet since *actus legis nemini facit Injuriam*, such fictitious Trespas to bring the Party to appear shall never oust the Attorney of his real Privilege: But if he be in Custodia Maresballi at the Suit of A. and B. declares against him in Custodia Maresballi, he shall not plead his Privilege against B. because B. declares against him collaterally, as he is in Prison at the Suit of A. and as to B. he is truly in Custodia Maresballi, for being once ousted of his Privilege at the Suit of A. he can no longer attend as an Attorney in the other Court, but is fixed in the King's Bench, and therefore cannot, by the Supposition of the Necessity of his Attendance, oust B. of his Action.

2 Rol. Abr. 275.
1 Salk. 125.
Mod. 310.
Cartb. 370.
3 Lev. 243.

It is said that the Courts will take Notice of the Privilege of Attornies, and that the Custom herein need not be so precisely alledged as other Customs.

2 Lutw. 1667.

3. Of Misnomer and the Want of Addition.

Vide Tit. Misnomer and Want of Addition. Misnomer is a good Plea in Abatement; as if *John* be sued by the Name of *Thomas*, he may plead, that (a) at the Time of the Writ purchased he was called and known by the Name of *John*, &c. 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.

(a) Must in setting forth his Name say, that by such Name he was known at the Time of the Writ purchased. *Skin. 620. 1 Salk. 7, 63. Gouldsb. 86.*

9 H. 5. 1. When there is a Mistake in the Writ or Declaration as to the Name of Baptism or Surname, and the Defendant pleads the same in Abatement, he must in such Plea set forth his right Name, so as to give the Plaintiff a better Writ. *Finch 363.*

Cartb. 124. Salk. 2. S. P. Also such Mistake must be taken Advantage of by being pleaded in Abatement, and cannot be assigned for Error after the Party has appeared, it being a Rule, that a Man shall not assign that for Error which he might have pleaded in Abatement.

1 *Rel. Abr. 781, 791. 1 Rol. Rep. 450. S. C. Markham v. Sir John Fortescue.* As if an Action be brought against Sir *Francis Fortescue Militem & Baronetum*, 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.

J. Villars, who pretended himself to be Earl of Buckingham 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*.
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. *1 Salk. 3, 7.*

One Defendant cannot plead Misnomer of his Companion, for the other Defendant may admit himself to be the Person in the Writ.

21 E. 4. 72. 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 fixed Habitation; but this is now altered by the Statute 1 Hen. 5. cap. 5. called the Statute of *Additions*, which requires the Estate, Degree, Mystery and Place of Abode to be added to the Defendant's Name, and was made to prevent the Inconvenience of troubling one Person for another; but though by this Statute the Party accused may take Advantage of Misnomer or Want of Addition, yet he must plead over to the Felony; and though his Plea in Abatement be found for him he is not to be discharged, but is to be indicted over again; or the Indictment may be amended, sitting the Grand Jury; also his Plea in Abatement, if found against him, is not peremptory, but he is to be tried on his Plea in Chief.

Cro Jac. 609. 2 Rol. Rep. 225. 1 Rol. Abr. 780. If a Man be indicted, and no Addition is given to him as there ought; yet, if the Defendant appears and pleads to Issue, and this is found against him, this is helped; for the Addition is ordained by the Statute, that the Party who happens to be outlawed ought to have Notice of it; and here he hath Notice, and *Constat de Persona*.

As the Name, 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; so also such Additions as are Inducements to the Action must be made Use of; as if one be liable as Heir, he must be named Heir; so if as Executor he must be named such.

Vide the several Titles Heir and Executor.

4. Of Abatement by Reason of Coverture.

There is no Case where a Feme Covert shall sue or be sued as a Feme Sole, but in Case where she is a sole Trader, according to the Custom of *London*, or where her Husband has abjured the Realm, or is banished, in which Case he is *civilitur mortuus*; and the Husband being disabled to sue for the Wife, it would be unreasonable that she should be remediless; and it would be equally hard on those who had any Demands on her, that not being able to have any Redress from the Husband, they should not have any against her.

Co Lit. 132. But for this vide Tit. Baron and Feme.

Coverture therefore is regularly 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 it abateable; but both must 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, being never a good Writ, the Defendant not being legally arrested; and therefore if the Husband brings an Action for Things so vested in him, the Recovery of the Wife will be no Bar; and therefore the Law resolves, that Coverture, at the Time of the Writ's being sued, may be pleaded at any Time, since it cannot be finally determined between the Parties; but if a Feme Sole takes out a Writ, and after marries, the Defendant was legally attached on such Writ; and therefore may plead in chief to it any Defence he has; and if on such Pleading it be found for the Defendant, it will be a good Bar to the Husband's Action; and therefore the Defendant has it in his Choice whether he will defend himself on such Writ or not, and such Choice must be made *Puis darrein continuance*; for it is but reasonable, since she has given the Right of the Demand to another, that the Defendant should plead it against her to abate it, that since he was once legally convened by this Writ, he may plead to the Demand, so as to get rid of it for ever.

Doct. pl. 3. 1 Sid. 140. 1 Leon 168. Re v. Madox.

If a Writ be brought against a Feme Covert as Sole, she may plead her Coverture; but this must be before there is a Day given by the Court *prece partium*, for by praying a Day she admits she is properly sued, and before Impar lance.

Theol. 119. Latch 24.

In Ejectment against Baron and Feme, after Verdict for the Plaintiff Baron dies between the Day of *Nisi prius* and the Day in Bank; adjudged that the Writ should stand good against the Feme; because it is in the 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 entered against him.

Cro. Jac. 356. Cro. Car. 509. 1 Rol. Rep. 14. Moor 469.

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

Cro. Car. 232. 1 Bull. 5.

If a Man recovers against a Feme Covert, as Sole, the Husband may avoid it by Writ of Error, or he may come in at any Time and plead it.

Stile 254. 2 Rol. Rep. 53.

^{Defendant}
 2 *Rol. Rep.* 53. If a Feme Sole, intermarries pending the Suit, this shall not abate the Writ, but the Plaintiff shall proceed to Judgment; for this is her own Act, and the Husband took her attached, with the Action, and therefore ought not to prejudice the Plaintiff: But *Doderidge* in this Case held, that if a Feme Sole Defendant marries between the Issuing of the Original and the Return, this shall abate the Writ; the Reason seems to be, that she is Covert before she comes into Court, and the Husband taking her before she was attached, *quare* whether he shall be liable to that, since he at that Time ought to be arrested.

Stille 138. In an Action against Baron and Feme the Baron dies, and the Feme intermarries *pendente placito*; and the Court inclined to think the Writ abated, because her Name was changed.

Fitz. Brief, 476. If a Writ be brought by *A.* and *B.* as Baron and Feme, whereas they were not married till 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; so if a Feme Sole brings Trespass and recovers, and has a Writ of Inquiry of Damages awarded, and takes Husband before the Return, the Writ is not abated, but abateable; and therefore the Defendant must plead it, for he shall not have Advantage of it in Error.

1 *Salk.* 8. If an Action be brought in an Inferior Court against a Feme Sole, and she pending the Suit intermarries, and afterwards removes the Cause by *Habeas Corpus*, and the Plaintiff declares against her as Feme Sole, she may plead Coverture at the Time of suing the *Habeas Corpus*; because the Proceedings are here *de novo*; and the Court takes no Notice of what was precedent to the *Habeas Corpus*; but upon Motion of the Return of the *Habeas Corpus* the Court will grant a *Procedendo*; for though this be a 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.

5. Of Abatement by the Death of Parties.

3 *Mod.* 249. Here the general Rule to be observed is, that wherever the Death of any Party happens pending the Writ, and yet the Plea is in the same Condition as if such Party were living, there such Death makes no Alteration; for where the Death of the Parties makes no Change of Proceedings, it would be unreasonable that the surviving Parties should make any Alteration in the Writ; for if such Writ and Process were changed, it would set Rights but in the same Condition they were in at the Death of the Parties; and it would be absurd that what made no Alteration should change the Writ and the Process; and on this Rule all the Diversities turn.

Cro. Eliz. 982. The first Difference is in real Actions, where there are several Plaintiffs, and this is Summons and Severance, as there is in most real Actions, there the Death of one of the Parties abates the Writ; but in personal and mixt Actions (where one intire Thing is to be recovered) there the Death of the Parties does not abate the Writ; and the Reason of the Difference is, that where there are two joint Tenants, and the one goes on to recover his Moiety, and the other will not proceed, there is no Reason that he who is willing should not recover his Right, since such Tenant has a distinct Moiety, and therefore should have an Action to recover. But no Summons or Severance lies in personal Actions; as if Trespass be committed on such joint Tenants, they must both join in the Action; for as one may release the Whole, so the other

other may refuse to go on, and the other cannot recover his Part of the Damage without him; so in Debt on an Obligation to two there can be no Summons and Severance, because one of the joint Obligees may release the Bond, and therefore may go on in the Action; but if a Man appoints two his Executors, there shall be Summons and Severance, because one of the Executors may release; yet such a Release is a *Devastavit* in him; but if he will not proceed at Law, it is no *Devastavit*; and therefore both Executors being only Trustees for the Person deceased, they shall not be compelled to go on together; but if one refuses the other may bring his Action in the Name of both, and have Summons and Severance; for otherwise each Executor might by Collusion with the Debtor, and not proceeding, keep the other from recovering the Assets, and not create a *Devastavit* in himself; but after such Summons and Severance he does not proceed for the Moieties as in the real Actions, but he proceeds as the whole Representative of the Testator, and is intitled to the Whole the Testator was in his Life-time.

From these Premises it follows, that if there be two Jointenants *Co. Lit. 138^d* or Copartners, and they bring a real Action, and one is summoned and severed, the other shall proceed for his Moiety; and 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; and it would be improper to do it on that Writ, where by the Summons and Severance he went only for a Moiety before; and the Writ cannot have a double Effect, to one for a Moiety in case of Summons and Severance, and for the whole in case of Survivorship; and therefore since the Nature of Things is changed by the Death of one of the Parties, there must be another Writ; and it is the same Law if such Jointenants proceed without Summons or Severance; for since both by the Writ might by Possibility recover their Moieties, they shall not go on for the whole in case of Survivorship; because the Words and Effect of the Writ at the Time of its first purchasing was, that each might recover his Moiety, and therefore a new Writ must be purchased to enable one to proceed for the whole: But in personal and mix'd Actions, where there is Summons and Severance, and yet after such Summons and Severance the Plaintiff goes on for the whole, there, if one of them dies, yet the Writ shall not abate, because they go on for the whole after Summons and Severance; and if they were to have a new Writ, it would only give the Court Authority to go on for the whole.

Therefore if there be two Executors, and they bring an Action of Debt, and one of them is summoned and severed, or not, and such severed Person dies, yet the Writ shall not abate. *Cro. Eliz. 652. 1 Leon. 44.*

So if two Jointenants bring a Writ of Ward, and they are summoned and severed, and the severed Person dies, the Writ shall not abate; because after such Severance he went on for the whole, and so he does after the Death. *Co. Lit. 139^d*

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. *Dier 279.*

In (a) judicial Writs it shall not abate by Death, if the Person surviving be intitled to the whole; as if a Fine be levied by two Coparceners, and one of them dies without Issue, Proceedings shall go on for the other, because he is intitled to the whole by Survivorship; but if the other Coparcener had Issue, then the Writ would have abated, for

Vol. IV.

M

10 Co. 134. Co. Lit. 139. (a) But shall abate in a Sci. Fa. being in an original Writ, 1 Brownl. 64.

the *1 Leon. 263.*
but not upon a Writ of Inquiry.

the Survivor was only intitled to a Moiety; for there is no Summons and Severance in judicial Writs, and therefore if one dies without Issue, he is intitled to a Moiety.

20 H. 6. 30. But if there be several Persons named as Plaintiffs in the Writ, and
18 E. 4. 1. one of them was dead at the Time of purchasing the Writ, this may be
2 H. 7. 16. pleaded in Abatement; because it falsifies the Writ, and because the
1 Brownl. 34. Right was in the Survivors at the Time of suing the Writ, and the
Clift Ent. 6. Writ not accommodated, as the Case there was.
Raff. Ent.
126.

26 Aff. pl. 25. But if an erroneous Judgment be given against two, either of them
Bro. Sum. may bring a Writ of Error, and he may summon and sever the other,
Sever. 19. because it would be unreasonable, that he should not discharge himself
of an erroneous Judgment because the other will not intermeddle; and
that Default of one in a personal Action shall not prejudice the other.

Cro. Car. 426. If there be several Defendants in the original Action, and one dies,
1 Fon. 367. the Writ does not abate; because there being a joint Demand, it sur-
Stile 299. vives against the Residue; but if one happen to die pending the Writ,
Hard. 151, there must be a Suggestion on the Roll, because it would be Error to
164. give Judgment against a deceased Person.
1 Slow. Rep.
186.

Relv. 208, In a Writ of Error, if there be several Plaintiffs, and one dies, the
212, 213. Writ shall abate; because the Writ of Error is to set Persons *in statu*
1 Vent. 34. *quo* before the erroneous Judgment was given below; and they that are
cont. Plaintiffs in Error were distinct Sufferers in the Judgment, since there
1 Sid 419. might be different Executions issued thereupon, and different Liens
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, lest by a collusive Perswasion, or by Negligence or Design, he
should hurt the Representative of the Deceased.

1 Sid. 419: But if any of the Defendants in Error die, yet all Things shall proceed; because the Benefit of such Judgment goes to the Survivor, and he only is to defend it.

Theol. 179. In an *Audita querela* by two, the Death of one shall not abate the
1 Vent. 34. Writ; for the Survivor is not to be restored to any Thing he has lost,
3 Mod. 249. 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.

(a) Made By the (a) 17 Car. 2. cap. 8. it is enacted, ' That the Death of either
perpetual by Parties (b) between Verdict and Judgment shall not be alledged for
1 Fac. 2. Error, so as Judgment be (c) entered within two Terms after such
cap. 17. Verdict.'
(b) If either

of the Parties dies at any Time before the Assizes, it is out of the Statute; but if after the Assizes, though before the Trial, it is no Error, for the Assizes 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.

Also by the 8 & 9 W. 3. it is enacted, ' If there be two or more
' Plaintiffs and 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 sug-
' gested on the Record, the Action shall proceed at the Suit of the sur-
' viving Plaintiff or Plaintiffs against the surviving Defendant or De-
' fendants. And it is further enacted, that if any Plaintiff happen to
' die after an interlocutory Judgment, and before a final Judgment ob-
' tained therein, the said Action shall not abate by reason thereof, if
' such Action might originally be prosecuted or maintained by the Ex-
' ecutors

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 *Sci. Fa.* 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 *Sci. Fi.* 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 Inquiry of Damages 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 or *Sci. Fa.* against such Defendant, his Executors or Administrators respectively.

6. Where a Defect in the Writ shall abate it.

The foregoing Objections, such as want of Jurisdiction, Disability in the Plaintiff, or Privilege in the Defendant, &c. being Matters *dehors* must be shewn to the Court, and must be pleaded in proper Time and Manner; but for Defects in the Writ itself the Court may *ex Officio* abate it.

Vide Tit. Writs, and a Defect in Process is aided by Appearance, Tit. Error.

And herein we must observe, that the Law hath been very strict in obliging Men to keep 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.

9 H. 7. 16. 10 E. 3. 1. pl. 2. 2 Inst. 662. Hob. 1, 51, 52, 84. Carth. 172. Cro. Fac. 576 7.

But though the Writ vary from the Register, yet, if it be warranted by the modern Precedents, this shall not abate it.

Hob. 84.

7. Where the Writ's not agreeing with the Count shall abate it.

If the Count or Declaration 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 it 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.

Cro. Eliz. 722. Cro. Fac. 651. 1 Jon. 304.

The Declaration varying from the Writ, (a) as 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; (b) as where the Writ calls him *A. B. of London*, Alderman, and the Plaintiff declares against

(a) *Fitz. Brief, 219. 231. (b) Yelv. 120. Finch of Law 357. Latch 173.*

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 the Law requires, or in (a) laying the Offence in a different County from that in which the Writ was brought; in all such Cases the Defendant may plead in Abatement.

(a) Allen 17, 18.
Doct. pl. 84.
Et Plus un-
der the Di-
vision of
The Declara-
tion's agree-
ing with the Writ.
 But the Writ may in some Cases be general, and the Declaration special; as where a Statute gives an Action, but does not prescribe any Form of the Writ, the Writ framed by the Common Law will serve, and the special Matter may be set forth in the Declaration.

14 H. 6 14.
2 And. 97.
 and several
 Cases there
 cited to this
 Purpose.
 If a Feme Sole be disseised, and afterwards marry, and she and her Husband bring an Assise, the Disseisin must be alledged to be done to the Wife; but if a Feme Disseisorefs marries, in an Assise against them the Disseisin shall be alledged to be done by them both, because there is no other Form of Writ.

8. Where the Writ is abated de facto, or is only abateable.

2 H. 6 4.
Doct. pl. 3.
(a) That
 where it ap-
 pears to the
 Court from
 the Writ it
 self, that it
 ought to a-
 bate, there
 the Court
 ought *ex Of-*
ficio to give
 Judgment
 against the
 Plaintiff,
 though the
 Defendant
 does not plead it in Abatement; otherwise where this does not appear in the Writ.
1 Rol. Rep. 2. and for what in particular the Court *ex Officio* will abate the Writ, *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. Vaugh. 95.*

Carth. 172.
 If the Return of a *Pluries Mandamus* is laid to be after the Beginning 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.

1 Salk. 2.
1 Show. 169.
1 Rot. Abr.
 783.
 Where the Writ is only abateable, it must be abated by pleading in Time; for Matters in and before the Writ cannot be taken Advantage of in (a) Error.

(a) A Man
 shall not assign that for Error which he might have pleaded in Abatement. *Carth. 124.*

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

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

So if a *Quare impedit* be brought against the Bishop and Incumbent only, without naming the Patron, tho' this might have been pleaded in Abatement, yet if the Defendant pleads in Bar, &c. it cannot after upon a Writ of Error be assigned for Error; for though the Want of the Patron's being made a Defendant might make the Writ abateable, yet it was not thereby actually abated; and nothing shall be assigned for Error concerning the Writ but what actually abates it.

Cro. Jac. 651.
1 *Bulf.* 4. 5.
2 *Brownl.*
229.
Palm. 306,
311.
2 *Rel. Rep.*
239.

If an Action be brought against Sir Francis Fortescue, *Militem & Baronettum*, and he appears and pleads to Issue, and a Verdict and Judgment 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 hath lost this Advantage by appearing to the other Name, and thereby concluded himself.

1 *Rel. Abr.*
781, 791.
1 *Rel. Rep.*
45.

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.

Palm. 270.

9. Where the Writ shall abate in toto, or in Part only.

Here the general Rule is, that whatsoever proves the Writ false at the Time of suing it out shall abate the Writ intirely; as if it appears on the Plaintiff's own shewing, that he has no Cause of Action for Part; therefore if an Action of Trespafs 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.

22 *H. 4.* 4.
Hob. 199.
1 *Bulf.* 1.
9 *H. 7.* 3 *per*
Fineux.

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: But herein it is to be observed, that this Falsification of the Writ must be in a material Point; for in a *Præcipe quod reddat* 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 who hath accepted the Tenancy; because he has a proper Defendant to the Action, and the Non-tenure of the one does no way prejudice the other Defendant.

Raff. Ent.
365.
Doct. pl. 7.
Co. Lit. 285.

But 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 the 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 proceed against one (a) 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*.

Doct. pl. 7.
21 *H. 6.* 4.

(a) The Disability of one Plaintiff shall stop the others from proceeding;

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 Executors, and that they proved the Will; if on 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 in them, and he that did not prove may come in when he pleases.

1 *Salk.* 3.

At Common Law Non-tenure of Parcel of the Lands abated the whole Writ; for this falsified 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 therefore 25 *E. 3. cap.* 16. enacts, that the Writ shall only abate for that Part of which Non-tenure is alledged.

38 *H. 6.* 7.
Booth. 29.

- 4 E. 4. 32.
Doff. pl. 5. If the Demandant enters into any Part of the Lands pending the Writ, this shall abate the Writ *in toto*.
- 1 Sand. 182.
Dupps v.
Mayo. The Plaintiff declared for Arrears of a Rent-charge, and demanded a larger Sum than was due to him by his own shewing by 7 l. 10 s. 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 7 l. 10 s. 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 it was said, 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 *pur auter vie*, and pending the Writ *Cestui 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 *Cestui 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 the Damages only.
But if Tenant *pur auter vie* had brought an Assise pending the Writ, and *Cestui que vie* had died; although the Action was well commenced, yet the Writ shall abate, because no Assise lies for Damages only.
- Co. Lit. 285. a. So if an Action of Waste was brought by Baron and Feme in Remainder in Special 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.
- Co. Lit. 45.
Godfrey's
Case.
1 Sand. 182. 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 where 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*.

10. In what Cases the Defendant hath it in his Option to plead in Abatement or in Bar.

- 1 Vent. 249.
2 Lev. 92.
1 Salk. 5. 92.
Carth. 243. Whatever destroys the Plaintiff's Action, 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.
- 3 Lev. 263.
3 Mod. 321.
& vide Tit.
Merchant,
the Case at
large. If there are several Part-owners of a Ship, and an Action is brought against some of them, they cannot, after they have pleaded in Chief, take Advantage of this, being a Matter that should have been pleaded in Abatement.

So if an Action be brought against one Executor, where there are more, if that one Executor doth not plead that Matter in Abatement, but pleads to the Action, he shall never have the Advantage of such a Plea afterwards. *Carth. 201.*

So where Trespass is brought by one Jointenant, or by one Tenant in Common, and the Defendant pleads to the Action, and the Jury find specially, that another (not named) is Jointenant or Tenant in Common with the Plaintiff; yet he shall have Judgment, notwithstanding the Writ at first was abateable. *Carth. 261.*

So where an Action of Debt is brought on a joint Bond against one of the Obligors, and upon *Non est factum* pleaded the Jury find, that *J. S.* (then living) was jointly bound with the Defendant, yet the Plaintiff shall have Judgment. *Cro. Eliz. 554.*
1 Sand. 291.
Moor 466.
3 Mod. 323.
1 Mod. 102.
Skin. 280.

Tenant in Common of Lands brought an Action of Trover in his own Name alone, for cutting down Trees and carrying them away; the Defendant pleaded to Issue; and in a special Verdict it was found, that the Plaintiff was Tenant in Common with *J. S.* not named; yet the Plaintiff had Judgment, because this was a Matter pleadable in Abatement. *Trin. 24*
Car. 2.
R. t. 1216. in
B. R. be-
tween Black-
burn v.
Grove.

Outlawry may always be pleaded in Abatement, but not in Bar, unless the Cause of Action be forfeited. *Co. Lit. 128.*
vide Tit. Out-
lawry.

Alienage may be pleaded in Bar or in Abatement; but with this Difference, that Alienage can only be 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 Reprisal for the Damages committed by the Dominion in Enmity with him. *Ero. Denizen,*
10.
Co. Lit. 129.

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; but in (a) one place it is said, it may be pleaded in Abatement, though not in Bar. *Carth. 136.*
(a) Carth. 1, 2.

A Man may plead in Bar or Abatement to a *Sci. Fa.* as well as to other Actions. *Lucas's Rep.*
112.

In Replevin, if the Defendant will take Advantage of a Variance in the Place where the taking is laid, from that in which it really was, he must plead it in Abatement. *6 Mod. 103.*
— Prisal in
auter lieu
must be plea-

ded in Abatement, and cannot be pleaded in Bar. *1 Salk. 3. Carth. 244.* *1 Show. 98.*

In Debt on a Bond the Defendant pleads the Condition for the Payment of three several Sums at three several Days, and that he hath paid two of them at the Days limited, and the third is not yet come, and concludes in Abatement; and it was argued, that this ought to be pleaded in Bar, and not in Abatement; for in every Plea in Abatement the Defendant ought to shew the Plaintiff how to bring a better Writ, and here he shews that he ought to have none at all, the Day of Payment of the third Sum not being yet come; as in an Action for an Attorney's Fees, if the Defendant pleads, that the Plaintiff delivered no Bill of them to him, he ought to conclude in Bar; and of this Opinion were the Court. *Comb. 483.*
Owen v.
Bulkley.

The Plaintiff in Bar to an Avowry pleaded a Distress for the same Duty in other Lands chargeable: And *Holt* said the Plea was naught; for it should have been pleaded in Abatement of the Avowry, that a former Replevin was depending (if the Truth was so) or if determined, then levied by Distress, & *issint riens arere.* *Comb. 379.*
Sully v. A-
rundel.

11. Pendency of another Suit or Action how to be pleaded in Abatement.

9 H. 6. 12. Here the general Rule is, that whenever it appears on Record, that
 Moor 418, the Plaintiff has sued out two Writs against the same Defendant for
 539. the same Thing, the first not being determined, the second Writ shall
 5 Co. 61. abate; for the Law abhors Multiplicity of Actions, and will not allow,
 Doct. pl. 10. that a Man shall be (a) twice arrested or twice attached by his Goods
 1 Vent. 101. for the same Thing; for if he might suffer twice, by the same Reason
 (a) Where a prior Writ he might suffer *in infinitum*.
 of Appeal may be pleaded in Abatement to a second Appeal, 2 Hawk. P. C. 190. and where a prior Suit de-
 pending may be pleaded to an Information. 2 Hawk. P. C. 275. But it is no good Plea in Abate-
 ment 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 such Case the Court will in Discretion quash
 the first Indictment. 2 Hawk. P. C. 367.

4 H. 6. 24. And it is not necessary that both should be pending at the Time of
 Doct. pl. 10. the Defendant's pleading in Abatement; for if there was a Writ in Be-
 H. b. 184. ing at the Time of suing out of the second, it is plain the second was
 vexatious, and ill *ab initio*, and therefore could not be rectified by a
 subsequent Determination of the first; 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.

3 H. 7. 3, 4. But a *Formedon* for Rent may be pleaded in Abatement of a *Forme-*
 Doct. pl. 10. *don* for the same Manor whence the Rent issues, & *vice versa*; because
 the Plaintiff cannot have a Manor and the Rent issuing out of it, and
 therefore the second *Formedon* is apparently vexatious.

3 Co. 61. In general Writs, as *Trespafs*, *Assise*, *Covenant*, where the special Mat-
 Doct. pl. 11, ter is not set forth, and the Plaintiff is nonsuited before he counts,
 12. and 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 de-
 manded by the first 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 for the same Thing.

5 Co. 62. An Action depending in an (b) Inferior Court cannot be pleaded to
 Sparry's Case. an Action brought in one of the Courts at *Westminster* for the same
 (b) The Plaintiff Thing.

counted up- on several Promises for Work and Labour in the Parish of *St. Mary Le Bow, London*; the Defen-
 dant pleaded in Abatement, that before this Action brought the Plaintiff had libelled in the Ad-
 miralty for the same Cause of Action; upon Demurrer it was insisted for the Plaintiff, that this
 was within the Rule laid down in 5 Co. 62. and the Whole Court gave Judgment against the De-
 fendant, *quod Respondeas Ouster*. Fitz. 313. 5 Geo. 2. in *C. B. Dudsfield v. Warden*.

Dier 92, 93. The Law will not allow two *Quare Impedit*s to be brought for the
 Heb. 15. same Presentation, *viz.* a second by the Defendant against the Plain-
 tiff, when there is one pending in Court by the Plaintiff against the De-
 fendant, & *sic in brevi de partitione*; because the Defendant can have
 the same Remedy on the first Writ as he could on a second.

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

for the same Demand, but not even two Actions of a (a) different (a) Therefore it is a good Plea Nature.

in Trespass, 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. 134.

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 Plaintiff, 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 demurred: And it was ruled, that the Writ should abate; for though there must be a Disturbance naturally 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 (b) new Defendant; yet the Writ abated, because there were two Quare impedit against the same Man; and therefore a fresh Defendant could no more enable him to bring a second Quare impedit than a second Disturbance could.

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.

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

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. Dier 227. Carth. 453.

So an Action of Battery and false Imprisonment brought in B. R. the Defendant pleaded in Abatement another Action depending for the same Matter in the same Court; the Plaintiff replied, Quod non habetur aliquod tale recordum & petit quod recordum illud, &c. inspiciatur, without giving Liberty to the Defendant to rejoin, Quod habetur tale recordum; and upon a Demurrer to this Replication the Plaintiff had Judgment; because this being a Record of the same Court in which it was pleaded, the Plaintiff might (c) pray, that it might be inspected by the Court, if any such there was; and upon this Plea the Court held the Plaintiff might have prayed Oyer of the Record pleaded, and for want of Oyer might have signed Judgment, which is the quickest Method of proceeding. Carth. 517. Creamer v. Wickett. Dier 227.

12. What shall be said a Plea in Bar or in Abatement; and therein of the Conclusion proper to each Plea.

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 thereupon; because by pleading to the Action the Writ is admitted to be good, and he puts the whole Matter upon his Plea. 2 Rol. Rep. 64. 1 Lev. 312. 1 Mod. 244. 2 Sand. 128.

- 1 *Show. Rep.* 4. So if a Man pleads in Bar, and concludes in Abatement, this shall be
but *vide* esteemed a Plea in Bar; because he could have no Writ, if he could
6 *Mod.* 103. have no Action; and where there could be no Action, the Dispute
1 *Lutw.* 34, about the Writ would be insignificant.
36.
- 10 *H.* 7. 11. A Plea in Abatement may be good, though it contains Matter in
1 *Mod.* 244. Bar; but this is to be understood of such Pleas as may be pleaded
either in Disability or in Bar; as Alienage, Outlawry, &c.
- 1 *Lev.* 312. If a Matter, which may be pleaded either in Abatement or Bar,
Comb. 479. be pleaded in Abatement only, if the Plaintiff replies or demurs in
6 *Mod.* 236. Bar, this will be a Discontinuance; because the Plaintiff does not main-
Lucas Rep. tain his Writ, and the Defendant may have other Matter in Bar, of
112. which he would hereby be excluded.
- 1 *Vent.* 136. But if the Defendant begin such Plea in Bar, and concludes in
Lutw. 36. Abatement, or pleads in Abatement, and concludes in Bar, there the
3 *Mod.* 281. Plaintiff may reply or demur to it, either as a Plea in Abatement or
in Bar; and if he demurs, or pleads to it as a Plea in Bar, then the
Judgment is final; for he has closed with the Defendant to put the
Plea to the Judgment of the Court, as a Bar to the Action.
- 3 *Lev.* 120. But if he demurs, or replies in Abatement, as he may, then the
6 *Mod.* 103. Judgment is *Quod defendens respondeat ouster*; for then only the Writ is
1 *Mod.* 244. put in Judgment before the Court; and the Plaintiff, by putting the
Writ in Judgment only to the Court, has waived the Benefit of putting
that Matter in Judgment to the Court as a Plea to the Action; and if
the Judgment were not in Abatement, it would not be pursuant to the
Defendant's Prayer.
- 5 *Mod.* 132. Every Plea in Abatement is either to the Writ or Count; if the
laid Arguen- Action is brought by Original, then the Plea is *Petit judicium de brevi*,
do. and it must conclude in the same Words; if it is to the Declaration,
then it must be *Petit judicium de villa & narratione*, for *Billa* and *Nar-*
ratio are the same.
- Lucas Rep.* It is said to be the Conclusion of a Plea, and not the Matter of it,
112. that makes a Plea in Abatement; so that should a Man plead a Plea,
that for the Matter of it might have been pleaded in Bar, and con-
cludes *Petit quod breve cassetur*, it would be but a Plea in Abatement,
and the Judgment would be no other than a *Respondeas Ouster*; so *vice*
versa a Plea in Abatement, pleaded in Form of a Plea in Bar, would
be a Plea in Bar, though an ill one.
- 6 *Mod.* 236. If a Dilatory be pleaded, and the Plaintiff take Issue upon it, he
per Holt. may conclude with a *Petit judicium & damna*, because there final Judg-
ment shall be; but if a Dilatory be pleaded, which the Plaintiff does
not deny, but confesses and avoids, he must conclude in Maintenance
of his Writ; as if the Defendant plead an Attainder in Disability of
the Plaintiff, and he pleads a Pardon, he must conclude with a
Petit judicium & (a) damna, but in Maintenance of his Writ.
- (a) 3 *Mod.* If there are four Defendants, and after several Continuances three
281. S. P. of them plead the Death of one of them in Abatement, *viz. Petunt*
3 *Lev.* 120. *judicium de brevi & quod breve illud cassetur*; this is ill in its Conclusion,
and should have been *Petunt judicium si Curia ulterius procedere vult*.
- Mod.* 30. pl. Where the Matter of Abatement appears on the Face of the Record,
99. 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.

13. Pleas in Abatement, how restrained.

As Pleas in Abatement enter not into the Merits of the Cause, but are merely dilatory, the Law has laid the following Restrictions on them:

1. By the Statute 4 & 5 Anne, cap. 16. for Amendment of the Law, no dilatory Plea is to be received, unless on Oath, and probable Cause shewn to the Court.

2. No Plea in Abatement shall be received after a *Respondeas Ouster*; *Hest. 126.*
for then would they be pleaded *in infinitum.* *2 Saut. 40,*
41.

3. That they are to be pleaded before Impar lance.

Vide the Di-
vision Impar-
lan e.

4. That when Issue is joined on them, if it be found against the De- *Vide the next*
fendant it shall be peremptory. *following*
Division.

5. That nothing shall be pleaded in Abatement of a *Sei. Fa.* upon a *1 Salk. 2.*
Judgment that was pleadable in the original Action; for it would be
unreasonable he should disable the Plaintiff from having Execution, since
he admitted him able to have his Judgment.

6. That though a Plea in Bar, being certain to a common Intent, is *Cro. Jac. 82.*
good, every dilatory Plea or in Abatement must be good to every In-
tent.

7. That the Defendant shall not plead in Abatement two Outlawries, *Hob. 250.*
or two Excommunications; Duplicity being a Fault in Abatement as *Carth. 8, 9.*
well as in Bar.

8. That a Plea in Abatement must be put in within four Days after *2 Lutw.*
the Return of the Writ; because the Person coming in by the Procefs *1181.*
of the Court ought not to have Time to delay the Plaintiff. *Hob. 19.*

9. That in Pleas in Abatement, which relate to the Person, there is *Carth. 363.* *The reason here given, it may be*
a Necessity of laying a *Venue*, all such Pleas being to be tried where *Salk. 4, 6.* *observed, supports the principle*
the Action is laid. *directly opposite to that, which is*
laid down. And by recurring to
the authorities cited from Salk. 4,
it will appear, that the words
underscored in the text, should
be, no necessity.

14. Of the Judgment on a Plea in Abatement, and how far peremptory.

The Judgment for the Defendant on a Plea in Abatement is *Quod breve* *Yelv. 112.*
or *Narratio cassetur*, and for the Plaintiff a *Respondeas Ouster*; but if *1 Vent. 22.*
Issue be joined on a Plea in Abatement, and it be found for the Plain- *2 Show. 42.*
tiff, it shall be (a) peremptory against the Defendant, and the Judg-
ment 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. *(a) Not pe-*
emptory on
Indictments
for capital
Offences.
2 Hawk. P. C.
354.

Also if the Defendant (b) demurs in Abatement, the Court will give *Salk. 220.*
final Judgment, because there can be no Demurrer in Abatement; for *6 Mod. 198.*
if the Matter of Abatement be *dehors*, it must be pleaded; if intrin- *(b) But a*
sick, the Court will take Notice of it *ex officio.* *Demurrer*
in Abate-
ment to an

Indictment 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. 354.*

If there be two Defendants, and they plead two several Pleas in *Hob. 250.*
Abatement, and there be Issue to one, and Demurrer to the other, if the
Issue

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.

Carrb. 447.
5 Mod. 392. 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 entered on the *Nisi prius* Record, Judgment will be arrested; for it being entered 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.

15. Foreign Plea.

2 Lil. Reg. 299.
Carrb. 402.
(a) Must be ingrossed in Parchment, and signed by Counsel. *2 Lil. Reg.* 299. A (a) Foreign Plea is when the Defendant pleads such Plea as carries the Cause out of the County that it is laid in, by shewing that the Matter alledged is not as to it's Trial within the Jurisdiction of that Court.

Lit. Rep. 236.
Stile 225,
435.
1 Sand. 97.
(b) *1 Vent.* 180. As this Plea is merely dilatory, and ousts the Court of its Jurisdiction, it hath been held, even before the Statute of 4 & 5 Anne, that it must be on Oath, and (b) before Impar lance; and if the Defendant refuses to make Oath of the Truth of his Plea, the Plaintiff may sign Judgment as upon a *Nil dicit*.

Heth. 126.
Lit. Rep. 236.
S. C. verbatim. If a Defendant in a Corporation Court pleads a foreign Plea, which is collateral, as in Debt upon a Bond, if he pleads a Release made in a Place out of the Jurisdiction of the Court, it need not be received without Oath; but if in Covenant, or Debt for Money to be paid at another Place, he pleads Payment accordingly, or Covenants performed in the Place limited, which was out of their Jurisdiction, it ought to be received without Oath.

Pasch. 26
Car. 2. in
B. R.
Browne —
1 Mod. 118.
S. C. If there be a Cause removed from *Canterbury* into B. R. by *Habeas Corpus*, and the Plaintiff declares here upon a Demise in *London* of a House in *Canterbury*; if the Defendant pleads an Entry and *Ouster* in *Canterbury*, so that this cannot be tried here; this is not a Foreign Plea, because it arises naturally upon the Case; so if Matter arise within two Counties, and the Plaintiff lays it in one, 'tis not a Foreign Plea for the Defendant to plead any Matter in the other.

3 H. 4. 12.
(c) How Foreign Pleas in *Wales* shall be

tried, *vide* the Statute 34 & 35 H. 8. cap. 26. (d) This is within the Equity of the Statute of *Glouc.* cap. 12. which *vide* expounded *2 Inst.* 324-5. which extends to real Actions only wherein Voucher lies, and not to personal. *2 Leon.* 37. *1 Sand.* 98.

5 Mod. 335. Antient Demefne, and all Pleas of Privilege, are Pleas to the Jurisdiction; but they are not foreign, and therefore they are to be received without an Oath.

Stile 225.
Dudney v. Collyer. If a Person be sued in an Inferior Court on an Obligation conditioned to pay Money out of the Jurisdiction of such Court, and the Defendant pleads Payment according to the Condition; this is not such a Foreign Plea as need be on Oath.

1 Sid. 234.
Collins v. Sutton; but *vide* *1 Mod.* 81. So if in Covenant brought in *London* for Payment of a certain Sum of Money on the Return of a Ship, the Defendant pleads, that the Ship returned to such a Place in *Cornwal*; and thereupon the Plaintiff demurs;

demurs; and adjudged, that this Plea is not good; for the Matter being transitory, the Defendant cannot oblige the Plaintiff to change his Action, but must plead to it in such Place as he has laid it; and had the Matter been local, then it would have amounted to a foreign Plea, which must have been put in on Oath.

But where a Prohibition was prayed for to the Court of the Compter 1 Vent. 180. in Wood-street, London, to an Action of Debt there commenced, for St. Aubin v. Cox. that the Defendant had pleaded before any Impar lance, that the Cause of Action did arise at a Place out of their Jurisdiction, and offered to have sworn his Plea, and they refused to accept this Plea; and upon this Matter a Prohibition was granted; for (a) Inferior Courts have (a) For this vide Tit. Courts, Letter (D). not Cognizance of transitory Things which arise in Places out of their Jurisdiction; but then it is not sufficient to surmise such Matter for a Prohibition; but a Plea to that Effect must be rendered in the inferior Court, and that before Impar lance; and it must be on Oath, and then, if refused, a Prohibition shall be granted, or upon such Refusal a Bill of Exceptions may be made.

In Debt brought in B. R. the Plaintiff laid the *Visue* in such a Place Carth. 402. within the County Palatine of Chester, which County was also in the 5 Mod. 335. Margin of the Declaration; the Defendant without imparling pleaded S. C. by Attorney, that he is, and at the Time of the Action brought was, Chumley v. Broom. resident at the said Place within the said County; and so prayed Judgment, if the Court of B. R. ought to hold Plea of this Matter. The Plaintiff taking this to be a foreign Plea rejected it, as not being on Oath, and signed Judgment: But *per Holt C. J.* a foreign Plea is where the Action is carried out of the County where it is laid, which in this Case was not done; so that this is only a Plea to the Jurisdiction of the Court, which is never sworn; so the Judgment was set aside.

In Debt brought in London, a Prohibition was moved for, and ruled 6 Mod. 146. *nisi*, upon Suggestion, that the Defendant had tendered for Plea below, Sparks v. Wood. that the Cause did arise out of their Jurisdiction, and offered to make Oath of the Truth of his Plea; and it was shewed, that he tendered his Plea after the Court was up; whereas it should be *in propria persona*, and in Court; and though an *Affidavit* was offered in B. R. of the Truth of his Plea; and one *Turner's Case* was quoted, where a Prohibition had been granted upon such an *Affidavit* here above without Oath of it below; yet *per Powel, Gould and Powis, absente Holt*, the Rule was discharged; for in all Pleas that oust a Court of Jurisdiction, whether inferior or superior, there must be Oath in that very Court of the Truth of the Plea.

If one be sued in an inferior Court for a Matter out of the Jurisdiction, the Defendant may either have a Prohibition from one of the 1 Peer Williams 476. Common Law Courts of Westminster-Hall; or in Regard this may happen in a Vacation, when only the Chancery is open, he may move that Court for a Prohibition; but then it must appear by Oath made, that the Fact did arise out of the Jurisdiction, and that the Defendant tendered a foreign Plea before Impar lance, which was refused; and if a Prohibition has been granted out of Chancery *improvide*, and without these Circumstances attending it, the Court will grant a *Supersedeas* thereto.

If it appear on the Face of the Declaration, that the Matter is out 1 Peer Williams 477. of the Jurisdiction of the Court, then a Prohibition will be granted without Oath of having tendered the foreign Plea; and in these Cases Equity imitates the (b) Common Law.

a Prohibition to an Ecclesiastical Court, as to more than appears on the Face of the Libel, there must be an *Affidavit* of the Truth of the Suggestion. 2 Silk. 549.

(b) In a Motion for

Hill. 12 Geo. 2. in B. R. Vokens v. Cull. On a Rule to shew Cause why an Attachment should not be granted against the Mayor of *Marlborough*, for refusing to accept the Defendant's Plea in his Court, it was held not to be sufficient for a Defendant in a Court below to bring his Plea into Court, and offer to make Oath of the Truth of it; but that he must tender his Plea with an *Affidavit* annexed of the Truth thereof, and that this must be done before a general Impar lance; but that he might have prayed a special Impar lance, and then have come at the next Court and pleaded: It was also held, that the proper Way of proceeding was not by Attachment, but that a Prohibition should have been moved for; and so the Rule for an Attachment was discharged.

(G) Of Pleas in Bar and in Chief: And herein,

1. Of the General Issue, and how formed.

10 Lit. 126. **I**SSUE is thus defined by my Lord *Coke*, a single, certain and material Point issuing out of the Allegations and Pleas of the Plaintiff and Defendant, consisting regularly of an Affirmative and Negative, to be tried by twelve Men; and is either General or Special.

The General Issues were contrived in such Words as were most proper to deny the whole Fact in the Declaration; as in a Charge of Trespass, the General Issue is (a) Not guilty, in Debt that he Owes nothing; (b) if the Action is grounded on a Specialty, *Non est factum*, or that it is Not his Deed; for the Debt being grounded on a Specialty, he admits the Debt, unless he denies the Deed; for the Seal continuing, it must be dissolved *eo ligamine quo ligatur*.

(a) That Not guilty is a good Plea to any Misfeasance whatsoever,

Cro Eliz. 257.

3 Mod. 324. Skin. 280.

(b) *Cro. Jac. 377, 531.* to an Usurious Bond or Sheriff's Bond *Non est factum* cannot be pleaded, but must be avoided by special Pleading. *Hob. 72. & vide Titles Sheriff and Usury.*

Co. Lit. 126. a. An Issue being taken generally referreth to the Count, and not to the Writ; as in Account, the Writ chargeth him generally to be his Receiver, the Count chargeth him specially to be his Receiver by the Hands of *T.* The Defendant pleadeth, that he was never his Receiver in Manner and Form, &c. this shall refer to the Count, so as he cannot be charged but by the Receipt by the Hands of *T.*

Co. Lit. 126. a. An Issue shall not be taken on a Negative pregnant, which implieth another sufficient Matter; but upon that which is single and simple, as *Ne dona pas per le fait* implies a Gift by Parol, and therefore the Issue must be *Ne dona pas modo & forma*.

Co. Lit. 126. a. Some Issues be good upon Matter affirmative and negative, albeit the Affirmative and Negative be not in precise Words; as in Debt for Rent upon a Lease for Years, the Defendant pleads, that the Plaintiff had nothing at the Time of the Lease made; the Plaintiff replieth, that he was seised in Fee, &c. this is a good Issue.

Co. Lit. 126. a. 33 H. 6. 21. Where the Issue is joined of the Part of the Defendant, the Entry is *Et de hoc ponit se super Patriam*; but if it be of the Part of the Plaintiff, the Entry is *Et hoc petit quod inquiretur per patriam*.

Co. Lit. 126. a. There be some negative Pleas which be Issues of themselves, whereunto the Demandant or Plaintiff cannot (c) reply, no more than to a General Issue, which is *Et prædictus A. similiter*; as if the Tenant be inconvenient to go

on to a Replication, because to reply generally would leave it too large and comprehensive, and to reply any particular Kind of Estate would be too narrow, and consequently immaterial.

1 Peer Williams 259.

do vouch, and the Demandant counterplead, that the Vouchee or any of his Ancestors had any Thing, &c. whercof he might make a Feoffment, he shall conclude, *Et hoc petit quod inquiratur per patriam & prædictus tenens similiter*; so in a Fine pleaded by the Tenant, &c. the Demandant may say, *Quod partes finis nihil habuerunt*, and *Hoc petit quod inquir' & prædict tenens similiter*; and so in a Writ of Dower, the Tenant pleads, *Unques seife que dower*, he shall conclude, *Et de hoc ponit se super patriam & prædict' petens similiter*.

Every Issue consists of an (a) Affirmative and Negative; and an Issue being once well tendered must be accepted, and closes the Pleadings.

1139. Comb. 86. (a) A Distinction was thus taken by Counsel, viz. that where an Affirmative came after a Negative, there Issue ought not to be joined, but ought to be left on the other Side; but where the Affirmative was first and the Negative came after, there it ought to be joined. But Holt, Ch. J. said he had never heard of this Distinction, and therefore gave but little Regard to it. Carth. 88.

In an *Audita querela*, to avoid the Execution of a Recognizance, the Plaintiff sets forth, that it was defeazanced upon Payment of divers Sums of Money at certain Days, and that he was at the Place appointed, and tendered the Money, and that the Defendant was not there to receive it; the Defendant pleaded (b) *Protestando*, that the Plaintiff was not there to pay it, and that he was there ready to receive it, *absque hoc*, that the Plaintiff was ready to pay it; which being specially demurred to, the Court held the Plea naught; and that there being an exprefs Affirmative and Negative, there should have been no Traverse; for so they may traverse one upon another *ad infinitum*.

and therefore, if the Issue be found for a Villein, he is enfranchised for ever; and yet in some special Cases, albeit the Issue be found against him that maketh the Protestation, yet he shall take Benefit of his Protestation; as if a Man entereth into Warranty, and taketh by Protestation the Value of the Land, albeit the Plea be found against him, yet the Protestation shall serve him for the Value. Co. Lit. 126. a.

The Reason of joining Issue is, that the Party may come prepared to defend one single Point; which holds in all Cases, except in Barratry; and even in that Notice must be given of the Point the Prosecutor intends to proceed on.

In an Action of false Imprisonment, the Defendant justifies by Force of a *Latitat* out of B. R. by Force of which he took him; the Plaintiff replies, that he did it *de injuria sua propria*, &c. It was moved, that this was naught after a Verdict, and not helped; but the Court held it well after a Verdict; but that upon Demurrer it would be naught, as being multifarious, jumbling Matters of Record and Matters of Fact together.

An Action of Debt was brought upon a Recovery in the Court of *Norwich*; the Defendant shews, that the Court is holden by Custom before other Persons, *absque hoc*, that the Plaintiff such a Day recovered *secundum consuetudinem*, &c. upon which it was demurred; and in Defence of the Plea it was said, that it is not the Record that is put in Issue, but the Custom only, and that may well be traversed; for which were cited *Hob. 244. Hutt. 20. 1 R. 3. 9.* But the whole Court held the Plea pregnant and insufficient; for he has made the Day Parcel of the Issue, which he ought not to have done, but have said only (c) *Modo & forma*; and they held clearly, that the Custom

the Substance of the Issue, and where but Words of Form, this Diversity is to be observed; where the Issue taken goeth to the Point of the Writ or Action, there *modo & forma* are but Words of Form; but otherwise it is where a collateral Point in Pleading is traversed; as if a Feoffment be alleged by two, and this is traversed *modo & forma*, and it is found the Feoffment of one, there *modo & forma* is material; so if a Feoffment be pleaded by Deed, and it is traversed, *absque hoc, quod seoffavit modo & forma*, upon this collateral Issue *modo & forma* are so essential, as a Jury cannot find a Feoffment without Deed. Co. Lit. 281. b.

Co. Lit. 126.
1 Sand. 338.
Lutw. 623,

Cro. Eliz.
754. 5.
Huish v.
Phillips.

(b) A Protestation availleth not the Party that taketh it if the Issue be found against him;

yet in some special Cases, albeit the Issue be found against him that maketh the Protestation, yet he shall take Benefit of his Protestation; as if a Man entereth into Warranty, and taketh by Protestation the Value of the Land, albeit the Plea be found against him, yet the Protestation shall serve him for the Value. Co. Lit. 126. a.

Lucas Rep.
299, vide
Tit. Barratry.

Raym. 50.
1 Keb. 125,
164.
Beesly v.
Walker.

1 Lev. 193.
1 Sid. 302.
2 Keb. 107,
122. S. C.
Dring v.
Repas.

(c) Where *modo & forma* are of

to hold Courts might well have been traversed, if that Point had been singly brought into Issue; but here Matter of Record is mixed with Matter of Fact, which is ill on a general Demurrer; and therefore Judgment was given for the Plaintiff.

2. Immaterial and informal Issues, and where aided.

Vide Tit. Amendment. Here the general Rule is, that where the Issue is immaterial a Verdict will not aid it; but where it is only informal, it is helped.

Carth. 371. An immaterial Issue is, where what is immaterially alledged by the Pleadings is not traversed, but an Issue taken on such a Point as will not determine the Merits of the Cause; an informal Issue is, where it is not traversed in a right Manner.

1 Leo. 32. A Verdict cannot help an immaterial Issue, because what is alledged in the Pleadings is not put in Issue; or if it be, it is not decisive between the Parties, and so the Verdict is no good Foundation for the Judgment; and if what is material in the Pleadings be not put in Issue, it is not made necessary to be proved on that Trial; but if it be not decisive, then what is necessary to be proved on the Trial will not in all Cases be a Foundation for the Judgment; for the Courts in these Cases are Judges on what Point they ought to go to Issue, so as to be a legal Charge by the Plaintiff, or Discharge by the Defendant; since it is the Province of the Judges to settle the Matter of Law, and the Jury the Matter of Fact.

3 Leon. 66. If the Plaintiff declares upon a Promise to find the Plaintiff, his *Kirbee v. Leers.* Wife and two Servants, with Meat and Drink for three Years, upon Request; and the Defendant pleads, that he promised to find the Plaintiff and his Wife with Meat, &c. *absque hoc*, that he promised to find, &c. for two Servants, &c. and the Plaintiff replies, that he did promise to find, &c. for three Years next following, & *hoc petit*, &c. and thereupon a Verdict is found for the Plaintiff; yet he shall not have Judgment; for the Promise in the Replication is not the same with that in the Declaration, which was traversed by the Defendant; and so there is no Issue joined, and therefore is not helped by the Statute.

Cro. Jac. 585. If in Debt on a Bond conditioned for the Payment of 105 l. at a certain Day and Place, the Defendant pleads, that at the Day and Place he paid *prædicti* 100 l. *quas solvisse debuit secundum formam & effectum conditionis*; and the Plaintiff replies, *Quod non solvit prædicti* 105 l. &c. and a Verdict is found *quod non solvit* the said 105 l. yet the Plaintiff shall not have Judgment; for *prædicti* 100 l. shall not be intended the 105 l. and so they meet not, and there is no Issue.

Cro. Car. 79. If in a *Sci. Fa.* upon a Judgment against the Administratrix of *J. S.* the Defendant pleads, that the said *J. S.* made *B.* within Age his Executor, and that Administration *durante minore ætate* of the said *B.* was committed to the Defendant, and that such a Day the said *B.* attained the Age of Seventeen, and then refused to be Executor, &c. and that when the said *B.* attained his said Age the Defendant had fully administrated, &c. And the Plaintiff replies, that at the Time the said *B.* came to his said Age *devastavit diversa bona*, &c. and the Defendant rejoins, *Quod ipse non devastavit*, &c. and thereupon Issue was joined, and found for the Defendant; she shall have Judgment; for the Devastation must be intended by the Administratrix, and the Plaintiff shall not avoid the Verdict by an Exception to his own Replication.

Hest. 35. Lit. Rep. 52. S. C.

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 concordia* 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 Bar, but puts another Concord in Issue, not alledged in the Defendant's Bar, between the Plaintiff and Defendant only, and the Court cannot be certain which is proved on the Trial; and though it may be said in this Case, that either may bar the Action, yet only one Thing is to be put in Issue; and if it should be otherwise, there would be no Correspondence between the *Probata* and *Allegata*.

In Debt on a Bond conditioned for the Payment of 8*l.* on a certain Day, the Defendant pleads Payment on the Day in the Condition, *Et de hoc ponit se super patriam*, & *predict* the Plaintiff *similiter*; and found for the Plaintiff; here the Defendant has closed the Issue on the Plaintiff by the *Hoc ponit se super patriam*; yet the Defendant cannot take Advantage of the Informality of his own Plea, and it is waived on both Sides when they go to Issue on the Substance of it.

But if in Trespass the Defendant pleads a special Justification, and the Plaintiff replies *de injuria sua propria absque tali causa*, there though the Issue is found for the Plaintiff, yet it is wrong after Verdict, because the *Injuria sua propria* does no more than affirm the Declaration, and does not confers or deny the Bar; and therefore the Git of the Bar is not put in Issue at all, but rather stands by the Replication since the Cause is not traversed; for saying it was *de Injuria sua propria* is no more than saying, that notwithstanding the Cause mentioned in the Bar the Defendant committed the Injury, which the Bar being a sufficient Excuse cannot be; but it does not in the least put the Bar in Issue.

If in an *Assumpsit* for Wares sold the Defendant pleads *quod tempore quo*, &c. he was an Infant, and the Plaintiff replies they were for Necessaries, & *hoc petit quod inquiretur per Patriam*, &c. and thereupon Issue is joined, and a Verdict found for the Plaintiff; though this Traverse is informal, because the Plaintiff ought not to have closed the Issue, but to have given the Defendant an Opportunity of rejoining, that there might have been a proper Negative to his Affirmative; yet since the Matter of his Replication is put in Issue, *viz.* whether they were Necessaries or not, the Defendant has waived all Objections to the Form, and by such Waiver it appears that he is not any ways injured by not rejoining, and it being found that they were Necessaries, the Plaintiff ought to prevail.

In Debt on a Bond conditioned for the Payment of 60*l.* on the 25th of June, the Defendant pleads Payment on the 20th of June *secundum formam & effectum conditionis*, & *sur ceo* Issue is joined, and the Verdict finds *quod non solvit* 60*l.* at the 20th; the Plaintiff shall not have Judgment, for the Issue is *dehors* the Matter of the Condition, and so void, and it might have been paid the 25th, though it was not paid the 20th, so that it does not appear the Condition was broke; but where the Issue is decisive between the Parties, though it be not so apt, yet this shall be cured after a Verdict.

As in Replevin the Defendant avows that *Ellen Enderby* was seised in Fee, and took *Pigott* to Husband, and had Issue by him *Thomas*; that *Ellen* and *Thomas* granted a Rent-Charge for which he distrains; the Plaintiff replies, that one *Fisher* being seised in Fee gave the Land to *J. Enderby* in Tail, who had Issue *Ellen*, that *J. Enderby* died and *Ellen* entered, and being seised in Tail took *Pigott* to Husband, and

1 Rol. Rep. 86.

Cro. Car. 316,

317.

Parker v.

Taylor.

1 Sid. 290.

S. C. cited.

1 Sid. 341.

Cro. Jac. 599.

S. P. adjudg-

ed.

1 Rol. Rep.

47. S. P. ad-

judged.

Stile 150, 198.

Vide Hayd. 40.

S. P. cited.

1 Vent. 70.

S. P. said to

have been

adjudged.

8 Co. 66.

1 Sid. 341-2.

Burton v.

Chapman.

Cro. Jac.

455.

Holms v.

Brocket.

Cro. Jac. 44.

Yelv. 54

Pigott v. Pi-

gott.

had Issue *Thomas*, who is dead, who granted, &c. *absque hoc*, that *Ellen* was seised in Fee; tho' this was an informal Issue, for the Plaintiff ought to have traversed that *Thomas* the Grantor was seised in Fee; yet it is a decisive Issue, for it is allowed on both Sides that *Thomas* was in by Descent from *Ellen*; and if *Ellen* was seised in Fee, *Thomas* was so too, and consequently had good Right to make the Grant.

5 Co. 43.
Nichol's Case.
Moor 692.
S. C.
Cro. Eliz.
455. S. C.
3 Bulf. 301.

If in Debt upon a single Bill the Defendant pleads Payment, without an Acquittance, and thereupon Issue is joined, and found for the Plaintiff, he shall have Judgment; for the Payment without an Acquittance is no Plea to a single Bill; yet because Issue was joined upon an Affirmative and Negative, and Verdict for the Plaintiff, he shall have Judgment; adjudged upon a Writ of Error *in Camera Scaccarii*, and the first Judgment affirmed accordingly.

Noy 56.
Cro. Eliz. 773.
2 Jon. 184.

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 ill Plea, and a false one, the Plaintiff ought to have his Judgment, both for the Badness of the Plea, and for its Fallhood; but if the Verdict had been for the Defendant, yet the Plaintiff should have Judgment; because the Declaration is not answered by the Plea.

Cro. Eliz. 470.
Corbyn v.
Brown.
(a) Where
in Debt a-
gainst an
Executor
upon the Bond of his Testator the Defendant pleaded *Non est factum*. Hard. 458.

So if in an *Assumpsit* the Defendant pleads Not guilty, and thereupon Issue is joined, and found for the Plaintiff, he shall have Judgment; though this is an (a) improper Issue in this Action, yet because there is a Disceit alledged, Not guilty is an Answer thereto; and it is but an Issue mis-joined, which is aided by the Statute.

Hob. 49.
Keble v. Of-
baston.

If in Debt against *A* as Executor of *B*. the Defendant pleads, that *B*. died Intestate, and that Administration of his Goods was committed to *C*. and the Plaintiff replies, that before the said Administration granted divers Goods, &c. came to the Hands of the Defendant, which as Executor to the said *B*. *administravit seu aliter ad usum suum proprium disposuit & convertit*, &c. and thereupon in the Disjunctive Issue is joined, and found for the Plaintiff, he shall have Judgment; for the Point in Issue is directly found, and so it is within the Statute; and this also is no improper Issue; for whether he administrated or converted to his own Use, both must be as Executor.

Hob. 113.

If in Replevin the Defendant avows for Damage-feasant, and the Plaintiff replies, that he was seised in Fee of a Messuage and certain Land, and that *J. S.* was seised of another Messuage and Land, and that they two, and all those whose Estate, &c. had Common, &c. in the Place where, &c. and conveys to himself the other Messuage and Lands for Years, and so justifies, &c. and the Defendant traverses the Prescription, and it is found for the Plaintiff; though the Prescription thus confessed for several is grossly faulty, and (a) the Issue thereupon confused, yet after Verdict it is saved by the Statute.

(b) If in
Debt upon
an Obliga-

tion the Defendant pleads the Statute of Usury, & *quod corrupte agreeat fuit*, &c. & *quod querens corrupte recepit*, the Usury and Issue is taken upon both, and found for the Defendant, he shall have Judgment; tho' this Issue is double, the one Part material and the other not. Moor 574. p. 790. If in Debt for Rent the Defendant pleads *Nil hab' in Tenementis*, and the Plaintiff replies *quod hab' bonum & sufficientem statum*, &c. but does not shew what in particular, and thereupon Issue is joined, and found for the Plaintiff, he shall have Judgment; for though the Issue is unformal, yet the Substance of the Matter is found, viz. that he had an Estate, &c. Glas' v. Gill, Yelv. 227. Cro. Jac. 312. & vide 2 Bulf. 41.

1 Sid. 289.
1 Lev. 183.
Walsingham
v. Comb.

If in an Action of (a) Covenant the Plaintiff assigns a Breach, that the Defendant was not seised in Fee, & *sic infregit conventionem*; and the

(a) So where the Covenant is to repair, and the Plaintiff assigns the Breach, that the Defendant suffered the Houses to be ruinous, & *sic non reparavit*, and the Defendant pleads that he did not suffer them to be ruinous. Moor 399. Cro. Eliz. 457. 2 Leon. 116.

the Defendant pleads *Non infregit conventionem*; and thereupon Issue is joined, and a Verdict for the Plaintiff, he shall have Judgment; for this is but an informal Issue.

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; tho' this be an informal Traverse, being 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.

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; for where the Substance is impossible, no Verdict can cure it, because it cannot make that true which cannot possibly be; but where it is only impossible in the Manner of it, there the Thing which is possible may be found to be or not, and the Manner which is impossible totally rejected; (a) as if an Action of Assault and Battery be brought, and the Defendant justifies by conveying to himself an Estate by Copy of a Parcel of the Manor of C. whereof D. is seised, and that the Plaintiff came upon it, and that he laid his Hands *molliter*; the Plaintiff replied, and conveyed to himself an Estate by Copy of another Parcel of the Manor, and that D. Lord of the Manor, had for himself and Tenants a Way over the Defendant's Piece of Land; Issue is joined, and Verdict for the Plaintiff; this is a void Prescription, a Copyholder, being originally but a Tenant at Will, could not prescribe at Will, but in the Name of the Lord, for an Easement; and for an Easement out of the Manor he could not prescribe in the Lord's Name, but must lay it by Custom as the *Lex loci*; but being laid here by way of Prescription it is in its own Nature void; and the Verdict could not make that which was repugnant to the Nature of the Thing to be true or false, and by Consequence could not help it.

But in Debt on a Bond conditioned for the Payment of 100*l.* on 31 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 is impossible and altogether idle and void; for not being paid before the End of that Month the Obligation is absolute.

If in Treipsa's Issue is taken, that the Prebend of A. and all his Predecessors, &c. had used Time out of Mind to keep a Shepherd, for the better keeping together their Sheep feeding in the said Pasture from the Sheep of T. Earl of S. and the Issue is found for the Plaintiff accordingly; tho' it is senseless and impossible that the Sheep of the Prebend, &c. Time out of Mind could be kept from the Sheep of the Earl of S. being but one Man's Life, yet the Plaintiff shall have Judgment; for the Substance of the Issue is the keeping of the Sheep of the Prebend, &c. and the other Part is but a Consequence thereof, that thereby they were kept from the Sheep of the said Earl.

In Debt upon a Bond against an Administrator brought in Hill Term. 22 Jac. the Defendant imparled; and in Easter Term. 1 Car. the Defendant pleaded a Judgment upon a Bond dated *anno quinto Regis nunc*, where it should have been *Regis Jac.* and that he had not Assets *ultra* to satisfy that Judgment; and thereupon the Plaintiff joined Issue, that the said Recovery was by Fraud and Covin; and it was found for the Plaintiff; tho' it was impossible there could be a Bond *anno quinto Regis Caroli*, which was not then come, yet the Plaintiff, having a good Declaration, had Judgment.

1 Sid. 444.

1 Vent. 70.

2 Keb. 623.

(a) H. b. 112.

113.

Moor 867.

Tasker v.

Salter.

Cro. Car. 78.

1 Fon 140.

Lat. h. 158.

Noy 85.

Purchase v.

Jegon.

H. b. 117.

Napper v.

Jas. er.

Cro. Car. 25.

Knight v.

Harvey.

1 *Lev.* 183.
 1 *Sid.* 289.
 2 *Keb.* 10,
 13, 47. S. C.
Twin. 18
Car. 2 between *Wal-*
singham v.
Coombe.

Covenant on a Conveyance of Lands, where the Vendor covenants, that he was seised in Fee, and assigns a Breach, that he was not seised in Fee, and so had not performed his Covenant; the Defendant pleads, that he had not broken his Covenant; and on the Issue so joined a Verdict was for the Plaintiff: And it was moved in Arrest of Judgment, that this was not any Issue, it consisting only of two Negatives, *viz.* that he was not seised in Fee, and so had not performed his Covenant on the Plaintiff's Part, and that he had not broken his Covenant on the Defendant's Part; also that the Pleading is too general, for that he ought to answer particularly in Covenant to the Breach assigned; and it was said, that though in Actions founded upon Tort the Declaration being special, may be answered generally, yet in Actions founded on a Contract a special Declaration must be answered specially. The Court at first doubted, but afterwards gave Judgment for the Plaintiff; for it is an Issue, though argumentative and informal; for if he had not broken his Covenant he was seised in Fee, and if he was not seised in Fee he had broken his Covenant; that it is not wholly immaterial, and informal Issues are cured by 32 *H.* 8. after Verdict, tho' immaterial ones are not.

3. Of special Pleas; and therein of Pleas amounting to the General Issue, and of Matters which may be pleaded or given in Evidence.

The Defendant is at Liberty to plead the General Issue, or traverse any material Point of the Declaration; but (a) he cannot plead a Plea that amounts to the General Issue; for Pleas which amount to the General Issue are only Facts on which the Issue may be turned in Evidence, and therefore are not Issues of Fact, to be referred to the Court, but Matters of Evidence to be determined by a Jury, and consequently not good Pleas; because they draw to the Examination of the Court what is proper to be determined by a Jury.

(a) Pleading that amounts to the general Issue is not to be allowed; and when such Plea is pleaded, it is a good Cause of a special Demurrer since 27 *Eliz.* and before it, of a general one. 10 *Co.* 95. *a.* The Reason of pressing the general Issue is not for Insufficiency of the Plea, but not to make long Records when there is no Occasion. *Hob.* 127. A Plea which amounts to the general Issue is only Matter of Form, 1 *Rol. Rep.* 112-3. and therefore must be specially shewn as Cause of Demurrer. *Cro. Car.* 157.

X 3 *Med.* 166. Where the Defence consists in Matters of Law, there the Defendant may plead specially; but where it is purely Fact, the General Issue must be pleaded; and in all Actions the Defendant may shew any Matter to the Court why the Action does not lie; and this being Matter of Law is proper to be shewn to the Court, and not to the Jury; for being Questions of Law, the Judges are to determine whether they discharge or bar the Plaintiff's Action; but such Bars or Matters produced by the Defendant may be traversed by the Plaintiff, whether they are true or not, which subsequently draws them to the Examination of a Jury.

5 *Mod.* 252.
Salk. 580.
Hob. 174.

Whatever therefore makes the Fact complained of to be lawful is Matter of Justification, and to be shewed to the Court; because the Court are Judges how far the Fact, if done, was lawfully done; and therefore on Not guilty in Trespafs the Defendant cannot shew a Licence to prove there was no Trespafs; because tho' the Licence makes it no Trespafs, yet he shews that Licence to an improper Jurisdiction, *viz.* to the Jury, who are not proper Judges of the Law.

So if the Defendant shews a Release of a Debt to a Jury, it is no Evidence; because, though the Release makes it to be no Debt, he

shews it to an improper Jurisdiction; but though a Man must shew all Matters to the Court that confirm the Fact complained of, and discharge it, yet where any Thing goes in Denial of the Fact, there it must be given in Evidence on the General Issue; because whatever denies that Cause of Complaint is Matter proper to be exhibited to the Jury, who are Judges, whether the Fact was, or not; and therefore Actions of Trover and *Assumpsit*, which are modern Inventions to get rid of the Law-Wager, which lay in the antient Actions of Debt and Detinue, were so formed, that almost every Thing may be given in Evidence.

As in Trover the Plaintiff declares of the Property of the Goods and Chattels, and that they came by finding to the Defendant; whatever Matters alledged that confers Property in the Plaintiff will intitle him to his Damages, and whatever denies it is on the General Issue; and therefore Levying by Distress, Releases, and the like, which were antiently in this Action, are now given in Evidence; because they disaffirm the Property of the Plaintiff on which his Action is founded. *Vide Tit. Trover & Conversion.*

So in *Assumpsit* the Action is formed on a Contract, and the Trespass to the Plaintiff is the Non-performance of it; and though the Issue be *Non assumpsit* instead of the old Issue Not guilty, yet on this Issue every Thing may be given in Evidence which disaffirms the Contract, for that goes to the Gift of the Action; since if there be no Contract to be performed at the Commencement of the Action, there can be no Trespass for the Non-performance of it; and therefore a Release goes to the Gift of this Action; for it shews there was no Action at the Time this Action was commenced; for as in Trover he must have a Right to the Thing, so in *Assumpsit* he must have a Right to the Thing declared on; therefore every Thing that shews the Contract to be void, as Non-age, or more Money lost at Play than the Statute allows, may be given in Evidence on the General Issue. *Vide Tit. Assumpsit.*

But Matters of Law, which do not go to the Gift of the Action, but to the Discharge of it, even in these new framed Actions, are to be pleaded; as, the Statute of Limitations; so if a lesser Sum be paid before the Time; because that is not a Performance which destroys the Being of the Action, but a collateral Agreement that destroys the Performance of it. *Cartb. 387. Salk. 278.*

If Matter be pleaded which amounts to the General Issue, yet if there be also a special Matter of Justification joined in the same Plea, the Plea is good. *3 Lev. 41.*

In Trover the Defendant pleaded a Sale in a Market overt, and thereby justified the Conversion; and ruled that a *Nihil dicit* should be entered, if he did not plead the General Issue, for that it amounted to it; and in another (a) Case in Trover the Defendant pleaded another Plea amounting to the General Issue; and the Court doubted, whether they should compel him to plead the General Issue, or award a Writ of Inquiry; but resolved at last to award a Writ of Inquiry. *Cro. Jac. 165. (a) Cro. Jaci 319.*

In an Action on the Case by a Commoner for digging Pits, the Defendant justified that he was Lord of the Soil and dug for Coals, doing as little Damage as he could, and that he left sufficient Common; and on Demurrer adjudged against him that it amounted to the General Issue. *1 Sid. 106.*

In Trespass if the Defendant pleads Property in a Stranger or himself, it amounts to the General Issue; otherwise in Replevin, in which Case it may be pleaded in Bar or Abatement; but where in Trespass the Plaintiff declared that the Defendant broke his Close, and took *quædam averia*, &c. the Defendant pleads the Cattle were his own, and that *J. S.* took them from him, and put them in the Plaintiff's *1 Vent. 249. 2 Lev. 92. Cro. Eliz. 329.*

- Clofe by his Affent, and that he took them, &c. and held a good Plea; for the Plaintiff does not declare that the Property of the Goods is in him; and when the Defendant's Beasts are taken from him by Wrong, he may justify Retaking them where-ever he finds them.
- Cro. Eliz.* 871. Where the Matter of the Plea confesses the Cause of Action but avoids it, the Defendant may plead specially, though he might have given it in Evidence; otherwise where the Matter of the Plea does not avoid but deny, as in *Assumpsit*, the Statute of Gaming may be pleaded, though it might be given in Evidence on the General Issue.
- Salk.* 344.
- Salk.* 394. In Trespafs for taking his Horse, the Defendant pleads that the Horse was the Horse of *J. S.* and that the Plaintiff took and impounded him, and that he the Defendant took him by Replevin, &c. this amounts to the General Issue, for it does not so much as admit a Possession in the Plaintiff; for the taking and impounding gave him no Possession, because the Horse was thereby in the Custody of the Law, so no Colour of Action left to the Plaintiff.
- Salk.* 394. In *Assumpsit* the Defendant pleaded *Quod ipse performavit omnia ex parte sua performanda*; and this was held to amount to the General Issue; *sed Q.* for the *Assumpsit* is admitted, so that this is but a Discharge.
- 5 Co.* 119. re- If a Man executes a Deed by (*a*) *Durefs*, he cannot plead *Non est factum*, for it is his Deed, though he may avoid it by special pleading, Judgment *Si actio*, &c.
- Curiam.*
2 Inst. 483.
S. P. (*a*) In a Plea of *Per minas* the very Manner of it, as whether for Fear of Life, Member or Imprisonment, ought to be specially laid. *Vide* 1 *Keb.* 516.
- Hob.* 72. Upon an Issue *Feoffavit vel non*, the Jury found a Feoffment, but a covinous one, and the Court was of Opinion, that upon this Issue a covinous Feoffment was a Feoffment, and that if the Party would have taken Advantage of the Covin, he ought to have done it by special Pleading; it is there likewise said, that a *Non est factum* cannot be pleaded upon the (*b*) Statute of Usury or Sheriff's Bonds, the Reason of which is, that these Things have the Appearances of Feoffments and Bonds, though they want the Validity.
- (*b*) Though the Statutes relating to Sheriff's Bonds and usurious Bonds are penned in very strong Terms, yet the Bonds are void only as to their Efficacy, for in these Cases the Defendant cannot plead *Non est factum*, but must avoid them by special Pleading. *Dier* 375. *b.* *Cro. Eliz.* 915. *Hob.* 72, 166.
- 6 Mod.* 218. It is said by my Lord Chief Justice *Holt*, that all special *Non est factums*, in Case of *Escrow* and *Razure*, are impertinent, for thereby the Defendant brings all the Proof upon himself; whereas if he had pleaded *Non est factum* generally, he would turn the Proof of whatever is necessary to make it his Deed upon the Plaintiff.
- 1 Vent.* 2. In Debt upon a Lease for Years the Defendant may plead Entry into Part, upon which follows Suspension, and it does not amount to the General Issue.
- Dier* 121. In every Action on the Case for a Misdemeanor the Defendant may plead generally Not guilty, or traverse the Point of the Writ, as *Ne forga pas*, *Non ejecit*, *Non rapuit*, *Non manutenuit*.
- Doct. pl.* 203.
- 22 H.* 6. 37. But in Trespafs *Non depasit herbas* is no Plea, but he ought to plead Not guilty, the other being only argumentative.
- Doct. pl.* 204.
- 40 E.* 3. 15. In Dower the Tenant pleads, that the Husband of the Demandant was only Tenant for Life, the Remainder in Tail to his Son; and this was held an ill Plea, it amounting to the General Issue *Ne unques seise que dower*.
- Doct. pl.* 205.
- Hob.* 127. In Debt against an Administrator the Defendant pleads, that the Intestate was indebted to him by Bond 80*l.* and that Goods to that Value *Et non ultra* came to his Hands, which he detains for his Debt; and on Demurrer it was objected, that it amounted to the General Issue

Issue of *Plenement administer*; but the better Opinion of the Court was, that this is no Cause of Demurrer, for the Plea is (a) sufficient; and besides, it is some Matter in Law which hath been allowed always to be pleaded specially, and not left to a Jury; and the Reason of pressing a General Issue is not for Sufficiency of the Plea, but not to make long Records when there is no Cause, which is Matter of Discretion; and therefore it is to be moved to the Court, and not to be demurred upon.

(a) That it is a good Plea, and safer than pleading the General Issue. *Noy 106. Winch 19. Cro. Car. 157.*

Cro. Jac. 165. 1 Leon. 178. Hob. 218. Like Point, & vide Raym. 230.

In an Action on the Case by a Commoner the Plaintiff declared, that the Defendant had inclosed the Places in which the Plaintiff had a Right of Common, and likewise had put his Cattle in those Places, by which he could not *in tam amplo & beneficiali modo* enjoy the same; the Defendant pleaded, that he put his Cattle in rightfully, and that the Plaintiff had Common enough; and on Demurrer it was held, that the Plea was the same as Not guilty, and therefore amounted to the General Issue; yet the Court likewise held, that for that Reason alone the Plaintiff had no Cause of Demurrer; for that the Defendant may well disclose the Matter of Law in Pleading, which is a much cheaper Way than to have a special Verdict; and that this is on the same Reason of giving Colour; but if the Matter by which the Defendant justifies be all Matter of Fact, and proper for the Trial of a Jury, then the Defendant ought to plead the General Issue.

² *Mod. 274. Birch v. Wilson.*

In Assault and Battery at *Maidstone in Com' Kent* the Defendant pleads, that he is possessed of a House in *D.* and that the Plaintiff with another Woman came to his Door, and the other Woman endeavoured to turn him out of Possession, and thrust him down, and that in his Fall he threw down the Plaintiff against his Will and fell upon her; *absque hoc*, that he is guilty of a Battery at *Maidstone* or any other Place *extra, &c.* Plaintiff demurs, *1st*, (a) Because the Defendant has traversed the Place without alledging any such local Justification as to make it material. *2dly*, Because the Plea amounts to the General Issue. *Cur'*: The Justification, if we may call it so, is local; but the Plea does amount to the General Issue; but we are not bound to give Judgment for the Plaintiff upon that, tho' he do assign it as Cause of Demurrer; it is a discretionary Thing, and we may allow of a Plea that does amount to the General Issue, if it contain any Thing that may breed a Scruple in the *Lay Gents*; and therefore they advised the Parties to the compound the Matter.

Pasch. 29 Car. 2. in C. B. Nicholls v. Feames.

(a) For this vide *Cro. Eliz. 705.*

An Action on the Case was brought upon a Bill of Exchange, to which the Defendant pleaded, that after the Acceptance of the Bill he gave a Bond in Discharge thereof; and upon Demurrer to this Plea it was objected, that it amounted to the General Issue; for, the Debt upon the Bill being extinguished by the Bond, the Defendant ought to have pleaded *Non assumpsit*, and to have given the Bond in Evidence; and the Court seemed to be of that Opinion; but by Consent the Defendant pleaded the General Issue.

⁵ *Mod. 314. Hackshaw v. Clerk.*

By the Statute of Bankrupts a Liberty of pleading *Generally* is given to the Bankrupt, and thereby he may avoid the Hazard of pleading *Specially*; but then he must take upon himself the Proof of his Conformity to the Statute in every Particular; or if he thinks fit to plead the Matter specially, then he must set forth every Point; and by it he has this Advantage against the Plaintiff, that he must reply one Particular only, upon which Issue must be taken; but where he pleads the Matter specially, but does not set forth the whole, Judgment must be given against him; for by the Act it is to be pleaded as that the whole Merits may be tried.

¹ *Peer Williams 258.*

In

Carth. 380.
5 Mo. 252.
Hallet v.
Byrt.

In Trespafs for taking three Cows at *Beomister* in *Dorsetshire*, the Defendant pleaded specially, that the Bishop of *Sarum* was seised in Fee of the Hundred of *Beomister* in Right of his Bishoprick, and that he and all his Ancestors, Time out of Mind, had a Hundred Court of all personal Actions under 40s. and of Replevins within the said Hundred from three Weeks to three Weeks; and that the Bishop, and all those whose Estates, &c. had used Time out of Mind by their Steward of the said Hundred, upon Complaint made, &c. to replevy Cattle unjustly taken at any Place within the said Hundred, and that the Bishop had demised the said Hundred unto *Carleton Whitlock*, Esq; for three Lives, by Virtue of which he was seised, &c. and that the Plaintiff and *T. S.* took those Cows, being the Cows of one *E. G.* at *Beomister* within the said Hundred, and impounded them there, and thereupon the said *E. G.* complained to *Henry Samways*, Steward of the said *Carleton Whitlock* of his Hundred Court afore said, of the unjust taking the said three Cows; and that thereupon the said Steward made his Precept to the Bailiff of the said Hundred, &c. to replevy those Cows; by Virtue whereof the Defendants took them and delivered them to the said *E. G.* And on a special Demurrer to this Plea, for that it amounted to the General Issue, it was adjudged that the Plea, in the Form it was drawn, did amount to the General Issue, for that the Defendants had not admitted by their Plea so much as a Possession of the Cows in the Plaintiff at the Time of the Taking, &c. for they say the Cows were then impounded, which is the Custody of the Law, and not of the Party, so that the Defendants by their Plea had not given any Colour of Action whatsoever to the Plaintiff.

Carth. 63. per
Holt and
 two other
 Judges.

If there are three or more Partners, and an Action is brought against two of them, and they plead the Partnership, this amounts to the General Issue.

Skin. 362. per
Holt.

In many Cases, though a Man plead a Thing which may be given in Evidence, yet this shall not amount to a General Issue; as where the Plea goes by Way of Confession and Avoidance; as in Trespafs where the Defendant acknowledges the Plaintiff to have a good Cause of Action, unless for the Matter which the Defendant has pleaded in his Plea; in such Case such Plea shall not amount to a General Issue.

2 *Inst.* 316.

In an Appeal of Maihem if the Defendant plead Not guilty, he cannot give in Evidence that it was *se defendendo*, but ought to have pleaded it by Way of Justification in Bar of the Action.

3 *Leon.* 94.
Roffe's Case.

In Trespafs brought by *R.* for breaking his Close and beating of his Servant, and carrying away his Goods; upon Not guilty pleaded the Jury found this special Matter, *viz.* that Sir *F. B.* Chancellor of *England*, was seised, and leased to the Plaintiff and one *A.* which *A.* assigned his Moiety to one *C.* by whose Command the Defendant entred: And it was moved in Arrest, &c. that this Tenancy in Common betwixt the Plaintiff and him, in whose Right the Defendant justifies, could not be given in Evidence; so it could not be found by Verdict, but ought to have been pleaded specially; but the whole Court was against that, and held, that it might be given in Evidence.

Co. Lit. 47. b.
 In Debt for
 Rent the
 Defendant

In Debt for Rent, if the Lessor has nothing in the Land, the Lessee may plead, that the Lessor *Non demisit*, and give in Evidence the other Matter.

may plead *Nil debet*, and give in Evidence *Nil habuit in tenementis*, per *Holt*, Ch. J. Or on such Plea may give Eviscion in Evidence. *Comb.* 238.

Dier 92. a.
 pl. 16.

In Waste the Defendant may plead *Nul wast fait*, and give the Lopping of Trees in Evidence.

Fier 276. a.
 pl. 51.

But if Waste be assigned in Houses, and the Defendant pleads *Nul wast*, he cannot give in Evidence that the Houses were repaired before the

the Action brought, but ought to have pleaded it specially; for having once committed Waste, he ought to discharge himself by shewing the special Matter to the Court, which would have been a good Bar.

In an Action brought against *Jacob a Goldsmith*, upon a Bill of Exchange drawn by the Lord *Chandos* on the said *Jacob* for 112 Guineas, which was accepted by him, the Defendant pleaded in Bar, that after the 29th of *September* 1664, and before the making that Bill of Exchange, viz. on such a Day the said Lord *Chandos* and the Plaintiff *Huffey* played together with Dice at a certain Play, called Hazard, upon Tick and Credit, without ready Money, and that the Lord *Chandos* then and there at one Time and Meeting lost to the Plaintiff the said 120 Guineas upon Tick, and that for the Security of the Payment of the said Guineas lost as aforesaid the said Lord *Chandos*, on the Day and Year in the Declaration, &c. made the said Bill of Exchange, and directed it to the Defendant, requesting him to pay, &c. and that the Defendant did accept of the said Bill and assume upon himself, as the Plaintiff had declared, *Quorum premissorum pretextu & vigore statuti in eo casu editi & provis*, the said Bill of Exchange so by him accepted, and the Acceptance thereof, and the Promise of the said Defendant so as aforesaid made, *devenerunt & fuerunt & modo sunt vacua & nullius vigoris in lege, & hoc, &c.* To which the Plaintiff demurred, and shewed for Cause, that it amounted to the General Issue. *Sed per Cur*: The Plea is good, both as to the Matter and Form, and that it did not amount to the General Issue; and 'tis not a Rule, that because such a Matter may be given in Evidence, therefore it ought not to be pleaded specially; for it often happens to be in the Election of the Defendant, either to plead it specially or not, as he should be advised; as for Instance, the Pleading a Release, Coverture or Infancy, in an *Assumpsit* is certainly good; and yet those Things might be given in Evidence upon *Non assumpsit* pleaded; however the Defendant sometimes may not be willing to put such Matters of Law to the Judgment of the Jury, or perhaps may design to save the Costs of a special Verdict.

In Debt for Rent, upon *Nil debet* pleaded, the Statute of Limitations may be given in Evidence, for the Statute has made it no Debt at the Time of the Plea pleaded, the Words of which are in the Present Tense: But in Case on *Non assumpsit* the Statute of Limitations cannot be given in Evidence, for it speaks of a Time past, and relates to the Time of making the Promise.

4. Of sham Pleas, and the Consequence of false Pleading.

The Pleading a sham Plea, or such a one as the Party knows to be false, is a great Abuse on the Justice of the Court; and such Pleas have not only been set aside with Costs, but the Parties censured, and otherwise punished according to the Discretion of the Court.

If it appears judicially to the Court, on the Defendant's own shewing, that he hath pleaded a false Plea, this is a good Cause of Demurrer; as where the Defendant brought an Indenture into Court, and pleaded that it contained no Covenants, and on Inspection it appeared to contain several, Judgment was given against him.

It hath been holden, that pleading a false Plea is within the Statute of *Westm. 1. cap. 29.* which my Lord *Coke* says was made in Affirmance of the Common Law.

If therefore, says he, a Serjeant, or an Apprentice of the Law, in pleading a Matter of Fact issuable for his Client, alledge the same to be done at a Town in such a County, where indeed he knoweth there

Carth. 356.
5 Mod. 178.
1 Salk. 344.
Huffey v. Jacob.

1 Salk. 278.
 ruled by *Holt*
 at *Hertford*
Assizes.

1 Sand 316.
Smith v. Yemans.

2 Inst. 215.
1 Vent. 215.

2 Inst. 215.

is no such Town, of purpose to delay Justice, *et a' enginer la court*, this is a Deceit within the Statute, and hath been so holden.

2 Inst. 215.

And if the Client would have the Attorney plead a false Plea, he ought not to do it, for he may plead *Quod non sum veraciter informatus & ideo nullum responsum*, and that shall be entered in the Roll to save him from Damages in a Writ of Disceit; and if an Attorney ought

(a) Though Counsel are obliged to

not wittingly to plead a false Plea, *a fortiori* (a) a Serjeant or Apprentice ought not to do the same. be faithful to their Clients, yet not to manage their Causes in such a Manner, as Justice should be delayed, or Truth suppressed. 1 Vent. 213; per Hale.

Cro. Jac. 64.
Davis v.
Clerk.

In Debt upon an Obligation the Defendant pleaded *Non est factum*, and afterwards *Relicta verificatione* confessed the Action, and the Judgment against him was *in Misericordia*; and it was moved that it should be *Capiatur*, because he once denied his Deed, and so ought to be fined to the King; and of this Opinion was *Gawdy*; but *Fenner* and *Williams* held otherwise, because a Fine is not payable but where he denies his Deed, and it is found against him upon his false Plea, and the Jurors are troubled with the Trial thereof; there, for troubling the King's Courts, and for troubling the Country, and the Falsity of his Plea, he shall be fined and imprisoned; but when it is not found against him, but he relinquishes his Plea, he shall only be amerced, and accordingly the Judgment was affirmed.

Co. Lit. 366. a.

In Dower if the Tenant pleads Non-tenure for Part, and Detinue of Charters for the Residue, and these Pleas are found against the Tenant, the Demandant shall recover Damages for all the Time, from the Death of her Husband, without any Defalcation, for which Reason the Tenant ought to be careful that he does not plead a false Plea.

Dier 222.

Doct. pl. 181.

If an Obligation be made to pay Money at a certain Day and Place, Payment before the Day and at another Place is a good Discharge; yet in Pleading, if the Defendant says that he paid at the same Day and Place, according to the Obligation, the Issue will be found against him unless the Jury help him, which they are not obliged to do, his Plea not being in Strictness true.

Co. Lit. 366.

Doct. pl. 180.

In a Formedon if the Tenant pleads Warranty and Affets descended, and the Demandant takes Issue thereon, and the Issue is found for the Demandant that Affets descended, and thereupon the Demandant recovers; in this Case, although Affets afterwards descend, yet the Tenant shall never have a *Scire Fa.* on the same Judgment; for by his false Plea he hath lost the Benefit of the Statute of *Glocester*, and of the Statute *De donis* in this Point.

Doct. pl. 181.

Vide Tit.

Heir and Ancestor.

If an Heir at Law pleads *Riens per discent*, which is found against him, there shall be a general Judgment of his Body and other Lands and Goods, because of his false Plea.

Cro. Car. 436.

In a Writ of Annuity against one as Heir to his Ancestor the Defendant pleaded *Non est factum patris sui*, and found against him; whereupon it was moved that the Execution ought to be awarded of his proper Lands, and of his Lands descended, because he had pleaded a false Plea: But *per Cur.* the Denying the Deed to be his Father's was not a false Plea in his Cognizance; and although it were false, yet being charged in Respect of his Ancestor's Deed, the Land of his Ancestor shall only be taken in Execution, for that is the Cause of his Charge.

(H) Traverse :

(H) **Traverse:** And herein,

1. **The Nature thereof.**

A Traverse is the Denial of some material Point alledged in the Pleadings, and which, if properly taken, closes the Issue. It may be taken to the Declaration, Bar, Replication, &c. and therefore, if properly taken to the Declaration, it destroys the Plaintiff's Action; if to the Bar, it destroys what is said in Avoidance of the Action; and if to the Replication, what was said in Avoidance to the Bar.

Doff. pl. 344.
2 Lil. Reg. 586.
Co. Lit. 282.
Yelv. 195.

But for the better Understanding the Nature of a Traverse, we shall in the first Place insert some general Rules that have been laid down herein.

And first it is laid down, that where a Matter is expressly pleaded in the Affirmative, which is expressly denied by the other Party, there a Traverse is needless; because in such Case a sufficient Issue is joined.

36 H. 8. 15.
Cro. Eliz. 755.
1 It. Rep. 15.
same Rule.

1 Vent. 101. same Rule laid down; and that if it were otherwise, they might traverse one upon another *in Infinitum.*

As where in an *Audita querela*, to avoid the Execution of a Recognizance, the Plaintiff sets forth that it was defeazanced upon the Payment of divers Sums of Money at certain Days, and that he was at the Place appointed, and tendered the Money, and that the Defendant was not there to receive it; the Defendant pleaded *Protestando*, that the Plaintiff was not there to pay it, and that he was there ready to receive it; *absque hoc*, that the Plaintiff was ready to pay it, which being specially demurred to, the Court held the Plea naught; and that there being an express Affirmative and Negative, there should have been no Traverse.

Cro. Eliz. 754. 5.
Huish v. Phillips.

So if in an Assise the Defendant pleads a Feoffment by a Stranger, which he avers to be absolute and without any Condition, and the Plaintiff replies that it was on Condition, this is sufficient without any further Traverse.

2 Rol. Rep. 35.
Hob. 71, 72.

But this Rule, that there shall be no Traverse where the Matter alledged by one Party is expressly denied by the other, must be understood of those Cases where the Denial makes a compleat Issue; for though the Matter contradicts, that is not sufficient without an apt Issue is formed upon an Affirmative and Negative; as where the Death of a Man is positively alledged on one Part, and his Life by the other Party, here the Death ought to be traversed, otherwise no Issue is joined.

6 H. 7. 5, 6.
1 Vent. 213.
1 Lutw. 15.

A Traverse therefore seems to be properly taken when the adverse Party to the Declaration, Plea, Replication, &c. forsaking the General Issue sets up a Title for himself, or sets forth a particular Specification of his Case, with a Justification thereof, &c. with a Traverse, (*a*) *Absque hoc*, or Denial of the Matter alledged by the adverse Party, or that the same is true in that (*b*) Manner and Form he hath alledged; and such Specification is called an (*c*) Inducement to the Traverse.

Hob. 103. 4.

(*a*) That *absque hoc*, so that without that, &c. are the proper Words of

Traverse. *1 Sand. 22.* *2 Salk. 628.* (*b*) Where the Words *modo & forma* are only Words of Form and not of Substance, and the Diversities therein, *vide Co. Lit. 281.* (*c*) Such Inducement is said to be shewing of cross Matter contrary to the Allegation of the adverse Party, *Dier 365. pl. 33.* and therefore a Traverse is said to be the Affirming of one Thing and the Denial of another. *2 Lil. Reg. 587.* *Doff. pl. 344.*

Hence it is said to be a Rule, that when any Thing pleaded specially by the Defendant, is directly contrary to the Matter in the Declaration,

1 Sid. 301.

claration, such Plea is not good without a Traverse; yet it is in the Election of the other Party to waive the Advantage thereof, or demur thereupon.

Cro. Car. 336. The Inducement to the Traverse ought to be (a) sufficient in
(a) Also it Matter.
is said to be
a Rule, that nothing can be an Inducement to a Traverse but such a Thing as is traversable.
2 *Leon.* 32 per *Manswood.*

3 *Mod.* 320. A Traverse ought not to be taken but where the Thing traversed
(b) That is (b) issuable.
Matter of
Law cannot be traversed, *Yelv.* 200. nor where Part is Master of Law, and Part Matter of Fact.
2 *Mod.* 55.

Cro. Jac. 221. And therefore where in Ejectment upon a Lease made by *E. J.* the
Yelv. 151. Defendant pleaded, that before *E. J.* had any Thing to do, *Ec. M. J.*
Bedel v. Lull. was seised in Fee, after whose Death the Land descended to his Heir,
and that *E.* entered and was seised by Abatement; the Plaintiff replied,
and confessed the Seisin of *M.* but saith, that he devised it in
Fee to *E. J.* who entred; *absque hoc*, that *E. J.* was seised by Abate-
ment: And upon Demurrer this was held to be an ill Traverse; for
the Plaintiff had confessed the Seisin of *M.* and avoided it by the De-
vise, and therefore ought not to have traversed the Abatement; for
having derived a good Title by the Devise to the Lessor, 'tis an Ar-
gument that he entered lawfully, and it was that alone that was issua-
ble, and not the Abatement; therefore it was ill to traverse that, be-
cause it must never be taken, but where the Thing traversed is issuable.

(c) 2 *Sand.* The Traverse is regularly to be taken to the (c) most material Point
5, 28. alleged by the other Party, and is not to be (d) multifarious, but to
1 *Rob. Rep.* a single Point.
235. & vide
infra. (d) 3 *Lev.* 40, 41.

Harv. 317. But any Part of what the Defendant (e) makes his Title is tra-
(e) But a De- versable; as if in Trespass the Defendant alledge a Seisin in Fee in
fendant can- *J. S.* and a Demise to himself; the Plaintiff may traverse either the
not traverse Seisin in Fee, or the Demise, at his Election.
a Matter not
alleged in the Declaration. 2 *Vent.* 79. But if the Plaintiff assigns several Breaches, the Defen-
dant may traverse any of them. 1 *Salk.* 138.

Vaugh. 8. Also, when the Defendant traverseth any Part of the Plaintiff's
Count or Declaration in a *Quare impedit*, it ought to be such Part as is
both inconsistent with the Defendant's Title, and being found against
the Plaintiff doth absolutely destroy his Title, if it doth not so, how-
ever inconsistent it be with the Defendant's Title, the Traverse is not
well taken.

But for the Exceptions this Matter, that there cannot be a Traverse upon a Traverse, that
to this gene- Pleadings and Proceeding might not be endless; for if that were per-
ral Rule mitted each Party might go on traversing *ad infinitum.*
vide infra.

An Issue joined upon an *Absque hoc* ought to have an (f) Affirma-
Co. Lit. 126. tive after it.

(f) 1 *Salk.* 4. S. P. admitted to be the general Rule; but the Court seemed to think, that where an *Absque hoc*
comprizes the whole Matter generally, as *absque tali causa*, it may conclude *Ec de hoc ponit se super*
patriam; but where it only traverses a particular Matter, as *absque tali warranto*, *Ec.* it ought to
be averred. *Farell.* 105. *L. P.*

3 *Mod.* 203. In Assault and Battery the Defendant pleaded a Release of all Ac-
tions, *Ec.* The Plaintiff replied, that the Release was gotten by
Durefs, *Ec.* The Defendant rejoined, and shewed Cause why it was
not gotten by Durefs; *absque hoc*, that it was voluntary, *Et hoc petit*
quod

quod inquiratur per patriam: Upon this Issue the Cause was tried, and the Plaintiff had a Verdict; and it was moved in Arrest of Judgment, that he ought not to conclude to the Country after a Traverse; because a Traverse it self is negative, and therefore the Defendant ought to have joined Issue in the Affirmative; it was admitted, that if Issue had been joined before the Traverse it might have been helped by the Statute of Jeofails; but not being so in this Case the Judgment was arrested.

If the Defendant's Plea be in the Negative, the Plaintiff need not traverse it, for a Negative cannot be traversed; and therefore, if an Executor or Heir in Debt, for a Debt due by the Testator or Ancestor of the Defendant, pleads no Assets, or *Riens per descent præter*, &c. the Plaintiff, without traversing the *Præter*, may reply generally Assets *ultra*, without saying what, or where they are.

Palm. 511.
2 Mod. 50.
 But for this
vide 8 Co.
Mary Ship-
ley's Case,
Cro. Car.
Dorchester v.
Webb. *Hob.* 104. *Yelv.* 165.

But for the fuller Explication of this Matter we shall consider more particularly:

2. In what Cases a Traverse is permitted.

It hath been held, on the 26 *H. 8. cap. 3.* for Payment of Tenths, and which enacts, *That after Default and Certificate made thereof to the Court, under the Seal of the Bishop, the Benefice shall be void*, that the Party may traverse such Certificate; for herein the Bishop acts only as an Officer, not as a Judge.

Cro. Eliz. 80.
1 Leon. 269.
Moor 541,
 915.
Savil, Case
 63.

But if on a Trial of general Bastardy, the Party be certified a Bastard by the Ordinary, such Certificate cannot be traversed; for herein the Ordinary acts as Judge; also such Certificate shall bind perpetually the Person certified a Bastard, though he was not Party to the Suit; as all Persons are 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.

1 Rol. Abr.
 362.

If upon a Judgment obtained by *A.* he sues out a *Scire Facias*, upon which *J. S.* is returned Tertenant, he cannot traverse this Return of the (a) Sheriff.

2 Mod. 10.
Whitrong v.
Blaney.
 (a) That the

Sheriff's Return of a Rescous cannot be traversed. *Dier* 212. *Cro. Eliz.* 780.

On the Statutes against Forcible Entries and Detainers it hath been holden, that one Justice of Peace may make a Record of a Forcible Detainer, and that such Record is not traversable; because the Justice of Peace in making thereof acts not as a Minister, but as a Judge.

1 Hawk.
P. C. 142.
Vide Tit.
Forcible Entry
and Detainer.

It hath been held, that Presentments in the Quarter-Sessions of the Peace, and even in *B. R.* are traversable; and that if it be so in Courts superior to the Leet, *a fortiori* it must be so in Presentments at the Leet.

Carth. 74.
 but for this
vide 1 Hawk.
P. C. 217, 219.
2 Hawk. P. C.
 71.

It is held, that wherever an Escape is finable, the Presentment of it is traversable; but where the Offence is amerceable only, there the Presentment is of it self conclusive, such Amerciaments being reckoned among those *Minima de quibus non curat lex.*

2 Hawk. P. C.
 154.

It is held by some Opinions, that an Inquisition taken by the Coroner *super visum corporis* cannot be traversed; also in Respect to that high Credit that the Law gives to an Inquisition found before a Coroner, it hath been held, that if an Inquisition finds that a Person has

But for this
vide Tit. Co-
roner, Letter
 (D).

been slain, and that *J. S.* hath fled, he forfeits his Goods and Chattels; the Coroner's Inquest being of that Solemnity as not to be traversable.

1 *Roll. Rep.*
226.
2 *Roll. Abr.*
299.
Hard. 131.
Raym. 406.

The Probate of a Will is not traversable; and herein it is settled, that the Ecclesiastical Courts having the Probate of Wills, they, as incident to such Jurisdiction, have Power to determine all those Matters that are necessary to the authenticating such Testament; therefore if the Seal of the Ordinary appears, it cannot be suggested, or given in 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.

Dier 254.
Gouldf. 351.
3 *Leon.* 199.
3 *Co.* 57. but
vide Show.
P. Cases 88.
3 *Lev.* 313.

If the Ordinary refuse a Person presented to him for Cause, such Cause is traversable, and shall be tried by the Metropolitan if the Party be living, but if dead by a Jury; for though the Bishop be Judge in examining, yet as his Proceedings are not of Record, the Cause of Refusal is traversable.

3. In what Cases a Traverse is necessary.

1 *Lutw.* 381.

Herein it is laid down as a general Rule, that where the Matter alledged by the Defendant in his Plea is contrary to the Matter set forth in the Declaration, there must be a Traverse or Denial of such Matter set forth in the Declaration; so if the Replication contradicts the Matter alledged in the Plea, &c. (a) as where the Defendant alleges Seisin in one from whom he claimeth, the Plaintiff cannot alledge Seisin in another from whom he claimeth, without traversing, confessing or avoiding the Seisin alledged by the Defendant.

(a) *Cro. Eliz.*
30.

5 *H.* 7. 11, 12.
Doct. pl. 349
Dier 312. b.
S. P.
(b) 1 *Leon.*
78. *S. P.*

So if it be alledged by the Defendant, that the Party died seised in Fee, and the Plaintiff alleges that he died seised in Tail, he must traverse the Dying seised in Fee, (b) because two Affirmatives cannot make an Issue.

2 *Mod.* 60.
Snow v.
Wiseman; &
vide Cro. Jac.
221. that
the Plaintiff
having said
enough in
his Case to

The Omission of a Traverse where necessary is Matter of Substance; and therefore where in Trespass for taking his Horse the Defendant pleaded, that he was seised of such Lands, and intitled himself to an Heriot; the Plaintiff replied that another Person was jointly seised with the Defendant, *Et hoc paratus est verificare*; and on Demurrer it was adjudged for the Defendant, because the Plaintiff ought to have traversed the sole Seisin.

avoid the Bar, if he had traversed it also it would make his Replication naught. *Et vide* 1 *Leon.*
43 4. that a Traverse is but Matter of Form, and the Want thereof shall not prejudice the other Party in Point of Judgment; but the Judges ought to judge upon the Substance, and not upon the Manner or Form of Pleading; & *vide Tit. Amendment* and *Jeofail*.

2 *Mod.* 168.
Singleton v.
Bawtree.

Where a Man confesses and avoids he needs not traverse; but where in *Assumpsit* against the Defendant as Executor, he pleaded that the Testator made *J. S.* Executor, who proved the Will, and took upon him the Execution thereof, and concluded in Abatement; but because he had not traversed, *absque hoc*, that he was Executor, or administered as Executor, it was adjudged against him.

Cro. Eliz. 281.

When a Malefeazance is laid to the Defendant's Charge he ought expressly to traverse it, and not to answer it by Argument; but in Waste the Defendant may say it was ruinous, without answering expressly to the Waste; so in Case of an Innkeeper, he may alledge a Robbery without traversing it was by his Default.

In Debt for Rent, the Plaintiff declares on a Lease of four Acres of Land at 5*l.* Rent, and for Rent arrear he brought the Action; the Defendant pleads to Part *Nil debet*, and to the Residue he pleads, that the Lease was of the said four Acres, and of one Acre more, and that before the Rent was arrear the Plaintiff entered into the fifth Acre: On which the Plaintiff demurs; and Reason shewn on the Argument was, for that he did not traverse, that he demised four Acres only. But on the other Side it was said for the Defendant, that the Traverse ought to come on the Plaintiff's Part, *viz.* he ought in his Replication to have maintained the Lease in the Declaration, and have traversed, that he demised the fifth Acre. To which it was answered, that that would be a Departure from his Declaration, and therefore the Traverse ought to have been on the Defendant's Part; for when he pleads another Lease than that upon which the Plaintiff declared, he ought, to traverse the Lease on which the Plaintiff declared, *viz.* to plead the Lease of the fifth Acre, *absque hoc*, that he demised the four Acres only; and so held the Court, and gave Judgment for the Plaintiff.

1 Sand. 206.
1 Sid. 405.
Raym. 175.
2 Keb. 467.
1 Lev. 263.
Salmon v. Smith.

In an Action against a Sheriff for an Escape, the Plaintiff declared, that the Defendant being Sheriff of *Surry* voluntarily suffered *J. S.* whom he had in Execution to escape. The Defendant, protesting that he did not let him voluntarily Escape, pleads, that he took him upon fresh Pursuit. To which it was demurred; because he did not traverse the voluntary Escape: And resolved for the Defendant; it being impertinent for the Plaintiff to alledge it, and no Ways necessary to his Action; and it being out of Time to set it forth in the Declaration, being a Matter that ought to come in in the Replication. And *per Hale C. J.* 'Tis like leaping before one comes to the Stile; as in Debt upon a Bond the Plaintiff should declare, that at the Time of Sealing and Delivery of the Bond the Defendant was of full Age, and the Defendant should plead *Deins age*, without traversing the Plaintiff's Allegation.

1 Vent. 211,
217. Sir
Ralph Bovey's
Case.
1 Lutw. 381.
S. C. cited.
Latch 200.
S. P. ad-
judged.
Et vide Cro.
Jac. 657.

But in Debt by the Gentlemen Ushers of the King for a Fee of 5*l.* due to them from one who had received the Degree of Knighthood, they declared, that Time out of Mind they used to receive a Fee of 5*l.* of every Person who voluntarily and without Compulsion had received the Degree of a Knight, &c. The Defendant pleaded, that he had taken the Degree in sole Obedience to the King; but because he had not traversed *absque hoc, quod def' recepit vel suscepit Gradum Militar' voluntarie & sine compulsione*, it was adjudged for the Plaintiff; for the voluntary Acceptance of Honour, without Compulsion, is of the Essence of the Action, and not like the aforefaid Case of an Escape.

1 Lutw. 381.
Duppa & al'
v. Stephens.

In Account against one as Bailiff of a Manor such a Year, it is a good Plea, that *J. S.* was his Bailiff that Year; but there he must traverse that he himself was not.

Dier 66. b.
pl. 15.

So in Escape against a Gaoler he may plead, that the Prison was broke open by the King's Enemies, or that it was burnt by a sudden Fire; but then he must traverse, that the Escape was not in other Manner, or as the Plaintiff hath alledged.

Dier 66. b.

If in Trespass the Defendant intitles himself by the Feoffment of a Stranger, and the Plaintiff replies and maintains, that the same Stranger did enfeoff him, this cannot be a good Issue (a) without a Traverse of the Feoffment alledged to be made to the Defendant.

Poph. 67.

(a) That where the Parties in

Pleading vary in the Estate alledged, or in the Quantity thereof, there ought to be a Traverse. *Tel 140.*

Stile 150,
198, =10.

In Assault and Battery the Defendant pleads a special Plea, and justifies; the Plaintiff replies *de injuria sua propria*; upon which Issue is joined, and a Verdict for the Plaintiff; but in Arrest of Judgment it was held, that the Replication was not good, in not answering the special Matter pleaded, and traversing *absque tali causa*, so that an Issue might be joined on an Affirmative and Negative; and therefore the Court ordered a Repleader.

Stile 373.

If in Covenant for Payment of Money the Defendant pleads, that he was at *Lisbon in Portugal* at the Day of the Payment of the Money which he had covenanted to pay, the Plaintiff may reply, that he was in *England*, without a Traverse, *absque hoc*, that he was in *Portugal*.

Godb. 43.

If Account be brought against two, and one of them pleads *Ne unque son receiver*; this is good without a Traverse, that he and his Companion were Receivers.

3 Leon. 15.

If in Trespass for chasing his Ewes, being great with Lamb, so as by driving them he lost his Lambs, the Defendant justifies, that they were Damage-feasant, and that therefore he drove them to Pound, &c. this is naught without a Traverse; for though he might take and drive them to Pound, yet this should have been done without any Prejudice to them, and was therefore a Matter traversable.

2 Leon. 209.
that one
Prescription
pleaded a-
gainst ano-
ther is not
good without a Traverse, *vide* Yelv. 217. 9 Co. 59. 2 Mod. 104. Carth. 116.

If there are two Prescriptions, one pleaded by the Defendant by way of Bar, the other set forth by the Plaintiff in his Replication, without any Traverse of that which is alledged in Bar, this is naught.

2 Leon. 209,
210. Ruffel
v. Broker.

As where in Trespass for cutting Oaks the Defendant pleads, that he was seised of a Messuage in Fee, and prescribes to have *rationabile estoverium ad libit' capiend' in boscis*; the Plaintiff replies, that the *locus in quo* was within the Forest, and that the Defendant and all those, &c. *habere consueverunt rationabile estoverium, &c. per liberationem forestarii*: And upon a Demurrer the Replication was held naught; because the Plaintiff ought to have pleaded the Law of the Forest, *viz. Lex forestæ talis est*, or to have traversed the Defendant's Prescription, and not to have set forth another Prescription in his Replication without a Traverse.

4 Leon. 16.
Ruisbrook v.
Pisanies.

In Trespass for pulling down his Hurdles in his Close, the Defendant justified, that *J. S.* was Lord of the Manor of *D.* and that the said *J. S.* and all those whose Estate he had in the said Manor, had had a free Course for their Sheep in the Place where, &c. and that the Tenant of the said Close could not there erect Hurdles without the Leave of the Lord of the Manor, and that the said *J. S.* let to the Defendant the said Manor, and because the Plaintiff erected Hurdles without Leave, &c. in the said Close he threw them down, as it was lawful for him to do: The Plaintiff replied of his own Wrong, without Cause, &c. and it was held an ill Replication, because the Plaintiff had not traversed the Prescription.

4. Whether there may be a Traverse upon a Traverse.

Co. Lit. 282.
Hob. 104.
Hut. 97.
1 Sand. 20, 22.
Vaugh. 62.
1 Fon. 216.
Cro. Car. 105.

It is laid down as a general Rule, that there cannot be a Traverse upon a Traverse; because that in all Pleadings, whereupon a Traverse is properly taken, the Issue is closed; and therefore a Traverse cannot be taken on a Traverse, for a Traverse must be a material Point; and if to the Declaration it destroys the Plaintiff's Action; if to the Bar, it destroys

destroys what is said in Avoidance of the Action; and if to the Repliation, what was said in Avoidance to the Bar, & sic de cæteris, and consequently a subsequent Traverse will be insignificant; because (a) when a material Traverse is taken the rest stands confessed.

(a) That whatever is traversable and not traversed is admitted. 1 Salk. 91.

This Rule is thus laid down by my Lord *Hobart*, That regularly whensoever a Traverse is taken apt and material to the Plaintiff's Title, the Plaintiff is bound to it, and cannot for the same Thing leave it, and force the Defendant to accept another Traverse tendered by him. *Hob. 104.*

But if a Man brings an Action of Trespas for breaking his Close on a certain Day, if the Defendant plead a Release of Actions he shall traverse all Trespases after; if a Feoffment, he shall traverse all Trespases before; if a Licence for once, all before and after; and in these Cases the Plaintiff hath it in his Choice to leave the Traverse, and traverse the Point of Justification, ff. the Release, Feoffment or Licence; or he may alledge a Trespas before or after, and so join upon the Traverse offered, which is Traverse after a Traverse, but yet is not according to the Rule, a Traverse upon a Traverse to the self-same Point. *20 H. 4. 2. 12 E. 4. 6. 2 Ric. 3. 9. Hob. 104.*

So if a Man brings an Action of Waste for felling of Trees, and lays that the Lessee felled and sold them, and the Defendant confesses that he felled them, but saith that he bestowed them in repairing the House, *absque hoc*, that he sold them; the Plaintiff may reply that he let them rot, or any like Case of Waste, *absque hoc*, that he employed them in Reparations; and though this be a Traverse upon a Traverse, and directly to the same Thing, yet it is out of the above-mentioned Rule, because the Traverse in this Case was not material; for the Plaintiff might have declared of the Selling only, and the other Point was meer Surplufage. *Hob. 104.*

If Assault and false Imprisonment be laid in *London*, and the Defendant pleads a special Justification in (a) another County, with a Traverse or *absque hoc*, &c. the Plaintiff may maintain his Action, and traverse the special Matter alledged by the Defendant, though this be a Traverse upon a Traverse; for as the Matter alledged by the Defendant may be false, it would be unreasonable by such Falstity to oust the Plaintiff of the Liberty the Law gives him, of laying his Action in the proper County where the Cause arises. *Poph. 107. Cro. Eliz. 418. Moor 350. S. C. Parmer and Verard. 2 Lutw. 1437. S. C. ci ed. and like Point adjudged.*

Cro. Eliz. 99. S. P. adjudged. (a) There never shall be a Traverse upon a Traverse, but where the Traverse in the Bar takes from the Plaintiff the Liberty of his Action for the Place or Time, or such like, there the Plaintiff may maintain his Action for the Place or Time, and may traverse the Inducement to the Traverse, and needs not to join with the Defendant in the Traverse, but at his Pleasure may do the one or the other; but when the Inducement is made and concluded with a Traverse of a Title shewn by the Plaintiff, there the Plaintiff is enforced to maintain his Title, and not to traverse the Inducement to the Traverse. *Cro. Car. 105. 2 Lutw. 1630. S. P.*

In Trespas the Defendant justifies his Entry by the Command of *J. S.* Plaintiff replies, and shews that *J. S.* was seised in Fee, and let unto him at Will, and traverseth the Command of *J. S.* the Defendant maintains his Plea, that *J. S.* commanded him to enter, and that he entered by his Command, and traverseth the Lease at Will; and it being hereupon demurred, it was adjudged for the Plaintiff, that the Command was traversable, and that therefore the Defendant's Rejoinder to make a Traverse upon a Traverse is not good. *Cro. Car. 586. Thom v. Skering.*

Where one traverses a Thing which he had before confessed and avoided, this is merely Form, and aided upon a general Demurrer; *Carth. 166. 2 Lutw. 1632.*

for the other Party might traverse that Traverse, and also the Inducement to it.

2 Lev. 112.
1 Sid. 140
1 Hawk. P. C.
221.

Where to an Indictment for not repairing a Bridge the 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 an Issue ought to be taken on such second Traverse; and the Attorney General may afterwards surmise, that the Defendants are bound to repair it, and then the whole Matter shall be tried by an indifferent Jury.

Vaugh. 62, 64.
1 Mod. 280.
Stansf. 64. for
this vide Tit.
Prerogat. ve.

So tho' regularly a common Person cannot take a Traverse upon a Traverse, yet the King by his Prerogative may, upon a Title disclosed in the Traverse of the Party, desert his own Title, and take a Traverse to such Matter disclosed, tho' this be a Traverse upon a Traverse.

1 Lev. 192.
1 Saund. 20,
21.
2 Keb. 94,
105. S. C.
Bennet v.
Pilkins.

In Debt on an Obligation conditioned to appear on a Bill of *Middlesex*, returnable *die Sabbati prox' post quinden' Pasch.* the Defendant pleads, that he was arrested on a Bill returnable *die Veneris*, and pleads the Statute of 32 H. 6. and that the Bond was given for Ease and Favour. The Plaintiff replies, that he was taken on a Bill returnable *die Sabbati*, and not *die Veneris*. The Defendant rejoins, that he was taken by Virtue of a Bill returnable *die Veneris, absque hoc*, that he was taken by Virtue of a Bill returnable *die Sabbati*; on which the Plaintiff demurred: And it was argued, that the Rejoinder was ill, and a Traverse upon a Traverse; for when the Plaintiff replied, that he was taken by a Bill returnable *die Sabbati, & non die Veneris*, the *& non die Veneris* was a Traverse, whereon the Defendant might have joined, and taken Issue. On the other Side it was argued, that the *& non* was not any Traverse, at least not a formal Traverse, or such as the Books mention, that a Traverse cannot be taken on a Traverse; and to have joined Issue on the *& non die Veneris* would have made an immaterial Issue; for it matters not whether he were taken by Virtue of a Bill returnable *die Veneris*, or not; for if he were not arrested on a Bill returnable *die Sabbati*, the Bond is void by the Statute; but if he were taken on a Bill returnable *die Sabbati*, 'tis good, for that only is traversable and triable; and so held the Court.

Carth. 99, 100.
Crosse v Hunt.

In Debt upon a Specialty for 200*l.* which was to this Effect, ff. *The Defendant did declare from his Heart before God, that he had taken the Plaintiff to be his Wife, as she had taken him for her Husband; and the swore to confirm the said Plaintiff, that he had no Design but to perform his Promise aforesaid, he (the said Defendant) obliged himself by the same Deed to pay unto the Plaintiff 200*l.* if he should happen to be so base as to be worse than his Word; and that if he did not pay it when demanded, she (the Plaintiff) should have good Right to sue and recover it by Law, &c.* The Breach assigned was, that she had tendered herself to marry the Defendant, but that he refused, and afterwards married another Woman, *per quod actio accrevit.* The Defendant pleaded, that he, after the making of the aforesaid Writing, *obtulit se* to marry the Plaintiff, and she refused; *absque hoc*, that he refused to take her for his Wife before she had refused to take him for her Husband. The Plaintiff replied, that she tendered herself to marry the Defendant, and he refused; *absque hoc*, that the Defendant offered himself to marry the Plaintiff; *& hoc, &c.* And upon a Demurrer to this Replication, it was insisted for the Defendant, that the Traverse in it was ill; because she had traversed that which was the Inducement of the Traverse in the Bar, so that it is a Traverse upon a Traverse, which the Law will not allow; besides, the Words of this Deed are *in presenti*, and not executory, but declaratory of an Act executed. On the

the other Side it was argued, that the Words in this Deed are sufficient to create a Contract, and that of the highest Nature, for God is called as a Witness to it; and these Words cannot import any other Sense, but only a Contract to marry the Plaintiff: That the Traverse in Bar is ill, because it is too large; for the Defendant had traversed more than was alledged in the Declaration; *ff. absque hoc*, that he had refused to take the Plaintiff for his Wife before she had refused to take him for her Husband, so that he intended to make this Circumstance of Time Parcel of the Issue; whereas there is no such Circumstance alledged in the Declaration, nor any Affirmation, that the Defendant had refused before the Plaintiff had refused; and therefore, because the Traverse in the Bar was idle and frivolous, the Plaintiff might well traverse the Substance of the Matter of the Bar; and of this Opinion was the Court, as well to the Pleading as to the Matter in Law.

5. To what Point the Traverse shall be taken; and therein what Matters are traversable, and of the Manner of taking thereof.

Herein the general Rule is, that the Traverse must be taken to some material Point alledged by the adverse Party, which, if found for him who takes it, absolutely destroys the adverse Party's Right, by shewing, that he hath none in Manner and Form as he hath alledged; and being to the (a) principal Point alledged puts an End to the Matter.

be always of such Part, as if found for the Defendant destroys the Plaintiff's Action. *2 Sand. 5, 28. 6 Co. 24 a. 1 Rol. Rep. 235. Carter 217. Lane 18. (a) A Traverse should Comb. 321.*

If in Covenant on a Charter-party the Plaintiff declares, that upon the Ship's going with the next fair Wind, &c. he the Defendant should pay so much; the Defendant by way of Traverse says, that the Ship did not go with the first fair Wind; and this was held an ill Traverse, not being to the principal Point, or Gift of the Action, which is the going of the Ship, and not the Nature of the Wind.

A Traverse must be taken to some Matter alledged; and therefore, where in false Imprisonment the Defendant justified by Process out of an Inferior Court, and the Plaintiff replied, that the Cause of Action accrued out of the Jurisdiction; *absque hoc*, that it accrued within the Jurisdiction, the Traverse is ill, being of a Matter not alledged before; but it was held, that this being only an immaterial Traverse, no Advantage could be taken of it on a general Demurrer, and that then the Residue of the Replication should stand good. *Poph. 161. Latch 12. Noy 75. Fendl. 116. Palm. 397. S. C. Constable v. Clobery. Lutw. 935, 1560.*

If any Thing in the Count be traversed, it must be such Part as, if true, is consistent with the Defendant's Title; and if false, or found against the Plaintiff, doth absolutely destroy his Title; nay, if the Traverse leaves no Title in the Plaintiff, then it is good, whatever comes of the Defendant's. *1 Sand. 21. Vaugh. 3. Show. Pari. Ca. 220-1.*

In a *Scire Facias* against *A.* and his Wife, reciting, that the Wife *dum sola fuit* recovered in the King's Bench, in an Action upon the Case, *26 l. 13 s. 4 d.* for Damages and Costs, and had Execution of these Damages, and is thereof possessed; and whereas afterwards the said Judgment was by Writ of Error removed into the Exchequer Chamber, and there reversed, and Restitution awarded; and afterwards she took the said *A.* to Husband: The Plaintiff thereupon brought this Writ to have Restitution. The Defendant pleaded, that after the Reversal had, and before the Purchase of this Writ, he paid to the Plaintiff the said Debt and Costs of *26 l. 13 s. 4 d. absque hoc*, that *Cro. Car. 228. Vezey v. Harris & ux.*

that they be *possessionati* of the said Money *prout*: And upon Demurrer the Plea and Traverse were both held ill; and *1st*, Three Judges held the Plea ill, because it is grounded and affirmed against a Record; for a Payment being against Matter of Record cannot be a Discharge, unless by Matter of Record. *2dly*, Admitting it a good Plea, yet it is ill as pleaded; for he doth not rely upon it, but traverseth that which is material, *viz. absque hoc*, that he is *possessionatus*, &c. which was idly alledged, and not material or traversable; and by his Traverse he waives his Pleading of the Payment, which being (a) specially shewn for Cause of Demurrer, the Demurrer is good: But *Berkley* held, that Payment had been a good Plea, if he had relied thereupon; because that he avers, that thereby the Party is satisfied; and that in divers Cases Matter in Fact may be pleaded in Discharge; as in Debt upon an Escape, he may plead, that the Plaintiff commanded him to let him out of Execution, and such like, &c. but as to the Traverse he conceived it ill; and therefore agreed with the other Justices, that Judgment should be given for the Plaintiff.

(a) That an immaterial Traverse is aided by 27 Eliz. unless it be specially demurred to. *Dier* 366. *Yelv.* 151. *Co. Ent.* 505. *Cro. Jac.* 221. *2 Lutw.* 1558.

Stile 344. *Wood v. Holland.*

In Trespass and Ejectment the Defendant pleads, that the Plaintiff disseised *J. S.* of the Land, and then made a Lease of it to him, and that afterwards the Land descended to the Plaintiff. The Plaintiff replies, that he was seised of the Lands, and traversed the Disseisin on *J. S.* And on Demurrer, because he had not traversed the Descent, and not the Disseisin, it was held by *Rolle C. J.* that the traversing the Disseisin makes an End of all, and was therefore well taken, being the most material Matter, altho' the Descent might likewise have been traversed.

Cro. Car. 502. *Arundel v. Sanders.*

Trespass upon the Case brought by Bill in the King's Bench, that the Defendant's Father held of him such Land by Knight's Service, and died in his Homage, his Heir within Age, and that he tendered unto him a convenient Marriage, and shews what, &c. and demanded of him the Value of the Marriage, &c. The Defendant *protestando* to the Tenure, *pro placito* traverseth the Tender, &c. and hereupon the Plaintiff demurred: And it was resolved that the Plea was ill, for the Tender is not traversable.

Yelv. 122-3. *Lane v. Alexander.*

If the Plaintiff in his Replication sets forth a Grant of Copyhold Lands such a Day, and by such a Seneschal; and the Defendant by way of Rejoinder maintains his Bar, and traverses the Grant to the Defendant the said Day, and by the said Seneschal, the Traverse is ill; for the principal Point is the Grant, which may be at another Court and Day, and by another Seneschal, and yet good.

Yelv. 1:2.

If a Feoffment by Deed such a Day be pleaded, there can be no Traverse to the Day, because the Estate passes by Livery, and not by the Deed.

6 Co. 24, 25. *Cro. Eliz.* 650. *Moor* 551. *Helyar's Case.* *2 Vent.* 212. S. C. cited, and held to be only Form, and aided by the 27 Eliz.

A Difference hath been taken between pleading a Feoffment and a Grant of a particular Estate; that in the first Case, if the other will intitle himself by an elder Feoffment, he ought to traverse, but not in the last Case; because a Man may come to a Fee-simple by divers Means, *viz.* by Disseisin and Tort, or by lawful Means; and therefore, when one intitles himself to a particular Estate by an elder Grant, he shall not traverse the last Grant, but shall compel the other to shew by what Title he claims it after the elder Grant.

Marsh. 21.

A Man pleaded a Descent of a Copyhold in Fee; the Defendant, to take away the Descent pleaded, that the Ancestor did surrender to the Use of another; *absque hoc*, that the Copyholder died seised: And the Opinion of the Court was, that it was no good Traverse; because he traversed that which needed not to be traversed; for being Copyhold,

hold, and having pleaded a Surrender of it, the Party cannot have it again, if not by Surrender, as in *Hellyar's Case supra*; for as none can have a Lease for Years but by lawful Conveyance, so none can have a Copyhold Estate if not by Surrender.

In Trespass the Defendant pleads, that *A.* was seised, and infeoffed *B.* who infeoffed *C.* who infeoffed *D.* whose Estate the Defendant hath; in this Case the Plaintiff may traverse which of the Feoffments he pleases.

Several material Things alledged, it is in the Election of the Party to traverse which he pleases.

If in Trespass or Case the Plaintiff declares that *J. S.* was seised in Fee, and made a Lease to him, and the Defendant pleads that *J. N.* was seised in Fee, and leased to him, &c. this Seisin of *J. N.* shall be intended by Disseisin, for he ought to have traversed the Seisin of *J. S.* and said, that long before such a one was seised, &c.

In Trespass the Defendant pleads, that long before the Trespass one *James Stephens* was seised in Fee, and 12 *Iliz.* infeoffed *Thomas Norwood* to the Use of *James Baker* and *Mary* his Wife, and the Heirs of their Bodies; and that they had Issue *Henry Baker*, and died seised, which descended unto him, and from him to his three Daughters, and justify by their Lease, and gives Colour to the Plaintiff; the Plaintiff replies, that long Time before the Trespass *Sir Thomas Tyrrel* was seised in Fee, and gave it to *Edward Baker* and *Joan* his Wife, and the Heirs Males of their Bodies, and that they had Issue the said *James Baker* and the Plaintiff; and that *James* had Issue *Henry* and died, which *Henry* died without Issue Male; wherefore he as Heir Male entered, and that the Defendant committed the Trespass, &c. and traverseth the Seisin in Fee alledged in *James Stephens*; whereupon the Defendant demurred, and shews that he traverseth the Seisin in Fee of *James Stephens*, whereas he ought to have traversed the Gift in Tail, which is the principal Matter of the Bar; but the Court held that it was in his Election to traverse the one or the other.

Where by the (a) Inducement or Conveyance to the Action the Defendant is ousted of his (b) Law, there the Defendant may as well traverse the Conveyance as the Gift of the Action.

where a Disseisin is alledged by Way of Conveyance to the Title or Possession of the Plaintiff, it need not be traversed. *Dier 655 b. pl 34.* (b) Where the Conveyance to the Action is that which doth intitle the Plaintiff to the Action, it may well be traversed if the Defendant cannot wage his Law; otherwise where he may wage his Law. *Cro. Eliz. 169, 201. S. P.*

In *Assumpsit*, supposing that such a Day 4 *Fac.* upon an Account betwixt them, the Defendant was found in Arrears in such a Sum, and assumed to pay, &c. the Defendant pleads that such a Day 4 *Fac.* they accounted, and then he was found in Arrears such a Sum as the Plaintiff supposed, and that the same Day he made an Obligation for the Payment thereof, and traverseth that any other Day after the Obligation made they accounted together *prout*, &c. and it was thereupon demurred; for that the Account (which is the Cause of the *Assumpsit*) is not traversable, nor the Time, for it is but an Inducement and Conveyance to the Action: But the Court held that the Account which was the Ground of the Promise was well traversable; wherefore it was adjudged for the Defendant.

It is said, that the Consideration of a Promise is never traversable, nor allowed to be traversed, but 'tis the Promise itself which is traversable; but herein a (a) Difference is taken between a Consideration

Vol. IV.

X

Of (a) The Difference between a Promise upon a Consideration executed and executory is, that in that executed you cannot traverse the Consideration by itself, because it is passed and incorporated, and coupled with the Promise. *Hob. 106.*

Doff. pl 365.
6 Co 24 read
S. P. and
that where
there are

1 Sid. 227.
Palm v.
Elshbees.

Cro. Jac. 681.
2 Rol. Rep.
362. S. C.
Baker v.
Blackman.

Dier 121. b.
1 Leon. 252.
S. P.

(a) But
of the Plaintiff,
(b) Where the Conveyance to the Action is
if the Defendant
cannot wage his Law;
Cro. Eliz. 169, 201. S. P.

Cro Jac. 234.
Yelv. 171.
1 Bulst. 16.
S. C.
Dalby v.
Cook.

Cro Eliz. 201.
1 Rol. Rep.
43, 401.
Cartb. 82.
Of (a) The Dif-

of a Promise which is executed, and a Consideration which is executory; that the one is not traversable, but the other is.

Cro. Eliz. 97. *per Coke*; but for this vide *Tit. Trover and Conversion*. In Trover and Conversion the Conversion is traversable; for it is the Substance of the Action, and the Tort supposed in him, and so may well be traversed; for if one finds Goods, but doth not convert them, no Action lieth.

Cro. Jac. 501. *Nevison v. Whitley*. In Debt on an Obligation of 100 *l.* dated 12 *Julii* 10 *Car.* 1. with Condition for the Payment of 58 *l.* at the End of six Months; the Defendant pleads the Statute 21 *Jac.* 1. of Usury: The Plaintiff replies, that he lent the 50 *l.* for a Year, and that the Defendant should pay 8 *l.* for the Forbearance for a Year; and that, by the Scrivener's Mistake, it was made payable at the End of Half a Year. The Defendant rejoins, that the Lending was only for Half a Year, and that he was to pay for it 8 *l.* for that Time; and traverseth, that upon the said 12 *July* it was agreed the Loan should be for one intire Year, or that he should forbear it for a whole Year. And it was held, that this Traverse in the Rejoinder, making the Day Parcel of the Issue, was ill; and that the Agreement only was traversable.

Co. Lit. 282. *Stile* 382. *1 Leon.* 39. *2 Leon.* 79. *1 Rol. Rep.* 265, 395. In Trespafs for Goods carried away, or Battery, or false Imprisonment, if the Defendant pleads that he is Not guilty in the Manner as the Plaintiff supposes, and it be found that he is guilty at another Day, or in another Town or County than the Plaintiff supposes, yet he shall recover; for in transitory Actions the Defendant shall not traverse the County or Town where the Fact is laid, without some special Cause of Justification, which is so local that it cannot be alledged in another Place; as where a Constable of a Town in another County arrests a Man for a Breach of the Peace, in which Case, if an Action be brought against him, he shall traverse the County, and all other Places, saving the Town whereof he is Constable; (a) so where the Defendant justifies for Damage-feasant, &c.

(a) *Cro. Eliz.* 667. *S. P.* adjudged.

Cro. Eliz. 184. *Cowleigh v. Edwards*. In false Imprisonment for imprisoning him at *Bristol*, the Defendant justifies, for that he arrested him at *Gloucester* by Virtue of a Commission of Rebellion; *absque hoc*, that he was guilty at *Bristol*; and it was moved that the Traverse was not good, the Cause of Justification not being local, and therefore he might have justified in the Place where the Action was brought; otherwise if the Commission had been to arrest him at *Gloucester*; and of this Opinion was *Wray*.

Cro. Eliz. 705. *Peacock v. Peacock*. In Trespafs for an Assault and Battery laid in *London*, the Defendant pleaded, that the Plaintiff entered into his House in *Waltham* in the County of *Essex*, and that he *molliter manus imposuit* to put him out of his House; *absque hoc*, that he is guilty *extra Waltham*, and this was held a good Traverse, the Cause of Justification, *viz.* the Defence of his House, being local; *secus* if the Justification had been personal and transitory, and such as might have been alledged in any Place.

Cro. Jac. 44, 45. *Wadhurst v. Damme*. In Trespafs laid *apud Edinbridge in Comit. Cant.* for killing his Dog, the Defendant pleaded, that *J. S.* was seised in Fee of a Warren in *D.* in the same County, whereof he is and then was Warrener, and that his Dog was divers Times killing Conies there, and therefore, finding him there *tempore quo*, &c. running at Conies, he there killed him; *absque hoc*, &c. that he is guilty *apud Edinbridge prout*, &c. And on Demurrer it was objected, that he had traversed the Place only, &c. and had not traversed all other Places: But the Court held, that the Traverse was good, his Cause of Justification being local, and that he needed not alledge any more than that Place.

Trespafs of Assault, Battery and Wounding in London; the Defendant justifies in the County of Norfolk, by Virtue of a Warrant from the Sheriff of Norfolk, upon a Writ of *Latitat, Que est eadem transgressio, &c. absque hoc*, that he is guilty in London, *vel alibi extra Comitatum Norf.* On Demurrer one Objection was, that he had justified and also traversed, which he ought not to have done: But the Court held it well enough; for the Justification being in another County, the County wherein the Action is brought ought to be traversed; and the Plaintiff may maintain the Action and Issue, if he will, or he may traverse the Defendant's Plea, at his Election.

If a Man bring an Action of Trespafs for beaking his Clofe on a certain Day, if the Defendant plead a Release of Actions, he shall traverse all Trespaffes after; if a Feoffment, he shall traverse all Trespaffes before; if a Licence all before and after.

307. 2 Mod. 68. That where the Justification goes to a Time and Place not alledged by the Plaintiff, there must be a Traverse of both.

In Trespafs laid to be done 1 May, the Defendant pleads a Release made to him 1 Junii, and traverses, *absque hoc*, that he was guilty at any other Time after the first of June; and this was held an ill Traverse; for the Day not being material in Trespafs, he ought to have traversed, *absque hoc*, that he was guilty before or after 1 Junii.

If in Trespafs for entering a House the Defendant says, that it was the Freehold of J. S. and justifies 27 Eliz. a Year before the Trespafs supposed, and traverses the Time before 27 Eliz. but says nothing as to the Time after; yet the Traverse is good; for when he pleads his Freehold, or the Freehold of another, it shall be intended so to continue, unless the contrary be shewn, and therefore no need of traversing the Time after.

Herein also this Difference hath been agreed, that where a general Action is brought, in which the Time is not material, there, upon a Traverse to the Fact charged upon the Defendant, he must add *absque hoc*, that he was guilty either before or after; but where the Thing traversed is not to the Point of the Action, (though the Case may be so, that if it happened before or after, the Action might have lain) the Party need not add *absque hoc*, that he did it before or after, and this, whether the Traverse comes in of the Plaintiff's Part or the Defendant's.

In Case upon several Promises, the Statute of Composition of two Thirds was pleaded in Bar; but the Plaintiff shewed the Contract to have been since the Time of the Statute, which the Defendant did not traverse in his Plea, as he ought to have done; and therefore Judgment was given for the Plaintiff; for if you vary from the Time in the Declaration, and make such Variance material, you ought to traverse the Time in the Declaration.

Trespafs and Imprisonment laid the first of May 17 Car. 2. The Defendant justifies, as Sheriff of Coventry, to arrest him for a Breach of the Peace made upon him in the Execution of his Office, for which he arrested him, and carried him before the Mayor; and traversed all the Time before he was Sheriff, or afterwards; and the Traverse was adjudged good, though it was objected to be too (a) large.

taken more narrow than it need, being to the Prejudice of the Party, no Jeofail. But where the Traverse contains more than is alledged in the Breach, it is not good.

If in Ejectment the Defendant pleads a Surrender of a Copyhold by the Hands of J. S. then Steward of the Manor, and Issue is joined; *absque hoc*, that he was Steward; this is naught, for the Traverse ought to be general, that he did not surrender; for if he were not Steward the

Cro. Jac. 372.
Bateman v.
Woodcock.
Cro. Eliz. 868.
S. P. adjudg-
ed.

Hob. 104.
Carter 207.
1 Sid. 293 4.
1 Sand. 14.
1 Lev. 241,
adged by the

3 Bulf 209.
1 Rel Rep.
406. S. C.
Amson v.
Wakor.

Cro. Eliz. 87.
Higbam v.
Reynold.

1 Sid. 234.
1 Keb. 680,
822.

Farefl. 16.
Beverly v.
Pim.

1 Lev. 216.
Law v. King.

(a) If the
Traverse be
2 Lev. 81.—
3 Lev. 167.

Cro. Eliz. 260.
Wood v. Butts.

Surrender is void; so of a Surrender pleaded into the Hands of the Tenant of the Manor.

3 Lev. 113.
Bridgewater v.
Lythway.

In Battery, the Defendant pleads a Judgment obtained by *A.* his Father, and an Execution thereupon, whereon the Goods of *J. S.* were taken in Execution; and that the Plaintiff assaulted the Bailiffs, and would have rescued the Goods; whereupon in Aid of the Bailiffs, and by their Command, the Defendant *molliter manus imposuit* upon the Plaintiff to prevent his Rescue of the Goods. The Plaintiff replied, *De injuria sua propria; absque hoc*, that the Defendant by Command of the Bailiffs, and in Aid of them, to prevent a Rescue of the Goods, &c. whereupon the Defendant demurred generally: And upon Argument it was resolved, 1st, That the Replication in traversing the Command of the Bailiffs was not good, for he might of himself do that to prevent the Rescue, which is a Tort and Breach of the Peace. 2^{dly}, The Defendant's Plea is ill, for the Action was brought as for a Battery at *D.* and the Defendant justifies at *S.* in the same County, whereas the Bailiffs have Authority through the whole County, and therefore the Cause of Justification in the same County not local; so that he should have conformed and justified in the same Place, being the same County where the Plaintiff declared; and if the Place had been material, he ought to have traversed all other Places within the same County; & *sic quacunq; via data* the Plea was held ill.

1 Salk. 107.
Trevilian v.
Pyne.

(a) For this
vide Cro. Eliz.

14.
1 Rot. Rep.
46.

2 Leon. 215.
Telv. 148.
Comb. 471.

In Replevin the Defendant makes Conusance as Bailiff to *J. S.* Plaintiff pleads, that he took them *de injuria sua propria; absque hoc*, that he was Bailiff to *J. S.* To which it was demurred: And after Argument the Traverse was held to be well taken; and a (a) Difference observed between an Action of Trespass *Quare clausum fregit*, and an Action of Trespass for taking Cattle or Replevin: In the first Case, if the Defendant justifies an Entry to the Close by Command, or as Bailiff to one in whom he alledges the Freehold to be, the Plaintiff shall not in his Replication traverse the Command; because it would admit the Truth of the rest of the Plea, *viz.* that the Freehold was in *J. S.* and not in the Plaintiff; which would be sufficient to bar his Action, whether the Defendant was impowered by *J. S.* to enter or not; for it is not material that the Defendant has done a Wrong to a Stranger, if it be none to the Plaintiff; but in the other two Cases, if the Defendant justifies taking the Cattle as Bailiff to *J. S.* in whom he lays a Title to take them, as for a Distress, or other Cause, there it may be material to traverse the Command or Authority; for tho' *J. S.* had Right to take the Cattle, yet a Stranger, who had no Authority from him, will be liable; so that both Parts of the Defendant's Plea in this Case must be true, and therefore an Answer to any Part is sufficient; so in Trespass for taking Goods; *aliter* in Trespass *Quare clausum fregit*.

3 Lev. 20.
Dohson v.
Douglas.

In Replevin the Defendant made Conusance as Bailiff of *J. S.* for a Rent-Charge; the Plaintiff in Bar says, that he took the Distress without the Privity or Command of *J. S.* and that such a Day after the Distress *J. S.* came first to have Notice, & *deadvocavit captiones predictas*: The Defendant demurred generally. *Et per Cur'*, The Bar is naught, for he should have traversed his being Bailiff; and he was ruled to replead accordingly, and to mend his Bar, paying Costs, and go to Trial upon Issue, Bailiff or not.

2 Sand. 160.
Rex v.
Stoughton.

If on a Presentment for not repairing a Highway, it is alledged, that the Defendant is chargeable *ratione tenure quarundam terrarum parcell' diste pecie terre*, &c. *dista communi alta via Regia inclus'* & *incrochiat'*; the Traversing the *Ratione tenure* is sufficient, without answering to the Incroachment, being the principal Point to be traversed.

A Traverse must be taken to some Matter alledged; and therefore where in false Imprisonment the Defendant justified by Process out of an inferior Court, and the Plaintiff replied, that the Cause of Action accrued out of the Jurisdiction; *absque hoc*, that it accrued within the Jurisdiction; the Traverse is ill, being of a Matter not alledged before; but it was held, that this being only an immaterial Traverse, no Advantage could be taken of it on a general Demurrer, and that then the Residue of the Replication should stand good.

Lutw. 935, 1560.
(a) Meer Matter of Supposal is not traversable, no more

is Matter alledged out of due Time, nor Matter immaterially alledged. 2 *Salk.* 628.—But whatever is necessarily understood, intended and implied, is traversable, as much as if it were expressed. 2 *Salk.* 629.

In Case against a Sheriff for taking insufficient Bail to the Intent to deceive him of his Debt; the (b) Intention to deceive is not traversable.

1 *Sid.* 96.
(b) That Matter of Intendment

is not traversable. *Stile* 383. 1 *Leon.* 50. S. P.—Nor Cause of Suspicion. 3 *Bulst.* 284.

In Ejectment, Antient Demesne was pleaded in Bar; Plaintiff replied, that the Lands are pleadable at Common Law, and traverses, that the Tenements are Parcel *de Antiquo Dominico*; and it was adjudged ill on Demurrer; because he should have traversed, that the Manor was Antient Demesne, or else, that these Tenements were held of the Manor.

1 *Show.* 271.

In an Action of (c) Covenant a Person cannot take a Traverse in Mitigation of Damages, but must help himself upon (d) Evidence; and the Traverse must be to the (e) Point of the Action; as in Covenant for Payment of Rent, the Plaintiff says, that there were seven Years Rent behind; the Defendant cannot traverse two of these Years being behind, but must plead Covenants performed.

(c) That where the Declaration is special the Defendant shall have Liberty to traverse the spe-

cial Matter. *Carth.* 82. (d) That in many Cases the Matter may be specially traversed, which probably might have been given in Evidence upon the General Issue. *Carth.* 82. (e) In Trespass, that which comes under the *Ita quod*, for Aggravation of Damages, need not be traversed. 1 *Lev.* 283.

In Debt on a Judgment obtained 1 *May* 14 *Car.* 2. before the Mayor and Bailiffs of *Norwich*, at a Court then held according to the Custom of the said City, the Defendant pleads, that the Court there, according to the Custom, &c. is held before the Mayor; *absque hoc*, that he recovered at the Court held the said 1 *May* before the Mayor and Bailiffs, according to the said Custom. And upon (f) Demurrer the Traverse was held ill in traversing a Matter of Record which is not to be tried *per pais*, and in (g) joining the Matter of the Custom, which is triable *per pais*, with the Matter of Record; but he ought to have pleaded *Nul tict record*, which would have made an End of all, or that there was not any such Custom, and have tried it *per pais*; it was likewise held, that making the Day Parcel of the Issue made the Traverse ill.

1 *Lev.* 193.
Dring v. Refp.

(f) That it would have been good after Verdict. *Hob.* 244
Hutt. 20.

(g) A Traverse must not be multifarious, but to a single Point. 3 *Lev.* 40, 41.—Traverse must not be complicated. *Skin.* 63, 64.

Debt upon an Obligation to the Sheriff, conditioned to appear *Octabis Martini ad respondend*, &c. Defendant pleaded the Statute 23 *H.* 6. and that he was taken and imprisoned *Virtute brevis retorn' quinden' Martini*, and that the Obligation was taken for Ease and Favour. The Plaintiff replied, *Auter brief retorn' octabis Martini*, and that he was taken and imprisoned upon that; *absque hoc*, that he was in Prison *Virtute brevis retorn' quindena Martini*. The Defendant demurred generally. *Saunders* argued, that the Traverse was ill and immaterial; for it matters not whether any Writ was returnable *Quindena Martini*, or not,

2 *Lev.* 174.
Gold v. Cutler.

but he should have concluded *Et hoc paratus est verificare*, and left the Defendant to traverse the Writ returnable *Octabis Martini*; and upon this Traverse no good Issue can be taken; for it is not material whether any Writ was returnable *Quindena Martini*, or not; the only material Thing to maintain the Goodness of the Obligation is this, that the Writ was returnable *Octabis Martini*. *Sed per Curiam*, If the Traverse be immaterial, the Defendant waiving that should have traversed the Writ's being returnable *Octabis Martini*; but they held the Traverse was well enough in this Case, it being taken to the most material Thing pleaded in Bar to avoid the Obligation; and they gave Judgment for the Plaintiff.

Comb. 245.
Foden v.
Haines.

In Debt on a Bond made by a Prisoner to an Under-Sheriff, conditioned to pay 60*l.* the Defendant pleads the Statute *H. 6.* of Sheriffs Bonds, and that this Bond was made for Ease and Favour, and so void by the Statute. The Plaintiff replies, that it was for the better Security of Money due to himself, and traverseth the Ease and Favour: And herein it was adjudged for the Defendant; for though the Traverse be good, yet the Inducement being ill, in not saying that it was *pro bono & vero debito*, the Plaintiff cannot recover.

Yelo. 225.
1 Bullst. 116.
1 Sand. 268.
S. C. cited,
and like
Point ad-
judged.

(a) That in
an Action
for Damages,
and in which
the Plaintiff
is to recover

If in an Action on the Case for stopping of three Windows, the Defendant justifies the Stopping of two of them, and traverses the Stopping of three Windows; the Traverse is ill, for the Inducement goes only to Part, *viz.* the Stopping of two Windows; and yet the Traverse goes to all three, which ought not to be; for if the Defendant had stopped only two, yet in Case the Plaintiff shall recover Damages (a) *pro tanto*; and therefore the Defendant ought to have pleaded, as to the Stopping of one Window, Not guilty, and as to the other two to have justified, and then every Part of the Injury alledged by the Plaintiff had been put in Issue.

in Proportion to his Loss, every Part is to be put in Issue. 2 Sand. 206.

1 Vent. 70.
Aubrey v.
James.
1 Sid. 444.
2 Keb. 623.
S. C.

In Assault the Defendant justified, for that he, being Master of a Ship, commanded the Plaintiff to do some Service in the Ship, which he refusing to do, he *moderate castigavit* the Plaintiff, *prout ei bene licuit*. The Plaintiff maintains his Declaration; *absque hoc, quod moderate castigavit*: After Verdict for the Plaintiff, it was moved in Arrest, that the Issue was not well joined; for *non moderate castigavit* doth not necessarily imply that he did beat him at all, and so no direct Traverse to the Defendant's Justification, which *immoderate castigavit* would have been; but *de injuria sua propria absque aliqua tali causa* would have been the most formal Replication; but it was held to be well enough, being after Verdict.

1 Vent. 77.
Gifford v. Perkins.
1 Sid. 450.
2 Keb. 633.
S. C. ad-
judged.

In Debt upon a Bond entered into to *Eliz. Perkins*, who was the Plaintiff's Wife, and he, as her Administrator, brought the Action; the Defendant pleads, that he delivered the Bond to one *Eliz. Perkins, quæ obiit sola & innupta*; *absque hoc*, that he delivered it to *Eliz. Perkins*, the Plaintiff's Wife To which it was demurred specially; for if it be taken, that there are two of the Name, the Defendant should have pleaded *Non est factum*, for it amounts to no more; or at least he ought to have induced his Plea, that there were two *Eliz. Perkins's*; but this Traverse is designed to bring the Marriage in Question, which is not to be tried; wherefore the Court gave Judgment for the Plaintiff.

Carth. 195.
Beake v. Kent.
4 Mod. 63.
S. C.

In *Assumpsit* against an Executrix, she pleads several Judgments, and that she hath not Assets *ultra*. The Plaintiff replies, that *judicia prædicta, &c.* were kept on Foot by Fraud. The Defendant maintains her Bar, and traverses, that all or any of the Judgments were kept on Foot by Fraud. And on Demurrer it was objected, that the De-

defendant

Defendant ought to have rejoined severally to every Judgment, and not to include all three Judgments in one general Traverse; but it was held that this general Form of Pleading was good, it being no Disadvantage to the Plaintiff; for if Issue had been joined that all the Judgments had been kept on Foot by Fraud, and if it had been found that one of them alone had been kept, &c. by Fraud, this Issue had been found for the Plaintiff; because the Plea was false in Part, and for that Reason the Whole is false.

Lessee for Years brings Covenant against the Lessor, declaring upon a Demise and Covenant for quiet Enjoyment, and assigns for Breach, that the Lessor did enter upon him, and oust him of the Premises; the Defendant pleads that he entered to distrain for Rent arrear; *absque hoc*, that he ousted him *de Præmissis*; to which the Plaintiff demurred, thinking the Traverse ill; because if he had ousted him of any Part of the Premises, he had a good Cause of Action; therefore he should have traversed, *absque hoc*, that he ousted him of the Premises, or any Part thereof: But *per Cur.* the Plea is well enough in this Case; for if the Plaintiff will join Issue upon the Matter of the Traverse, and prove the Ouster of any Part, the Issue will be for him; and the Court took a Diversity between pleading the General Issue, as in Debt you must plead *Non debet nec aliquam inde parcellam*, and a special Issue, as this is.

2 Salk. 629.
White v.
Bodinam.

(I) Pleas in Bar, their Sufficiency and Certainty: And herein,

1. That the Plea must be proper to, and adapted to the Action.

HEREIN it is laid down as a general Rule, that every Man must plead such Pleas as are pertinent and proper for him, according to the Quality of his Case, Estate and Interest.

Co. Lit. 285,
303.
Hob. 162.

As in an Action of Debt upon a Bond or other Specialty, the Defendant cannot plead *Nil debet*; it is otherwise in Debt founded upon a Matter *in Pais* only, as upon a Prescription, or upon a Deed, that is not requisite to maintain the Action.

Hard. 332.
of Pleading
Non est factum, vide
infra.

Therefore if an Action of Debt be brought on a Bond or single Bill, and the Defendant pleads Payment without an Acquittance under Seal, this, though it be found for him, will not intitle him to Judgment; for the Obligation is in Force till it is dissolved *eo ligamine quo ligatur*.

Cro. Jac. 377.
Wingfield v.
Bell.

So in Debt for the Arrears of an (a) Annuity granted for Life *Nil debet* is no good Plea; for the Action is merely founded upon the Deed, for without it no Action can be maintained; and though by the Death of the Grantee the Nature of the Action is changed, the Annuity being determined, yet this proves not but that the Action is founded upon the Deed.

Kelw. 147.
(a) But in
Debt upon
the Grant
of a Rent-
Charge *Nil
debet* is a
good Plea,

because the Plaintiff hath other Remedy to levy it, *viz.* by Distress. Otherwise upon the Grant of a bare Annuity, for there being no Remedy by Distress, the Grant must be avoided by Matter of as high a Nature, *viz.* by Acquittance. Hard. 33.

Where

Cro. Eliz. 257. Where the Action is founded upon a Penal Statute, it hath been adjudged that Not guilty is a good Plea.
Goult. 39.
Noy 56.
2 Inst. 651. *Moor* 914. *pl.* 1293.

2 Inst. 551. So in Debt upon the 2 *E. 6.* for not setting forth Tithes it hath been held, that Not guilty or *Nil debet* are good Pleas.
 and *Hob.*
218. S. P.
 adjudged.

Hard. 332. In Debt for the Arrears of a Rent-Charge by Will devised to the Plaintiff's Wife for Life, against the Administrator of the Occupier of the Land, it hath been adjudged that (a) *Nil detinet* is a good Plea; (a) Where the Testator for a Will is no Deed, nor wants any Delivery; and in this Case it could not was said, that the Action was not so much grounded upon the Will plead *Nil debet*, his Executor shall itself as upon the Statute, by which Men are enabled by Will to dispose of their Lands and Rents issuing out thereof.
not plead Nil detinet. 2 *Mod.* 266.

Hard. 332. In Debt for Rent, if it be by Deed, the proper Plea is *Non est factum*; but if it be without Deed, the Defendant may plead *Non dimisit*, Nothing in Arrear, or that he never entered; also by the better Opinion of the (b) Books, if the Rent be due by Indenture the Defendant may plead *Nil debet*; for an Indenture does not acknowledge a Debt like an Obligation, since the Debt accrued by subsequent Enjoyment.
 (b) For which *vide*
Hettl. 54
4 Leon. 18.
1 Vent. 41. 1 *Mod.* 3. 1 *Sid.* 423. *Palm.* 117. 1 *Salk.* 209.

It is said, that Not guilty is a good Plea to any Misfeasance whatsoever (c), though formerly in Actions for Nonfeasance Not guilty was not pleaded, but they pleaded Specially, and traversed any special Point alledged in the Declaration, and Not guilty to such Actions was not pleaded till after the Time of the Case of (d) *Talting v. Fay*.
 (c) 3 *Mod.* 324. *per Cur.*
Skin.
 (d) *Moor* 355. where the Case was; the Plaintiff declared on a Custom that the Parson should find a Bull and a Boar, to which the Defendant, *Protestando* that there was no such Custom, pleaded Not guilty; and on Demurrer it was held, that Not guilty was no Plea to an Action for a Nonfeasance, being two Negatives, which cannot make an Issue; but the Court held that to an Action, for a Misfeasance it was otherwise. *Cro. Eliz.* 569. *S. C.* & *vide Palm.* 393. 2 *Roll. Rep.* 368.

1 *Lev.* 142. In *Assumpsit* the Defendant pleaded Not guilty, Issue thereon, and Verdict that he was Guilty, and that he assumed in Manner and Form as declared; and it was moved in Arrest, &c. that Not guilty was no Issue in this Case, and the finding farther that he assumed is void, not being in Issue; but *Wyndham* and *Twisden* being only in Court held it cured at least by the Verdict, and *Wyndham* held that Not guilty (e) was a good Plea, and Issue in *Assumpsit*, it being a Trespass on the Case.

(e) But in the Case of *Marshall v. Gibbs* in *B. R. Mich.* 9 *Geo.* 2. it was ruled to be ill on Demurrer, though good after Verdict, according to this Case.

2 *Brownl.* 273. In an Action of Covenant for Non-payment of Rent, the Defendant *Have v. Saville* adjudged. 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 (f) But this in 1 *Brownl.* 19. *per Cur.* it was agreed that the Covenant alters not the Nature of the Rent (f), but that Nothing behind, or Payment at the Day, is a good Plea.
 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* 2 *Vent.* 99.

Nil debet was pleaded to an Action brought on a Covenant for a Forfeiture, and on Demurrer the Plea was held ill.

Trin. 5 Geo. 2. in B. R. Meard v. Phillips.

In Trover there is no Plea, but a Release or Not guilty, for every Plea in Justification is but Tantamount.

1 Keb. 305. Noy 46.

Hob. 187. & vide Tit. Trover and Conversion.

In *Assumpsit* and *Quantum meruit* for 20*l.* the Defendant pleaded *Onerari non debet*, because he paid the Money at the Time, &c. *Et hoc paratus est verificare*; and it was held by *Holt*, that *Onerari non debet* was no Plea here, because the Defendant allows the Promise to be a good Promise, but avoids it by a Matter of Charge *ex post facto*, and therefore in this Case he should have pleaded *Actionem non*; but where the Matter of the Plea shews there never was a good Cause of Action, *Onerari non debet* may be proper; as in Debt on a Bond, the Defendant may plead *Onerari non debet quia riens per discent*.

2 Salk. 516. Brown v. Cornish.

In Account the Defendant may plead that he was never Receiver, Agent, Factor, or Bailiff to the Plaintiff; or if charged as Bailiff he may plead that he was only hired as his Servant to drive his Plough, or he may plead a Release or a Submission to Arbitration.

1 Rol. Abr. 121, 122. Cro. Car. 116. Hetl. 114.

So he may plead 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 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.

1 Rol. Abr. 125. & vide Yelv. 202.

But it is no good Plea in Bar to an Action of Account, that the Defendant hath made Payment of the Money which he received, or that he hath made Satisfaction, or that the Defendant hath given him a Receipt or an Acquittance for the Sum received; for these Pleas being Matters which shew that he was once accountable, are only to be made Use of before the Auditors.

Dier 22, 145. 6 Co. Ferrers's Case. 4 Leon. 91. Stile 353, 410.

If in Account upon Receipt by the Hands of *J. S.* the Defendant pleads Never his Receiver, &c. and the Jury find that he was his Receiver of such a Sum, &c. and the Defendant pleads before the Auditors that he was possessed of several Obligations, in which the Son of the Plaintiff was bound to the Defendant, and that *J. S.* paid him this Money in Satisfaction of those Bonds, and that thereupon he delivered to him the said Bonds to the Use of the Plaintiff, which he after accepted; this is no good Plea, for it is no more than *Not his Receiver*, which is found and adjudged against him.

Cro. Eliz. 8, 10. Tresham v. Ford adjudged.

In an Assise the General Issue is *Nul tort, nul disseisin*; and therefore in an Assise of an Office it is no Plea to say, that there is no such Office, for that amounts to no more than saying that he did not disseise him.

Noy 223 & vide Tit. Assise.

In an Attaint the Petit Jury can plead no Plea, but such as may excuse them of the false Oath.

Kelw. 130.

In an Information in Nature of a *Quo Warranto* against a Person, to know by what Authority he exercised the Office of Port-reve of a Borough, *Non usurpavit* is no Plea, which appears from the Nature of the Charge, which is for him to shew by what Warrant or Authority, &c. to which that Plea is no Answer.

Lucas Rep. The Queen v. Blagden.

In Debt by Baron and Feme the Defendant pleaded (a) *Ne unques accouple in loyal Matrimony*, and on Demurrer it was held an ill Plea; because it puts it upon Trial by Certificate, which admits a Marriage, but not *secundum Leges Ecclesie*, and therefore he should have pleaded No Marriage in Fact, which must have been tried *per Pais*.

1 Show. 50. Allen & ux' v. Grey. (a) That this no Plea but in Dover or Appeal, vide Tit. Bastardy.

2 *Inst.* 302, In Waste the General Issue is *Nul wast*, also Reparation of Waste
306. before the Writ brought is a good Plea in Waste, and so is a special
Noy 93. Non-tenure.
3 *Leam.* 203.
& vide Tit. Waste.

Cro. Eliz. 593. In an Action of Waste for cutting down 300 Oaks, the Defendant,
Gorges v. as to 200, pleaded that the Houses let to him were ruinous, &c. and
Starfield. he cut them down, and keeps them to employ about Reparation *tem-*
pore opportuno; and on Demurrer this Plea was held ill.

Hob. 162. Every Defendant may plead in a *Quare impedit* the General Issue,
Vaugh. 58. which is *Ne disturba pas*; because that Plea doth but defend the Wrong
cited. wherewith he stands charged, and leaves the Plaintiff's Title not only
uncontroverted, but in Effect confessed; and the Plaintiff may upon
that Plea presently pray a Writ to the Bishop, or at his Choice main-
tain the Disturbance for Damages.

2 *Inst.* 360. At Common Law Plenarty before the Writ of *Quare impedit* brought
vide Tit. was a good Plea; *secus* of Plenarty hanging the Writ; but by the *Stat.*
Quare impe- *West.* 2. cap. 5. Plenarty is no Plea in a *Quare impedit* or *Darrein Pre-*
dit. *sentment*, unless it be by the Space of six Months before the Writ
brought; also Plenarty by six Months is no Bar against the King, ac-
cording to the Rule *Nullum tempus*, &c.

Noy 30. *Li-* In a *Quare impedit*, where the Incumbent pleads the Presentment of
ster v. Cramel. a Stranger, there he ought to shew that the Stranger had a Title, and
that he was seised of the Advowson, &c. or that he was seised of a
Manor, &c. to which, &c. But where he pleads, that he was in for
six Months of the Presentment of the Plaintiff himself, or by Colla-
tion, by Lapsc, by the Ordinary, there he need not make any Title.

2. That the Plea must be good in Substance; and therein of Matter of Inducement, and that which is the Gift of the Defence.

As the Plaintiff's Action must have all Essentials necessary to main-
tain it, so the Defendant's Bar must be (a) substantially Good, that
(a) Note, That what is Substance, and what not, must be determined in every Action according to its Nature.
is Substance, Defendant, the Court, according to the Rules of Law, must dismiss, or give Judgment for him; but if the Gift of the Bar be naught, it cannot be cured even by (b) a Verdict found for him; 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.

(b) A Verdict cures not only such Defects as may be called Artificial Defects, and come within the Purview of the several Statutes of *Jeofail*, but 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. Vide Tit. Amendment and Jeofail, that these Statutes do not help Substance, 2 *Salk.* 521.2.

Cro. Eliz. 268. The Defendant's Plea must fully (c) answer the Count or Declara-
Penalebury v. tion; as where in Assault, Battery and Wounding, the Defendant
Elmott. pleaded that he was Constable of *D.* and for such a Misdemeanor of
(c) That the the Plaintiff he laid his Hands on him, and carried him to the Stocks,
Plea ought *que est eadem transgressio*; and on Demurrer it was adjudged for the
to be ac- Plaintiff, because the Defendant had not either justified or pleaded
cording to the Demand. Not guilty as to the Wounding; but if one pleads that the Hurt
Hob. 327. which the Plaintiff had was of his own Assault, this a good Answer
3 *Lev.* 375. to all.

Cro. Eliz. 812. In Replevin the Defendant as Bailiff to *P.* who was seised of the
Whitnel v. third Part of the Place, &c. justifies for Damage-tenant; the Plaintiff
Cook. saith

saith that a Stranger was seized of the other two Parts, and by his Licence he put in his Cattle; the Defendant saith *De injuria sua propria absque tali causa, &c.* the Plaintiff demurs; and it was adjudged no Plea, but he ought to answer to the special Matter in the Bar.

So where in Covenant the Plaintiff declared, that he the Plaintiff had covenanted with the Defendant to go with a Ship to *D. in Ireland*, and there to take in 280 Men from the Defendant, and to carry them to *Jamaica*; and the Defendant covenanted to have the 280 Men there ready, and to pay for the Carriage of them 5*l.* a Man, and says that the Defendant had not the 280 Men ready, but that he had 180, and those he took and carried, and the Defendant had not paid for them; the Defendant pleads that he had the 280 Men ready, and tendered them to the Plaintiff, and that he would not receive them, but says nothing to the Carrying of 180 Men, nor to the Non-payment for them; and as this was not a Plea to the Whole, but to the Carrying only, Judgment was given for the Plaintiff on a Demurrer.

If as to Part the Defendant joins Issue, but says nothing to the Rest, and this Issue is found for the Plaintiff, he shall have Judgment; but (a) if the Matter is pleaded to the Whole, though in Fact but an Answer to Part, this is a bad Plea, and not helped by the Statute.

Hob. 187. *Gouls.* 109. *1 Bulf.* 25. *Carter* 51. *3 Lev.* 39. (a) *Hard.* 331.—If many Words contain one Thing in Signification, if he answers to them in Substance it is good.

If in an Action of Trespass, 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 Licence from the Lord to put his Cattle there, but does not aver there is sufficient Common left for the Commoners, this is no 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.

In Debt upon an Obligation conditional, the Defendant cannot plead in Bar Matters in Discharge of the Obligation, but he must plead it in Discharge of the Sum contained in the Condition of the Obligation; for it is not a Debt simply by the Obligation, but the Performance or Breach of the Condition makes it a Debt; for the Obligation is guided by the Condition, so that if the Condition be not discharged the Obligation remains in Force.

In Debt upon a Bond, it is no Plea, that the Plaintiff accepted a new Bond in Satisfaction of the old, for that is no Satisfaction actual and present, as it ought to be.

In Debt upon an Obligation of 10*l.* recited to be from Rent, Entry and Suspension is no Plea; because it only answers a Recital in the Condition, which is not material, and not the Condition itself.

The Condition of an Obligation was, that if *A.* pay 20*l.* at *Michaelmas* next, and 20*l.* at *Easter* after, so 20*l.* at every of the said Feasts so long as *A.* shall live, or until *B.* shall be prefer'd to a Benefice of 40*l.* per Ann. In an Action of Debt upon that Obligation the Defendant pleads that *B.* was prefer'd, &c. before *Michaelmas* next; and held no good Plea on Demurrer; for take it which Way you will, he ought to pay the 20*l.* at the said two Feasts that are expressly set down, for they are absolute.

In Debt upon an Obligation the Condition was, if such Lands be proved to be Parcel of the Manor of *D.* if then the Plaintiff may enjoy them without Interruption of the Defendant, that then, &c. the Defendant pleads that they were not proved to be Parcel of the Manor, and it was thereupon demurred; and it was insisted that he ought to have pleaded that they were not Parcel of the Manor, so as Proof thereof

1 Lev. 16.
Thompson v. Noel.

11 Co. 6. E.
2 Leon. 174.
Godb. 55.
1 Rol. Rep. 161.

Cro. Jac. 353.
many Words
Cro. Elz. 256.

2 Mod. 6.
Smith v. Feverel.

Yelo. 192.
Cro. Jac. 254.
Neale v. Sheffeld.

Hob. 68.
Lovell v. Cockatt.

Hob. 130.
St. John v. Diggs.

Nov. 64.
Countess of Warwick v. The Bishop of Litchfield.

Cro. Jac. 232.
Ilve v. Sabe
adjudged.

thereof might have been made in that Action; and of that Opinion was the whole Court.

Hob. 28. In an Action on the Case against a common Bargeman, for Goods delivered to him to carry to such a Place, &c. if he pleads, that he was discharged of keeping, without saying of carrying them, 'tis not good.

2 Mod. 33.
Duck v. Vincent. In Debt upon a Bond conditioned to perform Covenants, one of which was for Payment of Money upon making Assurances, the Defendant pleaded, he paid the Money such a Day, but doth not mention when the Assurance was made, that it might appear to the Court the Money was immediately paid pursuant to the Condition; and for that Reason the Court were all of Opinion the Plea was not good.

2 Vent. 156.
Brown v. Rands. In Debt upon an Obligation, conditioned to permit the Obligor's Wife (whom he intended to marry) to dispose of his personal Estate, the Defendant the Obligor pleaded *Quod conditio ejusdem scripti nunquam infracta fuit per ipsum ad aliquod tempus hucusque; & hoc paratus est verificare*: And on Demurrer the Court held the Plea naught, and that for saving the Bond, it was necessary to shew he had performed the Condition.

1 Mod. 176.
Harman's Case. But where in Covenant the Breach assigned was, that the Defendant did not repair, and he pleaded generally *Quod reparavit, & de hoc ponit se super patriam*; and this was held good after a Verdict.

March 77. If in a *Quantum meruit* for Medicines, the Defendant pleads, that he hath paid to the Plaintiff *tot & tantas denariorum summas*, as the said Medicines were worth, without shewing what Sum in certain he hath paid, this is no good Plea.

March 100. If in *Assumpsit* the Plaintiff declares, that the Defendant did assume and promise to pay 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 *Nou assumpsit*; for the Promise being intire cannot be apportioned.

2 Mod. 43.
1 Mod. 205.
S. C.
Milward v. Ingram. 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 in 30*l.* and thereupon in Consideration that the Defendant promised to pay the said 30*l.* the Plaintiff promised likewise to release to acquit the Defendant of all Demands; this is a good Plea, for by the Account the first Contract is merged.

Raym. 449.
2 Fon. 158.
Case v. Earber. If the Plaintiff declares upon an *Indebitatus assumpsit* for 100*l.* and upon an *Insimul computasset* the same Day for another 100*l.* and the Defendant pleads, that the said several Sums of 100*l.* are for one and the same Cause of Action, and for one Sum of 100*l.* only, and not for several Sums; and that after the Time of the said several Promises made, the Defendant, by the Order of the Plaintiff paid to one *B.* 30*l.* in Part of Payment and Satisfaction of the said Money in the Declaration mentioned, and in full Payment and Satisfaction of the Residue of the said Money, did become bound to the Plaintiff in a Bond of 120*l.* conditioned for the Payment of 65*l.* to the Plaintiff at a certain Day in the Condition specified, which said 30*l.* and Bond the Plaintiff accepted, &c. this is a good Plea; for though 'tis no Plea to say the several *Narr'* are for one Sum only, and so to go no further, yet when the Defendant pleads over, that the very Sum demanded is satisfied, this is a good Plea; and if the several 100*l.* were distinct Sums, the Plaintiff might have replied so, and taken Issue thereupon; but when he admits there was but 100*l.* due, and that satisfied, the Plea is good.

In Trespafs for taking several Goods, the Defendant justified for 3 *Lev. 19.*
 several Amercements assessed in a Court-Baron; but because he did *Cotiers v.*
 not shew an Afferment by the Afferors, Judgment was given for the *Frank.*
 Plaintiff.

In Trespafs for pulling down a Gate, treading his Grass, &c. the 3 *Lev. 92.*
 Defendant as to Pulling down the Gate justified, that Time out of *Spring v.*
 Mind he had a Passage *per & trans* the Yard, and that a Gate was *Neal.*
 erected upon the Passage, so that he could not pass with his Beasts,
 wherefore he broke and pulled down the Gate, &c. And on Demurrer
 to this Plea, it was objected, that the Defendant could not justify the
 Pulling down and Breaking of the Gate, not having shewn that it
 was locked or nailed, so that he could not pass. *Sed per Curiam,*
 Having pleaded that the Gate was put there, so that he could not
 use the Passage, it shall be intended that it was locked or nailed, or
 the Way thereby straightened that he could not pass, and the Plea
 therefore good.

In Debt upon an Obligation the Defendant pleads, that he delivered 1 *Vent. 9.*
 it as an Escrow; *& hoc paratus est verificare;* this held a vicious Plea, for
 he ought to shew to whom he delivered it; and also he ought to con-
 clude his Plea, (a) *Et issint nient son fait.*

(a) Vide 1
Vent. 210.

If in Action for the following Words, *Thou art a Bankrupt,* the De- *Cro. Jac. 378.*
 fendant pleads, that such a Day and Year the Plaintiff became a Bank- *Upsbeer v.*
 rupt, and so justifies, but does not alledge that he continued a Bank- *Bets.*
 rupt; this is no good Justification, for it shall not be presumed that he
 continued so.

If in an Action for these Words, *She is a Thief to you and to me,* *Cro. Jac. 676.*
and hath stolen 20 l. from me, and 40 l. from you, the Defendant pleads, *2 Rol. Rep.*
 the Plaintiff is a Thief, and stole two Hens from the Defendant; this is *414. H. 15:en*
 no good Plea; for it does not answer the particular Charge in the De- *v. Mercer.*
 clarator, and the last Words are as material to be answered as the first.

If the Plaintiff declares, that whereas she was a Woman of a good *Stille 118.*
 Fame and Reputation, &c. the Defendant said of her, *She is a common*
Whore, &c. per quod, &c. and the Defendant pleads, that at the Time *Starckly's*
 when the Words were spoken the Plaintiff was not of an honest Re- *Case, ad-*
 putation, as in the Declaration is alledged; this is no good Plea. *judged upon*
 a Demurrer *to the Plea.*

If the Defendant pleads a proper Plea, though it is not full, it is *5 Mod. 226.*
 aided by the Statute; and therefore in all Cases where Issue is taken *said arguendo.*
 upon an insufficient Plea in Bar, and which would have been ill
 upon Demurrer, it is held, that after a Verdict the Defendant shall
 not take Advantage thereof.

Therefore in Trespafs, where the Defendant pleaded a Concord in *Cro. Eliz. 778.*
 Bar, but not with Satisfaction, Issue being taken upon the Concord, *1 Rol. Abr. 225.*
 the Plea was held ill, for Want of Satisfaction being pleaded; yet it was *Moor 696.*
 not wholly void, because Concord was a good Plea to such an Action, *5 Mod. 226.*
 tho' not so fully pleaded as it might. *cited.*

So in Debt for Rent upon a Lease for Years, Entry is a proper *Hob. 326.*
 Plea, but not good, without saying he did expel and hold him out; *Reynolds v.*
 yet if Issue be taken upon *Non intravit,* and found for the Defendant, *Buckle.*
 he shall have Judgment.

In Ejectment the Defendant pleaded, that one *Ridler* was seised in *Cro. Jac. 678.*
 Fee, and made a Lease to him for five Years, by Virtue whereof he *Johns v. Rit-*
 was possessed, until the Lessor of the Plaintiff entered and disseised *ler.*
 him, and made a Lease to the Plaintiff, that thereupon he re-entered
 and ejected him, *prout ei bene licuit.* The Plaintiff replies, that the
 Lessor was seised in Fee, and leased to him, and the Defendant ousted
 him; *absque hoc,* that he did disseise the Defendant: Upon which Issue
 was joined, and found for the Plaintiff; and though this Issue was vain,

it being impossible that a Lessee for Years should be disseised; yet the Defendant shall not take Advantage of such an ill Plea; but having confessed a Lease made to the Plaintiff, and it being found that he did not disseise the Defendant, Judgment shall be given for the Plaintiff; but if there had been a Verdict for the Defendant, he could not have Judgment; for then the Jury would have found against the Law, that a Termor was disseised.

3. Of general Pleading to avoid Prolixity; and therein of Affirmative and Negative Pleas.

Co. Lit. 303.
8 Co. 133.
Plow. 123,
126, 129.
(a) 26 H. 8. 5.
Kelw. 95.
40 E. 3. 30.

It seems that formerly great Certainty and Exactness was required in setting forth all the Particulars in a Declaration, as likewise in pleading the Performance of Conditions and Covenants; as (a) in a Bond for Performance of Covenants, it was held necessary to demand Oyer of the Condition, and likewise of the Covenants, and to plead particularly the Performance of each of them; this created great Inconveniences in overloading the Proceedings with a Recital of useles Facts; and therefore this Rule hath in the modern Practice received a Relaxation; and it is now settled, that where the Matters to be pleaded tend to Infiniteness and Multiplicity, whereby the Rolls may be incumbered in the Length thereof, to allow of general Pleading.

Raym. 400.
Aghlonby v.
Torverson ad-
judged.

As if in an *Assumpsit* the Plaintiff declares, that whereas there was a certain Discourse between the Plaintiff and Defendant, concerning a Marriage to be had between the Nephew of the Plaintiff and the Niece of the Defendant, and thereupon the Defendant, in Consideration the Plaintiff would do his Endeavour and Labour to perswade his Nephew to marry the Niece of the Defendant, did assume and promise to pay the Plaintiff, &c. and avers, that such a Day, and divers other Days and Times *Omniibus modis quibus poteret conatus fuit & elaboravit suadere* his said Nephew to marry the Defendant's said Niece, &c. this is a good Declaration, without shewing in particular how he did his Endeavour; for if he shall set forth his several Speeches to his Nephew in the Praise of the young Lady, or the Advantages of a married Life, &c. the Record would be too long.



3 Bulst. 37.
1 Rol. Rep. 173.
Crips v. Bainton.

So in an *Assumpsit* the Plaintiff declares, that in Consideration the Plaintiff would find and provide for a sick Man all such Necessaries as he should 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.

Carth. 110.
Huggins v.
Wiseman, &
vide Tit. Infancy, Letter (I).

In *Assumpsit* for Labour and Medicines in curing the Defendant of a Distemper, &c. who pleaded *Infra etatem*; the Plaintiff replied it was for Necessaries generally: And upon Demurrer to this Replication, it was objected, that the Plaintiff had not assigned in certain how or in what Manner the Medicines were necessary; but it was adjudged, that the Replication in this general Form was good.

1 Vent. 114.
Emery's Case.

So where Trover was brought for a Library of Books, and held to be good without expressing what they were; because to set down the particular Books would make the Record too prolix; and in this Case

(a) Bulkeley's
Case cited,
also Raym. 9.

(b) Plow. was cited, where a Man pleaded, that he was Knight of the Shire *per majorem numerum*, and held to be good.

Mich. 16 Car.
2. in B. R.
Prior v.
Dawkes
1 Keb. 825.
S. C.

So in an Action on the Case for setting an House on Fire, *per quod*, amongst divers other Goods, *ornatus pro equis aratris amisit*. After Verdict for the Plaintiff, it was objected, that this was uncertain; but the Objection was disallowed by the Court. And in this Case Justice

Justice *Windham* said, that if he mentioned only *diversa bona* it had been well enough; as a Man cannot be supposed to know the Certainty of his Goods when his House is burnt; and that to avoid Prolixity, the Law will sometimes allow such a Declaration.

As to general and particular Pleading there are many Distinctions, which may be reduced to this Rule, that a Certainty or Generality in pleading is required, according to the Nature of the Subject Matter pleaded; and this has begot the Distinction between (a) Negative and Affirmative Pleas; as if a Man is bound to perform all the Covenants in an Indenture, if they are all in the Affirmative, he may plead Performance thereof generally, and is not obliged to exhibit to the Court a Performance of each of them; which would overload the Proceedings with a Recital of all the Covenants, whereas one only might be in Controversy between the Parties.

Co. Lit. 303.
1 Leon. 136.
Kew. 95.
Palm. 70.
1 Lev. 303.
1 Sid. 215.
2 Vent. 156.
(a) Mode,
and other
Circum-
stances of
Quality,
Time and

Place, are requisite in Affirmative Pleas, none of which are necessary in Negatives. *Show. Parl. Cases* 97. and several Authorities there cited.

But if some of the Covenants are in the Negative, (b) the Defendant must plead specially; for a Negative cannot be performed, otherwise on a special Demurrer the Defendant's Plea would be bad; *aliter* on a general Demurrer.

Co. Lit. 303.
Moor 856.
Cro Eliz. 691.
1 Sid. 87.
(b) But if
the Nega-

tive 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.

Even in Affirmatives our Law allows of general Pleading, where Particulars would be many; as in a Bond for Performance of Covenants upon an Apprentice's Indenture, for finding him Meat, Drink, Washing, Lodging, and other Necessaries, held, that *invenit* Meat, Drink, Washing, Lodging, & *alias res necessarias*, is a good Plea, though intirely uncertain what or how much; and the Reason is not only because it is in the Words of the Covenant, for that Reason doth not always hold; for many Times you must shew how, and are forced to vary from the Words of the Covenant in the Breach; as in the Case of quiet Enjoyment, Breach must alledge how, and by whom, and under what Title the Man was disturbed; but there is another Reason, because the Particulars would be many.

1 *Show. P. C.*
98. *arguendo.*

Where some of the Covenants are in the Disjunctive, there the Defendant cannot plead Performance generally, because both the Alternatives are not to be performed; and by pleading Performance generally, he does not shew in certain which is performed by him; and therefore this is bad on a special Demurrer, which shews the Want of that Certainty; but where the Plaintiff does not demur for Want of such Certainty, it shall be intended that the Defendant performed one of them, and therefore good.

Co. Lit. 303.
Palm. 70.
Cro. Eliz. 560.
1 Leon. 311.

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.

Savil 120,
121.

If in Debt upon an Obligation, conditioned that if the Obligee shall enjoy such Lands till the full Age of *J. S.* and if *J. S.* within one Month after his full Age, makes an Assurance thereof to the Obligee, then, &c. the Defendant pleads, that *J. 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. Eliz. 870.
Waller v.
Croot.

Where

Dier 229. Where the Covenants are to do a Matter of Law, as to (a) convey, *Hob.* 69, 107. discharge an Obligation, ratify, or to confirm, &c. there it must be (a) If the Condition be pleaded specially; because, it being a Matter of Law to be performed, it ought to be exhibited to the Court, to see if it be well performed, who are Judges of the Law, and not a Jury, who are Judges of the Fact only.

shewed by what Manner of Conveyance it was done. 1 *Leon.* 72. 2 *Leon.* 39. 2 *Mod.* 248. *Godb.* 36. —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. *Hob.* 107.—In Debt upon an Obligation, conditioned to deliver all Evidences concerning such Lands, the Defendant must plead, that he hath delivered such and such Charters, which are all the Charters concerning the Land. *Kelw.* 95. But per *Cro. Eliz.* 869. he may plead, that he hath delivered all, &c. and the contrary in some Particulars ought to be shewed on the other Side; per *Curiam.*

Co. Lit. 303 b. Where the Covenants are Matters of (b) Record, the Performance must be shewed specially; because it must appear to be done by the Record, and is not to be tried by a Jury on the General Issue. *Cro. Jac.* 560. *2 Rol. Rep.* 159.

2 *Co.* 4. *Mar-* If in Debt upon an Obligation, conditioned that the Plaintiff shall enjoy certain Lands discharged, or otherwise save harmless (c) from all *fer's Case,* Incumbrances, the Defendant pleads, that the Plaintiff had enjoyed the and the like Point in Lands discharged and kept indemnified from all Incumbrances; this Plea *Winch* 9. is naught; for being in the Affirmative it ought to have been shewed *Cro Jac.* 363, how; but if he had pleaded in the Negative, *Non fuit damnificatus,* it *634.* had been otherwise. *1 Leon.* 71.

March 121. (c) If the Condition be to save harmless from all Bonds entered into for the *Kelw.* So. Obligor, *exoneravit & indem' conservavit* is no Plea without shewing how. *Cro. Eliz.* 916. adjudged, but that he need not shew from what Bonds he saved him harmless; and per *Cro. Eliz.* 433. per *Gandy,* 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.

Where the Bar is in the Negative, it is impossible for the Plaintiff to go to an Issue, for a Negative cannot be proved; and therefore the Plaintiff must assign a Breach, by replying in the Affirmative, on which Issue may be properly taken; as if a Condition of a Bond is, that the Defendant should not deliver Possession to any Person but to the Lessor, or to such Persons as him lawfully evicted; the Defendant pleads he did not deliver the Possession to any but such as him lawfully evicted; here it comes on the Plaintiff's Side to assign a Breach, and shew that he delivered the Possession to some Person that had not lawfully evicted him; because, the Condition being in the Negative, the Defendant's Plea must necessarily be in the Negative also, and the Plaintiff, to assign a Breach, must assign a Fact directly opposite to such Negative Condition. *1 Lev.* 83. *Pullen v. Nicholus.*

Vide Tit. Arbitrament. So if an Obligation be to perform an Award, and the Defendant pleads no Award made, it is not sufficient for the Plaintiff to shew an Award made in his Replication, unless he shews also a Breach; because the Defendant's Plea is in the Negative, and the Plaintiff, by replying in the Affirmative, does not shew the Obligation to be broke; for the shewing such an Award leaves it uncertain whether it was performed or not; and his having shewn that there was an Award subsisting, does not make it appear that he was intitled to the Money, unless he also shews that the Award was broken.

1 Sand. 102. The Condition of a Bond was, that the Obligor should render an *Hayman v. Gerrard.* Account of the Goods of *William Narril* deceased, which came to his Hands, and make an equal Dividend between him and the Obligee; the Defendant pleads, no Goods came to his Hands; the Plaintiff must

must reply what Goods came to his Hands, and farther assign the Breach that he did not account for them; because the Plaintiff, by replying the Goods came to the Defendant's Hands, leaves it on his own shewing indifferent to the Court whether he be intitled to the Penalty of the Obligation or not, unless he goes farther, and shews that the Defendant did neither account nor divide them.

(a) If in Debt upon an Obligation conditioned to pay 30*l.* to *A. B.* Cro. Jac. 359. and *C. tam cito* as they shall come to the Age of twenty-one Years; 2 Bull. 267. the Defendant pleads that he paid those Sums *tam cito* as they came of Age; this is no good Plea, for the Time, Place and Manner of S. C. Halsey v. Carpenter. Performance ought to be shewed in certain, so that a certain Issue (a) If the might be taken upon it; adjudged upon a special Demurrer. 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. *Winch* 11. adjudged.—If the Condition be, that the Obligee shall enjoy an Office according to Letters Patent, the Defendant must not plead *in hac verba*, but shew the Effect of the Letters Patent, and the Enjoyment accordingly. *Hob.* 295.

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 A'd. 27. Duck v. Vincent.

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 the 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 if the Pleadings were not so contrived as to pursue the Covenants, the Defendant would be obliged to fill the Pleadings with Multitudes of useles Deliveries, which might not be controverted by the Plaintiff; whereas the Plaintiff by assigning a particular Breach in the Non-delivery at any one Time may bring the whole Matter in Question. Cro. Eliz. 749. Mints v. Bethel.

But here we must take Notice of another Distinction, *viz.* That when the Condition consists of Matters to be done that lie within his own Knowledge, though they consist of great Variety, yet the Defendant cannot plead generally, but must shew the particular Performance of all Matters in his Plea; as if the Condition be that the Defendant, Bailiff of the Plaintiff's Manor, should render an Account of all the Rents of the Manor he has received before such a Day; if the Defendant plead he has accounted for all the Sums before such a Day, it is ill; but he must shew the particular Sums, because it lies within his own Knowledge only. Cro. Eliz. 749. cited between Sands and Malverer.

So if the Condition be, that the Defendant should deliver Briefs to all Churches within such a Time, and should collect the Money given upon them, and should deliver it over to the Plaintiff; there the Defendant cannot plead generally, that he has delivered the Briefs, collected the Money, and delivered it over to the Plaintiff; but he must particularly shew what Briefs were delivered, what Sums were collected, and that he delivered them over to the Plaintiff, because such particular Facts lie within his own Knowledge only. 1 Sid. 215. Woodcock's Case.

If the Condition be, that the Defendant pay the Plaintiff all Manner of Costs and Charges that *J. S.* shall charge the Plaintiff with, for carrying on a Suit; the Defendant pleads he did pay all Manner of Costs and Charges; this is ill, because it relates to one single Point, which may and ought to be shewed in certain, in order that the Plaintiff may take Issue upon it. 1 Lutw 410.

- 1 Sid. 334.
Church v.
Brunswick. A Bond to pay from Time to Time a Moiety of all such Monies as from Time to Time he should receive; Payment of a Moiety generally, without shewing the Particulars in certain, was held a good Plea, because it is of what he should receive from Time to Time; otherwise if these Words had been omitted, because in that Case there would be a Stuffing of the Rolls with a Multitude of Particulars.
- Cro. Eliz. 913.
King v. Hobbs. In an Action on the Case against the Defendant, who promised, that in Consideration the Plaintiff would discharge a third Person then under Arrest, that he would pay the Money; and alledged *in facto* that he *exoneravit*, &c. and this was held sufficient without shewing how; for that it may be done by Composition, &c. and without Deed.
- Cro. Fac. 359.
1 Rol. Rep. 8.
2 Bulf. 93.
Freeman v.
Sheen. 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 quietatus*, without shewing how, or that he *in facto* discharged him; for it was not intended that an actual Discharge should be given, but that by the Arbitrament he should be acquitted.
- 5 Mod. 243.
Harris v. Pett. In Debt upon a Bond, the Condition whereof was to free and keep harmless the Plaintiff of and from all Costs and Damages that may arise by Reason of a Law Suit, &c. the Defendant pleaded *Non damnificatus* generally; and on Demurrer to this Plea it was held good, because the Condition was to save the Plaintiff harmless from something that was uncertain at the Time of making thereof, *viz.* from the Costs and Charges of the Suit, that no Costs might be recovered against him; but if it had been to save harmless from a particular Thing, there such a negative Plea generally would not have done, because the Defendant ought to shew how he had indemnified the other.
- Skin. 344.
Knight v.
Keech. In Case upon an Agreement, in which the Defendant promised to assign all the Profits which accrued by a Voyage made by a Ship, &c. and the Breach assigned was, that the Defendant *non performavit agreementum predictum*; upon a Verdict and Judgment in C. B. for the Plaintiff Error was brought in B. R. where it was insisted that the Breach was too general and incertain: But *per Cur.* had this been even on Demurrer, it would have been good, but being after a Verdict it is beyond Question, for the Plaintiff would not have Damages given if he had not proved a good Breach; and here the Agreement is single, *ff.* to assign; so the Non-performance is in the Non-assignment, and it being Negative, and in the Words of the Agreement, the Judgment was affirmed.
- 3 Mod. 252.
Mather v.
Mills. In Debt on a Bond conditioned to acquit, discharge, and save harmless a Parish from a Bastard Child, the Defendant pleaded *Non damnificatus* generally; and on Demurrer it was held, that being in the Negative he need not shew how, and it not appearing on the whole Record that the Parish was damnified, Judgment was given for the Defendant.

4. Of Surplusage and Repugnancy in Pleading.

- Co Lit. 303.
Plov. 232,
502.
1 Co. 42.
19 H. 6. 50,
32.
1 Sand. 232. If either Party, Plaintiff or Defendant, alledge more than is necessary, or introduce new Matter repugnant and contradictory to what went before, in any Point not material, this will not vitiate the Pleadings, according to the Maxim *Utile per inutile non vitiatur*; and such redundant or repugnant Part shall be rejected, especially after a Verdict; so though there be a Repugnancy in any material Point, though this is not aided after Verdict, yet if it appears that the Verdict was given on a different Part of the Declaration, or if the Plaintiff release such repugnant Part, Judgment shall be given for him.
- Cro. Fac. 549. In Debt on an Obligation the Defendant pleads Payment of 50 l. 14 Jun. 11 Jam. according to the Condition; the Plaintiff replies *quod*

non solvit 50 l. prædict' 14 August Ann. 11. *suprad'* quas ad eundem diem solviffe 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 Surplufage, 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 Surplufage being a Repugnancy to what was before material, was idle and void.

In Trespafs the Bill was filed Hill. 18 Jac. setting forth that the Defendant 2 January 17 Jac. beat the Plaintiff's Servant, *per quod* the Plaintiff *servitium per magnum tempus, ff. a prædict'* 20 Martii *suprad'* usque primum diem Martii extunc prox' sequen perdidit; on a *Nihil dicit* a Writ of Inquiry was awarded, and 10 l. Damages; but the Defendant had Judgment, because the Git of the Action is for the Use of the Plaintiff's Service, and the Battery is but Inducement, and the Loss of the Service is not *ex necessitate rei* relative to the Battery; for the Servant might fall ill some Time after the Battery, and the Plaintiff having laid a different Month from the Battery, there is nothing in the Record to determine the Court to the 20th of *January*, and to rectify the Month *March* as repugnant; and if the Loss of the Service stands on the Month of *March* 17 Jac. until *March* following, it takes three Months of the Time elapsed after the Time of the Action brought, for which the Jury was not authorized to give Damages.

But in Debt upon a Bond, conditioned that if the Plaintiff did not depart out of the Defendant's Service without his Leave, &c. then if he paid the Plaintiff 100 l. within 28 Days upon Demand, the Bond shall be void; the Defendant pleaded that the Plaintiff 4 Maii 30 Eliz. departed out of his Service, and without his Leave; the Plaintiff replied that 6 Septemb. in the same Year she departed with Leave, and that afterwards 4 Octob. she demanded the 100 l. which the Defendant refused to pay; *absque hoc*, that she departed without Leave; it happened that the Demand was laid to be 4 Octob. and the Writ was tested 18 Octob. so that there was not 28 Days between the Demand and the Action brought, yet the Plaintiff had Judgment; though upon her own shewing she brought the Action 14 Days too soon; for the Issue was upon the Departure, and the Demand in the Replication was altogether immaterial, and therefore shall be rejected as Surplufage.

If in Ejectment the Plaintiff declares on a Lease made to him the third of *May*, and that the Defendant *postea, ff. 1 Maii* ejected him, this is good after Verdict; for by the *Postea* it appears that the Defendant committed a Tort on the Plaintiff's Title, and when he lays 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; 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; and besides, the Jury could not take Cognizance of any Fact done since the Action brought, for that was not in Issue.

In Trespafs for entering his Close 10 Julii 44 Eliz. *contra Pacem Domine Regine Eliz. & Domini Regis nunc*, after Verdict this was moved in Arrest of Judgment, and held that these Words *Domini Regis nunc* were but Surplufage.

1 Show. 28. where it is held that this would not be good on Demurrer.

If an Action be brought, and the Plaintiff concludes his Declaration with a *contra formam statuti*, and there happens to be no Act of Parliament in the Case, the Words *contra formam statuti* shall be rejected as Surplufage.

- 1 Salk. 212.
Carth. 382.
5 Mod. 307.
Comb. 420.
S. C. Bennet
v. Talbot.
- So in Trespafs for entring his Clofe and treading down his Grafs and Corn, and hunting there, the Defendant being an inferior Tradesman, *contra pacem Domini Regis, & contra formam statuti inde provis'*; in this Case, though several Trespasses are alledged, the last of which only is within the Statute, and the Conclusion of the Count is *contra formam statuti*, which in a grammatical Construction goes to the whole Count; yet as in Law it goes only to the Hunting, it therefore may be applied to the latter Part, and rejected as to the rest for Surplufage.
- Salk. 24.
Palmer v.
Staveley.
- 1 Mod. 42.
1 Sid. 306.
2 Keb. 615.
S. P.
- In *Assumpsit* for Money had and received by the Defendant for the Plaintiff, *ad usum* of the Defendant; and Verdict upon *Non assumpsit* for the Plaintiff: On Motion in Arrest of Judgment the Court held, that these Words *ad usum* of the Defendant should be rejected, being insensible and repugnant; and then the Promise is for Money had and received by the Defendant for the Plaintiff, which is well.
- Salk. 213.
Nevil v. So
per.
- In Covenant against an Apprentice the Plaintiff assigned for Breach, that the Apprentice, before the Time of his Apprenticeship expired, and *durante tempore quo servivit*, departed from his Master's Service; the Defendant demurred and had Judgment; because the Declaration was repugnant, for it should have been *durante tempore quo servire debuit*.
- 1 Salk. 213.
Lawley v. Ar
nold.
- So in Trespafs for taking and carrying away his Timber and Brick, *super terram suam jacent' erga confessionem domus de novo edificat'*; and the Court held this insensible; for they could not be Materials towards building a House already built.
- Noy 145 Va-
lentine v. Pen-
ny.
- Trespafs *Quare clausum fregit & solum fodit*; the Defendant justifies, that he and his Ancestors, and all those whose Estate he had in a Cottage, have used to have Common of Turbary to dig and sell *ad libitum*, as belonging to the House, &c. and adjudged an ill Plea, being repugnant in itself; for a Common appertaining to a House ought to be spent in the House, and not sold abroad; also such a Common, as is above-said, is an Interest and a Frank-tenement.
- Co. Lit. 312. a.
- If an Annuity, Common of Pasture, Common of Estovers, or the like, be granted for Life or Years, &c. the Reversion may be granted without Attornment; and therefore to plead it is Surplufage, and more than needs; because in none of them there is any Tenure, Attendance, Remainder, or Payment out of Land.
- Cro. Fac. 282.
Bowles v.
Poor.
- 1 Bullst. 135.
S. C. & vide
Hob. 208.
Moor 887.
Like Point.
- In an Avowry for a Rent-Charge, the Defendant made Title to *Jan. Stiles*, with whom he married *Anno 1603*, and because at *Mich. 1597*, 20l. was arrear, and not paid to him and his Wife, avowed *Hill. 7 Jac.* Adjudged a good Avowry; for the saying it was arrear to him and his Wife was but Surplufage, when the contrary appears, he not being married then.
- 1 Sand. 298,
305.
- If an Acceptance of Rent of an Assignee be pleaded, *quod receperunt & acceptaverunt de predict' J. S. redditum sicut fertur superius reservat'*, viz. *sex denarios de redditu predict'*; this is repugnant, because it is in a Point perfectly material; and it is repugnantly pleaded, because it is saying he received the whole Rent, and yet received but Part of it, which is in Substance a different Thing; and the *Sex denar'* is no Surplufage, because it is the certain Sum that is alledged to be accepted; and therefore the Acceptance is not in the Form only.
- Latch 175.
Noy 44.
Telv. 5.
- If a Man makes several Demands in one Declaration, and in the *toto se attingunt* miscasts the whole Sum, and makes it more than what is contained in the several Articles demanded; this shall not vitiate the Declaration, because the Casting up one Total is meer Surplufage, and that Total not agreeing with the Parts, such disagreeing Surplufage cannot hurt; for it is plainly the Mistake of the Clerk, in comparing the Demand aright, and not of the Party, in shewing any particular Demand otherwise than he ought.

But if a Man brings a Plea in an inferior Court, and the Declaration sets forth particular Demands, which over-run the Sum mentioned in such Plea, though never so little, and the Jury give a Verdict according to the Sums mentioned in the Declaration; this is erroneous; for the Plea in Court is in Nature of a Writ, and is the Original and Foundation of the whole Proceedings; and if the Declaration, Verdict or Judgment, are for more than is contained in the Writ or Plea, and if it be beyond it ever so little, by the same Reason they may go to larger Sums *in infinitum*; and then the Plea or Writ would be no Direction for the future Proceedings of the Court.

Yelv. 5.
Noy 44.
Litch 175.
& vide 1 Sand.
282. that the
Plaintiff may
remit such
Overplus de-
clared for.

5. That the Pleading ought to be direct, and not argumentative.

(a) Every Plea must be direct, and not by way of Argument or Rehearsal. Co. Lit. 303.4. (a) A Plea in Bar, that destroys the Plaintiff's Action only argumentatively, is not good. Yelv. 223.

If a Man be bound by Obligation to warrant Lands, and in an Action on this Bond the Defendant pleads, that the Plaintiff *pacifice gavisus est*, &c. this is naught, being only argumentative; for he should have pleaded, that he did warrant the Lands, & *non damnificatus*.

Dier 42, 43.
2 Co. 3. &
vide 1 Lev.
194.

To say *Quod indentura testatur quod dimisit* is an ill Plea; for he ought to shew that he demised *de facto*.

Dier 118.

In a *Formedon in reverter*, the Demandant counts of a Gift to Baron and Feme in Tail, and that they are dead without Issue, the Defendant cannot plead, that the Gift was to them in (b) Fee, without traversing the Gift in Tail, being only argumentative.

2 And. 179.

(b) So in a *Quare impedit* cannot

plead that A. is Incumbent, and not B. without a Traverse that B. is Incumbent, being only argumentative, ff. A. is Incumbent, ergo B. is not. 2 And. 179. — In Trespass against divers Defendants, they plead, that one of the Defendants was dead before the Writ purchased; the Plaintiff replies, that he was alive; this is naught, without adding & *sic nient morte*; so if Villenage be pleaded, Replication, that he is Frank-free, without adding *nient Villein*, is naught.

19 H. 6. 4.

So if a *Sci. Fa.* be brought against a Parson for the Arrears of an Annuity recovered against him, the Defendant pleads, that before the Writ brought he had resigned into the Hands of the Ordinary, who accepted thereof; this is no good Plea, for he ought to have pleaded, that he was not Parson the Day of the Writ brought.

7 E. 4. 16.
2 And. 179,
180.

In *Assumpsit* the Defendant pleaded, that the Plaintiff was *Alienigena in Regno Franciæ sub ligeantia adversarii Dom' Regis*, &c. *oriundus*: And on Demurrer to this Plea, the Exception to it was, that this was not a direct Affirmative, that the Plaintiff was *Alienigena*, in that it should have been *Natus*, and not *Oriundus*; but some Precedents being cited out of *Rastal*, where the Word *Natus* was supplied with *Oriundus*, the Plea was held good.

4 Mod. 405.
Verrier v.
Arnaud.

A Plea, that he is now a Subject, intended a natural one, and that he was always so.

1 Lev. 121.

In *Assumpsit* against an Executor, on the Promise of his Testator, he pleaded *Non assumpsit*; and after Verdict for the Plaintiff, it was objected, that it did not appear by the Plea (c) who did not assume: But *per Cur'*, It shall be intended of the Testator, for here is no Charge of any Assuming by the Executor.

1 Lev. 184.
Browning v.
Litton.
(c) *Super se assumpsit*, without saying to whom,

where the Law raises the Promise, will be well enough, but not in the Case of a special Promise.

1 Sid. 292. 2 Keb. 57. Cro. Eliz. 703.

- Tatch* 125. So in Debt against an Executor on the Bond of his Testator, the Defendant pleaded *Non est factum suum*; and it was adjudged, that *suum* should be intended the Testator.
- Baker's Case.*
- 2 *Salk.* 686. If a Horse be taken as a Stray, and the Owner says, he demanded the Horse *proferendo satisfactionem*; this is sufficient, and a direct Affirmation, as in the Case of *Warrantizando vendidit*.
- Henry v. Walsh.*
- 5 *H.* 7. 1, 2. If a Man pleads, that he entered *come* or as Heir to such a one; this is positive enough: So if a Man justifies as Bailiff or Servant; this is not barely argumentative, but as positive and direct as if he had alledged that he was Heir, Bailiff or Servant.
- Lier* 132.
- 1 *Sand.* 169. If the Condition of a Bond be to stand to the Award of *J. S.* and so, that the Award be made on or before the 16th of *March*, and no Award be pleaded, and the Plaintiff replies, that after the making the Bond, and before the Action brought, *ss. pradiet' 16 die Martii*, they made an Award; the (a) *Scilicet* is a direct Affirmation that the Award was made within the Time limited by the Condition, and may therefore be traversed.
- (a) The Word *Licet* is not a bare Implicative, but is an express Averment. 3 *Leon.* 67. *Plew* 127.—*Eo quod* is an Affirmative; so is *Et quia*, *Quod cum*, &c. and may be traversed. 1 *Lev.* 194. 1 *Sand.* 117.

6. Negative Pregnant.

- Co. Lit.* 126. a. It is laid down as a Rule, that every Plea ought to be direct, and not by way of Argument; and that therefore Issue cannot be joined on a Negative Pregnant, or an Affirmative Pregnant of a Negative, *i. e.* such a Negative as supposes or implies an Affirmative, or such an Affirmative as implies a Negative; as *Ne dona pas per le fait* implies a Gift by Parol, and therefore the Issue ought to have been *Ne dona pas modo & forma*, and this Kind of Pleading is held to be ill on a (b) Demurrer; because the Plea, &c. is not a certain Affirmative or Negative of any single Point in Question, but being only an Error in Phrase, it is aided after Verdict.
- 303. a.*
- Doct. pl.* 256.
- 2 *Leon.* 197.
- 1 *Leon.* 136.
- Stile* 309.
- Bro. Tit. Negative Pregnant, 1.*
- Fitz. Issue, 88.*
- (b) There must be a special Demurrer to a Negative Pregnant, that is, a Negative Plea which doth also contain in it an Affirmative; and to an argumentative Plea, that is, a Plea which concludes nothing directly, but only by way of Argument or Reasoning; for the Court will intend every Plea good, 'till the contrary appears. 1 *Lit. Reg.* 437.
- 21 *H.* 6. 46, 47. In Trespass for cutting his Trees, the Defendant pleads, that it was by the Command of the Lessor to give them to a Stranger; the Plaintiff replies, that he did not cut the Trees by his Command; this was held a Negative Pregnant, and that he should have pleaded *Ne comanda pas*.
- Doct. pl.* 256.
- 21 *H.* 6. 9. After Issue joined the Defendant pleaded a Release of the Plaintiff *Puis darein continuance*; the Plaintiff replies, that it is not his Deed *Puis darein continuance*; this is a Negative Pregnant, because it implies the Deed to be his, though not executed at the Time alledged by the Defendant.
- Loft. pl.* 256.
- 22 *H.* 6. 38, 39. In Case against an Host, for that the Plaintiff's Goods were imbezilled by his Default, he pleaded, that they were not lost by his Default; this is Negative Pregnant, and he should have pleaded the special Matter.
- Doct. pl.* 256.
- 28 *H.* 6. 7. In Case for burning the Plaintiff's House by the negligent Keeping of his Fire, the Defendant pleaded, that the House was not burnt by the negligent Keeping of his Fire; this is Negative Pregnant.
- Doct. pl.* 256.
- Quare.*
- 5 *H.* 7. 9. If a Defendant plead, that the Cattle died in a Pound overt by the Default of the Plaintiff, and the Plaintiff replies, that they did not die

by his Default generally; this is a good Plea; but if he says, that they did not die in a Pound overt, this is a Negative Pregnant.

In Trespass the Issue joined was, that *J. N.* the Defendant did not disseise the Plaintiff to the Use of *W. P. &c.* and held a Negative Pregnant; but had he pleaded *Non disseisivit modo & forma*, it had been good to all Intents and Purposes. 3 H. 6. 37,
38.
Doct. pl. 257.

In a Writ of Entry *sine assensu capituli*, *Ne alien pas* is a Negative Pregnant; so of an Entry for the Alienation of Tenant for Life. 36 H. 6. 22.
Doct. pl. 257.

In Trespass the Defendant justifies, by Reason that the particular Tenant aliened the Reversion in Fee to him; the Plaintiff traverses, that he did not alien in Fee; this is no good Issue, but a Negative Pregnant; for if he aliened but for another's Life, his Entry is lawful. 22 H. 6. 38.
Doct. pl. 257.

He in Reversion brings a Writ of Entry *in casu proviso*, upon an Alienation made by the Tenant for Life, supposing that he has aliened in Fee, which is a Forfeiture of his Estate; the Tenant comes and pleads, that he hath not aliened in Fee; this is a Negative, wherein is included an Affirmative; for though it be true, that he hath not aliened in Fee, yet it may be he hath aliened in Tail, which is also a Forfeiture of his Estate. 2 Lil. Reg.
212.

If an Executor pleads several Judgments, and that he hath not Assets *ultra*; and the Plaintiff replies, they are kept on Foot by Fraud; and the Defendant rejoins, they are not kept on Foot by Fraud, &c. but doth not say Nor any of them; the Rejoinder is naught, for (a) there is a Negative Pregnant. Carter 221.
Wareup v.
Symonds ad-
judged.
(a) Where a
Plea, that a
House, &c.

was not burnt for want of good Custody of his Fire, is a Negative Pregnant. Bro. Tit. Negative Pregnant, 3. Fitz. Issue, 88.—Saying that you accepted not the Obligation in Satisfaction, implies that he gave you the Obligation, which is a Negative Pregnant. *Stile* 309.

If an Action of Trespass be brought for entering into a Man's House, the Defendant pleads, that the Daughter licensed him to enter, by which he entered; the Plaintiff replies, *Quod non intravit per licentiam suam*; though this Replication be a Negative Pregnant, for it seems rather to confess the Licence than to deny it, yet the Verdict having found that Licence, the Dubiousness of Phrase is now removed, and the Truth appears by the Verdict. Cro. Jac. 87.
Min v. Cole.

So in Debt for Rent on a Lease, the Defendant pleads *Quod nihil habuit in tenementis tempore dimissionis*; and the Plaintiff replies, *Quod habuit in tenementis*, without shewing what Estate; though this had been bad on a Demurrer, because, by not shewing what Estate he had, it is Pregnant of this Negative, that he had not such an Estate by which he had Power to demise, yet after Verdict it is good, where the Truth appears that he had such an Estate that he could demise. Cro. Car. 312.
Gill v. Glasf.

In Debt on an Obligation to perform Covenants in an Indenture of Lease made by the Plaintiff to the Defendant, whereby the Defendant covenanted, that he would not deliver the Possession to any but the Lessor, or to such Persons as should lawfully evict him; the Defendant pleads, that he did not deliver the Possession to any but such as lawfully evicted him: And on Demurrer to this Plea it was objected, that the same was ill, and a Negative Pregnant; and that he ought to have said, that such a one lawfully evicted him, to whom he delivered the Possession; or that he did not deliver the Possession to any: But the Court held the Plea pursuing the Words of the Covenant good, being in the Negative; and that the Plaintiff ought to have replied, and assigned a Breach; and therefore Judgment was given against him. 1 Lev. 83.
Pullen v. Nicholas.

7. That Things must be pleaded according to their Operation in Law.

Co. Lit. 193. b. The Grant or Conveyance of one Jointenant to his Companion must be pleaded as a Release; for one Jointenant cannot enfeoff his Companion, because they are already both seised *per mie & per tout*; and this Manner of Conveyance passing by Livery cannot operate so as to give him what he already has; but though a Release be the proper Conveyance from one Jointenant to another, yet if the Jury find, that the one Jointenant did grant or convey to another, this amounts to a Release; for they having found the substantial Part, the Court is to apply the Words according to the Operation they have in Law; but every such Conveyance must be pleaded as a Release.

4 Mod. 151. *Comb.* 190. So if Tenant for Life grant his Estate to him in Reversion; this is a Surrender, and must be pleaded accordingly, being the Operation it hath in Law.

2 Vent. 149, 260, 266. *Lade v. Baker and March.* *4 Mod.* 149. *3 Lev.* 241. *S. C.* If *J. S.* pleads the Grant of a Rent from his Father in this Manner, *viz.* that in Consideration of Love and Affection, and *5 l.* he *concessit & assignavit, &c.* and there is neither Attornment nor Inrolment of the Deed; this cannot pass as a Grant at Common Law, nor as a Bargain and Sale for want of Inrolment; and though it (*a*) amounts to a Covenant to stand seised, being in Consideration of Love and Affection, yet it ought to have been (*b*) so pleaded, being the Operation it hath in Law.

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; yet if it hath not, and the Consideration of Love and Affection is expressed, it will amount to a Covenant to stand seised. *7 Co.* 40. *Bedel's Case.* *2 Co.* 24. *Cro. Eliz.* 394. and *vide 1 Vent.* 137. *1 Lev.* 56. *1 Mod.* 173. *Cross v. Sudamore.* (*b*) The Word *Dedi* or *Concessi* may amount to a Grant, to a Feoffment, to a Gift, Lease, Release, Confirmation or Surrender; and it is in the Election of the Party to use it to which of these Purposes is most agreeable to his Interest, and therefore he may plead it as either. *Co. Lit.* 301. b. *4 Mod.* 150. cited.

Co. Lit. 303. *Yelv.* 135. *Plow.* 149, 105. All necessary Circumstances implied by Law in a Plea need not be expressed; as in pleading a Feoffment, Livery and Attornment are implied; *secus* in a Grant.

8 Co. 82. In pleading a Countermand to a Submission to Arbitration, it need not be alledged, 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.*

Co. Lit. 353. b. If a Disseisee plead, that he could not enter for Fear, he must shew some just Cause of Fear, that the Court may judge of the Reasonableness of an Apprehension of Danger to his Person; but in a special Verdict, if the Jurors find, that the Disseisee did not enter for Fear of Corporal Hurt, it is sufficient, and it shall be intended that they had Evidence for what they find.

Comb. 403. *Trygarn v. Fletcher.* The Defendant made Conufance as Bailiff to *Jane Griffith*, that *Robert Griffith* was seised in Fee, and devised to *Thomas Griffith* in Tail, and that a Common Recovery was suffered against him, to the Intent that *Jane* should have a Rent of *40 l. per Ann.* after the Death of *Thomas*; and that there was a Deed after the Recovery declaring the Uses, &c. which was held to be ill pleaded; for he should not have set forth the Deed, but have pleaded according to the Construction of Law, that the Recovery was to such Uses at the Time.

4 Co. 22. The Admittance of a Copyholder, as well upon a Descent as Surrender, may be pleaded as a Grant, to avoid the Inconvenience which would

would follow, if the Copyholder should be forced in pleading to shew the first Grant; for that was either before the Time of Memory, and so not pleadable, or within the Time of Memory, and (a) then the Custom fails.

(a) That he

exundum consuetudinem manerii does not necessarily import a Copyhold. 3 *Bullst.* 230. 1 *Rot. Rep.* 211. 2 *Vent.* 144.

So he may alledge the Admittance of his Ancestor as a Grant, and shew the Descent to him, and that he entered, without shewing any Admittance of himself.

But he cannot plead, that his Father was (b) seised in Fee at the Will of the Lord by Copy of Court-Roll of such a Manor, according to the Custom of the Manor, and that he died seised, and it descended to him; for in Truth his Interest in Judgment of Law is but a particular Interest at Will.

4 *Co.* 22.

(b) Without shewing of whose Grant.

Cro. Jac. 103.

adjudged

naught upon

a general Demurrer, *Cro. Car.* 190. *per totam Curiam*; tho' the Son had there shewed, that after the Descent he was admitted: But by three Judges, it is but a Fault in Form, and the Issue being taken upon a collateral Matter, and found for the Plaintiff, it is helped by the Statute of Jeofails.—But if *A.* pleads the Grant of the Reversion of a Copyhold after the Death of *B.* Tenant for Life, he need not shew the Beginning of the Estate of *B.* nor by whom granted; for it is not the Title of *A.* but Matter of Inducement only. *Cro. Jac.* 52. 2 *Vent.* 182.

If one licence another to enjoy such a House or Land till such a Time, this amounts to a present and certain Lease or Interest for that Time, and may be pleaded as such, though it may be also pleaded as a Licence; and if it be pleaded as a Lease for Years, and traversed, the Lessee may give the Licence in Evidence to prove it.

Hard. 366.

2 *Lev.* 194.

vide Tit.

Leases.

If an Obligee in a Bond covenants not to sue the Obligor, this amounts to a Release, and may be pleaded as such; but if the Covenant is, that he will not sue him before such a Day; this rests only in Covenant, and the Party, if sued, can only have an Action of Covenant.

1 *And* 307.

Cro. Eliz. 352.

1 *Rot. Abr.*

939. *Dowse v.*

Jessies.

A. having a Rent-charge issuing out of three Acres, *B.* purchased two Acres thereof, and *A.* covenanted and granted to and with *B.* not to distrain in these two Acres for the Rent. *Glanvil*, contrary to *Anderson*, held it a Release; and the Court held, that if it be a Release, the Tenant of the other Acre may plead it, for thereby the Rent was extinct.

Noy 5.

1 *Show.* 321.

S. C. cited.

If two are bound in an Obligation, and the Obligee releases to one of them, provided the other shall not take Benefit of this Release, the Proviso is void, and the other shall take Advantage of the Release, if he can get it to shew.

Lit. Rep. 190.

Everard v.

Herne.

If two are jointly and severally bound in an Obligation, and the Obligee by a Deed covenants and agrees not to sue one of them, this seems to be no Release, but that he may sue the other.

Cro. Car. 551.

March 95.

Dennis v.

Pain.

If the Obligee covenants and grants to and with the Obligor, that during ninety-nine Years he will not put the Bond in Suit; this is only a Covenant, upon which an Action will lie, but it cannot be pleaded in Bar of the Bond; but where the Covenant is, that the Obligee will not at any Time hereafter put the Bond in Suit; such Covenant is pleadable in Bar as a Release; and in the Argument of this Case it was allowed by all, that if a Letter of Licence contains the following Words, *viz.* that if the Creditor sues within such a Time his Debt shall be forfeited, such Licence is pleadable in Bar.

Carth. 63, 64.

Salk. 575.

1 *Show.* 46.

Ailoffe v.

Scrimshire.

8. Of Colour in Pleading.

- 2 *Lil. Reg.*
 273.
Vide 10 *Co.* 91.
 in *Dr. Ley-*
field's Calc.
- Colour is a feigned Matter, which the Defendant or Tenant useth in his Bar when an Action of Trespass or an Assise is brought against him, in which he gives the Demandant or Plaintiff a Shew that he hath a good Cause of Action, whereas in Truth he hath not, but only a Colour and Face of a Cause; and it is used to the End that the Determination of the Action should be by the Judges, and not by the Jury, and therefore Colour ought to be Matter of Law, or doubtful to the *Lay Gents.*
- 2 *Inst.* 411.
Booth 214.
 10 *Co.* 90.
Doff. pl. 72,
&c.
 10 *Co.* 91.
- In an Assise, when the Defendant pleaded only a colourable Bar, that is such a Bar as shewed some Title in the Demandant, they proceeded to take the Assise at large, which was in this Manner; the Assise shewing no Title in the Plaintiff, the Defendant would shew his own Infeoffment or Investiture, but because such Feoffment was only Evidence that there was no Disseisin, it would amount to the General Issue without Colour; and therefore the Defendant urged, that the Plaintiff obtained by Virtue of an Investiture, on which the Ceremony of Livery had never passed, and the Validity of such Investiture, being a Question of Law, was not to be answered by the Jury, and therefore the Plea of his own Investiture, which alone would have been only Evidence of no Disseisin, joined to the Plaintiff's Title, which turned on a Question of Law, drew the Cause from the Jury to the Court; and this obliged the Plaintiff to shew by what Investiture he claimed, and then the Assise was taken at large on the Title of the Plaintiff; which was done, that the Plaintiff's Title might appear on Record, and the Plaintiff be confined to give Evidence touching that Title, that the Jury might not wander from that Evidence; and that if they did, they might the more easily convict them in an Attaint.
- Kelw.* 103.
- In an Assise, if the Tenant pleads, that he demised the Lands to the Demandant for Years, this is no good Plea; because the Complaint is of a Disseisin of a Freehold, and the Tenant gives the Demandant no Colour to have an Assise.
- Kelw.* 103.
- If in an Assise the Tenant pleads in Bar, that his Father was seised and died, and that he as Son and Heir entered, and gives Colour to the Demandant; and he replies, that he himself was seised, till by the Father of the Tenant disseised, and that he made continual Claim, and after the Death of the Father re-entered and was seised till, &c. this is a good Replication, and yet his Title is founded on his own Possession only.
- Co. Ent.* 652.
Doff. pl. 73.
- In Trespass, if the Defendant justifies the Taking of the Cattle Damage-feasant, he need not give any other Colour to the Plaintiff; for by this Justification he acknowledges the Property to be in him.
- Dier* 365.
Co. Ent. 79.
Raft. Ent. 254.
- In Ejectment the Plaintiff's Title in his Declaration must be answered; and it is not sufficient barely to give Colour, as in Trespass, or an Assise.
- 10 *Co.* 88.
- Colour ought to have the following Qualities, 1st, It ought to be a Matter doubtful to the Jury; as where the Defendant says, that the Plaintiff claims by Colour of a Deed of Feoffment, where nothing passed by the Deed; this is a good Colour, being a Doubt to the *Lay Gents* whether the Land passed by this Feoffment without Livery. 2^{dly}, It ought to have Continuance, though it wants Effect; as where the Defendant gives Colour by Colour of a Deed of Demise to the Plaintiff for the Life of *J. S.* who before the Trespass was dead; this is not any Colour, for this doth not continue; but he ought to say,
- that

that he claims by Virtue of a Deed of Demise made to him for his Life where nothing passed by that. *3dly*, It ought to be such Colour that if it were effectual would maintain the Nature of the Action, as in Assise to give Colour of Freehold, &c.

In Trespafs if the Defendant pleads a Fine *sur Conscience de Droit*, levied by the Ancestor of the Demandant, he shall not give Colour although this be but executory; otherwise if he pleads, that his Ancestor granted the Reversion after an Estate for Life or Years. *Raft. Ent. 277. Co. Ent. 673. 10 Co. 90.*

The Reason why Colour shall be given in a Writ of Entry *sur disseisin*, Writ of Entry in Nature of an Assise, in Assise, Trespafs, &c. is to make a certain Issue; but when the special Matter of the Plea totally bars the Plaintiff, no Colour is necessary; and therefore in pleading a Warranty, an Estoppel or Fine with Proclamations, no Colour is necessary. *10 Co. 90. Doct. pl. 77.*

When a Man pleads to the Writ, or to the Action of the Writ, no Colour shall be given. *22 H. 6. 50.*

Where the Defendant intitles himself by Act of Parliament, no Colour is to be given. *Doct. pl. 77.*

Where Letters Patent are pleaded, the Defendant ought to plead Colour by former Letters Patent in this Form, *Scilicet colore quarundam Literarum Patentium facti predicti* the Plaintiff, &c. *ubi nil transivit*, and not that the Plaintiff claims *Colore concessionis sive dimissionis*, &c. *10 Co. 90. Doct. pl. 77.*

He who justifies for Wreck, Waifs, Strays, need not give Colour. *Doct. pl. 78.*

So he who justifies for Tithes shall not give Colour; for although any Person severs them from the nine Parts, yet they belong to the Parson. *10 Co. 91.*

In Trespafs the Defendant pleads, that the Freehold is in *ŷ. S.* or that *ŷ. S.* is seised in Fee as of his Demesne, and that he by the Command of *ŷ. S.* &c. he need not give Colour; for though the Fee or the Freehold be in *ŷ. S.* yet the Plaintiff might have an Interest for Years as a Lease in the Premises; but where the Defendant makes a special Justification in him, in whose Right as Servant, &c. there he ought to give Colour; as if he pleads that *ŷ. S.* was seised, and infeofed him, in whose Right, &c. there he ought to give Colour; for in this Case it cannot be presumed that the Plaintiff has any Interest in the Land. *22 H. 6. 50. 18 E. 4. 3. 10 Co. 89. b. That if in Trespafs the Defendant justifies as Servant to ŷ. S. he need not give Colour. Lutw. 1343. Et vide Cro. Eliz. 76.*

In Forcible Entry the Defendant may plead, that he was seised until disseised by the Plaintiff, and this is good without giving Colour. *Raft. Ent. 62. 21 H. 6. 39.*

In Assise the Defendant justifies by Virtue of a Lease for Years, he need not give Colour, in as much as he does not plead in Bar of the Assise, nor does he take the Freehold on himself. *Dier 246.*

In Trespafs the Defendant pleads, that the Plaintiff claims *Colore Feoffamenti*, by which Nothing passed, this is not good Colour, for he ought to have pleaded *Colore Chartæ Feoffamenti*. *2 Rol. Rep. 140.*

Where the Defendant devised a Title to himself by divers mesne Conveyances, and gave Colour to the Plaintiff by one who was last named in the Conveyance, this was held naught; and that he should have given Colour by him who was first named in the Conveyance. *2 Rol. Rep. 140.*

In Trespafs for entering the Plaintiff's House, and taking and carrying away of his Goods, the Defendant pleaded, that before the Trespafs supposed one *A.* was possessed of the said Goods, and the said Goods being in the House of the Plaintiff, the said *A.* sold them to the Defendant, by Force whereof he was possessed, and being so possessed came to the Plaintiff's House, &c. and by Assent and Licence of the Plaintiff's Wife he entered into the House, and carried away the Goods; *3 Leon. 266. Taylor v. Fijber.*

Goods; and this Plea was held naught, there being no Colour given the Plaintiff, and the Licence given by the Wife not material, nor sufficient for justifying an Entry; but in this Case it was held that the Want of Colour is but Matter of Form, which must be taken Advantage of on Demurrer.

Cro. Jac. 122.
Radford v.
Harbyn.

In Trespass for taking and carrying away a hundred Load of Wood the Defendant justifies, for that *J. S.* was possessed of them *ut de bonis propriis*, and the Plaintiff claiming them by Colour of a Deed of Gift afterwards made took them, and the Defendant retook them, and it was thereupon demurred, because the Colour given to the Plaintiff is a good Title for the Plaintiff, and confesseth the Interest in him; for Colour ought to be such a Thing, which is good Colour of Title, and yet is not any Title; as a Deed of a Lease for Life, because it hath not the Ceremony of Livery, so the Grant of the Reversion is not good without Attornment; but a Deed of Goods and Chattels, without other Act or Ceremony, is good; so of Colour by a Lease for Years, or by Letters Patent.

9. Of pleading Non-tenure, and Disclaiming.

Doct. pl. 129.
Bridg. 72, 73.
Dier 227.

(a) So in Debt
on a Lease
Non-tenure is
a good Plea.
4 *H. 6.* 5.

Doct. pl. 129.

(b) 36 *H. 6.* 6.
1 *Mod.* 181.

At (b) Common Law if the Tenant had pleaded *Non-tenure* as to Part, it would have abated all the Writ; but by the Statute of 25 *E. 3. cap. 16.* it is enacted, That by the Exception of *Non-tenure* of Parcel no Writ shall be abated, but only of that Parcel whereof *Non-tenure* was alledged.

Doct. pl. 128.

When the Tenant pleads *Non-tenure* to the whole Lands demanded, he need not set forth who is Tenant; but when he pleads *Non-tenure* as to Part, he must set forth who is Tenant of the other Part, and must (c) aver that he himself was not Tenant *die impetrationis brevis*.

(c) Pleading
Non-tenure at

the Time of the Writ purchased is sufficient, without adding *Nec unquam postea*, *Doct. pl.* 128.

—with what Certainty, 1 *Mod.* 181.

Cro. Eliz. 233.
Leonard v.
Bacon.

If Issue be joined on a Plea of *Non-tenure*, and it is found by Verdict, that before the Writ purchased the Tenant infeoffed divers Persons with an Intent to defraud him who had Cause of Action, and notwithstanding still took the Profits, this finding is sufficient to intitle the Demandant, the Feoffment being void by the (c) Statute 13 *Eliz.*

(d) For which
vide Tit.
Fraud.

1 *Mod.* 181.
Fowle v.
Doble.

If a Formedon be brought of 140 Acres lying in three Villis, and the Tenant pleads *Non-tenure* of 100 Acres, he need not set forth in which of the Villis the 100 Acres lie.

6 *Co. 10. a.*
Doct. pl. 129.

If on a Plea of *Non-tenure* for the Whole the Writ abates, the Demandant shall not have a new Writ by Journies Accounts; otherwise if it abates only on a Plea of *Non-tenure* for Part.

33 *H. 6.* 2.
Doct. pl. 128.

In a *Præcipe* after Jointenancy pleaded the Defendant to another Writ cannot plead *Non-tenure*, for by his former Plea he hath affirmed himself to be Tenant; but had the first Writ been brought against a Husband,

Husband, and the second against Husband and Wife, she might have pleaded *Non-tenure*, being a Stranger to the first Action.

In a Writ of Entry in the Nature of an Assise against Husband and Wife, the Husband says, that the Wife was not Tenant of the Land the Day of the Writ purchased, *nec unquam postea*, and held a good Plea. Doff. pl. 129. 10 H. 6. 22.

As to *Non-tenures* being a Plea in Bar or in Abatement, this Difference hath been taken, *viz.* That *Non-tenure* which goes to the Tenure, as when the Tenant denies that he holds of the Demandant, but says that he holds of some other Person, then it is in Bar; but *Non-tenure*, that goes to the Tenancy of the Land, as where he pleads that he is not Tenant of the Land, goes in Abatement only. 1 Mod. 250.

A General *Non-tenure* is not a good Plea to a *Scire Fa.* upon a Judgment in a personal Action, because it falsifies the Plaintiff's Return; but in a *Sci. Fa.* to have Execution of a Judgment in a real Action one may plead *Non-tenure* against the Return of the Sheriff, because of the high Regard the Law has to the Freehold. 2 Rol. Rep. 54. 1 Rol. Rep. 302. Cro. Eliz. 872. 6 Mod. 226.

But a special *Non-tenure* may be pleaded to a *Sci. Fa.* upon a Judgment in a personal Action; as to a *Sci. Fa.* on a Judgment for Debt or Damages against Tenant for Years, he may plead that he has only a Term for Years. Owen 134. 3 Lev. 205.

In a Formedon in Reverter, if the Tenant pleads *Non-tenure* generally, the Demandant may maintain his Writ, that he is Tenant, tho' he can recover no Damages; adjudged by all the Court, and that (a) *Lit. and Co.* were not to be intended of a simple Plea of *Non-tenure*, but of *Non-tenure* with a Disclaimer, as the Pleadings were usually in *Littleton's Time*; for upon the simple Plea of *Non-tenure*, supposing the Tenant hath no Freehold but a Reversion in Fee, the Demandant shall not be restored to the Fee, for Nothing is disowned by the simple Plea of *Non-tenure* but only the Freehold, which may be true, and yet he may have the Reversion in Fee; but when the Tenant disclaims, or pleads *Non-tenure* and disclaims, the Demandant shall be restored to the Whole, because he hath disclaimed the Whole. 3 Lev. 330. Hunlock v. Peter. (a) Co. Lit. 102, 361.

10. Pleading Hors de son Fee.

Hors de son Fee is an Exception to avoid an Action brought for Rent-Services, &c. issuing out of Lands by him who pretends to be the Lord; for if the Defendant can prove that the Land is without the Compas of his Fee, the Action falls. Doff. pl. 216. Bro. Tit. Hors de son Fee. 1 And. 237.

If the Writ comprehends Certainty of Title, as in *Mordancestor*, Formedon in the Descender or Remainder, *Hors de son Fee* is no Plea; otherwise in a Writ of Entry *sur disseisin*, or in an Assise of Rent; but in an Assise, if the Party makes Title, *Hors de son Fee* is no Plea. Bro. Hors de son Fee, pl. 9. 5 E. 4. 6. 27 H. 8. 7. Dier 311.

In Trespass or Rescue *Hors de son Fee* is no Plea, without shewing of whom the Land is held. 6 E. 4. 4. Doff. pl. 216.

In a Cessavit *Hors de son Fee* is no good Plea, because the Tenure is traverseable. 2 Inf. 295.

If a Stranger claims a Seignory, and distrains and avows for the Services, the Tenant may plead that the Tenancy is *extra Feodum*, &c. of him, that is, out of the Seignory, or not holden of him; but he cannot plead *extra Feodum*, &c. unless he takes the Tenancy upon himself. Co. Lit. 1. b. 1 Mod. 104. cited, and there said by the Ch. J. that this Rule is to be intended in Cases of an Assise, and so were all the Books cited in *Co. Lit.* for Proof of this Opinion.

In an Avowry the Tenant cannot plead *Ne unque seise* of such Services generally, because he leaves no Remedy for the Lord either by

Avowry, or by Writ of Customs or Services; and therefore if he is a Tenant in Fee Simple, he ought either to disclaim or plead *Hors de son Fee*.

2 Mod. 103, 104. *Sherard v. Smith*.
 (a) So in an Avowry a Stranger may plead generally *Hors de son Fee*, and so may Tenant for Years. 2 Mod. 104. *per Cur.*

If in (a) Trespass for taking of Goods the Defendant justifies by Command of the Lord of the Manor, of whom the Plaintiff held by Fealty and Rent, and that for Non-payment of the Rent he took them *Nomine distinctionis*; the Plaintiff may reply, that the *Locus in quo est extra, absque hoc quod est infra Feodum, &c.* adjudged upon a special Demurrer, it being shewn for Cause that the Plaintiff had not taken the Tenancy on himself.

11. Estoppels in Pleadings.

Co. Lit. 352. a. There are three several Kinds of Estoppels, by Matter of Record, by Matter in Writing, and by Matter in *Pais*. 1st, By Matter of Record, *viz.* by Letters Patent, Fine, Recovery, Pleading, taking of Continuance, Confession, Imparlanse, Warrant of Attorney, Admittance. 2^{dly}, By Matter in Writing, as by Deed indented, by making an Acquittance by Indenture or Deed Poll, by Defeazance by Indenture or Deed Poll. 3^{dly}, By Matter in *Pais*, as by Livery, by Entry, by Acceptance of Rent, by Partition, by Acceptance of an Estate.

Co. Lit. 352. Every Estoppel, because it concludes a Man to alledge the Truth, must be certain to every Intent, and not to be taken by Argument or Inference.

ought to be a precise Affirmation of that which makes the Estoppel. *Co. Lit. 305.*—Estoppels are odious in Law; and although all Parties to an Indenture are bound by the Words thereof, because they agree to it, yet that must be intended of material Words, and not of all minute and descriptive Words and Circumstances. 6 Mod. 315.—A Matter alledged that is not traverfable shall not estop. *Co. Lit. 352. a.*—An Estoppel is not taken Notice of unless relied on in Pleading. 1 Mod. 201.—An Estoppel cannot be pleaded without a Traverse. 2 Mod. 37.

9 H. 6. 60. By Matter of (b) Record all Parties are estopped, so that a Man (b) If a Deed shall not be received to take an Averment (c) directly contrary to a be inrolled of Record, Record.

the Party is estopped to say that it is not his Deed, or that it was not acknowledged by him. 1 Leon. 184. 3 Leon. 84. *Comb. 248.* & *vide Tit. Bargain and Sale*. (c) If one of my Name levies a Fine of my Land, I may confes and avoid the Fine by shewing the Special Matter which stands with the Fine. *Cro. Eliz. 531.* & *vide Tit. Fines.*—Where one shall be estopped to say, that a Writ issued after the *Teste*, *Lutw. 334.*—But whether it may not be so found by Verdict, *vide 1 Lev. 173. 1 Sid. 271. 1 Keb. 930. 2 Keb. 32. Bayly v. Bunning.*—Whether the Defendant shall be estopped to say, that the Plaintiff's Testator was dead when a Writ was sued out in his Name. *Lutw. 254.*—Where one shall be estopped by praying Oyer of a Record or Deed. *Lutw. 1644. Salk. 7.*

Co. Lit. 352. b. When the Truth is apparent in the same Record, the adverse Party shall not be estopped to take Advantage thereof, for he cannot be estopped to allèdge the Truth when it appears of Record.

Stile 395. Bayly v. Scarborough. If *A. B.* is outlawed by the Name of *A. B. Esq;* and comes in *Gratis*, and reverses it for want of Proclamations, he shall not be estopped to say afterwards that he was a Knight and no Esquire.

(d) *Fares. 38. Salk. 3. S. C.* If one puts in Bail by a wrong Name, (d) he shall be concluded thereby, as was agreed *per Cur.* in the Case of (e) *Smith v. Villars*; and in a Civil Action he need not join in the Recognizance; and in the Case of the Earl of *Banbury*, who was indicted by the Name of *George Knowles*, Esq; though by the Course of the Court he ought to have joined in the Recognizance; yet because if he had entered into one by the Name of *G. K.* it would have been an Estoppel upon him, he

he was indulged to bring others who gave Bail for him by the Name of *G. K. Esq;* for their Act could not conclude him.

Where one brought a Writ of Error upon Judgment in Dower against him, and assigned for Error that he was within Age, and appeared by Attorney, and Issue being joined upon the Nonage, and found for the Plaintiff in Error, the Defendant therein would have staid Judgment, because in the Assignment of Error it was alledged that *7 Sept. 20 Car. 2.* he was of the Age of fourteen & *non amplius*, and the Writ of Error was brought *4 July 26 Car. 2.* and in Michaelmas Term following, and Error assigned by Attorney, when he could not be of the Age of twenty-one, according to his own Allegation; but the Substance of the Issue being whether he was within Age, and the *viz.* no material Part of the Issue, it was held no Estoppel.

Matters alledged by Way of Supposals in Counts shall not conclude or estop, otherwise it is after Judgment given; and though after Non-suit the Supposal in the Count shall not conclude, yet the Bar, Title, Replication, or other Pleading of either Party, which is precisely alledged, shall conclude after Non-suit.

Regularly a Stranger shall not be bound by, nor take Advantage of an Estoppel.

Privies in Blood, as Heirs, Privies in Estate, as the Feoffee, Lessee, &c. Privies in Law, as Lords by Escheat, Tenant by the Curtesy, Tenant in Dower, the Incumbent of a Benefice, and others that come under by Act in Law or in the *Post*, shall be bound and take Advantage of Estoppels.

Where the Record of the Estoppel runs to the Disability or Legitimation of the Party, there all Strangers shall take Benefit of that Record, as Outlawry, Excommungement, Profession, Attainder of *Præmunire*, Bastardy, Mulierty, and shall conclude the Party, though they be Strangers to the Record.

But of a Record concerning the Name of the Person, Quality or Condition, no Stranger shall take Advantage, because he shall not be bound by it.

If *A.* Leases by Indenture to *B.* to begin after the Expiration of a Lease to *D.* in Covenant brought by *B.* against *A.* he is estopped to say there is no such *D.* and though the common Rule is, that a Recital is not an Estoppel, yet where the Recital is material, as here, it is otherwise.

If by Indenture between *A.* and *B.* reciting that *A.* was seised in Fee of certain Lands, *A.* in Consideration of a Marriage to be had between her Son and *B.* grants a Rent out of those Lands to *B.* to begin after the Death of her Son, and covenants to pay it; in an Action against *A.* upon this Covenant she cannot plead she had Nothing in the Land at the Time of the Covenant, but that a Stranger was seised thereof, both because she is estopped by the Deed, and the Covenant extends to it as an Annuity.

If *A.* being a Lessee for Years makes an Under-Lease to *B.* by Indenture, and *B.* covenants with *A.* to perform all the Covenants in the original Lease to be performed by *A.* his Executors, &c. in an Action upon this Covenant *B.* will be estopped to say there are no Covenants in the original Lease.

If the Condition of an Obligation be to perform all Covenants contained in such an Indenture, in Debt upon the Obligation, the Defendant (*a*) cannot say that there is no such Indenture, because he is estopped.

Sand. 316. 1 Mod. 15. L. P. (*a*) But he may say there are no Covenants, But then he will confess the Obligation to be single, and the Plaintiff upon Demurrer shall have Judgment, *1 Lev. 3. adjudged, & vide 1 Lev. 45. Raym. 27.*

If

1 *Rob. Abr.*
872-3.

If the Condition of an Obligation hath Reference to a Particular to be done, or in which a Generalty is to be done, the Obligor shall be estopped by it to say, that there is no such particular Thing; as if the Condition of an Obligation be to release all the Right that he hath for Life in *Black Acre*, he shall be estopped to say, that he hath not any Right for Life in *Black Acre*, because this contains a Particular.

(a) For this
Diversity
vide *Cro Eliz.* 362.
Owen 110.
Popb. 114.
Moor 405.
1 *Brownl.* 117.
Yelv. 226.

But if the Condition of an Obligation contains (a) a Generalty, a Man shall not be concluded to say, that there is no such Thing; as in Debt upon an Obligation, of which the Condition is to perform all Agreements now set down by *J. S.* the Defendant may say, that no Agreement was then set down by *J. S.* because this comprehends a Generalty.

2 *Bull.* 19. *Latch* 125. *Cro. Jac.* 375. *Dal.* 28. 1 *Show.* 59.

Dier 3.

Saivil 90.
(b) So if the
Condition
he to pay all
such Sums
which he
was bound to pay by his several Obligations, according to *Moor* 25. pl. 79. but in *Dal.* 28. it is a *Q.* being General.

If the Condition of an Obligation be to pay (b) all such Sums of Money in which *T. S.* stands bound by his Deed Obligatory to *T. H.* of and for the Behoof of the Children of *W. S.* according to the Will of, &c. he shall be estopped to say, that *T. S.* never stood bound by any Deed Obligatory for the Use of the Children of *W. S.*

Moor 420. pl.
578. *Paramour v. Durning.*

(c) Where

In Debt upon a Bond conditioned to pay (c) all Legacies that *J. S.* had given by his Will, the Defendant shall be estopped to say, that *J. S.* made no Will; but he may say that *J. S.* gave no Legacy by his Will.

Cro Eliz. 362.
Popb. 114.
Moor 405.
Owen 110.
S. C. Stroud v. Willis.

Noy 79.

Latch 125.

Germin v. Randal.

Cro. Eliz. 756.

Dier 196. *S. C.*
in Margin,
Willoughby v. Brook.

(d) Where
it was reci-

ted that *J. S.* claimed to have a Lease, and the Condition was to save harmless from all Claims of *J. S.* the Defendant could not plead *J. S.* had no Lease. 3 *Leon.* 118.

Allen 52.

Stila 103. *S. C.*
Hurt v. Buckminster.

In Debt upon a Bond, conditioned that whereas the Plaintiff had carried 12000 Billets for the Defendant to *D.* if the Defendant should pay the Plaintiff after the Rate of 17s. per 1000, then, &c. the Defendant cannot plead that the Plaintiff did not carry 12000 Billets to *D.* for he is estopped to deny it.

Cro. Jac. 640.

Godb. 283.

S. C. Maby v. Shephard.

If in an Action upon a Bond against one as Executor of *Edmund Shephard*, upon Oyer prayed it appears that the Words are *me Edward S. teneri*, &c. and that he subscribed it by the Name of *Edm. S.* (which was his true Name) and upon *Non est factum testatoris* pleaded, it is found to be the Deed of the said *Edm. S.* yet the Plaintiff shall not have Judgment, the Truth appearing on the Record; for *Edward*

and

and *Edmund* are two distinct Names, and the (a) Subscription by the Name of *Edm.* being no Part of the Bond, is not material. (a) That if a Man binds himself by a

wrong Name, he shall be estopped to avoid it. *Vide Dier 279. 1 Leon. 322. Moor 897. Cro. Jac. 261, 558. Lutw. 894, & Tit. Misnomer.*

If *A.* gives a Bond by the Name of *B.* and is sued by the Name of *B.* and pleads the Misnomer, the Plaintiff may reply that he made the Bond by the Name of *B.* and estop him by demanding Judgment if against his own Deed he shall be admitted to say his Name is *A.* *Salk. 7. Linch v. Hook.*

If *A.* enters into a Bond to *B.* conditioned that *A.* shall use and maintain *C.* his Wife; in an Action upon this Bond *A.* shall not be estopped to say that *C.* was married to *D.* (who is yet living) before she married *A.* and so *A.* cannot use and maintain her as his Wife, for he confesses and avoids, because she might notwithstanding be called in common Speech or named his Wife in Writing. *Mich. 39 Eliz. Prat v. Phan-ner.*

If in an Action for *5 l.* by the Lessor upon a Covenant to pay so much for every Acre of Meadow ploughed, he lays the Ploughing of an Acre of Lands called *Lane's Meadows* (there being other Meadows leased) the Defendant may plead that the Lands in the Indenture leased, there called *Lane's Meadows*, are not Meadow, but Time out of Mind Arable; for though all Parties to an Indenture are bound by the Words thereof, yet it must be intended of material Words, and not such as are descriptive only; and if the Closes had been leased as containing 500 Acres, yet the Defendant would not have been estopped to say there were not so many. *Mich. 11 Geo. 1. in B. R. Skip-with v. Green.*

If one gives an Acquittance under his (b) Hand and Seal for Rent due at a Day, he shall be estopped thereby to demand Rent due at a Day before. *1 Lev. 43. 1 Sid. 44. Raym. 21. S. C. Palmer (b) If not*

v. Stannage, and 3 Co. 65. Dier 271. 1 And. 14. Bendl. 186. Moor 87. L. P. under his Hand and Seal it is no Estoppel, but Evidence only. *Comb. 59.*

But yet if one avows for Rent due at a Day, he shall not be estopped to (c) avow for Rent due at a Day after. *1 Lev. 43. (c) May have Covenant after. Comb. 59, 60.*

If upon a Writ of Error it be assigned for Error, that the Plaintiff died before the Trial, and Issue thereupon taken, the Plaintiff in Error, by his Pleading to the Action, is estopped to give in Evidence that the Plaintiff died before the Action brought; but the Defendant in Error pleading *quod adhuc in plena vita existit, & hoc, &c.* lets the Plaintiff loose from the Estoppel. *Comb. 446. ruled by Holt at Guild Hall.*

12. Pleading with a Profert, and demanding Oyer: And herein,

1. In what Cases there must be a Profert or (d) Monstrans de fait. (d) Is the producing the Deed in Court.

Where the Plaintiff declares upon a Deed, or the Defendant pleads a Deed, it must regularly be with a *Profert in Curia*, to the End the adverse Party may at his own Charges have a Copy of it, without which he is not bound to answer; and the (e) Reason why Deeds must be shewn or produced to the Court is, because it is the proper Office of the Court to judge of the Sufficiency of them, to see that they are duly executed, and without Razure or Interlineation, and whether they are absolute, conditional or revokable. *2 Lil. Reg. 201. 2 Lil. Reg. 382. (e) 6 Co. 36. 10 Co. 93. Hob. 233. Stile 459. 2 Salk. 498. 6 Mod. 244.*

6 Co. 38. *Bel-*
lamy's Case.
 1 *Bullst.* 119.
Cro. Car. 143.
 (a) But tho'
 a Thing will
 pass without
 Deed, yet if
 the Party
 pleads a
 Deed, and
 makes a Title thereby, he must come with a *Profert.* 2 Mod. 64.

A Deed therefore that is (a) requisite *ex institutione legis* must be shewn in Court, though it concerns a Thing collateral, and conveys or transfers nothing; as in Case of Attornment by a Corporation, which must be by Deed, there the Deed must be shewn; *secus* where it is *ex provisione hominis*; as where the Condition of a Lease is, that the Lessee shall not assign but by Deed, and not by Parol, there he may plead the Assignment, without shewing the Deed; an Assignment by Parol being sufficient, had it not been provided against by Covenant.

Stile 459. *per*
Glin C. J.
 (b) But in a
 Motion for a Prohibition grounded on Letters Patent, the Suggestion need not be with a *Profert.*
 2 Show. 303.

In (b) all Cases, where a Thing cannot be demanded but by Deed, the Deed must be produced.

6 Co. 38.
Cro. Jac. 102.
 3 *Lev.* 205.

But of Things executed, or Estates determined, a Deed need not be shewn; as a Licence which is executed, though of its own Nature it cannot be without Deed.

Cro. Jac. 372.
Bateman v.
Woodcock.
 1 *Rol. Rep.* 221.
 S. C.

So it in Trespafs against a Bailiff, he justifies by Virtue of a Warrant, without any *Profert* thereof, this is sufficient; for the Warrant, being executed and returned to the Sheriff, is determined; but it is said to be otherwise in a Justification for a Rent-charge or such Things as have Continuance.

1 *Rol. Rep.* 221.
per Coke &
Doddridge,
& vide Dier
 29. *pl.* 194.

So the Grantee of the next Avoidance to a Church, having presented, need not shew the Deed of Grant to him, being a Matter executed.
 Like Point.

3 *Lev.* 205.
Ailsbury v.
Harvey.

So where in Replevin the Defendant justified by a Condemnation before the Justices of Peace upon the Statute of Excise, for the Non-entry of Strong Waters, and a Warrant made thereupon to levy 20 s. for a Fine; and Exception was taken thereto, because there was no *Profert hic in Curia* of the Warrant. But *per Cur'*, the Statute does not require that the Warrant be under Hand and Seal, but only in Writing, and no Writing is to be pleaded, unless it be a Deed; and held further, that this being executed need not be shewn.

Co. Lit. 225.
Fenk. 305.
Cro. Car. 209.
 5 Co. 75.

Also a Person, who comes in by Act or Operation of Law, need not produce the Deed, or plead with a *Profert in Curia*; as Tenant in Dower; so of Tenant by Statute-Staple or Merchant, who may take Advantage of a Rent-charge without shewing the Deed.

Co. Lit. 225. b.

So if a Guardian in Chivalry in Right of the Heir had entered for a Condition broken, he might have pleaded the Estate to have been on Condition, without shewing any Deed; because his Interest was created by Law.

Co. Lit. 226. a.

But the Lord by Escheat, though his Estate be created by Law, shall not plead a Condition to defeat a Freehold, without shewing it; because the Deed belongs to him.

Co. Lit. 226. a.

So Tenant by the Curtesy shall not plead a Condition made by his Wife, and a Re-entry for a Condition broken, without shewing the Deed; for though his Estate be created by Law, yet the Law presumes that he (c) had the Possession of the Deeds and Evidences belonging to his Wife.

Cro. Car. 209.
Gray v. Field-
der.

In Debt upon an Obligation assigned by the Commissioners of Bankrupts, without shewing the Obligation; upon which there was a Demurrer; but because the Party came in by Act in Law, and has no Means to obtain the Obligation, it was adjudged to be good enough, without shewing of it in Court.

Where

Where a Man is a (a) Stranger to the Deed, and doth not claim any Thing comprised in the Grant, nor any Thing out of it, nor doth claim any Thing in Right of the Grantee, as Bailiff or Servant, there he shall plead the Patent or Deed, without shewing of it.

(a) 10 Co. 94. laid down as a Maxim. One need not produce a Deed in 2 Show. 418.

pleading, which is made to a third Person, and which he has no Means to come by. 3 Lev. 83. Moor 870. Plow. 149.

Grantee of the next Presentation was outlawed, and the Church became vacant; the Lord of the Manor, who was intitled to the Goods and Chattels of Persons outlawed, brought a *Quare impedit*; and it was refused, that the Plaintiff being *in le post*, and not (b) privy to the Grant in any wise, need not shew the Deed of Grant to the Person outlawed.

Hob. 302. Holland v. Shelley.

(b) He who is privy, as Lessee for Years, Feof-

fee, &c. cannot plead a Deed without shewing it. Bro. Monstrans, pl. 61. Co. Lit. 267, 317.

Where a Person pleads, that he claims by Virtue of a Feoffment to Uses, or that *J. S.* being seised in Fee, covenanted with *A.* and *B.* to stand seised to the Use of such and such Persons, and that the Lands came and belong to him by Virtue of such Covenant, he need not produce the Deed; for the Deed doth not belong to him, though he claims thereby, but to the Covenantees; also he is in by Force of the Statute of Uses, by Operation of Law; as Tenant in Dower, Tenant by Statute-Staple are.

Cro. Car. 441. Stockman v. Hampton. But for this v. de Dier 277. Cro. Jac. 217. 1 Jon. 377. Ney 145. and Carth. 316. S. P. determined

for the following Reasons. 1st, Because the Deed doth not belong to him who is only *Cestui que Trust.* 2dly, Because he hath no Remedy in Law to get Possession of the Deed. 3dly, He is in merely by Operation of Law, and not in the *Per.*

In Debt against an Executrix for 10*l.* the Plaintiff declared upon an Obligation, conditioned to pay 5*l.* to *A.* to the Use of *M.* his Daughter, at a Time limited in a certain Indenture; the Defendant pleads, that the Indenture was made between her Testator and one *J. S.* by which the Plaintiff infeoffed *J. S.* to the Use of the Testator, and his Heirs, and that the Testator covenanted to pay 5*l.* to the Plaintiff within two Months after the Death of *W. R.* which *W. R.* is yet alive; the Plaintiff demurred; because the Defendant did not produce the Indenture: But the Court held, that the Plea was good without it, because the Defendant was a Stranger to the Deed; and it does not belong to her, but belongs to the Feoffees, and she has no Means to enforce them to produce it, and the Court will not impose an Impossibility, especially she being an Executrix.

1 Lut. 481. Crotch v. Crotch.

Where a Man justifies under a Deed only as Servant, and claims no Title himself, nor hath any Interest therein, but the Title and Interest is his Master's; yet he ought to shew the Deed, for it is the Substance of the Title, and without shewing of it he cannot justify.

Cro. Jac. 292. 2 Lil. Reg. 202.

So where the Defendant justified as Servant to the Queen's Patentee for Years, and by his Command, but did not bring into Court the Patent; and the Plea was held naught; for that he deriving his Title from the Patentee, not by Act in Law, but by his Command, he ought to shew the Patent, as well as he who claims under the Patent by Assignment; but he who claims Interest under an Act in Law (because he had no Means to compel the Patentee to shew it) may justify without shewing of it.

Cro. Jac. 377. & vide Stiles 15.

So where a Servant justifies for Tithes by Lease, yet coming in by Title and Privy, he ought to shew it, as well as his Master; and he cannot plead the Entry into another's Soil without making a good Title thereto, which ought to be by shewing of the Lease.

Cro. Jac. 362. 2 Lil. Reg. 202.

Co. Lit. 226. a. In an Assise the Tenant pleads a Feoffment of the Ancestor of the Plaintiff unto him, &c. and the Plaintiff saith, the Feoffment was on Condition, &c. and that the Condition was broken, and pleads a Re-entry, and that the Tenant entered and (a) took away the Chest, in which the Deed was, and yet detaineth the same; he shall not in this Case be enforced to shew the Deed.

(a) If the Party who would plead the Deed has it not, he ought to move the Court, and the Court will order him the Deed, or a Copy of it. *1 Sid.* 50.

1 Sand. S. 9. In Debt upon a Bond, conditioned for the Performance of the Covenants in an Indenture, the (b) Defendant ought to shew the Indenture; and the Entry always supposes it to be brought into Court by him, though the Court will sometimes (c) compel the Plaintiff to give a Copy thereof to the Defendant, if he swears he never had a Part thereof, or hath lost it; but this is done *ex gratia Curiae*, and not *ex debito justitiæ*; but in such Action, after Oyer of the Bond and Condition, it was entered upon the Roll, that the Defendant prays Oyer of the Indenture, & *ei legitur*, This Indenture, &c. and the Defendant pleaded, &c. It was adjudged upon a general Demurrer, that this Manner of Pleading was good in Substance, though not formal; for it shall be intended the true Indenture, and that it was in Court, though by the Record it did not appear to be so. But *per Curiam*, If it had been on a special Demurrer, it had been naught.

(b) He cannot plead Performance without shewing of it. *Allen* 72. *1 Vent.* 37. *1 Mod.* 266

(c) That if it be lost, the Court will compel the Party to shew his Counterpart, and he to plead thereto, otherwise they will grant an Imparllance. *Cro. Jac.* 426. *1 Sid.* 386. *2 Keb.* 430.

6 Mod. 237. When one is bound by Bond to perform Covenants in an Indenture, in an Action upon the Bond the Defendant, in order to discharge himself, ought to shew the said Deed to the Court, that they might see what the Covenants were; for he cannot shew that he has performed all, without shewing what he was to perform; and therefore he ought to recite the Indenture, whereof he is supposed to have a Counterpart, in his Plea; but if he never had a Counterpart, or had lost it, upon Oath thereof the Court will compel the Plaintiff to give him a Counterpart, in order to set it out for his Defence.

per Curiam.

1 Salk. 215. But where an Action was brought upon a special Agreement contained in a Note, and a Rule was made to shew Cause why the Plaintiff should not give the Defendant a Copy; but upon Cause shewn the Rule was discharged; because the Contract, upon which the Action was founded, was a parol Contract, of which the Note was only Evidence, and therefore the Defendant ought not to have a Copy.

Hill v. Aland.

2 Bull. 228. Where a Deed is only Inducement to the Action, it need not be pleaded with a *Profert*.

Stile 193, 264.

Cro. Eliz. 217. *1 Fon.* 377. *Cro. Jac.* 43, 70. *Cro. Car.* 442. *1 Rol. Rep.* 13, 328.

Palm. 387. As where a Lessee for Years claimed a Way to his House by a *Que Estate*, without shewing the Deed; and this was held sufficient by three Justices against one, because the Lessee has not the Deed; and it is but a Conveyance to the Action, which is grounded on the Disturbance done to him in his Possession; but if he had claimed a Rent or Common in Grofs, which could not pass without Deed, it had been otherwise; for there he could not shew *Que Estate*, without shewing the Deed, how he came by the Estate.

Cro. Jac. 673. *Slackman v. West.* *3 Mod.* 52. *S. C.* cited; and for which *vide* *Ye'v.* 201. *1 Brown* 220.

Cro. Jac. 271. *2 Mod.* 277.

It was formerly, and before the Statute 16 & 17 Car. 2. held, that the not pleading a Deed with a *Profert* was Matter of Substance, and that such Omission made the Judgment (a) erroneous.

17 de Cro. Jac. 32.
Cro. Eliz. 217.
Hob. 301.

Moor 885. Cro. Car. 190. (a) Where the Want of a *Profert* was made good or dispensed with by the Plea of the adverse Party. *Hutt. 54.*

But now by the 8th Chapter of the said Statute it is enacted, 'That after Verdict Judgment shall not be staid or reversed for Default of alledging the bringing into Court any Bond, Bill or other Deed mentioned in the Pleadings, or of any Letters Testamentary or of Administration.' Since this Statute, it hath been (b) held only Matter of Form.

(b) For which *vide 1 Sid.*

249. Salk. 497. Lutw. 1353. 6 Mod. 137.

And by the 4 & 5 Anne, cap. 16. 'No Advantage or Exceptions shall be taken for want of a *Profert in Cur'*, &c. but the Court shall give Judgment according to the very Right of the Cause, without regarding any such Omission and Defect, except the same be specially and particularly set down and shewn for Cause of Demurrer.

In a *Sci. Fa.* by an Executor, the Clause of *Profert hic in Curia Litteras Testamentarias* may be inserted in the Middle as well as in the Conclusion of the Writ.

Carth. 69.
Bosworth v. Ridgley.

2. Of demanding Oyer.

(c) Oyer of a Deed or Record is always to be had by him who is to be charged by it, and not by him who pleads it; and he who pleads or declares upon it must (d) shew it.

Fro. Oyer de fait, 15.
(c) To de-

mand Oyer of an Obligation is not only for the Defendant's Attorney to desire the Plaintiff's Attorney to read the Obligation to him, as the Word seems to import, or to have a Sight of it, but that he may have a Copy of it, that his Client may consider by it what to plead to the Action. *2 Lil. Reg. 226.* (d) But the Defendant may, if he pleases, plead without demanding Oyer of it; and if he doth once plead, he cannot after waive his Plea and demand Oyer. *2 Lil. Reg. 226.*—Where there ought to be Oyer, the Party, if he demanded it, is not bound to plead without it. *6 Mod. 28.*

If a Man (e) enters into an Obligation by a wrong Name, no Advantage can be taken thereof, without demanding Oyer of the Deed. would take Advantage of a wrong Original, he must demand Oyer of it.

6 Mo. 303.
(e) If the Defendant

Articles of Agreement indented were pleaded, and Replication was, that in the said Articles it is further covenanted, without demanding Oyer of the Deed; and the Court held it ill Pleading, and gave Judgment *nisi*.

1 Keb. 513.
—For according to *Hutt. 33.*
they cannot plead and shew the Counterpart.

In Trespass the Defendant justifies for Common, and sets forth Letters Patent of the King *hic in Curia prolat'*; which Plea the Plaintiff accepts, without demanding Oyer of the Letters Patent, but after he demanded Oyer of them; but denied *per Curiam*; and the Prothonotaries said, that he is not obliged to shew them, if not required at the Acceptance of the Plea.

Pasb. 26
Car. 2. in C. B. Matthews v. Alderton.

Oyer of the Deed cannot be demanded but during the Time it is in Court, and that is all the Term wherein it is produced, and then it may be entered *in hæc verba*; and there may be a Demurrer or Issue upon it; but it cannot be done of another Term, because the Deed is then out of the Court.

5 Co. 76.
Lutw. 1644.
2 Lil. Reg. 267.

If the Defendant pleads a former Action depending in the same Court in Abatement, and the Plaintiff craves Oyer of the Record, if it is not given in convenient Time, viz. the next Day, the Plaintiff may sign Judgment.
Carth. 452.
Theobald v. Long, and
Carth. 517.
 S. C. where this is said to be the quickest Method of proceeding.

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 hic in Curia*, and the Defendant craves Oyer, and then demurs for Variance between the Award set out in the Replication and the Oyer, and the Variance appears 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 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 may reply *Nul tiel agard*.

After Impar lance Oyer cannot be demanded, because the Impar lance is to another Term; but if it be by Bill in B. R. it may, tho' not in the Common Pleas.
Lil. Reg. 267.
6 Mod. 27,
 233.
2 Show. 310.
 & vide under the Division Title *Impar lance*.

When Oyer of a Deed is prayed, it is intended that the Deed is in Court, and the *ei legitur*, or Reading of it, is the Act of the Court.

When a Deed is pleaded with a *Profert hic in Curia*, the very Deed it self is by Intendment of Law immediately in the Possession of the Court; and therefore when Oyer is craved, it is of the Court, and not of the Party; and (a) after Oyer is craved the Deed becomes Parcel of the Record, and the Court must judge upon the whole; and the Demand of Oyer is a Kind of Plea, and may be counter-pleaded.

Case appears to the Court as fully as if the Deed had been in the Plea. *Hob.* 217. *Show. Parl. Cases* 221.

If the Defendant prays Oyer of the Bond and Condition, and it is entered *in hec verba*, the Condition becomes Parcel of the Plaintiff's Declaration, and is not Part of the Defendant's Plea.

Debt for the Duty of Scavage, and declares upon a Patent of *Ed.* 4. Defendant imparls, and after demands Oyer of the Letters Patent; upon which the Plaintiff demurs. *Per Cur'*: The Demurrer is ill; for the Defendant having demanded Oyer, &c. he ought either to have it, or to be ousted of it by Rule of Court; but there cannot be a Demurrer upon the Demand; he ought to have counterpleaded the Demand of the Oyer, and the Judgment of the Court would have been, that he should answer *sine auditu*, &c. and it was resembled to an *Aid prier*, in which the Plaintiff cannot demur, but must counterplead.

13. Pleading a Recovery in a former Action.

It is a Maxim in Law, *Quod nemo bis vexari debet si constat Curie quod sit pro una & eadem causa*; so that regularly a Bar in a real or personal Action by Judgment, Confession, Verdict or Demurrer, is a perpetual Bar, and may be pleaded to any new Action of the same or like Nature.

But herein there is a Diversity between real and personal Actions; for though in the latter, as Debt, Account, &c. the Bar is perpetual;
6 Co. 7. &
vide Tit. Ejectment.

yet in real Actions there is this Distinction, that a Bar in one real Action is not a Bar to an Action of a higher Nature; and therefore if a Man is barred in an Assise of *Novel Disseisin* he may have a *Monstrans de droit*, *Assise de Mortancestor*, *Ayel*, *Besail*, *Entry sur Disseisin a son Ancestor*; and this is said to be in Favour of Inheritances.

So if a Man is barred in a *Formedon in Descender*, he may bring a *Formedon in Remainder* or *Reverter*. 5 Co. 33. a.
2 Mod. 43.

If a Man is barred in an Action of Trespafs for taking of Goods, this cannot be pleaded in an Appeal of Robbery, being of a higher Nature. Bro. Eftoppel,
217.
4 Co. 43.

If *A.* rob *B.* of 3000*l.* of Money in Bags, for which he is afterwards indicted and convicted, and afterwards *A.* brings Trespafs against *B.* for taking of the said Monies, who pleads this Matter in Bar, but does not shew that the Plaintiff had given Evidence for the Conviction; for which Reason the Bar was held insufficient; for otherwise he shall not have Restitution, and the Allegation of Procurement is not sufficient; & *ca de causa* Judgment was given for the Plaintiff, and not for the Matter in Law, for that was against him. Noy 82.
Lutw 144.
Markham v.
Cobb.

If a Man grants a Rent to another, payable at a certain Day, and covenants to pay the Rent accordingly, if the Grantee afterwards recovers in an Action of Covenant for the Non-payment of the Rent, (a) this will be a Bar for any Action after for the Rent; (b) for in the Action of (c) Covenant he shall recover all the Rent in Damages. 1 Rol. Abr.
353 Strong
v. Watts.
(a) So a Recovery or
Bar in an

Assumpsit will be a good Bar in Debt for the same Thing. 4 Co. 94. Yelv. 84. Cro. Jac. 110. Cro. Eliz. 240. (b) But in *Assumpsit* the Defendant cannot plead an Account brought for the same Money to which he had rendered his Law; because Damages are recovered in *Assumpsit*, but not in an Account. *Moor* 458. But *quere*; & *vide* *Cro Jac.* 110. (c) So where an Action is brought upon a special *Assumpsit* to pay Rent. *Cro. Car.* 415. *Cro. Eliz.* 57.

If *A.* and the other Executors of *B.* bring Debt upon a Bond, and the Defendant pleads, that before the Purchase of this Writ the said *A.* as Administrator to *B.* brought Debt upon the same Bond against the Defendant, who then pleaded, that *B.* made Executors, who administrated, &c. and the Plaintiff then replied, that Administration was committed to him *pendente lite* between the Executors; upon which the Defendant then demurred; and it was adjudged for him; and so now pleads this Matter by way of Estoppel, and demands Judgment if, as Executor, he shall have an Action upon the same Bond against the same Defendant; this is no good Plea; for by the first Judgment the Plaintiff was only barred as to the Action of the Writ, *viz.* to have one as Administrator; but this Mistake of his Action is no Bar nor Estoppel to bring his true Action. 5 Co. 32, 33.
Robinson's
Case.
Cro. Jac. 15
S. C. by the
Report of
which it ap-
pears, that
he did not
know that he
was Execu-
tor; and
there said,
that the
Rule in per-
sonal Ac-
tions, once

barred and always barred, must be intended where it is a Bar to the Right, not where the Action is only misconceived. — And so is *6 Co.* 8. where the S. C. is cited, and *2 Mod.* 319. — So where Judgment is given upon the Matter, not the Matter of the Plea. *2 Lev.* 210. — If a Man brings Trespafs for taking his Horse, and is barred in that Action, yet if he can get the Horse into his Possession, the Defendant is without Remedy; for notwithstanding the Recovery the Property is still in the Plaintiff. *2 Mod.* 319. *per Cur.*

If in Trover for Plate the Defendant pleads, that the Plaintiff had before brought his Action for the same Plate against *J. S.* and had Judgment to recover 20*l.* Damages, and (d) had *J. S.* in Execution for the same, and avers it to be the same Conversion, &c. this is a good Plea; for by the Judgment the Damages which were before uncertain are reduced to a Certainty, and therefore he shall not demand the Cro. Jac. 73.
Brown v.
Wotton.
Yelv. 67.
Moor 762.
S. C.
(d) So tho'
Uncer- he had him
not in Exe-

dition; for by the Judgment *transit in rem judicatum*. *Yelv.* 68. — And where and how the Defendant may enforce the Plaintiff to enter up his Judgment, to the End he may plead it to another Action, *vide* *Latch* 216.

Uncertainty again; and by the Judgment the Property of the Goods is altered.

Cro. Jac. 73. But a Judgment in Debt against one Obligor, upon a joint and several Obligation, and the Body taken in Execution, is no Plea to an Action brought against the other Obligor.

6 Co. 44. Higgin's Case. If a Man hath Judgment in *B.* upon an Obligation, he shall not afterwards bring an Action of Debt upon the same Obligation, so long as the said Judgment remains in Force; for by this Judgment the Specialty is turned into a Matter of Record.

6 Co. 45. a. Otherwise if in the County Court by *Justices*, for that Court not being of Record, he may, upon the same Obligation, have Debt in a Court of Record.

Attachment shall be pleaded in Bar to other Actions, *vide 1 Rol. Abr. 555.* and *Tit. Custom of London.*

Cro. Jac. 284. If in Debt on a Bond the Defendant pleads, that the Plaintiff brought another Action in *London* upon the same Bond, to which the Defendant there pleaded *Non est factum*, and it was found for him; upon which it was entered, that the Defendant should recover Damages against the Plaintiff, *Et quod eat inde sine die*, this is no Plea, because the Judgment was not *Quod querens Nil capiat per breve*, and so no Judgment was given as to bar the Plaintiff in another Suit.

1 Lev. 261. If in Debt against Executors they plead a Judgment obtained against one of them as Administrator, this is a good Bar; for though he might have pleaded in Abatement to the first Action, yet he was not obliged so to do, and this Recovery against him was upon the Right of the Debt.

1 Mod. 20. If in Action upon the Case the Declaration is insufficient, and the Defendant pleads an ill Plea, but Judgment is given against the Plaintiff upon the Insufficiency of his Declaration, but by Mistake entered *Quia placit' prædict', &c. bonum & sufficiens in lege existit, &c. ideo consideratum, &c. quod querens Nil Capiat per billam*, (a) whereas it ought to have been entered *Quod defendens eat inde sine die*, and the Plaintiff brings a new Action, and declares aright, and the Defendant pleads the former Judgment, reciting the Record *verbatim*, this is no good Plea; for without Question, the Plaintiff having only committed a Mistake in his Declaration, he may set it right in a second Action.

(a) Where Judgment is given for the Tenant or Defendant upon a Plea in Bar, or to the Writ, &c. the Judgment is all one, *viz. quod eat inde sine die*, and shall have Reference to the Nature or Matter of the Plea, and so be taken to go in Bar, or to the Writ. *Co. Lit. 363.* *5 Co. 68.*

1 Mod. 207. But if a Declaration be faulty, but the Defendant takes no Advantage thereof, but pleads a Plea in Bar, upon which the Plaintiff takes Issue, and the Right of the Matter is found for the Defendant, the Plaintiff shall have no other Action, for he is estopped by the Verdict; so if a Declaration be faulty, and the Plaintiff demurs to the Plea in Bar, by which he confesses the Fact, if well pleaded, he is estopped thereby, and shall have no other Action; but if the Plea is not good, it can be no Estoppel, but the Plaintiff may have another Action.

per Cur. Skin. 120. S. P.

Cro. Car. 55. If in Trover for certain Sheep the Plaintiff declares, that the 25th Day of *March* in the Year, &c. he was possessed thereof, and lost them, and that the same the last Day of *April* in the same Year came to the Hands of the Defendant, who the same Day converted, &c. and the Defendant pleads, that the Plaintiff had before brought Trespas against the Defendant, and *J. S. quare ceperunt & abduxerunt* the said Sheep, and thereupon counted of a Taking the 14th of *April* in the same Year, to which the Defendants then pleaded a Judgment against *J. N.* who was possessed of the said Sheep, and that by Virtue

of a *Fi. Fa.* thereupon the said Sheep were fold to the Defendant, &c. whereupon Issue being joined it was found for the Plaintiff, and 2*d.* Damages given, upon which the Plaintiff had Judgment for the said 2*d.* Damages and 6*l.* Costs, and avers the Taking and Driving, for which the said Recovery in Trespass was had, and the Conversion in this Action to be all one, &c. and to this Plea the Plaintiff replies and confesses the said Action, and Recovery of the 2*d.* Damages, &c. but says the said 2*d.* Damage was not given for the Value or Conversion of the said Sheep; *absque hoc*, that the said Taking and Driving, whereupon the said Judgment was had, is the same Trespass *quoad* the Conversion of the said Sheep of which the Plaintiff now declares; this is a good Replication, and the Plaintiff shall recover; for the Damage being so small, cannot be presumed to be given for the Value of the said Sheep; for if so the Plaintiff must for 2*d.* only lose his Property in the said Sheep; therefore it shall be presumed, and may be averred, that this Damage was given for the Chasing and Driving, and that the Plaintiff had the Sheep again, and after lost them, &c. and the rather because in Time the Conversion is supposed so long after the Chasing and Driving.

If in an Action upon the Case the Plaintiff declares against the Defendant, that he falsely and maliciously did procure a Commission of Bankrupts to issue out against the Plaintiff, &c. by Virtue whereof the Defendant broke his Shop, and took away his Goods and Shop-Books, whereby he was discredited and lost his Trade, to his Damage, &c. and the Defendant pleads, that the Plaintiff had brought an Action of Trespass for the Breaking his Shop, taking his Goods, &c. and upon that Action had recovered Damages, &c. this is no good Plea, for this Action is not brought for the same Thing as the former was, in which no Damage could be recovered for the Scandal, upon which this Action is grounded.

Stile 3, 4. 201.
Watson v.
Norbury.

If in Trover for certain Goods the Defendant pleads, that the Plaintiff had brought Trespass *vi & armis* for the same Goods, and upon Not guilty pleaded a Verdict and Judgment was thereupon given for the Defendant, &c. this is no good Plea, because this Action will in many Cases lie where Trespass will not; and so it may be very well presumed, that the Plaintiff at first only mistook his Action, and brought Trespass where his Evidence would serve in Trover only.

Raym 47.
3 Med. 1, 2.
2 Med. 318.
Put v. Raw-
stern.

But it hath been since held, that if in Trover for certain Goods the Defendant pleads, that the Plaintiff had before brought an Action of Trespass *Quare vi & armis ceperunt & asportaverunt* against the same Defendants for the same Goods, to which the Defendants then pleaded Not guilty; and upon a special Verdict, which the Defendants in their Plea set forth *verbatim*, the Court then gave Judgment, that the Plaintiff *Nil capiat per billam*, and that the Defendants *Irent inde sine die*, and avers the Goods in both Declarations to be the same; and the Taking and Carrying away, &c. supposed in the said Action of Trespass, and the Coming to the Hands of the Defendant, &c. in this Declaration, to be the same, and the Cause of Action the same, &c. this is a good Plea; for though Trover will lie in many Cases where Trespass will not, yet upon the Matter here disclosed in Pleading it appears the Plaintiff was before barred, not by Mistake of his Action, but upon the Right and Merits of the Cause.

2 Vent. 169.
Letchmere v.
Tiplady.

If *A.* says *B.* is perjured, and thereupon *B.* brings his Action, and *A.* justifies, and Issue is thereupon taken and found for the Defendant, and Judgment thereupon given, and after *A.* again publishes the same Words of *B.* and thereupon *B.* brings another Action, and *A.* pleads the first Judgment in Bar, this is a good Plea.

2 Brownl. 49.
Stiles v. Bax-
ter.

3 Lev. 248.
Gardner v.
Helvis.

If an Alderman of N. brings an Action for these Words, *he is a rascally Alderman, a factious Alderman, a Lamponer*, and avers, that a Lamponer is there understood of a Libeller, and the Defendant pleads a former Action brought for the same Words, and laid in the same Manner (saying only that in the first Action no Interpretation is given to the Word *Lamponer*) in which Action the Plaintiff was barred, this is a good Plea; for the Plaintiff having been once barred shall not intitle himself to a new Action by a new Interpretation of the same Words.

1 Salk. 10.
Johnson v.
Long. Carth.
456. S. C.
adjudged,
because the
Plaintiff had
not laid any
Continuance

In Case for erecting a Nufance 2 *die Feb.* the Defendant pleaded a prior Action brought for erecting a Nufance 20 *die Martii*, and a Recovery thereupon, and avers these to be the same Nufance and Erection; Plaintiff demurred, and Judgment against him, for he may have an Action for the continuing of the same Nufance, but can never have a new Action for the same Erection.

of the Nufance in his Declaration.

1 Salk. 11.
Fetter v.
Beale.

But though an Action will lie for the continuing a Nufance, yet it hath been held that in Assault, Battery and Maihem; if the Plaintiff in his Declaration recites a Judgment in a former Action for the same Battery, and shews that he has since sustained consequential Damages by a Piece of his Skull's coming out; yet this will not intitle him to a new Action; for *per Holt Ch. J.* every new Dropping is a Nufance; but here is not a new Battery, and in Trespass the Grievousness or Consequence of the Battery is not the Ground of the Action, but the Measure of the Damages which the Jury must be supposed to have considered at the Trial.

(K) Duplicity in Pleading: And herein,

1. The Reason why Duplicity is a Fault, and the Manner of taking Advantage thereof.

Co. Lit. 304. a.
Doct. pl. 135.

(a) But where the Defendant pleaded to Outlawries on mean Process in Disability, to which the Plaintiff demurred for Duplicity, it was held that the Plea was naught; and the Diver-

THE Plea, says my Lord *Coke*, that contains Duplicity or Multiplicity of distinct Matter to one and the same Thing, whereunto several Answers (admitting each of them to be good) are required, is not allowable in Law; and this Rule, says he, extends to Pleas Perpetual or Peremptory, and not to Pleas (a) Dilatory, for in their Time and Place a Man may use diverse of them. Also where the Tenant or Defendant may plead the General Issue, there, upon the General Issue pleaded, he may give in Evidence as many distinct Matters to bar the Action or Right of the Demandant or Plaintiff as he can: Also a Special Verdict may contain double or treble Matter, and therefore in those Cases the Tenant or Defendant may either make Choice of one Matter, and to plead it to bar the Demandant or Plaintiff, or to plead the General Issue, and to take Advantage of all; or he may plead to Part one of the Pleas in Bar, and to another Part another Plea, and his Conclusion of his Plea shall avoid Doubtfulness, and hereby neither the Court nor the Jury is so much inveigled, as if one Plea should contain

ty between a Plea in Bar and Abatement as to Duplicity being urged, it was answered by the Court, that there was a Difference between a Plea of an Outlawry in Disability and other Pleas in Abatement; and that this Plea was ill for Duplicity, because the Plaintiff is disabled as well by one Outlawry as by all the other Nine, to which several Answers are required. *Carth.* 8, 9.

contain divers distinct Matters; and if the Tenant make Choice of one Plea in Bar, and that be found against him, yet he may resort to an Action of a higher Nature, and take Advantage of any other Matter.

The Reasons why Duplicity in Pleading is held a Fault are, that the Party being effectually barred by one single Point, it is unnecessary and vexatious to put him upon litigating any other; and though he might take Issue on any one Point, yet must he be at a Loss, which the material Point is, so as to traverse the same, and thereby put an End to the Cause; whereas the Party pleading such double Matter must be presumed confident of his own Strength, and therefore ought to put his Defence on that single Point, which will put an End to it; besides, the Jury ought not to be charged with Multiplicity of Things, when finding any one of them contrary to their Evidence lays them liable to the Severity of an Attaint.

Also from the Expence and Vexatiousness attending it, a Person is no more allowed to plead and demur to the same Fact, than he is to plead double; for the Duplicity herein draws the Matter to a different *Examen*, since the Demurrer is to be tried by the Court, and the Fact by a Jury.

So where one confesses and avoids, and likewise traverses the same Point, this is in Nature of a double Plea, and therefore naught.

But though Duplicity in Pleading be a Fault, yet must the same be taken Advantage of on a special Demurrer, that is, the Party must shew wherein the Doubleness consists; and it is not sufficient to demur *quia duplex & caret forma, &c.* but he must lay his Finger on the very Point that is so.

1 Lev. 76. 1 Salk. 219. & vide Tit. Demurrer more Authorities to this Purpose.

If a Plea is pleaded which is double, and the adverse Party demurs not for the Doubleness, he is obliged to answer both Parts.

2. What shall be said Duplicity in Pleading.

In Trespas for Assault and Battery, Defendant justifies by a *Molli-ter manus imposuit* for due Correction of the Defendant as his Servant, 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 Doubleness 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 be expensive and vexatious to the Plaintiff; but had it been really no Plea at all, or such a one on which no Issue could be taken, then it had been only (a) Surplusage, and consequently could not amount to a double Plea.

never make a Plea double. 1 H. 7. 16. Dier 42. b. DoF. pl. 138. S. P.

In an Action of false Imprisonment the Defendant justifies by Force of a *Latitat* out of B. R. by Force of which he took him; the Plaintiff replies, that he did it *de injuria sua propria, &c.* it was moved that this was naught after a Verdict, and not helped; but the Court held it well after a Verdict, but that upon a Demurrer it would be naught, as being multifarious jumbling (b) Matters of Record and Matters of Fact together, and putting both into the Mouths of the *Ley Gents.*

(a) Matter of Surplusage shall
(b) For this vide Hob. 244. H. tt. 20. 1 Sid. 314.

- 5 H. 77. In Debt on an Obligation the Defendant pleaded, it was on Condition that he stood to the Award of certain Persons, so that it were delivered in Writing, and pleads that no Award was made nor delivered in Writing; and this Plea was held naught for Duplicity, for the Award might be made in one County and might be delivered in another, and so the same Jury not proper Judges of both these Facts.
- Dier 242. a.
Doct. pl. 156.
- Plow. 140. In Debt upon an Obligation, if the Defendant says that the Obligation was made by Durefs of Imprisonment, and by Menace of Imprisonment, this is a double Plea.
- 19 E. 4. 4.
But if an
Executor
pleads *Plene administravit*, and so *Riens in mains*, this is not double, being only an Inference necessary following his Plea. 1 H. 7. 15. 18 H. 8. 4. Dier 243.—In Debt for Rent *Nilil debet* and *Nilil habuit in tenementis* held to be double and repugnant. Vide 4 Mod. 254.
- Co. Lit. 304. In a *Scire Facias* on a Fine, as Heir to two Parceners, the Tenant pleaded in Bar a Fine levied by the two Parceners with Warranty, and he relied on the Warranty; and that Plea was held double, and he forced to rely on the Warranty of one.
- Hob. 29.
- Co. Li. 304. So if one have divers Warranties, and they fall by Discent on one Person, Heir to both, yet he must be vouched as Heir to one only; for as to the Demandant the Voucher is a Kind of Plea in Bar, and ought to be single; for the Demandant may counterplead the Possession of the Vouchee and his Ancestors, which he cannot do if they be divers; and as to the Vouchee the Voucher is a Kind of Demand or Suit, and ought to be single; for the Vouchee may counterplead the Lien, which he cannot do if they be divers.
- Hob. 29.
- 2 Vent. 198, In Debt on a Penal Bill of 7*l.* for the Payment of 10 Shillings at one Day and 10 Shillings at another, and so till the Whole was paid; 222.
1 Saund. 338. the Plaintiff assigns the Breach, that the Defendant did not pay on the said several Days, &c. the Defendant pleads an insufficient Plea, the Plaintiff replies, and the Defendant demurs generally; in this Case it was held that no Exception could be taken on the general Demurrer to the Declaration for the Doubleness, but Judgment shall go against the Defendant for the Insufficiency of his Plea.
- 1 Lev. 79. In Covenant on a Lease, wherein the Lessee covenanted to pay his Rent yearly by equal Portions at *Michaelmas* and *Lady-Day*; the Breach assigned was, that he did not pay the Rent due at the aforefaid several Feasts during the Term; and though it was objected, that the Breach was not well assigned, but ought to have been so particularly; yet it was resolved to be well enough, for perhaps it was never paid at any of the Days; and this differs from the Case last abovementioned, for there the Assignment of Non-payment at any one of the Days was sufficient to intitle him to the Penalty of the Bill.
- 2 Sand. 48, In Debt against an Executor who pleads several Judgments had against him, &c. the Plaintiff replies to each severally, that it was had by Fraud to bar him of his Debt: This Replication is clearly double, 49. *Tvetbery v. Akland.*
1 Lev. 281. &c.
vide 1 Mod. 33. because if he had avoided any one of the Judgments he should have had a general Judgment against the Defendant, his Plea being intire; 2 Mod. 36. (a) yet in this particular Case this Pleading is allowed, for he may be 2 Keb. 591. mistaken in one; and in this Case he has it in his Election to plead 2 Sand. 336. Fraud to them all severally, or to any one of them, omitting the others; 4 Mod. 54, 63. and if Payment of several Obligations had been alledged, the Plaintiff Carth. 195. (a) This is called an anomalous Case against the Rules of Law, which condemn double Pleading; but in this Case it hath several Times been allowed. 2 Sand. 48 Comb. 444.

If a Man pleads two Things where he is compellable to shew both, this does not make his Plea double. *Plew. 194. Do. 7. pl. 156.*

As where to a Plea in Abatement in Trover that another Action depends by B. and C. for the same Cause, the Plaintiff replied that they are both dead; this Replication is not double, for he must shew the Death of both to enable him to bring the Action alone. *2 Lev. 82. 1 Vent. 256.*

If there are three in Execution jointly at the Suit of A. and all escape, the Plaintiff may declare for the Escape of all, and it will not be double, though the Escape of any one of them will be (a) sufficient to intitle him to the Action. *Kelw. 68. Stile 82. (a) For this vide 1 Sid. 5. Skin. 583. and Tit. Escape.*

In Detinue by Dame Audley the Defendant pleads, that after Bailment of the Goods to him by the Plaintiff she married Lord Audley, and that during such Marriage the Lord Audley released to him all Actions, &c. It was objected that this Plea was double, viz. Property in the Husband by the Intermarriage, and a Release by him; but it was resolved not double, because he could not plead the Release without shewing the Marriage. *Moor 25. pl. 85. Dame Audley's Case. Dal's. 30. pl. 9 S. C.*

3. Of Pleading double by Leave of the Court.

This depends on the Statute 4 & 5 Ann. cap. 5. for Amendment of the Law, by which it is enacted, ' That any Defendant or Tenant in any Action or Suit, or any Plaintiff in Replevin in any Court of Record may, with Leave of the same Court, plead as many several Matters thereto as he shall think necessary for his Defence; and if any such Matter shall on a Demurrer joined be judged insufficient, Cofts shall be given at the Discretion of the Court; or if a Verdict be found upon any Issue in the said Cause for the Plaintiff or Defendant, Cofts shall also be given in like Manner, unless the Judge who tried the said Issue shall certify that the said Defendant, or Tenant, or Plaintiff in Replevin had a probable Cause to plead such Matter, which upon the said Issue shall be found against him."

In the Construction of this Branch of the Statute the following Opinions have been holden:

That a Person cannot plead and demur to the same Part of the Declaration; also it is held, that pleading Double is at the Peril of the Pleader; and that if the Court give him Leave in Cases where they have no Power by the Act so to do, the other Party may demur. *Cases in Law and Equity 281, 327.*

It is held, that these double Pleas must be to the Defendant's Declaration, and that therefore the Defendant cannot rejoin two several Matters to the Plaintiff's Replication. *Trin. 5 Geo. 2. in B. R. Warren v. Ives.—Whether to a Writ of Error to reverse a common Recovery the Defendant may plead double, Cases in Law and Equity 326. Dubitatur.*

It was moved, that an Executor being likewise Heir at Law might have Leave to plead double, viz. *Solvit ad diem*, and *Riens per descent*, to an Action of Debt upon a Bond; but the Court refused the Motion, without an Affidavit that he had *Riens per descent*, and said, that there is the same Law in Case of an Administrator, who shall not be allowed to plead *Plene administravit*, and no Assets, without Affidavit. *Trin. 2 Geo. 1. in B. R. Carrington v. Warren.*

So in Covenant for Non-payment of Rent, as Assignee of several Terms the Plaintiff set out his Title under several Deeds, and the Defendant moved to plead Eight Pleas; but because he had not an Affidavit to prove them material to the Merits of his Cause, the Motion was denied; and here the Court observed, that this Statute was not designed. *Hil. 7 Geo. 2. in B. R. Sir Charles Peers v. White.*

designed to put the Plaintiffs under unnecessary Difficulties in proving Issues foreign to the Merits of the Matter in Question; and though they are to allow any Person that asks the Favour of pleading double, to use the Benefit of the Act, yet are they to see the Design of it is not abused in multiplying fruitless and impertinent Issues.

It hath been frequently insisted upon, that a Defendant could not within this Act plead contradictory and inconsistent Pleas; as *Non assumpsit* and the Statute of Limitations, &c. But the Court observing, that if the Benefit of the Statute was to be confined to such Pleas as are consistent, it would hardly be possible to plead a special Plea and a general Issue, the one always denying the Charge, the other generally confessing and avoiding it; and as the Statute it self makes no Distinction herein, hence it hath been held,

Hill. 8 Geo. 1. That in Debt for Rent the Defendant may plead a Tender and Eviction.
in B. R. Cary v. Jenkins.

Isaac and Sir So in an Action upon Articles under Hand and Seal relating to South-William Gordon in Scacc. Sea Stock, Defendant had Leave to plead *Non est factum*, *Non obtulit*, *Non dedit notitiam secundum* the Proviso in the Deed, and that the Deed was not registred.

Mich. 2 Geo. 2. So Not guilty and *Son assault demesne* was pleaded by Leave of the Court.
in B. R. Smith v. Smallwood.

Trin. 3 Geo. 2. So in Debt upon a Bond the Defendant was permitted to plead *Non est factum* and Bankruptcy.
in B. R. Atkinson v. Atkinson, and Mich. 8 Geo. 2. S. P. between Phillips and Wood.

Hill. 4 Geo. 2. In an Action on the Case against the Post-Master General, it was allowed him to plead *Non culp' & Non culp' infra sex annos*.
in B. R. Decosta v. Carteret.

Trin. 5 Geo. 2. In Trespafs the Defendant had Leave to plead a Licence and justify the cutting down some Boughs, because they hung over his Gardens; though it was objected, that these Pleas were inconsistent, the Licence being a tacit or implied Acknowledgment that he had no Right to cut the Boughs, whereas the Justification asserts one.
in B. R. Bohun v. Morgan.

Trin. 5 Geo. 2. In Debt upon a Bond given by a Woman, conditioned that she should marry the Plaintiff if he requested, within ten Days after his Return from Sea, Leave was given to plead *Non est factum* and that she was never requested.
in B. R. Dun v. Vanacher.

Mich. 6 Geo. 2. In Debt for Rent upon a parol Demise, Defendant had Leave to plead *Nil habuit in tenementis & Non demisit*.
in B. R. Semining v. Bygrove.

(L) Departure in Pleading.

2 E. 4. 12. A Departure in Pleading is when the second Plea contains Matter
Plow. 105. not (a) pursuant to the former, and which does not fortify the
Co. Lit. 304. same; and when the Rejoinder contains new Matter subsequent to the
Doff. pl. 119. (a) But Matter, or not fortifying the same, this is regularly a Departure.

wherea Man pleads any Thing which he could not have shewed at first, it shall never be reckoned a Departure; so where he fortifies it in the same Manner that he pleaded it; but if he fortifies in another Manner, as by a special Custom, it will be a Departure. For this *vide* Yelv. 14. Dier 253. Stile 260. 1 Fon. 262. 1 Leon. 156. 3 Leon. 3, 203. 2 Leon. 199. Cro. Car. 257. Finch 392.

In an Assise the Tenant pleads a Descent from his Father, and gives Colour, the Demandant intitles himself by a Feoffment from the Tenant himself, the Tenant cannot say that the Feoffment was on Condition, and shew the Condition broken; for that were a Departure, as containing new Matter, and subsequent to the Matter of his Bar; but in Assise, if the Tenant plead in Bar, that *J. S.* was seised, and infeoffs him; the Plaintiff shews, that he himself was seised in Fee till *J. S.* disseised him, who infeoffed the Tenant; the Tenant may plead a Release of the Plaintiff to *J. S.* for this fortifies his Bar.

If a Man plead an Estate generally, as a Feoffment in Fee, he, without a Departure, cannot maintain it in his second Plea by Matter tantamount; as by a Disseisin and Release, or by a Lease and Release, or a Gift in Tail and a Recovery in Value; nor when a Man pleads an Estate made by the Common Law, can he make it good by an Act of Parliament in his second Plea.

So when a Matter is pleaded as at Common Law, he cannot maintain it in his Replication by Custom; as in Covenant on an Indenture of Apprenticeship to serve seven Years, and Breach assigned, that he did not serve, &c. the Defendant pleads Infancy; the Plaintiff replies the Custom of *London*; and adjudged a Departure.

Nor can Action at Common Law be made good in the Replication by Statute; as in Trespass for taking his Beasts, the Defendant justifies as Damage-feasant; the Plaintiff replies, he drove them out of the County; and adjudged a Departure; for driving out of the County was not prohibited by the Common Law, but by the Statute of *Marl.* and 1 & 2 *Ph. & M. cap. 12.*

But if one pleads a Statute, the other says it is repealed, he may reply that it is revived by another; for this fortifies the first Matter.

If a Man plead Performance of Covenants, the Plaintiff replies, he did not do such an Act according to the Covenant; the Defendant says, he offered to do it, and he refused; this is a Departure, it being one Thing to do a Thing, and another, that he offered to do it, but he refused.

Debt against a Clerk upon an Obligation conditioned to perform Covenants, one of which was to account for all Money he should receive; the Defendant pleads Performance; the Plaintiff replies, that such a Day such a Sum came to his Hands, which he had not accounted for; the Defendant rejoins, that he accounted *modo sequente, viz.* that Thieves broke into the Counting-house and stole it, and that he acquainted the Plaintiff, & *hoc paratus est, &c.* And on Demurrer it was resolved, that the Rejoinder was no Departure; for though it contained new Matter, yet it was pursuant to the former; for shewing that he was robbed, amounted to giving an Account. *2dly,* That the Rejoinder, though an express Affirmative, *viz.* that he he did Account, in Contradiction to what was said in the Replication, *viz.* that he did not Account, was yet good with an Averment, without concluding to the Country; for new Matter being alledged in the Rejoinder, the Plaintiff ought to have Liberty to come in with a Sur-rejoinder and answer it, *viz.* by traversing the Robbery.

Debt on an Obligation for Performance of Covenants, one of which was, to return certain Goods from *D.* the Defendant pleads Performance; the Plaintiff assigns a Breach in not returning such Goods; the Defendant rejoins he had no Order; and held a Departure, for there was no Mention of Order in the Covenant; but it seems, had the Covenant been to return them on Order, the Plea had been good; for then the Covenant were not to be performed without Order, and *performavit omnia* may be taken, that he performed all that he ought to perform, he not having Orders.

In

¹ Lev. 85, ^{127, 133, 1300.} In Debt upon an Obligation for Performance of an Award, the Defendant pleads no Award; the Plaintiff replies, and shews the Award and Breach; if the Defendant rejoins, and shew that it is void, either because that there was an Award of mutual Releases to the Time of the Award, or that the Award was all on one Side, or that it was not made of all Matters submitted, and whereof the Arbitrators had Notice, or the like, in all such Cases the Rejoinder is a Departure; for no Award pleaded is no Award at all, either in Fact or in Law; which is not to be maintained by shewing the Award to be void, but he should at first plead the Award, and also the Matter whereby it was void.

³ Lev. 239, 241.

In Debt for not performing an Award, the Defendant pleads no Award, the Plaintiff replies, and shews one, but does not shew where it was made; the Defendant demurs; and resolved that that could not be objected after no Award pleaded, for that were a Departure.

² Saund. 80.

¹ Sid. 444.

¹ Mod. 43.

² Keb. 612,

619. Richards

v. Hodges.

In Debt on a Bond, conditioned to save a Parish harmless concerning a Bastard-Child which the Obligor was forced to Father, he pleads *Non damnificat*; they reply, that the Child was ready to starve, and that therefore they put it out to nurse, which cost them 4*l.* Defendant rejoins, that he was ready to repay the Money and save the Parish harmless: Upon this they demurred, and had Judgment, because the Rejoinder is a Departure; for the Defendant ought to have taken Issue upon the Child's being ready to starve; if the Plaintiff had once been at any Expence about the Child, and were thereupon actually damaged, the Defendant being ready to repay the Money will not save the Condition of the Bond.

² Sand. 189.

¹ Sid. 10.

In Debt on a Bond for Performance of an Award the Defendant pleads no Award; the Plaintiff replies and shews it, and the Breach; the Defendant pleads, that it was not tendered, &c. this is a Departure; for tho' both be necessary by the Condition of the Bond to charge the Defendant, *viz.* that an Award be made, and that it be also tendered, yet he ought to rely on either one or other, either being sufficient to bar the Plaintiff; then, when he chuses one in his Plea, *viz.* that no Award was made, he cannot after waive that in his Rejoinder, and have Recourse to the other, *viz.* that the Award was not tendered.

¹ Salk. 221.

Gaygrave v.

Smith.

In Trespas for breaking his House and carrying away his Goods, the Defendant justifies as a Distress Damage-feasant; the Plaintiff replied, that after the Distress, *viz.* the same Day, the Defendant converted them to his own Use; and on Demurrer the Replication was held no Departure; for he who abuses a Distress is a Trespasser *ab initio*, and the Converting is a Trespas or Trover, at Election; and the bringing Trespas determines his Election, and the Matter in the Replication makes good that Election; for it proves it a Trespas as well as Trover.

Dier 31. b.

Doff. pl. 120.

In Covenant for further Assurances, &c. the Defendant by Protestation says, that the Plaintiff's Counsel did not devise, &c. and for Plea faith, that he was not required; the Plaintiff replies, that *7. s.* his Counsel, devised a Release, and that he required the Defendant to seal it, which he refused; the Defendant rejoins, that he did not refuse; this is a Departure.

Dier 102.

Doff. pl. 121.

The Defendant pleads in Bar a Lease for 50 Years made by a Corporation, and after in the Rejoinder pleads the Proviso in the Statute 21 H. 8. which makes such Leases good for 21 Years; it was held, that the Pleading the Proviso was a Departure, as not enforcing that which went before in the Bar.

Dier 291.

Doff. pl. 121.

If it be pleaded, that the Parties to a Fine *Nihil habuerunt*, which is denied, and the Defendant rejoins, that the Party had only a Use in the Land; this is a Departure.

If in Bar to an Action on a Bond, conditioned to save the Plaintiff harmless, the Defendant pleads, that he did save harmless; and the Plaintiff in his Replication shews a Damnification; to which the Defendant rejoins, that he had not Notice thereof; this Rejoinder is a Departure. ^{1 Sand. 117.}
^{1 Lev. 194.}

If a Man lay a Day in his Declaration that is not material, and the Defendant by his Plea makes it material, and then the Plaintiff in his Replication varies from the Day in the Declaration, it will be a Departure; otherwise (a) if the Day had not been material by the Plea. ^{6 Mod. 115.}
^{per Holt C. J.}

(a) For this vide Cro. Car. 229. 2 Mod. 31. Tit *Traverse*.—And that a Departure in such Case may be cured by pleading over and Verdict. ^{1 Lev. 110.} ^{Raym. 85.} ^{1 Keb. 566.}

To an Information exhibited against the Defendant, for not taking upon him the Office of Sheriff of *Norwich*, the Defendant pleaded the Statute of 13 Car. 2. by which it is enacted, that a Person elected into any Office in a Corporation shall be such as within one Year before hath taken the Sacrament according to the Church of *England*, or else the Election shall be void, and averred, that he had not taken the Sacrament, &c. at any Time within one Year next before the Election of him to be Sheriff, &c. wherefore the Election was void: The Attorney General replied, and set forth that Part of the Act of Uniformity, by which every Person is obliged to take the Sacrament three Times a Year according to the Liturgy, &c. The Defendant rejoined, and set forth the Act of Parliament for tolerating Dissenters; to which there was a Demurrer; and it was held, that the Defendant's Rejoinder was a Departure from his Plea. ^{Carth. 306.}
^{The King v. Larwood.}

In Debt upon a Bond, conditioned to indemnify the Plaintiff from all Tonnage of certain Coals bought of the Defendant due to *W. B.* the Defendant pleaded *Non damnificat'*; to which the Plaintiff replied, that for 5*l.* for Tonnage of Coals bought of the Defendant the Day of the Date of the Bond his Barge was distrained, and that the Defendant had not paid the said 5*l.* the Defendant rejoined, that no Tonnage was due for the Coals; to which the Plaintiff demurred, supposing the Rejoinder to be a Departure from the Plea; for the Defendant having pleaded generally, that the Plaintiff was not damnified, and the Plaintiff having assigned a Breach, the Matter of the Rejoinder is only by way of Excuse, confessing and avoiding the Breach, which ought to have been done at first, and not after a general Plea of Indemnity; for Rejoinders it was insisted should strengthen the Bar, whereas this is a plain Retraction of the Plea, that denying the Plaintiff has suffered any Damage, this confessing and excusing it. On the other Side it was insisted, that it was not necessary for the Defendant to set out all his Case at first; and it suffices that his Bar is supported and strengthened by his Rejoinder, which it was urged had been done in this Case; for the Plea being only to enforce the Plaintiff to assign a Breach, the Defendant may come afterwards and shew the Breach assigned is not within the Meaning of the Condition; as here the Condition is to save the Plaintiff harmless from all Tonnage due to *W. B.* Plaintiff replies, his Barge was distrained for Tonnage, but does not aver it was due; then the Defendant rejoins, there was no Tonnage due, which being confessed by the Demurrer, it is certain the Plaintiff could not be prejudiced within the Tenor of the Condition, by which the Defendant is obliged only to indemnify the Plaintiff against such Tunage, so the Plea is directly confirmed by the Rejoinder; and of this Opinion was the Court. Another Point was made in this Case by Defendant's Counsel, *viz.* admitting there was a Departure, yet if the Plaintiff has assigned for a Breach of the Condition what is really no Breach, whereby it appears he has no Cause of Action, Judgment shall be entered for the Defendant; as in this Case Plaintiff his instanced a Di-
^{Mich. 6Geo. 2.}
^{in C. B. Owen}
^{v. Reynolds.}

strefs of his Barge for Tunnage of Coals bought of the Defendant the Day of the Date of the Bond, and has not ascertained what the Coals were, so that they do not appear to be the same Coals as are mentioned in the Condition, which the Court cannot intend, though they are said to be bought upon the Day of the Date of the Condition; for he might buy other Coals for what appears to the contrary; and of this Opinion also was the Court.

(M) Repleader.

1. Of the Nature of a Repleader, and Manner of awarding it.

WHEN Issue is joined on an immaterial Point, or such a Point as after Trial thereof the Court cannot give Judgment, as being impertinent or uncertain, and not determining the Right, the Court regularly awards a Repleader, or gives (a) Judgment *Quod partes replacitent*; in which Case the Parties must begin again at the first Fault which occasioned the immaterial Issue; and herein it hath been held, that (b) if the Declaration be ill, the Bar ill, and the Replication ill, the Parties must begin *de novo*; but if the Bar be good and the Replication ill, at the Replication; and if the Bar and Replication be both bad, and a Repleader is awarded, it must be as to both.

(a) The Judgment to replead was, *Quia videtur Curia quod placitum prædictum et exitum superinde junctum est minus sufficiens in lege, ideo dictum est partibus quod replacitent*; and it was objected, that it was not any Judgment, but that it ought to have been *Ideo consideratum est*, &c. But the Court held it a sufficient Award to replead, and that this was the Form agreeable to the Course of the Court. *Cro. Jac. 6.* (b) For this *vide Dier 117. 5 E. 4. 108. 19 E. 4. 1. Doct. pl. 311. Dal. 17. pl. 8. 76. pl. 2. 1 And. 31. Raym. 458. 3 Keb. 664. 2 Salk. 579. 6 Mod. 2.*

2 Salk. 579. 6 Mod. 2. If a Repleader be denied where it should be granted, or granted where it should be denied, it is Error.

1 Rol Rep. 287. Bishop of Bristol v. Sir Steven Proctor. Dalif. 15. pl. 6. Upon an Issue joined in Chancery, on a *Scire Facias* upon a Recognizance, the whole Record was removed into *B. R.* and after a Trial had there the Judgment was arrested, by reason of mis-awarding the *Venire*; and the Parties being desirous to replead, the Question was, whether the Repleader should be in Chancery or *B. R.* And it was held by the Judges of *B. R.* that it should be in that Court. — But I take it to be now the settled Rule, not to suffer the Court of *King's Bench* to alter or amend any Issue directed out of Chancery, but that for any Irregularity herein Application must be made to the Court of Chancery. *Vide under Tit. Courts, Jurisdiction of the Court of Chancery.*

2 Vent. 196. 2 Salk. 479. (c) 6 Mod. 2. It is held, that there can be no Costs to either Party on a Repleader; (a) because it is a Judgment of the Court upon the Pleading, and therefore differs from an Amendment, which cannot regularly be without Payment of Costs.

2. A Repleader in what Cases to be awarded.

Cro. Eliz. 227. Doct. pl. 312. 2 Mod. 137, 140. Herein the general Rule is, that if there be an immaterial Issue, and thereupon a Verdict, upon which the Court cannot know for whom to give
2 Lev. 32. — Where Issue is joined upon a Matter not triable. *Raym. 458. Cro. Eliz. 131.* — Where the Time is material, and yet made Part of the Issue. *Latch 92. 2 Sand. 318. 2 Lev. 12. Hard. 40.* — For an Issue on an immaterial Traverse, *Moor 693. pl. 959. Cro. Eliz. 456. Winch 76. Cro. Eliz. 228. Gouls. 39. pl. 15. Savil 78. 1 Sand. 22.*

give Judgment, whether for the Plaintiff or the Defendant, a Repleader is regularly to be awarded; for such immaterial Issue is not aided after Verdict by 32 H. 8. or any of the Statutes of Jeofail; for if what is material in the Pleadings be not put in the Issue, it is not made necessary to be proved on the 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 (a) informal Issue is helped by the Verdict.

(a) If the Plea on which the

Issue is joined hath no colourable Pretence in it to bar the Plaintiff, or if it be against an express Rule in the Law; there the Issue is immaterial, and so as if there was no Issue, and therefore it is not aided by the Statute; but if it hath the Countenance of a legal Plea, though it want necessary Matter to make it sufficient, there shall be no Repleader, because it is helped after Verdict. *Moor* 867. pl. 925. & vide 1 *Lev.* 32. *Carth.* 371.—Diversity where an Issue is misjoined, and where there is no Issue. 2 *Rol. Rep.* 187. *Cro. Jac.* 580. 2 *Leon.* 195. 3 *Leon.* 67. *Godb.* 56.

In Trover against Baron and Feme upon a Finding of the Goods by the Feme during Coverture, and a Conversion to her Use, and they pleaded *Quod ipsi non sunt culpabiles*; which was held ill, because there was no Tort supposed in the Husband, and therefore a Repleader was awarded, and the Plea made *Quod ipsa non est inde culpabilis*.

Cro. Jac. 5. *Cox v. Cropwell.*

If in Debt upon an Obligation by the Sheriffs of London against J. S. he pleads, that he being arrested by Precept out of B. R. appeared at the Day according to the Condition of the Bond, and thereupon Issue is joined; in this Case there shall be a Repleader; for the Appearance being entered of Record, as it ought to be, the same is triable by the Record, and not by a Jury.

Owen 53. *House and Elkin v. Grindon, S. P.* said to have been adjudged between Bret

v. Shepherd, the same Term. 1 *Leon.* 90.

In Trover for divers Trees, the Defendant pleads, that Queen Mary was seised in Fee of the Manor of D. where those Trees were growing, and that she granted it to the Defendant in Tail, whereby he was seised thereof, and that J. S. cut the said Trees, and granted them to the Plaintiff, who lost them, and the Defendant found them, and converted them, &c. the Plaintiff replies, *De injuria sua propria*, &c. and thereupon Issue is joined; it was held, that pleading *De injuria sua propria* was ill, where the Defendant makes Justification by claiming an Interest in the Freehold to himself; but that where one claims not any Interest, but justifies by Command or Authority derived from another, it is otherwise; wherefore a Repleader was awarded.

Cro. Eliz. 539. *Archbishop of Canterbury v. Kemp.*

In Battery the Baron justifies, for that the Plaintiff assaulted his Feme, in Aid of whom, &c. the Feme by herself pleads and justifies *De son assault demesne*; the Plaintiff saith, *De injuria sua propria absque tali causa*; and both Issues found for the Plaintiff, and Damages intirely given; and now alledged in Arrest of Judgment, that the Trial was ill; for the Feme by herself cannot plead, and the Damages being intirely assessed, all was ill; and of that Opinion was the Court, and awarded that they should plead.

Cro. Jac. 239. *Watson v. Thorpe and his Wife.*

If in Debt upon a Bond, conditioned for the Payment of 60 l. upon the 25th of June, the Defendant pleads Payment of the said 60 l. upon the 20th Day of June *secundum formam & effectum conditionis*; and thereupon Issue is joined, and a Verdict found, that he did not pay the said 60 l. upon the 20th of June; the Plaintiff shall not have Judgment, for the Issue is taken *dehors* the Matter of the Condition, and so void; and it might not be paid the 20th, and yet might be paid the 25th; but it is held, that if it had been found for the Defendant, *viz.* that the Money was paid the said 20th Day, perhaps the Verdict would have made it good.

Cro. Jac. 435. *Holmes v. Brockett.*

In

- 1 *Keb.* 662. In an Action of Debt upon a simple Contract, Payment was pleaded at *A.* Plaintiff traverses, that the Payment was at *A.* and a Verdict, that the Defendant did not pay at *A.* And it was moved in a Writ of Error, that there ought to have been a Repleader, otherwise if the Verdict had been found for the Defendant; but the Court affirmed the Judgment.
- 5 *Co.* 45. *Nichol's Case.* If in Debt upon a single Bill the Defendant pleads Payment without an Acquittance, and thereupon Issue is joined, and found for the Plaintiff, he shall have Judgment; for though Payment without an Acquittance is no Plea to a single Bill, yet because Issue was joined upon an Affirmative and a Negative, and a Verdict for the Plaintiff, he shall have Judgment.
- 1 *Lev.* 32. *Serjeant v. Fairfax.* Debt for Rent against Lessee for Years, Defendant pleads, that before any Rent due he assigned the Term to another, of which Plaintiff had Notice; Issue upon the Notice, and Verdict for the Defendant, but no Judgment was given, but a Repleader awarded, in regard the Issue was joined on a Thing not material.
- 2 *Mod.* 139. *Read v. Dawson.* In Debt on a Bond against the Defendant as Executor, Issue was joined, whether the Defendant had Assets or not, on the 30th Day of *November*, which was the Day on which he had the first Notice of the Plaintiff's original Writ; and it was found for the Defendant, that then he had not Assets; and this being held an immaterial Issue, for though he had not Assets then, yet if he had any afterwards, he is liable to the Plaintiff's Action, a Repleader was awarded.
- Cro. Car.* 78. *Purchase v. Fagon.* If in Debt upon an Obligation, conditioned for the Payment of 100 *l.* upon the 31st Day of *September* following, the Defendant pleads Payment the said 31st Day according to the Condition; and thereupon Issue is joined, and found, that the Money was not paid upon the said Day, the Plaintiff shall have Judgment; for though the Issue is upon an Impossibility, there being no such Day, yet the Jury finding it not paid at the Day, or at any Time before, in Effect find it was never paid, which is a good Verdict.
- 2 *Lev.* 164. *Masters v. Wood.* Trespass for Battery and false Imprisonment such a Day and Place; the Defendant justified at another Day and Place by Virtue of a Writ and Warrant from the Sheriff; *absque hoc*, that he is guilty *aliter vel alio modo*, *vel* at any other Place; the Plaintiff replied, that he is guilty *aliter & alio modo*, and at another Place; whereupon Issue was joined, and Verdict for the Plaintiff; but for the Badness and Uncertainty of the Issue, upon Motion in Arrest Judgment was staid, and a Repleader awarded.
- 2 *Vent.* 196. In *Assumpsit* against an Administratrix, the Defendant pleaded *Quod ipsa Non assumpsit* instead of the Intestate; and after Verdict a Repleader was awarded.
- 1 *Rol. Abr.* 200. *Yelv.* 65. *Cro. Fac.* 67. *S. C.* and *Cro. Eliz.* 752. *Stile* 167. *Palm.* 524. *L. P.* But if on an Issue tendered by the Plaintiff the Defendant joins the *Scilicet* by the Plaintiff's Name, or the Plaintiff joins the *Scilicet* by the Defendant's 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 of that Issue is to be taken; and this being a plain Mistake, as appears from the Nature of the Thing, of one Man's Name for another.
- 1 *Vent.* 122. *Reynell v. Heal.* In an Action upon a penal Statute the Defendant pleaded *Non debet* to the Informer, *& de hoc ponit se super patriam*; and Issue was joined, *& predicti* the Informer *similiter*, without mentioning the King; and after a Verdict for the Plaintiff a Repleader was awarded.
- 2 *Keb.* 788. *S. C.* If the Jury do not find Assets to a certain Value, the Verdict is insufficient, and a Repleader shall be granted, and the Issue tried by another Inquest.
- 40 *E.* 3. 15. *Doct. pl.* 313. *6 Mod.* 3.

3. Repleader at what Time to be awarded.

It seems that at Common Law a Repleader was as well allowed before as after Trial, because a Verdict did not cure an immaterial Issue; but (a) it seems to be now settled, that no Repleader ought to be allowed before Trial, because the Fault of the Issue may be helped by the Trial by the Statute of Jeofails.

1 Salk. 579.
(a) 3 Keb. 664. 6 Mod. 3. S. P. and that it is discretionary in the

Court but not advisable, since the Verdict may cure immaterial or informal Issues.

It is held by a Multitude of Authorities, that after a Demurrer a Repleader is not to be admitted, because by the Demurrer the Parties have put themselves on the Judgment of the Court.

5 Co. 52. Rigeway's Case. Doct. pl. 311.

Poph 42. Savil 89. Latch 148. 1 Leon. 79. Moor 461. pl. 644, 867. pl. 925. 1 Rol. Rep. 271. 1 And. 168. 1 Lev. 142. 6 Mod. 102.—But in 3 Lev. 20. there is an Instance of a Repleader after a Demurrer; and in 3 Lev. 440. it is said, that there was a Repleader after Demurrer and solemn Argument; but these Cases have of late been denied to be Law.

It is said to have been usual in antient Times to award a Repleader upon a Writ of Error in B. R. but it seems to be now agreed, that there can be no Repleader upon a Writ of Error.

2 Sand. 319. 2 Lev. 12. 2 Keb. 789. 6 Mod. 102.

It is held, that no Repleader can be awarded after a Default.

2 Salk. 579. 6 Mod. 3.—

No Repleader after a Discontinuance. Comb. 323.

(N) Demurrer.

1. The Definition and Nature of a Demurrer.

A (a) Demurrer in (b) Pleading is an Admission by the adverse Party of the Fact charged in the Count or Declaration, Plea, Replication, &c. (c) and refers the Law arising on such Fact to the Judgment of the Court.

Doct. pl. 115. Finch cap. 47. (a) Comes, says my Lord Coke, from

the Latin Word *Demorari*, to abide, in Law. Co. Lit. 71. b. (b) As there may be a Demurrer upon Counts and Pleas, so there may be of Aid Prier, Voucher, Receit, Waging of Law, and the like. Co. Lit. 72. a.—For demurring on Evidence *vide infra*. (c) May be taken to the Rejoinder, &c. and to a Special as well as a General Plea; for all Parts of Pleading to Issue ought to be according to the Rules of Law; and if any Part fail the Whole is naught, and may therefore be demurred unto. Co. Lit. 72. a. 1 Lil. Reg. 435.

It is termed in some Books an Issue in Law, and therefore in a Declaration, Plea, &c. there may be two independent Issues, *viz.* a Demurrer, which is the Issue in Law, determinable by the Court; and an Issue in Fact, determinable by the Jury; but this must be understood as to distinct Parts of the same Declaration, Plea, &c. for it is never allowed the Defendant to plead and demur to the same Fact, being a Duplicity that would draw the Matter to different Judicatures, and would be vexatious and expensive, were it admitted; for in such Case the Party would demur Specially to Form, and if he was overruled there, then he would deny the Fact.

Co. Lit. 71, 72. Doct. pl. 115. 1 Lil. Reg. 435. 5 Co. 104. Dier 21. a. 87. b.

So on the Statute 4 Ann. which enables Defendants by Leave of the Court to plead several Pleas, &c. it hath been refused to allow a Defendant to plead and demur to the same Declaration; for a Demurrer

Cases in L. and Eq. 280. Hylson v. Felferies.

is so far from being a Plea, that it is an Excuse for not pleading; and it would be absurd for the Party to plead, and at the same Time pray that he might not plead,

Co. Lit. 72. a. If there be a Demurrer for Part, and an Issue for Part, the more
125. b. orderly Course is to give Judgment upon the Demurrer first; but yet it
Doct. pl. 116. is in the Discretion of the Court to try the Issue first if they will.
Palm. 517.
S. P. because the Jury can then assess the Damages on the Whole.

1 Salk. 29. If there be a Demurrer to Part, and an Issue upon other Part, and
per Cur. Judgment be given for the Plaintiff upon the Demurrer, he may enter a *Non pros* as to the Issue, and proceed to a Writ of Inquiry on the Demurrer, but without a *Non pros* he cannot have a Writ of Inquiry, because on the Trial of the Issue the same Jury will ascertain the Damages for that Part to which the Demurrer was.

2. The Manner and Form of demurring; and therein of joining in Demurrer, and waiving thereof.

Co. Lit. 71. b. The Words of a Demurrer, when to the Declaration, are *Quia narratio, &c. materiaque in eodem contenta minus sufficiens in lege existit, &c.*
Telv. 5, 6. and to a Plea are *Quia placitum, &c. materiaque in eodem contenta minus sufficiens in lege existit, &c. unde pro defectu sufficientis narrationis sive placiti, &c. petit judicium, &c.* to which the adverse Party replies *Quod narratio, or Placitum prædictum, &c. materiaque in eodem contenta bonè & sufficiens in lege existunt, &c. & petit judicium,* and thereupon the Demurrer is said to be joined.
Where the substantial Part of the Demurrer was in, tho' ill in Form, the Court held it a Demurrer. Vide 5 Mod. 132.

Co. Lit. 72. b. In some Cases a Man shall alledge special Matter, and conclude with a Demurrer; as in an Action of Trespass brought by *J. S.* for the Taking of his Horse, the Defendant pleads, that he himself was possessed of the Horse until he was by one *J. S.* dispossessed, who gave him to the Plaintiff, &c. the Plaintiff saith, that *J. S.* named in the Bar, and *J. S.* the Plaintiff, are all one Person and not divers; and to the Plea pleaded by the Defendant in the Manner, he demurred in Law; and the Court held the Plea and Demurrer good, and that without the Matter thus alledged he could not demur.

1 Leon. 139. In a *Quare impedit* the Patron pleaded one Plea in Bar, and the Incumbent the same Plea by himself; the Queen demurred thus, *Quoad separalia placita per Des' separatim placitata dicta Domina Regina necesse non habet nec per legem terre tenetur respondere; & per cur.* the Demurrer ought to have been several on each Plea by itself.
The Queen v. Archbishop of Canterbury and others.

1 Salk. 220. If a Defendant demur in Abatement, the Court will notwithstanding give a final Judgment, because there cannot be a Demurrer in Abatement; for if the Matter of Abatement be extrinsic, the Defendant must plead it; if intrinsic, the Court will take Notice of it themselves.
Dominiq. v. Davenant. Vide 2 Hawk. P. C. 334.

1 Show. 213. After the Plaintiff and Defendant have joined in the Issue, which is to be tried betwixt them, neither of them (*a*) can demur without the Consent of the other; for by joining in the Issue they have admitted the Pleadings to be good, and sufficient to try the Issue.
1 Lil. Reg. 437.
 (*a*) A Demurrer to an Appeal hath been received after Issue joined. *Cro. Eliz. 196.*—But it hath been adjudged, that a Demurrer to an Indictment ought not to be received after Verdict. *1 Sid. 208.*

Cro. Eliz. 62, So it hath been resolved, that after a Demurrer there cannot be a Repleader; for the Parties, by their mutual Consent, having put themselves
318.
3 Co. 52. b. selves

felves on the Judgment of the Court, cannot without Leave of the Court replead.

There cannot be (a) a Demurrer to a Demurrer; and if there be, it makes a Discontinuance, for there is no Difference between pleading over when Issue is offered, and not joining in Demurrer, but pleading over, both are alike, and make a Discontinuance.

murrer for the Doubtfulness of it, for a Demurrer ought to have Formality and Certainty in it to avoid Barbarism, and Inveigling of the Court; but if one that might demur doth not demur to it, but joins in the Demurrer, he cannot demur afterwards, for he hath slipped his Advantage. *Lil. Reg.* 438.—And in Case of a Demurrer to a Plea in Abatement, it is said one may demur upon that Demurrer: But *per Holt*, Ch. J. that is where the Demurrer is not apposite; but if the Demurrer be proper and apposite, you must join. *Comb.* 306.

It is said, that there are the same Rules for joining in Demurrer as there are in Pleading; and that in criminal Cases, not capital, the Course is to allow the Party four Days to join in Demurrer; but it hath been held, that in capital Cases the Party must join in Demurrer *Instante*.

If a Demurrer be entered it cannot be waived, except both the Plaintiff and Defendant do consent unto it, nor then without Leave of the Court; because by the Demurrer both Parties have submitted the Matters in Law in Question betwixt them to the Judgment of the Court.

A Demurrer is not to be allowed unless it be signed by Counsel. murrer upon a Challenge to a Jury is good without a Counsel's or Serjeant's Hand; and as soon as it is agreed on at the Bar, the same is to be entered up without further Circumstances.

3. What Facts are admitted by a Demurrer.

It is laid down as a general and uncontested Rule, that a Demurrer admits all such Matters of Fact as are sufficiently pleaded.

Doct. pl. 119. *Hob.* 81. 1 *Sand.* 353. *Cartb.* 31.

And therefore if in Waste the Defendant demurs to the Declaration, and it is adjudged against him, there shall issue no Writ of Waste, this being admitted by the Demurrer; but a Writ shall issue to inquire of the Damages.

But Matters not sufficiently pleaded are not admitted by a Demurrer; so in a Demurrer upon a Matter in Law, says my Lord *Hobart*, tho' the Parties will join upon some one Point, upon which, if it stood alone, Judgment should be given for the one Party; yet if upon the whole Record, Matter in Law appears why Judgment should be given against the said Party, the Court must determine so; for it is the Office of the Court to determine the Law upon the whole Record, and the Consent of Parties cannot prejudice their Opinions, nor discharge them of their Office in that Point.

If in Covenant divers Breaches are assigned, some of which are good and others ill, and the Defendant demurs on the whole Declaration, the Plaintiff shall have Judgment for (b) those which are well assigned, and for the others shall be barred.

and among the Rest *De duobus ful. ris*, the Defendant demurred, and Judgment *Quod Nil Capiat*, saying, the Plaintiff may take several Damages, and this, and then take Judgment as to the Rest, and all would be well.

4. How

4. How far a Judgment on a Demurrer is peremptory.

(a) So where a Statute enacts, That a Person convicted of such an Offence shall forfeit so and so, a Conviction on a Demurrer hath been held sufficient. 11 Co. 53. 1 Rol. Rep. 89.

It seems to be agreed as a general Rule, that a (a) Judgment on a Demurrer is as conclusive and binding as if the same had been after a Verdict, &c.

Fenk. 306.
 (b) *Dier* 69.
pl. 35, 341.
pl. 5.—If after a Demurrer a Person shall have the Advantage of his Age, *Quere* 3 H. 6. 46. *Doct.* pl. 116.

But upon a Plea to the Jurisdiction, Person, Writ, Aid prier, View, Effoin, (b) Voucher, and Demurrer joined upon such Plea or Prayer, and ruled against him who demurs, there is only a Judgment to answer over.

Vide 2 *Hawk.*
P. C. 334.

It seems to be the better Opinion, that a general Demurrer, concluding in Bar of an Appeal or Indictment, or a Demurrer to a Plea in Bar which admits the Fact, or to a Replication to such a Plea, is peremptory and conclusive; so that if the Indictment be good, Judgment and Execution shall go against the Prisoner.

Dier 38.
Cro. Eliz. 196.

But it hath been adjudged, that if an Appellee demur in Law to an Appeal by Reason of the Insufficiency of the Declaration, or generally demur to the Declaration, with a Conclusion *Et petit iudicium de narratione illa, & quod narratio illa cassetur, &c.* such Demurrer shall not conclude him from pleading over to the Felony, either at the same Time with the Demurrer, or after it shall be adjudged against him.

Cro. Eliz. 196.
Robt. Ent.
 160.
 1 *Salk.* 218,
 200.

But in Criminal Cases, not Capital, if the Defendant demur to an Indictment, &c. whether in Abatement or otherwise, the Court will not give Judgment against him to answer over, but final Judgment; for it seems, that in such Cases there can be no Demurrer properly in Abatement, except it be to a Plea in Abatement, or to a Replication to such a Plea.

5. Of the Difference between a General and Special Demurrer.

Co. Lit. 72. a.
 (c) The Words of a General Demurrer are, *Quod breve vel narratio vel placitum, &c. materia que in eodem content' minus sufficien' in lege exist', &c.*—A Demurrer, because *Incerta & caret forma*, is a General Demurrer. 1 *Show.* 242. *Comb.* 297. (d) 10 Co. 88.

A Demurrer is said to be General or Special; (a) General where no particular Cause is alledged; Special where the particular Thing objected to is pointed out, and insisted upon as the Cause of Demurrer; and herein it is said, (c) that as a General Demurrer confesseth all such Matters of Fact as are sufficiently pleaded, so he that demurs Specially can take no Advantage of any other Matter of Form than what he hath expressed in his Demurrer; but he may of any other Matter of Substance.

1 *Vent.* 240.
 —Good Rule to be observed in Demurrers, always to shew the Cause of Demurrer.

And herein it is said, that the antient Practice was to demur Specially, and that the Way was, when the Pleadings were drawn at the Bar, to make the Exception immediately, and the other Party might mend if he pleased, or might demur if he durst venture it; and *Hale* says, that though now they are put in Paper, yet such a Course should be observed, that Persons might not be caught by Demurrers contrary to the original Intention of them.

2 *Eulf.* 267. *per Coke.*

But as the Law requires Regularity in it's Proceeding, and that all Parts of Pleading should be according to approved Precedents, it seems an established Rule, not to admit the Party to amend after a Demurrer entered of Record; but it hath been held, that 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 Payment of Costs, if the Cause be still in Paper; so may he withdraw a Demurrer not entered of Record, and move to amend.

Also where a Person hath good Cause of Demurrer at the Time of his Demurring, no Act of the other Party afterwards will make it naught; as if in Debt for Rent, the Plaintiff declares for more than appears by his own shewing to be due to him, and for which the Defendant demurs, the Plaintiff cannot afterwards enter a Remittitur for the Overplus; for by this Means the Defendant, by relying on his Demurrer, might be tricked in his Defence.

But for the better Understanding the Difference between a General and Special Demurrer, we shall briefly consider,

6. What Things are good on a General Demurrer, that would be otherwise on a Special one.

Herein the established Distinction is, that Matters of Substance, that is, the Omission of such material Things as are necessary to shew a Right in the Plaintiff, or material for the Defendant in his Plea, may be taken Advantage of on a General Demurrer; but Matters of Form merely must be specially alledged, and assigned as Causes of Demurrer; for the Law, says my Lord (a) *Hobart*, requires in Pleadings two Things; 1st, That it be in Matter sufficient: 2^{dly}, That it be deduced and expressed according to the Forms of Law; and if either the one or the other of these be wanting it is Cause of Demurrer, with this Distinction, which seems to be founded on the Common Law, and is fully explained and confirmed by the Statutes 27 *Eliz.* & 4 *Ann.*

For this Distinction vide 10 Co. 88. Dr. *Leyfield's* Case. Doct. pl. 118. *Stile* 41. *Latch* 185.

1 *Rol. Rep.* 112. *Co. Lit.* 72. a. *Hob.* 127, 164. *Hutt.* 15. *Savil* 78, 87. *Palm.* 368. 1 *Leon.* 44. 2 *Rol. Rep.* 306. 1 *Sid.* 308. 1 *Sand.* 9, 31, 98, 337. 2 *Sand.* 190. 5 *Mod.* 18. *Carth.* 66, 83. 1 *Salk.* 219. (a) *Hob.* 232.

By the 27 *Eliz. cap. 5. sect. 1.* reciting, ' That excessive Charges and Expences, and great Delay and Hindrance of Justice hath grown in Actions and Suits between the Subjects of this Realm, by Reason that, upon some small Mistaking, or Want of Form in Pleading, Judgments are often reversed by Writs of Error, and oftentimes upon Demurrers in Law, given otherwise than the Matter in Law and very Right of the Cause doth require, whereby the Parties are constrained either utterly to lose their Right, or else after long Time, and great Trouble and Expences to renew again their Suits; for Remedy whereof it is enacted, That after Demurrer joined, and entered in any Action or Suit in any Court of Record within this Realm, 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, Defect, or Want of Form 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, and that no Judgment to be given shall be reversed by any Writ of Error for any such Imperfection, De-

‘fect, or Want of Form as is aforesaid, except such only as is before
‘excepted.

‘And *Sect. 2.* it is further enacted, That after Demurrer joined and
‘entered, the Court, where the same shall be, shall and may, by Vir-
‘tue of this Act, from Time to Time amend all and every such Im-
‘perfections, Defects, and Wants of Form, as is before-mentioned,
‘other than those only which the Party demurring shall specially and
‘particularly express and set down, together with his Demurrer, as is
‘aforesaid.’

There is a Proviso in this Act, that it shall not extend to criminal Proceedings.

It hath been frequently adjudged, that if a Plea be double no Advantage can be taken thereof on a General Demurrer; but the Party must shew (a) specially in what the Doubtfulness consists, being only Matter of Form, and clearly within the above-mentioned Statute 27 *Eliz.*

(a) In Demurrer for Duplicity, it is not sufficient to demur *Quia duplex est, or Duplicem habet materiam,* but the Party must shew wherein; for the Statute, by requiring to shew Cause, intended to oblige the Party to lay his Finger upon the very Point. 1 *Salk.* 219. *per Holt,* Ch. J.

As in Debt upon an Obligation for Performance of Articles, which was to pay so much at two Days in certain, the Defendant says he paid accordingly, the Plaintiff replied that he had not, this was held a double Plea, because it went to both Days, yet aided on a General Demurrer.

So if the Defendant pleads a Plea which amounts to the General Issue, this is but Matter of Form, and must be taken Advantage of on a Special Demurrer; also at Common Law, if a Defendant had pleaded a Plea which amounted to the General Issue, and the Plaintiff had demurred thereupon; if the Defendant had refused to plead the General Issue, but instead thereof joined in Demurrer, the Court determined it against him.

Also it is held, that if a Special Matter is pleaded, which looks like the Colour of a Plea, but amounts to the General Issue, it is no Cause of Demurrer; as if in Debt you plead a Release, though you might have given it in Evidence on *Nil debet,* yet it is no Cause of Demurrer; so in Debt for Rent, if you plead Entry and Expulsion, it is no Cause of Demurrer, though it may be given in Evidence on *Nil debet.*

But where an Act of Parliament gives the Party Privilege to plead the General Issue, and he pleads Specially, if such special Plea be faulty the Plaintiff may demur to it; for though he needed not to have pleaded Specially, yet having done so, his Plea must be agreeable to the Rules of Law.

There must be a special Demurrer to a Negative Pregnant, that is, a Negative Plea, which doth also contain in it an Affirmative; and to an Argumentative Plea, that is, a Plea which concludes nothing directly, but only by Way of Argument or Reasoning, for the Court will intend every Plea to be good till the contrary doth appear.

In Debt upon an Obligation to perform Covenants, the Defendant pleaded generally Performance of Covenants, where some are in the Negative, and some in the Affirmative; and this was held to be but Matter of Form, and aided by the Statute 27 *Eliz.* except the Party sheweth for Cause of his Demurrer, that some of the Covenants are in the Negative, and some in the Affirmative, for the Court shall adjudge according to the Truth of the Matter; but if any of the Covenants are in the Disjunctive it is otherwise, for the Court cannot know which of them in the Disjunctive he hath performed.

In Debt upon a Bond for Performance of Covenants in an Indenture of Apprenticeship, several Breaches were assigned, and the Defendant

dant demurred generally; and *per Holt*, C. J. you could not take Advantage of the Assignment of several Breaches even at Common Law, without shewing it for Cause; and though in this Case there were the Words *Incerta & caret forma*, yet it was held but a General Demurrer, and therefore ill.

But though Matters of Form are holpen upon a General Demurrer, *Hob. 233.* yet there must be sufficient appear to the Court to ground their Judgments upon; and it is not enough that the Party hath Right, but such Right must be disclosed to the Judges in the Record so as to enable them to pronounce upon it.

And there it hath been held, that if an Executor or Administrator *Hob. 233.* brought an Action of Debt, and did not produce their Probate or Administration, that this was not holpen. *But this is now aided by the express Words of 4 & 5 Ann. which vide Tit. Amendment, Letter (B).*

So if a Man plead a Conveyance of a Rent, or the like, that cannot pass without Deed, without (a) producing the Deed in Plea it is not holpen; for it is not enough for the Party to say that he is Executor, or that the Rent was granted to him, but the Court must see and judge of it, or else the Right appears not; and the adverse Party may cause the Deed to be inrolled, which makes it a Part of the Plea, whereupon the Court shall judge whether it maintain the Plea or not. *Hob. 233. 10 Co. 88. Cro. Jac. 172, 613. (a) That the Omission of Profert in Cur. the Deed pleaded, is only Matter of Form, which the Party demurring cannot take Advantage of upon a General Demurrer, and that when Oyer of the Deed is demanded, it is presumed that the Deed is in Court, and that ei legitur; the Reading is the Act of the Court. 1 Sid. 308.*

So if the Means be wanting whereby the Right should be made to appear, it is incurable; as if a Man bring an Action of Debt upon an Obligation and produce it, but says it was made beyond Sea, or does not alledge a Place where it was made, a General Demurrer serves; and for the same Reason two Affirmatives without a Traverse is not holpen, because it admits no Trial, without which the Court cannot see the Right. *Hob. 233.*

So 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, or it is ill on a General Demurrer; for though the Defendant can make no Answer to the Breach, yet it ought to appear to the Court that the Plaintiff hath Cause of Action. *Hob. 233. Telu. 152. Cro. Jac. 220. 1 Sand. 102.*

But if in Debt on 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 on a General Demurrer. *1 Sid. 370.*

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. *1 Salk. 72. Foreland v. Marygold.*

It hath been held, that a Declaration in Trespass, not concluding *contra pacem Domini Regis* was ill on a General Demurrer; but this is now helped by the forementioned Statute 4 & 5 Ann. cap. 16. which enacts, *Carth. 66. cont. 1 Sid. 253.*

enacts, ' That no Advantage or Exception shall be taken of or for an
' immaterial Traverse, or of or for the Default of alledging the Bring-
' ing into Court any Bond, Bill, Indenture or other Deed whatsoever
' mentioned in the Declaration, or other Pleading, or of or for the
' Default of alledging of the bringing into Court Letters Testamen-
' tary 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 per recordum*, or of or for not
' alledging *Prout patet per recordum*; but the Court shall give Judgment
' according to the very Right of the Cause as aforesaid, without re-
' garding any such Imperfections, Omissions and Defects, or any other
' Matter of like Nature, except the same shall be specially and parti-
' cularly set down and shewn for Cause of Demurrer.

7. Demurrer to Evidence.

Demurrer to Evidence is an Admission of the Truth of the Fact al-
ledged by the adverse Party, or an Acknowledgment, that the Evi-
dence produced by him at the Trial of the Cause is true, but denies
its Operation and Effect in Law, and thereupon he demurs, and prays
the Judgment of the Court; for the Fact being agreed on, the Judges
are the proper Expositors of the Law, and are to determine the
same, and not the Jury; but if a Matter of Evidence which is thought
material be offered, and the Court disallow or over-rule it, this is a
proper Matter for a (a) Bill of Exceptions, which the Judges are com-
pellable to sign; also (b) if the Court over-rules one who offers to de-
mur upon Evidence, this is a proper Cause for a Bill of Exceptions,
and the Remedy which the Statute in that Cause provides.

Co. Lit. 72.
Allen 18.
Godb. 10.
Raym. 404.
2 Jon. 146.
Doct. pl. 118.

(a) For this vide Tit. Bill of Exceptions.
(b) 9 Co. 13.
2 Inst. 426. and Cro Car. 341. Cort and The Bishop of St. David's adjudged.—1 Jon. 331. S. C. by which it appears, that a Bill of Exceptions was tendered and signed.

5 Co. 104. a. If in Ejectment, or any other Action, the Plaintiff gives in Evidence
Baker's Case. any Matter in Writing or Record, or a Sentence in the Spiritual Court,
Cro. Eliz. and the Defendant offers to demur thereupon, the Plaintiff cannot
751-2. S. C. refuse joining in Demurrer, but must do the same, or waive his Evi-
adjudged, be- cause there dence.
cannot be
any Variance of a Matter in Writing.

5 Co. 104. Also if the Plaintiff produce Witnesses to prove any Matter of Fact,
Cro Eliz. 752. upon which any Question in Law arises, and the Defendant admits their
S. C. — Testimony to be true, in such Case likewise the Defendant may demur;
Where it is so the Plaintiff may demur upon the Evidence offered by the Defen-
said, that dant *Mutatis mutandis*.
if either Par- ty offers to
demur upon any Evidence given by Witnesses, the other, unless he pleaseth, shall not be com-
pelled to join; because the Credit of the Testimony is to be examined by a Jury; and the Evi-
dence is uncertain, and may be enforced more or less, but both Parties may agree to join in De-
murrer upon such Evidence.—Also it is said, that in a Demurrer upon Evidence the Party de-
murred unto may demand Judgment of the Court, whether he ought to join in the Demurrer;
for if there be not a colourable Matter to ground the Demurrer upon, the Court will not force
the Party to join in it, but will over-rule it, that Justice may not be frivolously delayed. 1 Lil.
Reg. 437.

Co. Lit. 72. a. But in the Case of the King, he by his Prerogative is not obliged
Dier 53. pl. 8. to join in any Demurrer; but in Case any Doubt arises, the Court
Cro. Eliz. 752. may direct the Jury to find the Matter specially, and thereupon de-
5 Co. 104. termine what the Law is.
S. P. — The
King by his Prerogative may waive his Issue and demur in Law, & cont'. Plow. 85. a. 236.

He that demurs upon Evidence ought to confess the whole Matter of Fact to be true, and not refer that to the Judgment of the Court; and if the Matter of Fact be uncertainly alledged, or that it be doubtful whether it be true or no, because offered to be proved only by Presumptions and Probabilities, and the other Party will demur thereupon, he that alledges this Matter cannot join in Demurrer with him, but ought to pray the Judgment of the Court, that he may not be admitted to his Demurrer, unless he will confess the Matter of Fact to be true.

Allen 18.
Wright v. Paul Pinder, said to be so resolved.
Stile 22, 34.
S. C.

As if it be alledged by one Party, that there is such a Writ, which is denied by the other, and thereupon there is a Demurrer to the Evidence; upon this there can be no Judgment given, for the being or not being such a Writ is Fact that the Jury should determine; but in this Case a Writ should have been admitted *viel quel*, and then the Effect thereof might have been determined by the Court; and in this Case both Parties having misbehaved themselves, the one in offering, and the other in joining in Demurrer, the Court held, that Judgment could not be given for either, but that an (a) *Alias venire facias* should be awarded.

Stile 22, 34.
Allen 18.

(a) In *Stile 34.* it is said by *Rolle*, that

a new *Venire facias* should go in the same Manner; as if a special Verdict be found insufficient; but in *Allen 18.* the Opinion of the Court was, that an *Alias venire facias* should be awarded, and not a *Venire de novo*, because no Verdict was given.

Upon a Demurrer to Evidence, though the Matter of Fact be confessed, yet the Jury may inquire of the Damages, and assess them conditionally, viz. if upon the Argument of the Demurrer the Law should be for the Plaintiff, then so much, &c. Also it hath been (b) resolved, that the Damages may be inquired of by a Writ of Inquiry of Damages, when the Demurrer is determined; and it is said to be the most usual Course, when there is a Demurrer upon Evidence, to discharge the Jury without more Inquiry.

Plew. 408.
Scholastica's Case.
Stile 22.
(b) *Cro. Car. 143.* *Darrose v. Newbott.*

Error of a Judgment in the Palace Court in *Assumpsit*, where to prove the Consideration an Arrest was to be proved by the Plaintiff; and for that he did not produce the Writ the Defendant demurred on the Evidence, and thereupon Judgment was given for the Plaintiff: And now to reverse the Judgment it was said for the Plaintiff in Error, that the King's Writs are Matters of Record, and are not to be proved but by themselves; and it was agreed by the Court, that the Writ ought to have been produced in Evidence, but by the Demurrer it is confessed, the Arrest being Matter of Fact, though it be to be proved by a Matter of Record; and the Jury might of their own Knowledge know that there was a Writ; and by the Demurrer on the Evidence all Matters of Fact are confessed that the Jury could know of their own Conufance.

1 Lev. 87.
Fitz-Harris v. Boinn.

(O) Plea at What Time to be put in, and the Ceremony requisite therein.

IF the Defendant neglects to put his Plea, when the Rules for pleading are out, the Plaintiff may sign Judgment for want thereof; but if the Matter which is to be pleaded is difficult, the Court will upon Motion grant the Defendant longer Time to put in his Plea than otherwise by the Rules of Court he ought to have; but without Leave

Lil. Reg. 36.
37.

of the Court he cannot have longer Time, because the Court is to judge whether it be necessary to plead such a Plea as requires longer Time to consider of than ordinary; and should it be otherwise, the Defendant might upon such Pretences delay the Plaintiff without Cause.

Lil. Reg. 37. Also where the Plaintiff doth keep any Deed or Writing or other Thing from the Defendant, which doth belong unto him, and whereby he is to make his Defence, and is disabled by the Retaining thereof to plead for his best Advantage, the Court will upon a Motion grant an Imparance to the Defendant till the Plaintiff do deliver it to him, or bring it into Court, and also a convenient Time after till he can draw up his Plea; for the Law gives every Defendant convenient Time to make his best Defence; and in this Case, if the Plaintiff be delayed, it shall be adjudged his own Default.

Hill. 5 Geo. 2. in B. R. Snell-grave v. Morris, Executor of H. Morris, and S. P. so ruled between the Bank of England v. Morris. So where an Executrix was sued by special Original, it was moved, that being Executrix she might imparl till next Term, that she might know how to plead with Safety; the Motion was granted for four Days to plead, and afterwards for three more; but the Court refused to enlarge it to the following Term, because of the Inconveniency that might accrue to other Creditors; and in doing of it thus far obliged the Defendant to enter into Terms not to acknowledge Judgment in the mean Time to other Creditors that were in equal Degree with the Plaintiff, nor to do any Thing to his Prejudice.

Trin. 5 Geo. 2. in B. R. Knight v. Robinson. So a Defendant had Time to plead given till the second Day of the next Term, upon Affidavit that four Days before the Declaration delivered he was and still continued to be so indisposed in Mind that he could not make his Defence.

5 Mod. 215. When a Person appears upon a Recognizance, or *in propria persona*, or is a Prisoner in Custody upon any Information for a Misdeameanor, where no Process issued out to call him in, by the Course of the Court, in these Cases he must plead *instante*.

Comb. 3. per Aston. Those that come in upon a *Habeas Corpus* or Attachment must plead the same Term without Imparance, giving the ordinary Rules, which are eight Days.

Comb. 251. A Plea in Abatement must be pleaded within four Days, without special Leave from the Court, because the Person coming in by the Process of the Court ought not to have Time to delay the Plaintiff; also such Plea by the 4 & 5 *Ann. cap. 16.* being for Delay is not to be received, unless on Oath, and probable Cause shewn to the Court.

Comb. 19. Upon a *Respondens Ouster* they have usually four Days Time to plead; but this is said to be in the Discretion of the Court.

Mich. 4 Geo. 2. in B. R. Andrews v. Dingley. By the Rule of the Court, as many Days are allowed for the Defendant to plead after Oyer given, as he had by the Rule of the Court at the Time of Oyer demanded.

Mich. 7 Geo. 2. in B. R. Star-kie v. Wilkes. Defendant had an Order by Consent from a Judge for eight Days Time to plead, and at the Expiration of the eight Days Plaintiff signed Judgment, without giving a Rule to plead; & *per Cur.* the Judgment is regular; Rules are only to give the Parties Notice when they are expected to plead, here the Defendant's praying Time to plead excludes any Presumption that the Plaintiff has not given him such Notice.

2 Lil. Reg. 298-9. If the Defendant doth not plead according to the Rules of the Court, so that the Plaintiff may enter Judgment upon a *Nil dicit*, yet if after the Rules are out the Defendant do put in his Plea into the Office before the Plaintiff hath entered his Judgment, this Plea is to be accepted, and the Plaintiff ought not then to enter his Judgment; and if he doth, the Judgment may be set aside for Irregularity.

1 *Rol. Abr.* 483. *Stile* 339. *Friend v. Baker* adjudged. If a Man declares in an Action upon the Statute of Monopolies, as the King's Parentee of Soap, and after the Defendant in *Easter* Term pleads, that the King did not make any such Letters Patent, and Issue is joined thereupon, and Day given to the Plaintiff till *Mich.* Term, but there is no Continuance between *Easter* and *Trinity* Term, it is a Discontinuance; for though the Court might give Day to bring in the Letters Patent in *Mich.* Term, omitting *Trinity* Term, yet there ought to be a Continuance between *Easter* and *Trinity* Term by a *Curia advisare vult* till *Trinity* Term, or otherwise it is a Discontinuance.

1 *Rol. Abr.* 486. *Lane St.* 86, 89. *Sir Hugh Brown's Case.* In Ejection, if the Defendant at the Day of *Nisi prius* at the Assizes pleads, that the Plaintiff entered into Parcel of the Land pending the Writ, and the Justices of *Nisi prius* accept the Plea, and dismiss the Jury, though they do not give any Day to the Parties *in Banco*, yet this is not any Discontinuance, altho' the Plea is collateral; for the Day of *Nisi prius* and the Day in Bank are but one Day, for the Court *in Banco* gave Day to the Jurors *in Banco nisi prius Justicarii ad assisas venerint*, and to the (a) Parties Day is given there absolutely.

(a) If the Issue is found against the Defendant, it is not material whether he had a Day given *in Banco* or not; because he hath nothing further to do but to discharge himself. *Palm.* 333. *Cro. Car.* 236. & *vide Cro. Jac.* 528.

1 *Rol. Abr.* 485. *Pipe v. Agar.* 1 *Rol. Rep.* 408. *S. C.* But 3 *Bullf.* 208. *S. C.* it is held by the Clerks, that there is no Necessity to have a Continuance entered after the Writ of Inquiry awarded; and *per Coke*, it is good either Way.—If a Judgment be given in Trespass, or other such Action, by Default or upon Demurrer, and a Writ of Inquiry of Damages awarded, returnable the next Term, no Continuance *per idem dies* shall be given to the Defendant, because he is out of Court by his own Default; said to be the constant Course of the Court of King's Bench. 1 *Rol. Abr.* 486. But for this *vide* 11 *Co.* 6. b. *Cro. Eliz.* 75, 144, 774. 1 *Rol. Rep.* 31. *Godb.* 195. 1 *Sid.* 16.

1 *Rol. Abr.* 486. *Thornton v. Wade* adjudged. In an Action of Debt in an (b) inferior Court, if the Defendant acknowledges the Action at one Court, and no Judgment is entered at this Court, but at the next Court Judgment is given for the Plaintiff; if there be no Continuance between the said Courts, this is a Discontinuance.

(b) That the Proceeds in an inferior Court must be returned at a Day certain, and ought to be to the Court as well as to the Day. *Vide Cro. Eliz.* 105. *Cro. Jac.* 314. *Stile* 58, 66, 70, 122. *Cro. Car.* 254. 2 *Bullf.* 36. 1 *Mod.* 81. 2 *Mod.* 59.—But if a Continuance be made in an inferior Court *ad proximam Curiam ibidem tenendam*, without alledging any Day to which it is adjourned, yet if the Court be to be held by Custom, not at any certain Day, as every Week, or *de tribus in tres*, &c. but *die lune*, when the Judges thereof please, this is a good Continuance. *Cro. Car.* 254.—In a Pie-Powder Court the Adjournment was entered *Idem dies datus est*, where it should have been *Eadem hora*, yet adjudged good. *Moor* 459. pl. 637.

Cro. Jac. 357. *Peplow v. Rowley.* If in an Action upon the Case in an Inferior Court the Defendant is essoined, and hath a Day *per essoine*, and the Plaintiff *habet eundem diem*, at which Day the Defendant being demanded appears not, but makes Default, & *habet diem per defaultam secundum consuetudinem ville* given by the Court, &c. this is a Discontinuance; for when the Defendant made Default he was out of Court, and (a) so no Day could be given to him; and the Custom alledged cannot help that which is against the Common Law.

(c) For this *vide Cro. Car.* 341. 1 *Fon.* 331. *Yelv.* 155. *Stile* 328, 329.

If in a *Quo warranto* against a Corporation, for using a Fair and Market and taking Toll, &c. Issue is taken, whether they have Toll by Prescription, or not, and it is found for the Defendants; the Attorney General may yet proceed to take Issue upon the rest, for in the Case of the King there is no Discontinuance before Judgment.

Hard. 504. *Attorney General v. Town of Eynham.*
6 *Mod.* 271.
S.C. cited—
That when

the King is Party no Day is given to him, because he is always present in Court. 1 *Rol. Abr.* 486-7.

In an Action after Issue joined, and a Verdict for the Plaintiff, the Plaintiff cannot discontinue the Action without the Consent of the Defendant; and if he will not enter the Judgment, the Defendant himself may enter it.

1 *Rol. Abr.* 487.—But for this *vide* *Stile* 346.
1 *Sid.* 60.

1 *Lev.* 48. 1 *Mod.* 13.—Where there has been a Discontinuance after a special Verdict. *Latch* 216. *Hell.* 3. *Cro. Car.* 575. 1 *Salk.* 178.—Where by the Course of the Court the Plaintiff may discontinue without Motion, paying Costs. *Stile* 366. 1 *Leon.* 105.—Where after a Demurrer by Leave of the Court. *Cro. Jac.* 317. *Cro. Car.* 195. *March* 24. *Stile* 120, 134, 306, 309, 310, 382. *Allen* 20. 1 *Sand.* 23. 2 *Sand.* 74. 1 *Sid.* 84, 306. 1 *Lev.* 227, 298. 2 *Lev.* 118, 124. 1 *Mod.* 41. 1 *Bulf.* 217.

If a Man vouches for Parcel, and as to the Rest makes no Answer, and the Demandant does not take Advantage thereof by Prayer of Seisin, but suffers the Process to be continued against the Vouchee in Right of the Parcel, all is discontinued.

18 *E.* 3. 40.
1 *Rol. Abr.* 487.

If the Tenant vouches for all the Demand, and the Process upon the Voucher is made for less than it is, all is discontinued.

18 *E.* 3. 40.
1 *Rol. Abr.* 487.

In an Action of Trespass a Discontinuance in Parcel is a Discontinuance in the Whole.

7 *H.* 6. 27.
1 *Rol. Abr.* 487.

In Trespass for several Things, the Defendant pleads a Plea in Bar for Part, and does not answer to the Rest, and the Plaintiff demurs generally, the Plaintiff shall not have Judgment against the Defendant; for the Demurrer was by Intendment upon the Bar, and not for want of Pleading to the Residue; for he ought to have prayed Judgment upon *Nil dicit* for it, so all is discontinued.

4 *Co.* 62.
1 *Rol. Rep.* 135, 176.
2 *Bulf.* 325.
—But where for want of answering to

Part all is discontinued, *vide* 1 *Brownl.* 228. *Carter* 51. 2 *Mod.* 259. *Yelv.* 65. 1 *Sid.* 223.

If a Plea begin with an Answer to the Whole, but in Truth the Matter pleaded is only an Answer to Part, the whole Plea is naught, and the Plaintiff may demur; but if a Plea begin only as an Answer to Part, and is in Truth but an Answer to Part, it is a Discontinuance, and the Plaintiff must not demur, but take his Judgment for that as by *Nil dicit*; for if he demurs or pleads over, the whole Action is discontinued.

1 *Salk.* 179.
—*vide* 1 *Salk.* 180. S. P.

In *Indebitatus Assumpsit* the Defendant pleaded an Attainder of High Treason in Disability; the Plaintiff replied a Pardon, *prout per exemplification inde*, &c. (which was held good) *Et petit judicium Et damna sua*; to which it was demurred; and held that there was a Discontinuance by the Misconclusion of the Replication, for an ill Prayer of Judgment is as none.

1 *Salk.* 177.
Bisse v. Harcourt.

It is said, that the Course of the Court of *King's Bench* is to enter no Continuance on the Roll till after Issue or Demurrer, and then to enter the Continuance of all upon the Back (a) before Judgment.

1 *Rol. Abr.* 485.
(a) A Discontinuance

can never be objected *pendente placito*, for before Judgment it may be continued at the Pleasure of the Court, though not after Judgment in another Term. *Cro. Jac.* 211.—But at what Time Continuances may be entered, *vide Savil* 54. *Lit. Rep.* 4. *Cro. Car.* 236.

In Debt the Declaration was of *Michaelmas* Term, and the Plea Roll of *Easter*, and no Continuance entered, and this upon Demurrer was shewed to the Court as a Discontinuance; but they said the Practice is never to enter Continuances till the Plea Roll be entered up, tho' the Declaration be of four or five Terms standing.

1 *Salk.* 179.
Curtius v. Padley.

1 Rol. Abr. 487. Like Point in *Godb.* 219. *Cro. Fac.* 35, 316, 317.

If the Plaintiff be Nonsuit, by which the Defendant is to recover Costs, if the Plaintiff will not enter his Continuances, on Purpose to save the Costs, the Defendant shall be suffered to enter them, and fo recover his Costs.

Yelv. 5, 6. *1 Brownl.* 192. *S. C. Johnson v. Turner* adjudged.

If in Trespafs for breaking his House, and taking and carrying away his Goods, the Defendant justifies the Whole, and the Plaintiff *quoad fractionem domus*, and the taking the Goods, *nec non materia in ea contenta*, demurs upon the Defendant's Bar, and the Defendant joins in Demurrer in this Manner, *Quia placit' prædi^{ct} quoad fractionem domus* and the taking the Goods *sufficiens*, &c. and thereupon Judgment is given, here is a Discontinuance; for in the Offer of the Demurrer *ex parte querentis* nothing is alledged Specially, but only *quoad* Breaking of the House, and Taking the Goods; and though the subsequent Words *nec non materia in ea contenta* go to all the Matter in Bar, *viz.* the Asportation; yet when the Defendant joins in Demurrer, he joins but Specially *quoad* the Breaking the House, and Taking the Goods, but says nothing as to Carrying them away.

Yelv. 117. *St. John v. Comyn* adjudged, and the Judgment upon a Writ of Error in *B. R.* in *Ireland* reversed upon a Writ of Error here accordingly, & *vide Yelv.* 138.

If upon a Writ of Error upon a Judgment in Ejectment the Plaintiff assigns for Error the Want of an Original, and the Defendant pleads, that such a Day an Original was delivered to, &c. and concludes to the Country, and thereupon the Judgment is reversed; here is a Discontinuance; for when the Defendant concludes to the Country where the Matter of his Plea, *viz.* the Delivery of the Original, was triable by Record, and the Plaintiff does not reply or demur upon the Defendant's Plea, here is not any perfect Record.

11 Co. 5, 6. *1 Rol. Rep.* 30. *S. C.*

In an Action of Trespafs against *A. B.* and *C.* *A.* confessed Judgment, and *B.* and *C.* pleaded severally Not guilty, and several *Venires* were awarded to try these Issues, &c. but no Day given to *A.* and it was resolved upon a Writ of Error upon a Judgment *in Banco*, that it was according to the Course of that Court, and that if it was a Discontinuance it was helped by the (a) Verdict against *B.* and *C.*

(a) By the *32 H.* 8. *cap.* 30 Discontinuances are aided, so that there be a Verdict for the Plaintiff or Defendant; in the Construction of which it hath been held, that 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. *11 Co.* 6. b. *2 Leon.* 194. *Godb.* 55. *1 Rol. Rep.* 161. *Cro. Fac.* 353. *Hob.* 187. *Goldb.* 109. *1 Bull.* 25. *Cartier* 51. *3 Lev.* 39. *1 Salk.* 179, 180. — But if the Matter is pleaded to the Whole, though in Fact but an Answer to Part, this is a bad Plea, and not helped by the Statute. *Hard.* 331. — That Discontinuances, as well on the Part of the Plaintiff as Defendant, are aided. *Cro. Eliz.* 489. *Cro. Fac.* 528. — That Discontinuances, in Inferior Courts as well as Superior, are aided, being within this Act. *1 Salk.* 177-8.

(Q) Pleas Puis Darrein Continuance.

Doff. pl 297. *1 Salk.* 178.

THE Defendant can regularly have but one Plea, on which, if there be an Issue or Demurrer, the Cause is to be determined, because there can be but one Verdict in a Cause; but if any new Matter happens pending the Writ, he may plead it after a former Plea pleaded, provided he plead it before the next Continuance after such new Matter has happened, which is called a Plea *Post Darrein Continuance*, because such Matter being new it was not in his Power to plead it when his former Plea was pleaded; and it would be hard, because he had pleaded, to elude him from an Advantage which he had not at

the Time of Pleading, since there was no Laches in him; but this he cannot plead after a Continuance, because having suffered the former Plea to continue he rests upon it, and waives the Benefit of any new Matter.

In Debt against an Administrator, after Demurrer joined, the Administration was repealed, and granted to another, for which the Defendant would have pleaded this Matter *Puis Darrein Continuance*; but it was resolved not to be pleadable after Demurrer, tho' it might after an Issue joined.

So if a Release be given after the Day of *Nisi prius*, and before the Day in Bank, he cannot plead it, because there is a Verdict already in the Cause, and upon another Plea; and therefore the Cause is determined, so that he is put to his *Audita querela* to hinder the Execution of the Judgment.

But there are two Cases where a Man may plead, though it be not after the last Continuance, *viz.* Outlawry, and the Death of the Plaintiff: As to Outlawry, it is upon the Prerogative that the Debt itself is forfeited to the King, and by Virtue of the Prerogative *Nullam tempus occurrit regi*, and therefore he may plead it though a Continuance has happened after the Outlawry; so he may plead the Death of the Plaintiff, because, though a Continuance has been entered, yet the Continuance is a Nullity, because there was no Plaintiff in Being to whom Day could be given; so it may be pleaded if the Plaintiff died after the Day at *Nisi prius*, and before the Day in Bank; and the Reason is, that there is no Cause in Court, for no Judgment can be given for a Person who is not *in rerum natura*, and if it be given it is erroneous; and if the Plaintiff's Attorney will traverse the Plea, he cannot say the Plaintiff comes *per Attorn'*, because that would be to forejudge the Matter in Issue; but the Attorney by his Name, *viz.* *J. S. venit pro magistro suo & dicit*, may appear, and so traverse it.

But a Release may it seems be pleaded, though there have been Imparlances between, because there is no Continuance of a former Plea pleaded; and by the *Libertas loquendi* the Defendant has Time given to plead what makes most for his Advantage.

But if the Writ be only abateable, as if the Plaintiff be made a Knight, or the Plaintiff being Feme Sole takes a Husband, this must be pleaded after the last Continuance, or otherwise he depends on his first Plea, and waives the Benefit of his new Matter; but it cannot be pleaded between the Day at *Nisi prius* and the Day in Bank, because there has been a Trial in the same Cause before.

But if the Lessor of the Plaintiff dies, this cannot be pleaded *Puis Darrein Continuance*, because the Right is supposed in the Lessee.

The Pleas of this Kind are twofold, *viz.* in Abatement and in Bar; if any Thing happens, pending the Writ, to abate it, this may be pleaded *Post Darrein Continuance* though there is a Plea in Bar, for this can only waive all Pleas in Abatement that were in Being at the Time of the Bar pleaded, but not any subsequent Matter; but though it be pleaded in Abatement, yet after a Bar is pleaded it is peremptory, as well on Demurrer as on Trial, because after a Bar pleaded he has answered in Chief, and therefore can never have Judgment to answer over; so it may be pleaded in Bar; but as to the Manner of its being pleaded in Bar or Abatement herein it is to be observed, that in the first Case it must be pleaded *Quod breve cassetur*, and in the other *Quod actionem ulterius manutenere non debet*, and not that the former Inquest should not be taken, because it is not a substantive Bar in itself, and comes in the Place of the former, and therefore must be pleaded to the Action.

There

M. or 871.
pl. 1210.
Stonner v.
Gibbons.

21 H. 6. 10.
Bro. Cont. 27.
2 Lutw. 1143,
1174.

21 H. 6. 10.
DoH. pl. 297.
1 Lev. 80.
1 Sid. 93,
133, 143,
185.
2 Lutw. 1143,
1174.
5 Mod. 12.

15 E. 4. 4.

2 H. 6. 13.
1 Sid. 143.

Hob. 5.

5 E. 4. 149.
Allen 66.
2 Lutw. 1143.

- Bro. Continuance, 40.
Fitz. Continuance, 5.
- There can be but one Plea *Puis Darrein Continuance*, that the Plaintiff may not be delayed *ad Infinitum*, for if he made a second Change he might make a third, and so *in Infinitum*; but some have held, that he might plead an Outlawry after the last Continuance, because *Nullum tempus occurrit regi*; but *Quære* whether the Subject shall after Plea *Puis Darrein Continuance* partake of the Prerogative, or whether it shall be presumed, after such trifling, that it is frivolous and untrue, and therefore to be rejected.
- Bro. Continuance, 1.
26 H. 8. 2.
- If a Matter happens after Plea pleaded, and before Issue joined, it shall be pleaded to be done pending the Writ; but if it happen after Issue joined it shall be pleaded *Post ultimam continuationem*.
- Bro. Continuance, 30.
22 H. 6. 1.
- If the Plaintiff release to the Defendant after the Award of the *Nisi prius*, and at the Day of *Nisi prius* the Jury remains *propter defectum*, the Defendant may plead it the Day in Bank; because the Cause was not determined by the Jury, and therefore he is at Liberty to plead it at any other Day of Continuance; and it may be tried by the Jury, when they appear.
- If the Plaintiff, after a Writ of Inquiry awarded, release to the Defendant, he cannot plead this Release at the Day in Bank; because there is no Day given him, and Judgment is already; but if the Plaintiff dies, such Death may be pleaded; because there is no Person in Court for whom Judgment can be given; but now by the 8 W. 3. cap. 10. the Executors, &c. may have a *Scire fac.* on such an interlocutory Judgment.
- Doff. pl. 297.
Allen 66.
2 Lutw. 1143.
- Time and Place must be laid in this as in other Pleas, and must have the same Certainty with other Pleas.
- 5 Mod. 12.
Yelv. 141.
Comb. 357.
- It is no good Plea to say *Post darrein continuance* such a Thing happened, but ought to be precise in the Day.
- One may plead *Puis darrein continuance*, that the Plaintiff brought a second Action for the same Cause, and recover'd, though he might have pleaded the former in Abatement to the second.
- 2 Mod. 307.
- Plea *Puis darrein continuance* put in at the Assizes must be certified as Part of the Record, and cannot be then tried.
- 1 Salk. 178.
Barber v. Palmer, & vide Hob. 81.
- If after a Plea in Bar the Defendant pleads a Plea *Puis darrein continuance*, this is a Waiver of his Bar, and no Advantage shall be taken of any Thing in the Bar.

Præmunire.

(A) What Offences come under the Notion of a Præmunire.

(B) Of the Punishment therein.

(A) What Offences come under the Notion of a Præmunire.

TH E Offences coming under the Notion of a (a) *Præmunire*, or for which the Party incurs a *Præmunire*, are reduced by Serjeant *Hawkins* to the following Particulars:

¹*Hawk. P. C.*
48, &c.

(a) So called from the Word in the

3 *Inst.* 120.

Writ, which is used for *præmonere*. *Co. Lit.* 129.

1. The Offence of making use of Papal Bulls is made a *Præmunire*, by many ancient as well as later Statutes, to which Purpose it is enacted by 25 *E. 3.* called the Statute of Provisors, 'That whoever shall, by a Papal Provision, disturb any Patron to present to a Benefice, &c. shall be fined and imprisoned 'till he make full Renunciation. And it is further enacted by 25 *E. 3. stat. 5. cap. 22.* that if any one purchase a Provision of an Abby or Priory, he shall be out of the King's Protection; and by 38 *E. 3.* and 12 *Rich. 2. cap. 15.* and 13 *Rich. 2. stat. 2. cap. 2.* that whoever shall accept a Benefice contrary to 25 *E. 3.* shall be banished; and by 13 *Rich. 2. stat. 2. cap. 3.* that whoever shall bring a Sentence of Excommunication against any Person for executing the said Statute of 25 *E. 3.* shall suffer Pain of Life and Member; and by 16 *Rich. 2. cap. 5.* that whoever shall purchase or pursue, or cause to be purchased or pursued, in the Court of *Rome* or elsewhere, any Translations, Processes, Sentences of Excommunication, Bulls, Instruments, or other Things contrary to the Tenor of that Statute, which touch the King, against him, his Crown, his Regality, or his Realm, or bring them within this Realm, or receive them, &c. shall be out of the King's Protection; and their Lands and Tenements, Goods and Chattels forfeited to the King, and they shall be attached by their Bodies; and by 2 *H. 4. cap. 3.* that whoever shall purchase from *Rome* a Provision of Exemption from ordinary Obedience; and by 2 *H. 4. cap. 4.* that whoever shall put in Execution Bulls purchased by those of the Order of *Cisteaux*, to be discharged of Tithes, shall incur the like Penalty; they are further restrained by 6 *H. 4. cap. 1.* 7 *H. 4. cap. 8.* 9 *H. 4. cap.—* and 3 *H. 5. cap.—* by which the Statutes abovementioned are enforced and explained; and it is further enacted by 23 *H. 8. cap. 2. sect. 22.* that whoever shall sue for or execute any Licence, Dispensation or Faculty from the See of *Rome*; and by 28 *H. 8. cap. 16.* (by which all Bulls, Briefs, &c. heretofore obtained from *Rome* are

(a) Yet it hath been holden that the Alleging an ancient Bull in order to induce another principal Matter whereon to ground a Title, without claiming any thing from the Bull itself, is not within this Statute. 2 Lev. 251.

Davis S4.

By the 13 *Eliz. cap. 2.* those who purchase any Bull, &c. from Rome, are guilty of High Treason; but those ancient Statutes continue still in Force, and it is in the Election of the Crown to proceed either upon them or 13 *Eliz.* Also by the said Statute of 13 *Eliz.* the Aiders, Comforters, and Maintainers of such Offenders, after the Offence, to the Intent to uphold the said usurped Power, incur a *Præmunire.*

Secondly; The Derogating from the King's Common Law Courts, is said to have been an high Offence at Common Law, and is made a *Præmunire* by many ancient Statutes; for by 27 *E. 3. cap. 1.* of Provisors, 'If any Subject draw any out of the Realm in Plea, whereof the Cognizance pertains to the King's Court, or of Things whereof Judgments be given in the King's Courts, or sue in any other Court to defeat or impeach the Judgments given in the King's Courts, he shall be warned to appear, &c. in proper Person, at a Day containing the Space of two Months, at which if he appear not, he and his Proctors, &c. shall be put out of the King's Protection, his Lands and Chattels forfeited, his Body imprisoned, and ransomed at the King's Will, &c.'

And by 16 *Rich. 2. cap. 5.* 'Both those who shall pursue or cause to be pursued in the Court of Rome, or elsewhere, any Processes, or Instruments, or other Things whatsoever which touch the King, against his Crown and Regality or his Realm, and also those who shall bring, receive, notify, or execute them, and their Abettors, &c. shall be put out of the King's Protection.'

2 Bull. 299.

3 Inst. 125.

Cro. Jac. 336.

In the Construction of these Statutes it hath been holden, that certain Commissioners of Sewers, for summoning one before them who had got a Judgment at Law, and imprisoning him till he would release it, were guilty of a *Præmunire.*

1 Hawk. P.C.

51, 52. and

the Authori-

ties there

cited.

Also Suits in the Admiralty or Ecclesiastical Courts within the Realm, for Matters which upon the Face of the Libel itself appear to belong only to the Cognizance of the Temporal Courts, are said to be within 16 *Rich. 2.* by Force of the Words, *or elsewhere.*

But for this

vid. Tit. Court

of Chancery.

And it hath been formerly holden, that even Suits in a Court of Equity, to relieve against a Judgment at Law, are within the Danger of these Statutes, especially if they tend to controvert the very Point determined at Law, or to relieve in a Matter relievable at Law.

Thirdly, Appeals to Rome are made *Præmunires* by 24 *H. 8. cap. 12.* and 25 *H. 8. cap. 19.* by which it is enacted, 'that such Appeals as formerly were made to Rome, shall be made from henceforth to Chancery.'

Fourthly, The exercising the Jurisdiction of a Suffragan without the Appointment of the Bishop of the Diocese, is made a *Præmunire.* by 26 *H. 8. cap. 14.* which sets forth at large how Suffragans are to be nominated, &c.

Fifthly, By 25 *H. 8. cap. 20.* 'If a Dean and Chapter refuse to elect one named in the King's Letter for a Bishoprick, and to certify such Election to the King within twenty Days after the Licence shall come to his Hands, or if any Archbishop or Bishop after such Election (or Nomination by the King in Default thereof, &c.) refuse to confirm and consecrate within twenty Days the Person signified to them by the King's Letters Patents, they incur a *Præmunire.*'

Sixthly, Maintaining the Pope's Power is made a *Præmunire* by 5 *Eliz. cap.* —

Seventhly, By 13 *Eliz. cap. 7.* 'If any one shall bring into the Realm, &c. any *Agnus Dei*, Crosses, Pictures, Beads, or such like superstitious Things, pretended to be hallowed by the Bishop of Rome, &c. and shall deliver or offer the same to any Subject to be used in any wise; or if any one shall receive the same to such Intent, and not discover the Offender, &c. or if a Justice of Peace having any Offence in that Act declared to him, do not within sixteen Days declare it to a Privy Counsellor, he incurs a *Præmunire*.'

Eighthly, By the 27 *Eliz. cap. 2.* 'Sending Relief to any Jesuit, Seminary Priest, or College of Priests or Jesuits beyond the Seas, or to one not returning out of such College into *England*, shall incur a *Præmunire*.'

Ninthly, Persons refusing to take the Oaths, incur a *Præmunire* by several Statutes, as 1 and 5 *Eliz. 3* and 7 *Jac. 1.* 1 *W. & M. &c.*

Tenthly, By the 6 *Ann. cap. 7.* it is enacted, 'That if any Person shall maliciously and directly, by Preaching, Teaching, or advised Speaking, declare, maintain and affirm, that the pretended Prince of *Wales* hath any Right or Title to the Crown of these Realms; or that any other Person or Persons hath or have any Right or Title to the same, otherwise than according to 1 *W. & M. cap. 2.* and 2 *W. 3. cap. 2.* and the Acts then lately made in *England* and *Scotland* mutually for the Union of the two Kingdoms; or that the Kings or Queens of this Realm with the Authority of Parliament are not able to make Laws to limit the Crown and the Descent &c. thereof, shall incur a *Præmunire*.'

1 *Vent* 171.
Raym. 212.
 374.
 2 *Keb.* 825.

(B) Of the Punishment therein.

MOST of the Statutes of *Præmunire* refer the Punishment to 16 *Rich. 2. cap. 5.* which enacts, 'That those who offend against the Purport thereof, shall be put out of the King's Protection, and their Lands and Tenements, Goods and Chattels forfeited to our Lord the King; and that they be attached by their Bodies if they may be found, and brought before the King and his Council, there to answer to the Cases aforesaid; or that Process be made against them by *Præmunire Facias*, in Manner as is ordained in other Statutes of Provisors.'

The Judgment in *Præmunire* at the Suit of the King, against the Defendant being in Prison, is, that he shall be out of the King's Protection; and that his Lands and Tenements, Goods and Chattels shall be forfeited to the King; and that his Body shall remain in Prison at the King's Pleasure; but if the Defendant be condemned upon his Default of not appearing, whether at the Suit of the King or Party, the same Judgment shall be given as to the being out of the King's Protection and the Forfeiture; but instead of the Clause, that the Body shall remain in Prison, there shall be an Award of a *Capiatur*.

Co. Lit. 129 *b.*
 3 *Inst.* 125.
 218.
 2 *Hawk. P.C.*
 444.

As the above-mentioned Statute 16 *Rich. 2. cap. 5.* expressly saith, that such Offenders shall be put out of the King's Protection; and also the Statute of 25 *E. 3. stat. 5. cap. 22.* had farther added, that any one might do with a Purchaser of the Provisions therein prohibited, as with the King's Enemy; and that he who should offend against such

Co. Lit. 130. an one in Body, Lands, or Goods, should be excused; it was formerly holden, that a Person attainted in a *Præmunire* might lawfully be slain by any one, as being the King's Enemy and out of the Protection of the Laws; but the later Opinions seem to have disapproved of this Severity; and it is now expressly enacted by 5 *Eliz. cap. 1. sect. 21, 22.* 'That it shall not be lawful to kill any Person attainted in a *Præmunire*, saving such Pains of Death or other Hurt or Punishment, as heretofore might without Danger of Law be done upon any Person that shall fend or bring into the Realm, or within the same shall execute any Process, &c. from the See of Rome.'

Co. Lit. 130. It is clearly agreed, that a Person attainted in a *Præmunire* can bring no (a) Action whatsoever; neither is it safe for any one, knowing Surety of him to be guilty, to (b) give him any Aid, Comfort, or Relief. the Peace.

1 *Hawk. P. C.* 126. (b) That it seems doubtful whether there can be any Accessories in a *Præmunire*, vid. *Stamf. P. C.* 44. *Plow.* 97.

1 *Vent.* 175. It hath been resolved, that a Statute, by appointing that an Offender shall incur the Penalty and Danger mentioned in the 16 *Rich. 2. cap. 5.* does not confine the Prosecution for the Offence to the particular Process thereby given.

Co. Lit. 130. It is holden, that the Statutes of *Præmunire* which give a general (a) Forfeiture of all the Lands and Tenements of the Offender, extend not to Lands in Tail.

(a) Whether the Forfeiture of any Lands, &c. shall relate to the Time of the Offence, or only to that of the Judgment, *Q. et vid. Cro. Car.* 172. 1 *Fen.* 217.

Cro. Jac. 336. It hath been adjudged, that a Pardon of all Misprisions, Trespasses, Offences, and Contempts, will pardon a *Præmunire*.

2 *Bullst.* 299. The Defendant in a *Præmunire* must regularly appear in Person, whether he be a Peer or Commoner, unless he is dispensed with by some Writ or Grant for that Purpose; but in the Case of (a) Sir *Anthony Mildmay*, he was allowed to plead a Pardon to a *Præmunire* by Attorney; but (b) it has been thought that there was some Clause to this Effect in the Pardon.

3 *Inst.* 125. Upon an Indictment of a *Præmunire*, a Peer of the Realm shall not be tried by his Peers.

12 *Co.* 92. Upon an Information on the Statute 6 *Geo. 1. cap. 18.* for setting up a Bubble called the *North Sea*, it was determined, that the Court was not obliged by that Act to give the whole Judgment, as in Case of a *Præmunire*, against the Defendant, but only such Parts of it as in their Discretions they should think fit; and accordingly a Fine of 5 *l.* was set on the Party convicted, and Judgment that he should remain in Prison during the King's Pleasure.

Ld. Vaux's Case.
2 *Ld. Raym.* 1361. *The King v. Ca-wood.*

+

Prerogative.

P R E R O G A T I V E is a Word of large Extent, including all the Rights and Privileges which by (a) Law the King hath, as Head and Chief of the Commonwealth, and as intrusted with the Execution of the *Laws*.

Part of the Law of *England*, and comprehended within the same.

The Nature of our Constitution is that of a limited Monarchy, in which the Legislative Power is lodged in the King, Lords, and Commons; but the King is intrusted with the executive Part, and from whom all Justice is said to flow; hence he is stiled the Head of the Commonwealth, Supreme Governor, *Parens Patriæ*, &c. but still he is to make the Law of the Land the Rule of his Government; that being the Measure as well of his Power, as of the Subjects Obedience: For as the Law asserts, maintains, and provides for the Safety of the King's Royal Person, Crown, and Dignity, and all his just Rights, Revenues, Powers, and Prerogatives; so it likewise declares and asserts the Rights and Liberties of the Subject.

ly of it as a Matter divine; the King, says he, carries God's Stamp, and has the Shadow of God's Excellencies given him; the Power of God is joined with Excellency; for to do Wrong is not Omnipotency but Weakness; so it is with the King, he can do no Wrong, &c. — As to which my Ld. Ch J. *Hale* thus expresseth himself. It is regularly true, that the Law presumes the King will do no Wrong, neither indeed can do any Wrong; and therefore, if the King command an unlawful Act to be done, the Offence of the Instrument is not thereby indemnified: For though the King is not under the coercive Power of the Law, yet, in many Cases, his Commands are under the directive Power of the Law, which consequently makes the Act itself invalid, if unlawful; and so renders the Instrument of the Execution thereof obnoxious to the Punishment of the Law; yet in Time of Peace, if two Men combat together at Barriers, or for Trial of Skill, if one kill the other, it is Homicide; but if it be by the Command of the King, it is only Felony. 1 *Hal. Hist. P. C.* 43, 44.

Hence it hath been established as a Rule, that all Prerogatives must be for the Advantage and Good of the People, otherwise they ought not to be allowed by the Law,

The Rights and Prerogatives of the Crown are in most Things as ancient as the Law itself; for tho' the Statute 17 *E. 2.* commonly called the Statute *De Prærogativa Regis*, seems to be introductive of something new, yet for the most part it is but a Sum or Collection of certain Prerogatives that were known Law long before: As, that the King's Wardship of Lands *in Capite*, did attract the Wardship of Lands held of others; that the Grant of a Manor did not pass an Advowson appendant, unless named; that the King had a Right to Escheats, Wrecks, Royal Fishes, and many others which were ancient Prerogatives of the Crown.

But for the better understanding hereof, I shall consider,

(A) When the King commences his Reign, and the Ceremony requisite therein.

(B) Of the King's Prerogative as universal Occupant:
And herein,

Vol. IV.

Q q

1. That

Vid. Stamf. Prerog. cap. 1. Co. Lit. 90. (a) That the King's Prerogative is

1 *And. 153. Co. Lit. 19. 73. 4 Co. 124. That he is to defend his Subjects. 7 Co. 4. — That he cannot change the Law. 5 Co. 55. 2 Inst. 36. 11 Co. 70. — Finch's Law 81, 82, 83. speaks high-*

Moor 672. Show. P. C. 75.

Bentl. 117. 2 Inst. 263. 496. 10 Co. 64.

1. That he is univerfal Occupant, and intitled to all derelict Lands.
2. Of his Prerogative in Escheats.
3. Of his Prerogative in Seas and Navigable Rivers.
4. Of his Prerogative in Swans and Royal Fishes.
5. Of his Prerogative in *Beacons* and Light-Houfes.
6. Of his Prerogative in Wreck.
7. Of his Prerogative in Relation to Coins and Mines.
8. Of his Prerogative in derelict Goods; and therein of Waifs, Strays, and Treasure Trove.
9. Of his Prerogative in Fines and Forfeitures.

(C) Of his Prerogative over the Persons of his Subjects: And herein,

1. Who shall be said his Subjects.
2. That he is intitled to the Service and Allegiance of his Subjects; and therein of the Oaths injoined them.
3. That he may restrain his Subjects from going abroad; and herein of the Writ *de Ne exeat Regno*.
4. That he may command his Subjects to return home; And therein of awarding a Privy Seal.

(D) Of the King as the Fountain of Justice, and intrusted with the Execution of the Laws: And herein,

1. That all Civil Jurisdiction flows from the King.
2. Of the King's Prerogative in Ecclesiastical Matters.
3. Of his Prerogative in creating Officers.
4. Of his Prerogative in making War and Peace.
5. Of his Prerogative in taking Care of Infants, Ideots; Lunaticks and Charitable Uses.
6. Of his Prerogative in Pardoning.
7. Of Dispensations and *Non obstantes*.
8. Of his Proclamations.

(E) How the Rules of Law differ with respect to the King and a private Person: And herein,

1. Of what Things incapable from the Dignity of his Person and Office.
2. What Things enure to him in his natural, what in his political Capacity.
3. Of the Difference in the Rules of Law, as directing the King's Property, otherwise than that of a Subject.
4. That his Rights shall be preferred to the Subjects where they happen to meet.
5. Of Acts of Parliament which extend to or bind not the King.
6. That no Laches can be imputed to him; and therein of the Maxim, *Nullum Tempus occurrit Regi*.

7. Of his Prerogative in his Suits and Proceedings in Courts of Justice.

(F) Of the King's Grants and Letters Patents: And herein,

1. What Things may the King grant; and therein,
 1. Of Grants arising from his Prerogative of Power, and which are inseparably annexed to the Crown.
 2. Of Grants arising from his Interest.
 3. How for the King must have an Interest, in order to enable him to grant.
 4. Grants tending to a Monopoly; and therein of Things of a new Invention.
 5. Grants of the sole Liberty of Printing.
2. Of the Construction of the King's Grants and Letters Patents, as to their being good or void; and herein of the King's being deceived in his Grant.
3. Where the King's Grantee shall partake of his Prerogative.

(A) When the King commences his Reign, and the Ceremony requisite therein.

UPON the Death or Demise of the King, his Heir is that Moment invested with the Kingly Office and Regal Power, and commences his Reign the same Day his Ancestor dies; whence it is held as a Maxim, (a) that the King never dies.

7 Co. 12. in Calvin's Case.
6 Co. 27.
7 Co. 30.
(a) And therefore if

Lands are given to the King by Deed inrolled, without the Words *Heirs or Successors*; yet a Fee Simple passeth, for that in Judgment of Law he never dies. *Co. Lit. 9.*

And herein we must take Notice, that the Rules of Descent are the same with those that govern private Inheritances, except only as to the Rule of *Possessio Fratris*; which does not hold in the Descent of the Crown or its Possessions: Neither is Half Blood any Impediment in such Case; for the Brother of the Half Blood shall be preferred to the Sister, in the Enjoyment of the Crown, as the most capable of the two, by the Advantages and Prerogative of his Sex.

Co. Lit. 15. b.

Therefore, if the King hath Issue a Son and a Daughter by one *Venter*, and a Son by another *Venter*, and purchases Lands and dies, and the eldest Son enters, and dies without Issue, the Daughter shall not inherit those Lands, nor any other Fee-Simple Lands of the Crown, but the younger Brother shall have them together with the Crown.

Co. Lit. 15. b.

As the King commences his Reign from the Day of the Death of his Ancestor, it hath been held, that Compassing his Death before Proclamation, yea before Proclamation of him, is a Compassing of the King's Death within the Statute of 25 E. 3. he being King presently, and

3 Inst. 7.
1 Hal. Inst.
P. C. 101.

and the Proclamation and Coronation only Honourable Ceremonies for the further Notification thereof.

1 Hawk. P. C. 35. Also it is held, that every King for the Time being, in the (a) actual Possession of the Crown, is a King within the Intention of the abovementioned Statute; for there is a Necessity that the Realm should have a King, by whom, and in whose Name, the Laws are to be administered; and the King in Possession, being the only Person who either doth or can administer those Laws, must be the only Person who hath a Right to that Obedience which is due to him who administers those Laws; and since by Virtue thereof, he secures to us our Lives, Liberties, and Properties, and all other Advantages of Government, he may justly claim Returns of Duty, Allegiance and Subjection.

1 Hawk. P. C. 35. (a) As to the Distinction between a King *de facto* and *de jure*, my *Ld. Hale* says, a King *de facto*, but not *de jure*, such as were *H. 4. H. 5. H. 6. R. 3. H. 7.* being in the actual Possession of the Crown, is a King within this Act; so that Compassing his Death is Treason within this Law; and therefore the *4 E. 4. 20.* a Person that compassed the Death of *H. 6.* was attained for that Treason in the Time of the rightful King; but had it been an Act of Hostility in Assistance of the rightful Heir of the Crown, which afterwards obtained, this had not been Treason; but *e converso*, those that assisted the Usurper, tho' in the actual Possession of the Crown, have suffered as Traitors; as appears by the Statute of *1 E. 4.* and as was done upon the Assistants of *H. 6.* after his temporary Readeption of the Crown, in *10 E. 4.* and *39 H. 6. 1 Hal. Hist. P. C. 102, 103.*

1 Hawk. 36 and the Authorities there cited. It hath been settled, that all judicial Acts done by *Henry* the Sixth, while he was King, and also all Pardons of Felony and Charters of Denization granted by him, were valid; but that a Pardon made by *E. 4.* before he was actually King, was void even after he came to the Crown.

1 Hal. Hist. P. C. 104. The right Heir of the Crown, during such Time as the Usurper is in plenary Possession of it, and no Possession thereof in the Heir, is not a King within this Act; as was the Case of the House of *York*, during the plenary Possession of the Crown in *H. 4. H. 5. H. 6.* But if the right Heir had once the Possession of the Crown, as King, tho' an Usurper had gotten the Possession thereof, yet the other continues his Style, Title and Claim thereto, and afterwards re-obtains the full Possession thereof; a Compassing the Death of the rightful Heir, during that Interval, is a Compassing of the King's Death within this Act; for he continued a King still, *quasi* in Possession of his Kingdom; which was the Case of *E. 4.* in that small Interval wherein *H. 6.* re-obtained the Crown; and the Case of *E. 5.* notwithstanding the Usurpation of his Uncle *Rich. 3.*

Keling 14, 15. 1 Keb. 315. It was resolved by the Judges, in the Case of *Sir H. Vane*, that *King Car. 2.* was King *de facto* as well as *de jure*, from his Father's Death; and that therefore all those who acted against and kept him out of Possession, in Obedience to the (a) Powers then in Being, were Traitors.

(a) That no Person was in Possession of any Sovereign Power known to our Laws. *1 Hawk. P. C. 36.*

By the *1 Mar. stat. 3. cap. 1. sect. 3.* 'The Kingly Office of this Realm, and all Prerogative, Royal Power, Authorities, and Jurisdiction thereunto annexed, being invested in (a) either Male or Female, are as absolutely invested in the one as the other.

(a) The Queen Regent, as were *Q. Mary* and *Q. Eliz.* is a King within the *25 E. 3. 1 Hal. Hist. P. C. 101.* but a titular King, as the Husband of a Queen Regnant, is not. *3 Inst. 8. 1 Hawk. P. C. 36.*

By the *1 W. & M. stat. 2. cap. 2. sect. 9.* 'Every Person that shall be reconciled to, or hold Communion with the See or Church of Rome; or shall profess the Popish Religion; or shall marry a Papist, shall be incapable to inherit or enjoy the Crown of this Realm and *Ireland*; and in such Case the People shall be absolved of their Allegiance

legiance, and the Crown shall descend to such Persons, being Protestants, as should have inherited the same, in Case the Person so reconciled, &c. were dead.

And by *Sect. 10.* ' Every King and Queen, who shall succeed in the Imperial Crown of this Kingdom, shall, on the first Day of the Meeting of the first Parliament, next after his or her coming to the Crown, sitting in the Throne in the House of Peers, in the Presence of the Lords and Commons, or at his or her Coronation, before such Person as shall administer the Coronation Oath, at the Time of taking the said Oath, (which shall first happen) make, subscribe and repeat the Declaration mentioned in the Statute *30 Car. 2. stat. 2. for preserving the King's Person and Government, by disabling Papists from sitting in either House of Parliament.*

The King, as King, cannot be a Minor; so that Grants, Leases, &c. made by him, tho' under Age, bind presently, and cannot be avoided by him, either during his Minority, or when he comes of Age; for the Politic Rules of Government have thought it necessary, that he who is to govern and manage the whole Kingdom, should never be considered as a Minor incapable of governing himself and his own Affairs.

Dier. 209. pl. 22. Plow 209. Case of the Dutchy of Lancaster. Co. Lit. 43. 5 Co. 27. Raym. 90.

(B) Of the King's Prerogative as universal Occupant: And herein,

(1) That he is universal Occupant, and intitled to all derelict Lands.

THE King by our Law is universal Occupant, and all Property is presumed to have been originally in the Crown; and that he partitioned it out in large Districts to the great Men who had deserved well of him in the Wars, and were able to advise him in Time of Peace. Hence it is said, that the King hath the direct Dominion; and that all Lands are holden mediately or immediately from the Crown.

Co. Lit. 1. Dier 154. 1 Bencl. 237. Seld. Mare Claus. 223.

Hence it is, that if the Sea leaves any Shore by a sudden falling off of the Water, such derelict Lands belong to the King; but if a Man's Lands lying to the Sea are increased by insensible Degrees, they belong to the Soil adjoining.

Dier 326. 2 Rol. Abr. 170.

So if a River, so far as there is a Flux of the Sea, leaves its Channel, it belongs to the King; for the English Sea and Channels belong to the King; and he hath a 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 of the Soil; this being no original Part or Appendix to the Sea, but distributed out as other Lands.

2 Rol. Abr. 170.

If Land be drowned, and so continue for divers Years; if it be after regained, every Owner shall have his Interest again, if it can be known by the Boundaries.

8 Co. Sir Francis Barrington's Case.

It is said that there is a Custom in *Lincolnshire*, that the Lords of Manors shall have derelict Lands; and that such is a reasonable Custom; for if the Sea wash away the Lands of the Subject, he can have no Recompence, unless he should be intitled to what he regains from the Sea.

2 M.d. 107

2 Lev. 171.
2 Md. 106.
Raym. 241.
S. C.
Attorney
General v.
Sir Edward
Farmer.

Information by *English* Bill in the Exchequer Chamber for one hundred Acres of derelict Lands in *Lincolnshire*; the Case was this: K. *J. a.* 1. granted to *J. S.* the Manor of *Holbeck*, with the Appurtenances, by exprefs Words; and in the Letters Patents there was the following Clause, *Nec non totum illud fundum et solum et terras suas contigine adjaecen'* to the Premises, *quæ sunt aquâ cooperta, vel quæ in posterum de aqua possunt recuperari, &c. non obstante non nominando valorem, qualitatem sive quantitatem, &c.* and these hundred Acres being afterwards improved and recovered from the Sea, the Question was, Whether they passed to the Patentee; and tho' it was urged in his Behalf, that these Words were as general as they well could be; that the King was intitled to the Soil of the Sea, not as a Matter of Prerogative only, but as an Interest which he might grant; that in some Cases the King may grant a Possibility; that the *Non Obstante* was so particular in this Case, as if intended to cure all Defects; and that the King's Grants ought to be construed liberally, as most for his Honour: Yet it being urged on the other Side, that these Words were too general; that tho' they might be intended to pass some small Parcels or Lines of Land which may become derelict, yet not so as to pass any great Tracts of Land; and that by the Construction contended for, all the Lands between that and *Denmark* might pass; and admitting the King might grant Part of his Seas, yet that must be by exprefs Name: It was held by *Mountague* Ch. B. with the Advice of *Rainsford* and *North* Ch. Justices, that the Patent as to these hundred Acres which became derelict, was void.

2. Of his Prerogative in Escheats.

Co. Lit. 13. 92.
Godb. 211.
(a) That if
the Party be
pardoned
there can be
no Escheat.
Owen 87.

2 Inst. 64.
Kelw. 104.
2 Rol. Rep. 251
4 Inst. 224.

2 Inst. 64.

Cro. Eliz. 120.
May v. Street.

An Escheat may be either *per defectum sanguinis*, or *per (a) delictum tenentis*; but it is said, that in Case of an Attainder of Felony, the Escheat to the Lord is *pro defectu tenentis*; and the not descending, the Consequence of the Corruption of the Blood; but in Case of Treason, the Lands come to the Crown as an immediate Forfeiture, and not as an Escheat.

If the King's Tenant dies without Heir, the Lands shall escheat and revert again to the Crown; but the Lands holden of any (a) other Lord shall, for Want of Heirs of the Tenant, escheat to the Lord.

(a) That the Lord by Escheat is in the *Post*, and cannot vouch. 1 Co. 1.

If Lands held of the King as of an Honour come to him by a common Escheat, as the Tenants dying without Heir, or committing Felony, these Lands are Part of the Honour; otherwise if forfeited for Treason, for then it comes to the King by reason of his Person and Crown; and if he grants them over, &c. the Patentee shall hold of the King in Chief.

It was found by special Verdict, that the Prior of *Merton* was seised of a House in *Southwark*, held of the Archbishop of *Canterbury*, as of his Borough of *Southwark*; and 30 *Hen.* surrenders it to the King *Hen.* 8. who granted the said Messuage and divers other Lands in *London*, *Middlesex* and *Essex*, to *J. S.* and his Heirs, to hold of him *in Libero Burgagio*, by Fealty, for all Services and Demands, and not *in Capite*; that afterwards *Q. Mar.* granted the Manor and Borough of *Southwark* to the Mayor and Commonalty of *London*; and the Tenant of the said Messuage died without Issue; and the Question was, whether *Q. Eliz.* or the Patentees of the Borough should have the Escheat

cheat; and adjudged for the Queen; for the first Patentee of the Mesuage held it of the Queen in Socage *in Capite*, as of a Seignory in Grofs; and the Words *in libero Burgagio* are merely void; for the Land out of the Borough cannot be held *in libero Burgagio*; and there shall not be several Tenures, for one Tenure was reserved by the King for all; and therefore of Necessity it shall be a Tenure in Socage of the King.

Upon an Attainder of High Treason, the King by his Prerogative shall have all the Lands of Inheritance whereof the Offender was seized in his own Right; and also all Rights of (a) Entry to Lands in the Hands of a Disseisor or other Wrong-Doer; tho' such Lands are holden of another; but in Case of Petit Treason and Felony, they go to the Lord of whom they are holden; for the Blood being corrupted so that no Person can represent him, it is the same as if he had died without Heir; and consequently the Lord is in by Escheat.

Co. Lit. 8.
3 Inst. 19.
 (a) But a Right of Action which consists only in Privy, cannot escheat. *3 Co. 2. b.*
Stamf. P. C. 191.

But the Lord cannot enter into the Lands holden of him upon an Escheat for Petit Treason or Felony, without a special Grant; 'till it appears by due Process, that the King hath had his Prerogative of the Year, Day and Waste.

If one attainted of Felony commits Treason afterwards, and is thereof attainted, as he may be, because the Offence is of a higher Nature than Felony; yet this shall not develt the Right of Escheat, which by the Felony was lawfully vested in the Lord, contrary to the Opinion of *Stamford*; for the Act of the Party shall not develt the lawful Escheat of the Lord.

3 Inst. 213.

If one seized in Fee of a Fair, Market, Common, Rent-Charge or Seck, Warren, Corrody, or other Inheritance not holden, is attainted of Felony, the King shall have the Profits of them during his Life; but after his Death they cannot descend, because his Blood is corrupted; nor escheat, because not holden; but perish and are extinct by Act in Law.

3 Inst. 21.

If a Man grant an Advowson in Grofs to another in Fee, and the Grantee die without Heir, it seems that this shall revert to the Grantor, not being held of any Man; for 'tis a Thing that cannot vanish, but ought to be in some Person; but in that Case, if the Grantor cannot have it, the King shall have it, as Supreme Patron; and for that Reason ought to present where none hath Right.

1 Rol. Abr. 8 6
Comp. Incumb. 75

If a Disseisor makes a Feoffment, or dies seized; and after the Disseisee dies without Heir, there shall be no Escheat, because the Lord hath a Tenant by Title.

Co. Lit. 268. b.

Tho' the Lord hath not been seized of his Services within the Time of Limitation, yet if the Tenant dies without Heir, the Land shall escheat; for at the Time of the Escheat, the Seignory remained, tho' Seisin of the Services was wanting.

4 Co. 11.

If an Infant or *Non Compos* in Person make a Feoffment, and after die without Heir, (a) the Land shall not escheat; otherwise if made by Letter of Attorney, for then the Feoffment is void.

4 Co. 125.
 (a) *Dier 10. pl. 38 S. P.*
 because the Lord hath a

Tenant by Title.—If *J. S.* conveys Lands to Trustees and their Heirs, to the Use of himself for Life, Remainder to his first and every other Son, &c. Remainder to his own Right Heirs, and *Cestui que Trust* dies without Heirs, *Quere*, Whether the Lands shall escheat or remain with the Trustees.

If he who hath Title to a Writ of Escheat accepts Homage or Fealty of the Tenant, this will bar him; otherwise if he accepts Rent of the Tenant; for that may be done by a Bailiff.

Co. Lit. 268.

If there be Lord and Tenant, and the Tenant is disseised, and the Disseisee dies without Heir; and after the Lord accepts the Rent from the Disseisor, this is no Bar to him; otherwise if he avows upon the Disseisor for the Rent.

Co. Lit. 268.

But

Co. Lit. 268. But if after a Title of Escheat accrued, the Disseisor makes a Feoffment or dies seised, the Acceptance of the Rent from the Feoffee or Heir, will be a Bar.

2 *Inst.* 146. If one lease a Manor for Life or Years, and a Tenancy escheats (a) (a) After the Death of the Tenant for Life, the Lessee may have a Writ of Escheat, and the Words of the Writ are true, viz. that the Tenant that died, &c. held the Lands of him. *Kelw.* 114. a.—The Tenancy comes in lieu of the Seignory. 1 *Co.* 122.

Co. Lit. 13. b. For the better taking Care of the King's Escheats there is an ancient Officer named (a) by the Lord Treasurer, and called so because his Office is properly to (b) look to Escheats, Wardships and other Casualties belonging to the Crown.

as Sheriff; by 12 *E.* 4. cap. 9. must have a Freehold in the same County worth 20*l.* per ann.— by the 1 *H.* 8. cap. 8. must have 40 Marks yearly— by the Statute 14 *E.* 3. cap. — there shall be as many Escheators as when King Edward came to the Crown, viz. one in every County— But anciently there were but two, one on this side Trent, and the other beyond Trent, but they had Sub-escheators. *Co. Lit.* 13. b. (b) To inquire of casual Profits, and seize them into the King's Hands, that they may be answered to him. *Co. Lit.* 92. b.

1 *Vern.* 357. If the Inheritance of Lands escheat to the King, altho' he is in in the *Post*, yet he shall have a Term that was limited to attend the Inheritance.

3 Of his Prerogative in Seas and Navigable Rivers.

Seld. Mar. It is universally agreed, that the King hath the Sovereign Dominion in all Seas and great Rivers; which is plain from *Selden's* Account of the ancient Saxons who dealt very successfully in all naval Affairs; and therefore the Territories of the *English* Seas and Rivers always resided in the King.

And as the King hath a Prerogative in the Seas, so hath he likewise a Right to the Fishery and to the Soil; so that if a River as far as there is a Flux of the Sea leaves its Channel, it belongs to the King.

Hence the Admiralty Court, which is a Court for all Maritime Causes or Matters arising upon the High Sea, is deemed the King's Court; and its Jurisdiction derived from him who protects his Subjects from Pirates, and provides for the Security of Trade and Navigation. far it extends, *vid. Tit. Court of Admiralty.*

From the King's Dominion over the Seas it was holden, that the King as Protector and Guardian of the Seas might, before any Statute made for Commissions of Sewers, provide against Inundations by Lands, Banks, &c. and that he had a Prerogative herein as well as in defending his Subjects from Pirates, &c.

But notwithstanding the King's Prerogative in Seas and Navigable Rivers, yet it hath been always held, that a Subject may fish in the Sea; which being a Matter of Common Right, and the Means of Livelihood, and for the Good of the Commonwealth, cannot be restrained by Grant or Prescription.

Also it is held, that every Subject of Common Right may fish with lawful Nets, &c. in a navigable River as well as in the Sea; and the King's Grant cannot bar them thereof; but the Crown only has a Right to Royal Fish; and that the King only may grant.

on a Claim of *Solam Piscariam* in the River *Ex* by Grant from the Crown.

4. Of his Prerogative in Swans and Royal Fishes.

The King, as a perpetual Sign and Acknowledgment of his Dominion of the Seas, hath several Creatures reserved to him under the Denomination of Royal Creatures, as Swans, Sturgeons and Whales; all which are the Natives of Seas and Rivers.

But a Subject may have a Property in Swans three Manner of Ways:

First, By the Acquisition of tame Swans; viz. by buying of tame Swans, or by Grant of the King of Wild Swans, and taming of them; and then the Subject shall have the Property in them wheresoever they are, as of any other tame Animal.

If the Cock Swans of one Man get into the Hen Swans of another, by the Custom of *England* this Brood shall be divided; and it shall not follow the Female, according to the common Right of Accession; and this is founded on a natural Observation on the Moderation of this Sort of Creatures, that they will not couple with more than one; and so if they were to be separated they could never be propagated.

A Custom that the Owner of Swans should have two Cygnets, and the Owner of the Manor the rest, has been held good.

Swans that are not the King's may be Strays in a Manor as well as any other Creatures; and a Man may prescribe to have Swanning for them in another Manor.

Secondly, The Property of Wild Swans may be in the Subject by a Grant of Swan-Mark from the King; for in this Case, all the Swans marked with such Mark shall be the Subject's wheresoever they fly.

A Swan-Mark may be granted over as well as the Privilege of a Park or Warren.

By the 22 *E. 4. cap. 6.* 'No Person other than the Son of the King, shall have any Mark or Game of Swans, except he have Lands of Freehold to the yearly Value of five Marks; and if any Person, not having Lands to the said yearly Value, shall have any such Mark or Game, it shall be lawful to any of the King's Subjects, having Lands to the said Value, to seize the Swans as forfeit; whereof the King shall have the one Half, and he that shall seize, the other.'

Thirdly, Swans may be the Subject's *ratione Privilegii*; as if the King grants to the Subject the Game of Wild Swan in such a River; but in such Case, the Subject cannot bring an Action of Trespass, *Quare Cygnos suos ibid' nidificant' or gignent' cepit*; for a Man cannot call that his own, which he hath only during particular Occupancy and Possession in a certain Place.

If a Man take away Swans marked or pinioned, or those which are unmarked, if they be kept in a Pond or private River, it is Felony.

The King shall have Wreck of the Sea, Whales and Great Sturgeons taken in the Sea and elsewhere throughout the whole Realm; except in Places privileged by the King.

5. Of his Prerogative in Beacons and Light-Houses.

4 *Inst.* 148. It is clearly agreed, that the King only has a Prerogative in (a) Beacons and Light-Houses; and that he may erect any such, and in such Places as will be most convenient for the Safety and Preservation of Ships, Mariners and Navigation; also it seems to be the better Opinion, that this being for the publick Utility, and one of the Prerogatives that he is intrusted with for the Safety of the whole Realm, he may erect such Beacon, &c. as well in the Soil or Ground of a Subject as in that of the Crown; and that he may do this without the Subject's Consent.

(a) Before the Reign of E. 3. there were but Stacks of Wood set upon high Places, which were fixed when the Enemy was descryed; but in his Reign, Pitch-Boxes were instead of these Stacks of Wood set up; and this properly is a *Beacon*. 4 *Inst.* 148.

Vid the Authorities *infra* and *Carter* 90. Also it is clear, that the Subject hath not any Power to erect any such Beacon, &c. without the King's Licence and Authority for that Purpose.

But by the 8 *Eliz.* it is enacted, 'That the Master, Wardens and Assistants of the Trinity House of *Debtford Strond*, shall and may lawfully from Time to Time at their Will and Pleasure, and at their Costs, make, erect and set up such and so many Beacons, Marks and (b) Signs for the Sea, in the Sea-Shores and Upland near the Sea Coasts or Forelands of the Sea only, for Sea-Marks, as to them shall seem meet; whereby the Dangers may be avoided, and the Ships the better come to their Ports; and all such *Beacons*, Marks and Signs so by them to be erected, shall be continued, renewed and maintained from Time to Time at the Costs and Charges of the said Master, Wardens and Assistants.'

(b) Resolved by the two Ch. Justices, Att. and Sol. Gen. that this Act extended as well to Light-Houses in the Night, as to Beacons, &c. by the Day. 4 *Inst.* 149. in Marg.

Vid. Tit. Court of Admiralty. And altho' by the Common Law none but the King could erect *Beacons*, Light-Houses and Sea-Marks, yet of later Times, by Letters Patents granted to the Lord High Admiral, he hath Power to erect *Beacons*, Sea-Marks and Signs for the Sea; which Power is now vested in the Lords of the Admiralty.

1 *Sid.* 158. And therefore a Suit for the Profits of the Beaconage of a Rock in the Sea near ——— in *Cornwall*, may be in the Court of Admiralty; for as the Profits of the Beacons belong to the Admiral, so the Suit for them ought to be in his Court; tho' the Rock be the Freehold of another, and Part of his Inheritance.

Raym. 448. It hath been resolved, that an Order or Decree for raising a Tax for repairing a *Beacon*, without setting forth, that it was in Decay or out of Repair, is good, in that it would be dangerous to wait 'till it became in Decay; the Consequence of which would be, that there would be no *Beacon* in the mean Time and during the Reparation; besides that it cannot be presumed that the Parties who contribute to the Tax will tax themselves unnecessarily.

6. Of his Prerogative in Wreck.

Gro. Fur. Belli 117, 132, 141. By the Common Law the King hath an undoubted Right to Wrecks; and his Prerogative herein is founded on the Dominion he has over the Seas; and being Sovereign thereof, and Protector of Ships

2 *Inst.* 167.
Molloy 237.
Moor 224.

Ships and Mariners, he is intitled to the derelict Goods of the Merchant; which is the more reasonable, as it is a Means of preventing the barbarous Custom of destroying Persons who in Shipwrecks approach the Shore, by removing the Temptations to Inhumanity.

There are four Sorts of Shipwreck'd Goods, *Flotsbam*, *Jetsbam*, *Ligan*, and *Wreck*.

Flotsbam, is when the Ship is split, and the Goods float upon the Water between High and Low Water Mark.

Jetsbam, is when the Ship is in Danger to be drowned, and for saving the Ship the Goods are cast into the Sea.

Ligan, *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 shipwrecked are cast upon the Land.

The *Flotsbam*, *Jetsbam* and *Ligan*, do in Shipwrecks belong to the King as well as the Wreck; for when the Mariners are cast away, there is the same Reason that the Prerogative should take Place in these Goods as in the Wreck. 5 Co. 106.

But tho' the King hath a Prerogative herein, yet Wreck may be in a Subject by Grant or Prescription; but if the Subject prescribes in Wreck alone, he shall not have *Flotsbam*, *Jetsbam* or *Ligan*; for the King's Grant shall not be taken to be more extensive than the natural Import of the Words will bear. 5 Co. 107.

Goods are said to be wreckt at Common Law when there are no Marks or Signs of their Property whereby to prove an Owner; which anciently, and before the Methods of Trading were well known, was very difficult to do; unless some living Animal escaped to the Shore, whereby they might take the Tokens of a Property. Hence ancient Authors define it to be no Wreck if a Dog or a Cat escape alive; or if certain Signs were placed on the Goods whereby they might be known. And because this Prerogative of Wreck was abused, to the Prejudice of the Merchant, the Statute *West. 1.* has provided, that if a Dog or Cat escape alive (which in these Cases they took to be the most certain Proofs of Property) that then the Sheriff, Coroner or Lord of the Isle might claim them; and if the Owner came and made his Claim within a Year and a Day, he should have his Goods, otherwise they remain'd to the King. 2 Inst. 167.

The Instance of a Dog or a Cat are only for Examples; for if any living Thing escapes, the Claim may be made. 2 Inst. 167.

If the Mariners are pursued by Enemies, and come ashore and leave the empty floating Ship, which comes to Land without any Person; yet shall they claim the Ship when it comes on Shore. 2 Inst. 167. Molloy 259.

The Year and the Day mentioned in the Statute, shall be from the Time of the Seizure; for from the Time of Seizure there is a Notoriety, in order for the Party to make his Claim. 2 Inst. 168.

But the Property is in the King or the Lord of the Manor, against all but the right Owner, from the Time that the Goods touch Land, even before Seizure; for the King's Interest herein is different from that of another Occupant, who only acquires a Right by the Seizure; for he is intrusted with this Prerogative in order to prevent any other Occupant. 5 Co. 107.

If the Owner dies within the Year and the Day, his Executors or Administrators may make Claim thereto; because it is not limited by the Statute to the Owner at the Time of the Wreck. 2 Inst. 168.

This

5 Co. 107. This Law extends not only to Wreck but to *Flotsbam*, *Jetsbam* and *Ligam*; but the Wreck must be claimed by Action at (a) Common Law, the *Flotsbam*, &c. by Suit in the Admiralty; because the Wreck is on the Land, the *Flotsbam*, &c. in the Seas.
 2 Inst. 167. (a) By the express Words of the Statute 15 R. 2. the Admiralty cannot take Cognizance of Goods wreckt.

5 Co. 108. If the Suit be commenced before the Year and the Day, it sufficeth, tho' the Verdict be not given; for the Delay of the Law must do no Man an Injury.

2 Inst. 168. If Wreck be imbeziled both from the King and the Owner, this may be inquired into on a Commission of *Oyer* and *Terminer*, and the Party fined.

2 Inst. 168. If a Lord of the Manor takes the King's Goods as Wreck, the King may claim them after the Year and the Day; because the King being perpetually employed in the Business of the Publick cannot be bound to a Time.

If Goods wreckt be *Bona Peritura*, the King or Lord may sell them before the Year and the Day be past; for the Statute shall not be understood to restrain them to keep these Things that of their own Nature cannot be kept.

5 Co. 107, 108. *Sir Henry Consta- ble's Case.* If Wreck be granted to the Lord of a Manor, and he take *Flotsbam* and Wreck, and the Jury find this whole Matter, and assess inire Damages, Judgment shall be given against the Plaintiff; for the Court will not give their Judgment, when for Part of the Matter claimed the Plaintiff hath no Title; and it being Matter of Fact, the Court cannot apportion the Damages.

Vaug. 164 to 172. Tunnage is granted to the King for all Goods imported into the Realm as Merchandise, by any Merchant whatsoever; certain Goods are wreckt, and the Question was, whether they shall pay this Duty? And resolved by *Vaughan*, that they should not. 1st, Because they could not be said to be imported; for Importation is the Bringing in of Goods by artificial Means, as by Ships, &c. with Deliberation, in order for some Use; therefore these Goods casually cast up cannot be said to be imported. 2^{dly}, They cannot be said to be imported for Merchandise, for they are now as Goods destined for Sale; but they may be reserved to the Proprietor. 3^{dly}, They are not brought in by any Merchant, for they are presumed to be deserted and derelict, and from thence the Property; and the King having a Property in the Whole, it is to no Purpose to give him a Part.

6 Mod. 149. Originally all Wrecks were in the Crown, and the King has a Right to a Way over any Man's Ground for his Wreck; and the same Privilege goes to the Grantee thereof.

7. Of the King's Prerogative in Relation to Coins and Mines.

Dav. 19. It is clearly agreed, that by the Common Law the King hath a Prerogative in, and is intitled to, all Royal Mines of Gold and Silver and
 2 *Roll. Abr.* 166. Treasures of Gold and Silver hid in the Earth; and that he is in-
 5 Co. 114. trusted with the (b) Coinage and making Money current; and that he
 1 Co. 146. alone can bring the Mines and Treasures of any conquered Country
 (b) The Legitimation of Money, and the giving it its denominated Value, is justly reckoned *inter Jura Majestatis*; and in *England* it is one special Part of the King's Prerogative. 1 *Hal. Hist.* P. C. 138.

Power

Power and Regulation of that which is the (a) common Standard (a) Money is and Measure of all Bartering and Commerce is committed to his the common Measure of all Com-
Care.

merce almost through the World; it consists principally of three Parts; 1. the Materials whereof it is made; 2. the Denomination or extrinsic Value; 3. the Impression or Stamp. 1 *Hal. Hist. P. C.* 188. — Sir *John Davis* mentions six Things as Essentials to the Legitimation of Coin; 1. Weight; 2. Fineness; 3. Impression; 4. Denomination; 5. Authority of the Prince; 6. Proclamation. *Davis* 19. in the Case of *mixed Money*—which last, *viz.* the Proclamation is not always necessary to the Legitimation, says my *Ld. Ch. J. Hale*; for the Curreney of Money is a Question of Fact, and may be proved by the Officers of the Mint or their Indenture, on an Indictment for Clipping or Counterfeiting the King's Coin. 1 *Hal. Hist. P. C.* 196. 2 *Salk.* 446. *S. P.*

Also this Prerogative is given to the King as a necessary Consequence *Plow.* 315. — of the Power of War and Peace; for there can be no Wars made frequently without the Expence and Consumption of Treasure. called the Sinews of

War. Co. Lit. 90. b. 11 *Co.* 91. 2 *Rol. Rep.* 298.

Besides it was thought, that if any other Persons had the Power of *Plow.* 316. Mines of Gold and Silver, they might by these immense Treasures grow too formidable, and wrest that Authority from the King which was deposited in his Hands only.

The Use and Necessity of Money arose from the Nature of Trade; *Cotton* 4. but more especially from this, that the several Provisions of Life are *Lock of Coin.* in their own Nature perishable, and not to be laid up in Specie; this made it necessary that some Things should be fixed on to pass as Tickets of Credit in Exchange for those Commodities; hence the Thing agreed on must have these Qualities; 1st, It must be durable, because otherwise it would not be more easily laid up than the Provisions themselves; 2^{dly}, It must be scarce, that a little of it might serve to be carried from Place to Place in order to supply Men's several Occasions; and upon these two Accounts Gold and Silver were pitched on as the two Metals most scarce and the most durable, and therefore best able to answer both the Purposes. If therefore Gold and Silver be taken up as the Measures of all other Things, it follows, that the Comparison of their Values will stand thus; when the Labour spent in digging, refining, and importing an Ounce of Silver, is equal to the Labour in sowing, reaping and threshing of a Bushel of Corn, then is an Ounce of Silver equal to a Bushel of Corn; the Industry in the acquiring is equal, and consequently Mens Property in them is the same, that is, their Values are equal; for if the Corn be more plenty than the Silver, then a Bushel and a half of Corn will possibly be worth an Ounce of Silver; if on the other hand, the Silver be more plenty than the Corn, then possibly an Ounce and a half of Silver will amount to no more than a Bushel of Corn; and what is done by coining of Silver is no more than ascertaining the Value of several Pieces in order for Commerce; as that the Crown shall contain an Ounce and the like, that the People may not be compelled to use their Scale and Touchstone on every Bargain.

The Policy in relation to the Coin is, that the Value remains unalterable; for the Standard cannot be varied without manifest Injustice; as suppose a Man contracts for ten Crowns, which is equal to ten Ounces of Silver, and that suppose equal to ten Bushels of Corn, and before Payment the publick Standard should alter; for Instance, that the Crown were lessened to half an Ounce, and yet we suppose that the Industry in the Acquirement is the same in relation to the Ounce of Silver and the Bushel of Corn; it then follows that the ten Crowns paid in publick Money will be equal but to five Bushels of Corn, and consequently the Man by the publick Act will lose half the Value in which he had a Property, by the Contract: So in Cases of foreign

Trade where the Measure of Commerce is the intrinsic Value of the Silver or Gold, there can be no Variation of such Measure without Injustice.

² *Inst.* 575. And indeed the keeping to the common Standard is of that Importance, that my Lord *Coke* seems to be of Opinion, that the Alteration of Money in Weight or Alloy cannot be without an Act of Parliament; and in this grounds his Opinion on the Statutes 25 *E.* 3. *cap.* 13. and 9 *H.* 5. *sess.* 2. *cap.* 6. but herein the Law seems to be as laid down by my Lord *Hale*.

¹ *Hal. Hist.* P. C. 191. 1. That at the first Institution of any Coin within this Kingdom, the King and he alone sets the Weight, the Alloy, the denominated Value of all Coin; and this is done commonly by Indenture between the King and the Master of the Mint.

¹ *Hal. Hist.* P. C. 192. 2. He may by his Proclamation legitimate foreign Coin, and make it Current Money of this Kingdom according to the Value imposed by such Proclamation; but the Counterfeiting such Money was not Treason till the Statute of 1 *Mar.* *cap.* 6. made it so; nor the Clipping, Washing, Impairing thereof was not Treason till 5 *Eliz.* *cap.* 11. and 18 *Eliz.* *cap.* 1. but all these Statutes allow the Power of Legitimation thereof to the King by Proclamation.

¹ *Hal. Hist.* P. C. 192. 3. He may inhanse the external Denomination of any Coin already established, by his Proclamation; and thus it hath been gradually done almost in all Ages (*a*); this is sometimes called Imbasing of Coin and sometimes Inhaning of it; and it is both; it is an Inhaning of Coin in respect of the extrinsic Value or Denomination, but an Imbasing of in respect of the intrinsic Value; as for Instance, when in the Time of *E.* 4. a Noble was raised to a higher Rate by twenty Pence.

yet it hath very near the same Effect. ¹ *Hal. Hist.* P. C. 194.

¹ *Hal. Hist.* P. C. 192. *Dav.* 18. ² *Rol. Abr.* 166. 4. He may by his Prerogative imbase the Species or Material of the Coin, and yet keep it up in the same denominated or extrinsic Value as before; namely, to mix the Species of Money with an Alloy below the Standard.

¹ *Hal. Hist.* P. C. 194. As to my Lord *Coke's* Opinion, all he says that can be inferred from it is, that it is not safe nor honourable for the King to debase his Coin below Sterling; and that if it be at any Time done, it is fit to be done by Assent of Parliament; but certainly all it concludes is that *fieri not debet, but factum valet*.

^{Hob.} 270. *Courteen's* Case, and ^{Pop.} 149. where it is held, that ingrossing a great Quantity of Money is an Offence; & *vid.* 1 *Rol. Rep.* 299. From the King's Prerogative in Coins it hath been adjudged, that at Common Law, and without any Statute, an Information lay against Persons for transporting large Quantities of Money, being against the Policy of the State and Government.

held, that ingrossing a great Quantity of Money is an Offence; & *vid.* 1 *Rol. Rep.* 299.

^{Plow.} 323. ² *Inst.* 578. ¹² *Co.* 12. But tho' Mines of Gold and Silver belong to the King, yet Mines of Tin and Copper belong to the Subject; for by none of the above-mentioned Reasons are these to be annexed to the Crown.

^{Plow.} 323, 328, 336. But herein there hath been a great Question, *viz.* whether if the Mine of Copper or Tin contained Gold or Silver, as they often do, whose it should be, the King's or the Subject's? And the Judges here made a very extended Construction, and held, that Gold and Silver being the nobler and more valuable Metals should attract the less valuable, and belong to the King; as likewise for the following Reason, that the King's Property cannot be held in Jointure with the Subject, and that the King's Property tho' ever so small shall not be lost by Mixture with the Subject's.

But upon this Case the Reporter very justly observes, that in all *Plow. 339.*
base Metals of Copper, Tin, &c. there is a Mixture of Gold and Silver, which Mixture is of no Value in Comparison of the other Metal, and the Gold or Silver is the Life of the Mine, without which it cannot be worked; so that this was declaring all Copper and Tin Mines in the King.

And therefore by the Statute 1 *Will. & Mar. stat. 1. cap. 30. sect. 4.* it is enacted, 'That no Mine of Copper, Tin, Iron or Lead, shall be adjudged a Royal Mine, altho' Gold or Silver may be extracted out of the same.'

And by the 5 *Will. & Mar. cap. 6. sect. 2.* 'All Proprietors of Mines wherein any Ore shall be found in which there is Copper, Tin, Iron or Lead, shall hold and enjoy the same, notwithstanding that such Mines or Ore shall be claimed to be Royal Mines; *Provided* that their Majesties, and all claiming Royal Mines under them, may have the Ore of such Mines (other than Tin Ore in the Counties of *Devon* and *Cornwal*) paying to the Proprietors within thirty Days after the Ore is laid on the Banks, and before the same is removed, the Rates following, *viz.* for all Ore washed wherein is Copper, 16 *l. per Tun*; and for all Ore washed wherein there is Tin, 40 *s. per Tun*; and for all Ore washed wherein there is Iron, 40 *s. per Tun*; and for all Ore washed wherein there is Lead, 9 *l. per Tun*; and in Default of Payment it shall be lawful for the Proprietors to dispose of the Ore.'

The King by express Words may grant away Royal Mines as well as invest a Subject with any Property in the aforementioned Chattels, *Plow. 336 & vid. postea.* but then it must be by express Words; for if the King grants to *J. S.* Lands and the Mines therein contained, and Royal Mines are found in them, they shall not pass to the Subject; for the Kings' Grant shall not be taken to a double Intent, because they are Records that ought to have the strictest Truths and Certainty; and the most obvious Intent is, that they should only pass the Common Mines that are grantable to a common Person.

It hath been held by the Judges assembled at *Serjeants Inn*, that the King may enter into any Man's Ground and dig Salt-Peter for making of Gunpowder; and that the King hath a Prerogative herein, being necessary for the Safety of the Realm, altho' it be a Thing of a new Invention. *12 Co. 12.*

And herein my Lord *Coke* observes, *1st*, That it must be done with as much Conveniency and as little to the Prejudice of the Owner of the Ground as possible; and consequently that the Digging in a Man's House, Barn, Outhouse, &c. or weakening the Walls of any such House, &c. is unlawful. *12 Co. 13, 14.*

2. That the Soil or Ground must be made and left as commodious to the Owner as it was before. *12 Co. 12.*

3. That this is in Nature of a Purveyance, and an Incident inseparable to the Crown, and cannot be granted, demised or transferred over to another. *12 Co. 13.*

4. That the Owner of the Land cannot be restrained from digging and making Salt-Peter; the King not having an Interest in it as he hath in Gold and Silver in the Land of the Subject. *12 Co. 14.*

8. Of his Prerogative in derelict Goods; and therein of Waifs, Strays, and Creature Trove.

Bro. Tit. Pre-
ro. pl. 12. All derelict Goods, and in which no Man hath a Property, belong to the King as well as derelict Lands; so (a) of extraparochial Tithes, tho' Things of an Ecclesiastical Nature.

(a) 5 Co. 13.

2 Inst. 646.—That a Person may be guilty of Felony in taking Goods, the Owner whereof is unknown, in which Case the King shall have the Goods, and the Offender shall be indicted for taking *Bona cuiusdam ignoti*. 1 Hawk. P. C. 94.

1 Salk. 37. So if a Person dies intestate and without Kindred, his Goods and Chattels belong to the King; and herein the usual Course is said to be for a Person to procure the King's Letters Patents, and then the Ordinary admits the Patentee to Administration.

5 Co. 109. As to Goods waived, these belong to the King, and are in him without any Office; because the Property is in Nobody, and therefore by publick Agreement is put out of the Finder, in whom it was by the State of Nature, and is vested in the King in Recompence for his Trouble and Charge in the Execution of Justice.

How far a Sale in a Market overt alters the Property in those Cases, *vid. Tit. Fairs and Markets*. But at the Common Law, the Owner pursuing the Felon, and the Felon waiving the Goods, the Owner may retake them; also upon an Appeal of Felony the Owner is intitled to a Writ of Restitution; and as a farther Encouragement for the Prosecution of Felons, by the 21 H. 8. cap. 11. it is provided, that if the Party comes in as Evidence on the Indictment and attain the Felon, he shall have a Writ of Restitution awarded by the Judge of Assise.

Bro. Estwa. (9)
29 E. 3. 19. If a Felon in Flight waive his own Goods, and the King seize them, these also are Waifs; for they are relinquished, and the Property is in Nobody.

5 Co. 109.
Cro Eliz. 694.
Foxley's Calc. In Trovor the Defendant pleads in Bar, that the Queen was seised of the Manor of *Newport Pannel*, and that in the said Manor the Goods were found waived, and doth not say, that they were waived in Flight, this is no Bar; for if the Goods were only laid upon the Manor, and not waived in the Pursuit, they are no such waived or derelict Goods as the King may claim by his Prerogative.

21 E. 4. 16.
Kitchen 82. The Owner may at any Time retake the Goods waived, if they are not seised by the King or Lord of the Manor; for the Lord's Property begins from the Seizure; for since there is no Property altered by the Wrong and Theft of the Felon, it follows that the Right remains 'till they are seised for the King as Guardian of the publick Safety, upon the Pursuit, or forfeited to him upon the Conviction.

8 H. 7. 1.
Bro. Estwa. 15. Waifs and Strays are not necessarily incident to a Leet, but they may be appurtenant to it by Grant from the King; for the original Prerogative is in the Crown, and comes from thence to the Subject at the Pleasure of the King.

Bro. Estwa. 13.
5 Co. 109.
43 E. 3. 16. And tho' a Lord of a private Manor may have Waifs and Strays by Prescription, yet he cannot have *Bona Felonum* and *Fugitivorum* without Grant from the King; because no Man can prescribe for 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.

44 E. 3. 19.
5 Co. 105.
Kitchen 81. The King may grant the Privilege of Strays to the Lord of a Manor, or he may claim it by Prescription, which supposes a Grant lost; but no Lord of a Manor can take the King's Beasts as Strays, because the

Grant

Grant of the King must be supposed to extend no farther than this particular Prerogative of the King, that is, to take the Cattle of common Persons.

Where the Lord of a Manor hath not a Grant or Prescription for Stray, there the Sheriff shall seise it in Behalf of the King, and shall account for it to the King in the Exchequer. 24 H. 6. 5.
Bro Tit
Estray (5).

If *A.* be seised of a Manor whereunto the Franchises of Waif and Stray be appendant, and the King purchases the Manor with the Appurtenances, the Royal Franchises are reunited to the Crown, and not appendant; because the Stray belongs to the King by his Prerogative, and when the Manor comes to him, the Strays are in him *Jure Coronæ*; but if he grants the Manor in as ample a Manner as *A.* had it, this grants the Strays by Reference to the former Grant. Co. Lit. 121. b.

In the Case of the King, if a Man justifies, as Beasts taken in Behalf of the King, yet he must say that the Beasts were taken and proclaimed; for otherwise the King's meer Seizure shall not be a sufficient Presumption in Behalf of his Property. 29 E. 3. 3.
Bro. Tit. E-
stray 4.

The Sheriff or Bailiff of the King cannot pray in Aid of the King in an Action of Trespass brought against him; for the Aid of the King cannot be demanded to come in to justify the Acts of his Ministers, but they are answerable for their own Acts; and the taking any Chattels is only a Fact of the King's Ministers; but in Matters of Titles of Land which is no Fact of the King's Ministers, but relate to his permanent Revenue, the particular Tenant shall pray in Aid of the King in Reversion. Bro Estray (5)
24 H. 6. 5.
Cro. Eliz. 694.

Also the Pleading of the Officer is not good unless he says, he hath answered the Value of them to the King; for the Officer cannot justify the Taking in his own Right. Cro. Eliz. 694.

The King or Lord of the Manor hath Property from the Time of the Stray's coming upon the Manor against all others but the right Owner; but in Relation to the right Owner he hath only the Custody, and not the Property. Yelv. 96.

The King hath a Prerogative in Treasure Trove, that is, Treasures of Gold and Silver which must be hid in the Earth, and in which no Man hath a Property; but Treasures of Gold and Silver found on the Surface of the Earth, or found in the Sea, belong to the Finder. 3 Inst. 133.
Kitch. 80.

This Prerogative was thought to be of that Consequence to the Crown, that it is said, that anciently the Concealing of Treasure Trove was punished with Death; but it is now only punishable with Fine and Imprisonment. 3 Inst. 133.
1 Hal. Hist.
P. C. 506.

9. Of his Prerogative in Fines and Forfeitures.

Fines and Forfeitures for Offences at Law, go to the King as the Head of the Government; and are given to him as well for the publick Good as for the Increase of his Revenue. 2 Vent. 268.
Vid. Tit. For-
feiture.

Hence it is held, that if a Person be attainted of High Treason, all his Lands of whomsoever holden are forfeited to the King; and that tho' the Lands are immediately held of the King, yet he hath them not as Royal Escheats, but *Jure Coronæ* or *Prærogative regalis*. 1 Hal. Hist.
P. C. 255.

Also where a Statute giveth a Forfeiture, either for Nonfeasance or Misfeasance, the King shall have it, unless it be otherwise particularly directed by the Statute. Moor 238.
7 Co. 36.
11 Co. 68.

And on this Foundation it hath been adjudged, that an Archdeacon having sold the Office of Register of the Archdeaconry, which being 2 Vent. 267.
Woodward v.
Fox.

a Forfeiture within the Statute 5 & 6 E. 6. the Right of Nomination belonged to the Crown, and not to the Bishop of the Diocese.
Vid. plus Titles Forfeiture and Outlawry.

(C) Of his Prerogative over the Persons of his Subjects: And herein,

I. Who shall be said his Subjects.

7 Co. 1, &c.
Calvin's Case.
 Molloy 370.
 Co. Lit. 129.
 Dier 300.
vid. Tit. Aliens

ALL Persons born in any Part of the King's Dominions and within his Protection are his Subjects, as all those born in *Ireland, Scotland, Wales*, the King's Plantations, or on the *English Seas*; who by their Births owe such an inseparable Allegiance to the King that they cannot by any Act of theirs renounce or transfer their Subjection to any foreign Prince.

3 Inst. 4, 5.
 Dier 145.
 Hob. 271.
 Salk. 630.
 1 Hawk.
 P. C. 35.
 1 Hal. Hist.
 P. C. 59.

Also the Subjects of a foreign Prince, coming into *England* and living under the Protection of our King, may in respect of that local Ligeance which they owe to him, be guilty of High Treason, and indicted that they *contra dominum regem* (the Words *naturalem dominum suum* being omitted) did compass, &c. *contra Ligentia sue debitum*; and it is said that even an Ambassador committing a Treason against the King's Life, may be condemned and executed here, and that for other Treasons he shall be sent home.

1 Hawk.
 P. C. 35.

But Aliens who in an hostile Manner invade the Kingdom, whether their King were at War or Peace with ours, and whether they come by themselves or in Company with *English* Traitors, cannot be punished as Traitors, but shall be dealt with by Martial Law.

Dier 224.
 Vaugh. 281.

If the King of *England* makes a new Conquest of any Country, the Persons there born are his Subjects; for by saving the Lives of the People conquered he gains a Right and Property in such People, and may impose on them what Law he pleases.

2 P. Will.
 75, 76.

But until such Laws given by the conquering Prince, the Laws and Customs of the conquered Country shall hold Place; unless where these are contrary to our Religion, or enact any Thing that is *Malum in se*, or are silent (*a*); for in all such Cases the Laws of the conquering Country shall prevail.

(a) That where the Laws are rejected or silent, the conquered Country shall be governed according to the Rule of natural Equity. 2 Salk. 412.

2 P. Will. 75.
 2 Salk. 411.
 like Point.

If there be a new and uninhabited County found out by *English* Subjects, as the Law is the Birthright of every Subject, so wherever they go they carry their Laws with them; and therefore such new found Country is to be governed by the Laws of *England*; tho' after such Country is inhabited by the *English*, Acts of Parliament made in *England* without naming the foreign Plantations, will not bind them.

(2) That he is intitled to the Service and Allegiance of his Subjects; and therein of the Oaths enjoined them.

It is clearly agreed, that the King hath an Interest in all his Subjects, and is intitled to their Services, and may employ them in such Offices as the publick Good and the Nature of our Constitution require; and on this foundation it hath been held, that the King may oblige a Person to serve the Office of Sheriff, and that no Person can be exempt from such Office but by Act of Parliament or Letters Patents.

The Allegiance that is due from every Subject to the King is of two Kinds. 1st, Original, virtual and implied. 2^{dly}, Expressed or declared by Oaths or Promises. The first of these arises from that Protection which every Subject hath from the King and the Laws, and is (a) said to be due to the Natural and not to the Politick Person of the King; and from the Breach whereof ariseth the Crime of High Treason. The second is not to be applied nor laid upon private Causes; for no Man can make a Cause of Allegiance other than such as the Law makes, and as concerns the Faith and Loyalty that the Subject oweth to his Sovereign in Points of State.

Sav. 43.
Moor 111.
2 Vent. 247-8.
4 Mod. 269
1 Salk. 168.
7 Co. Calvin's Case.
1 Hal. Hist. P. C. 59, 61.
(a) 1 Vent. 3.
—That the Obligation of Allegiance

The Express Allegiance, or by Oaths and Promises, is either by the Common Law, or by particular Acts of Parliament. By the Common Law, besides the Oath due by Tenure or *ratione Feodi*, all Persons above the Age of twelve were obliged in the Tourn or Leet to take an Oath of Fidelity and Allegiance, whether such Person held any Lands of the King or not; and in all Oaths of Fealty, as likewise in the Profession of Homage to any inferior or subordinate Lord or Prince, it was with a *salva fide et Ligeantia domini regis*, which Saving to omit was punishable in such Lord.

Shelm. Tit. Fidelitas.
Co. Lit. 85.
Finch of Law 241.
2 Inst. 147.
1 Hal. Hist. P. C. 64, &c.

The particular Acts of Parliament relating to this Matter are the 1 Eliz. cap. 1. which enjoins the Oath of Supremacy, 3 Jac. 1. cap. — which instituted the Oath of Obedience, the Statutes 7 Jac. 1. cap. 2 & 6. 13 Car. 2. st. 2. cap. 1. 13 & 14 Car. cap. 3 & 4. 25 Car. 2. cap. 2. 30 Car. 2. stat. 2. cap. 1. which are abrogated by 1 W. & M. sess. 1. cap. 1 & 8. and new ones appointed in their Room by the 1 W. & M. sess. 2. cap. 2 & 3. 3 W. & M. cap. 2. 13 W. 3. cap. 6. 8 Ann. cap. 22. 4 Ann. cap. 8. 6 Ann. cap. 7. 14, 23. 1 Geo. 1. cap. 13. 13 Geo. cap. 29. 2 Geo. 2. cap. 31. 9 Geo. 2. cap. 26.

By the 2 Geo. 2. cap. 31. it is enacted, 'That all Persons that shall be admitted into any Office Civil or Military, or shall receive any Pay by Reason of any Grant from his Majesty, or shall have Command or Place of Trust under his Majesty, or by Authority derived from him, in England, or in his Majesty's Navy, or in Jersey or Guernsey; or that shall be admitted into Office in the Household of his Majesty, or of the Prince of Wales, or any other of his Majesty's Issue; and all Ecclesiastical Persons, Heads and other Members of Colleges and Halls in the Universities, that are of the Foundation or enjoy any Exhibition, being of the Age of eighteen Years; and all Persons teaching or reading to Pupils, and all School-Masters and Ushers, and all Preachers of separate Congregations, High Constables, and every Person who shall act as a Serjeant at Law, Counsellor, Barrister, Advocate, Attorney, Solicitor, Proctor, Clerk or Notary, by practising as such in any Court in England, who shall after the 21st of January 1728. be admitted into any of the above-mentioned Preferments, &c. or shall come into any such Capacity, &c. shall take the Oaths appointed by 1 Geo. 1. cap. 13. as by the

(a) By the 9 Geo. 2. cap. 26. the Time is enlarged to six Kalendar Months after such Admittance, &c.

the said Statute is directed in the Chancery, Common Pleas or Exchequer, at any Time (a) before the End of the next Term after he shall be admitted, &c. or before the End of the next Quarter-Sessions where such Persons shall reside.

Persons neglecting, to incur the Penalties in 1 Geo. 1. cap. 13. viz. Disability to, &c. or to be Guardian or Executor, or capable of any Legacy or Deed of Gift; or to be in any Office, or to vote at any Election for Members of Parliament, and shall forfeit 500 l.

3. That he may restrain his Subjects from going abroad; and herein of the Writ de Ne exeat Regno.

F. N. B. 85. Dier 165, 296. 2 Rol. Rep. 12. 3 Mod. 131. Lit. Rep. 27. Stil. 442. (b) This Statute is repealed by 4 Fac. 1. cap. 1. (c) Noy 182. 12 Co. 33. 11 Co. 92. Fitz N. B. 89. 2 Inst. 54. — One Reason, says Sir John Davis, why the King is intrusted to Customs, is his permitting his Subjects to go beyond Sea when he might restrain them. Dav. 9. (d) Vid. Tit. Merchant. 4 Mod. 179.

By the Common Law every Subject may go out of the Kingdom for Merchandise or Travel, or other Cause, as he pleases, without any Licence for that Purpose; this appears from the (b) Statute 5 R. 2. cap. 2. made to restrain Persons passing out of the Realm, but excepts Lords, great Men, and notable Merchants; as also by the Statute 26 H. 8. cap. 10. which gave Power to the King during his Life to restrain Persons from trading to some certain Countries (e); which Acts had been vain and idle, if the King by his Prerogative might have done it.

But notwithstanding this general Freedom and Liberty allowed by the Common Law, it appears plainly that the King by his Prerogative, and without any Help of an Act of Parliament, may prohibit his Subjects from going out of the Realm; but this must be by some express Prohibition; as (d) by laying on Embargoes, which can be only done in Time of Danger, or by Writ of *Ne exeat Regno*, which from the Words *quam plurima nobis et Coronæ nostræ Prejudicialia ibidem prosequi intendis*, appears to be a State Writ, but is never granted universally, but to restrain a particular Person, upon Oath made that he intends to go out of the Realm; indeed *Fitzherbert* says, that the King may restrain his Subjects by Proclamation; and assigns as a Reason for it, that the King may not know where to find his Subject, so as to direct a Writ to him.

Dier 179. Moor 109. 3 Inst. 179. Comb. 53. Skin. 166.

It is agreed, that the Matter alledged in the Writ of *Ne exeat Regno*, is not traversable, and that the King may avoid it without shewing any Cause; and tho' it may be objected, that if the King may, without assigning any Reason, grant it in one Case, he may in five hundred, &c. The Answer is, that this is a Royal Trust reposed in the King, which the Law does not presume that he will abuse or make use of to the Prejudice of the Subject.

F. N. B. 85. Lane 29. 2 Co. 17. b. 76. 11 Co. 92. Skin. 136. 1 Chan. Ca. 115. 2 Chan. Ca. 245. Faresf. 9. 1 Ld. Raym. 696. Cases in B. R. 562. Stil. 441, 442.

This Writ may be awarded under the Privy Seal or Signet, as well as the great Seal.

The Writ of *Ne exeat Regno*, tho' a Prerogative or State Writ, hath been introduced into the Court of Chancery, but was at first but tenderly made use of; it is now become the common Process of that Court. The Plaintiff, by a standing Order made in my Lord *Cowper's* Time, is to make Oath of his Debt; and the Writ is always marked for the Sum sworn in the Affidavit, in Words at Length and not in Figures; and the Plaintiff swears the Defendant is going out of the

King-

Kingdom, which if he should do, the Debt may be lost; the Order is 'till Answer or further Order; and it was formerly thought, that upon the Party's putting in a full Answer the Writ should be discharged, but of the late, the Party hath been obliged to give Security to abide the Order on Hearing, before the Court will discharge the Writ; which Security is taken by Recognizance before a Master, as all other Security is; and it is in the Penalty of what is sworn due, and the Sheriff takes Bail accordingly when he arrests the Party thereon, the Sum sworn due being constantly indorsed on the *Ne exeat Regno*, as a Guide for the Sheriff to take Bail by.

A Writ of *Ne exeat Regno* may be granted in any Case where there is Danger of Subterfuge from the Justice of the Nation, tho' of a private Concern. 2 Chan. Ca. 245.

Giving out that he intends to go beyond Sea, assigned as a Reason for awarding a Writ of *Ne exeat Regno*, and it was granted. 2 Chan. Rep. 20.

A Solicitor's Bill being taxed and reported overpaid 60*l.* On Motion and Affidavit of his going Seyond Sea, a *Ne exeat Regno* was granted, tho' no Bill was in Court whereon to ground this Writ. Preced. Chan. 171. Loyd v. Cardy.

A Motion was made for a *Ne exeat Regno* against Sir *Ferom Smithson*, for that his Wife had sued him in the Ecclesiastical Court for Alimony, and it was suspected that he would go beyond Sea to avoid the Sentence; and the Writ was granted; and the Lord Chancellor said that it had been so done before, for this Court was to aid the Ecclesiastical Court in such Cases. 2 Vent. 345. Sir Ferom Smithson's Case.

It hath been held, that a *Ne exeat Regno* lies to prevent one's going into *Scotland*, it being out of the Jurisdiction of Chancery; and the Process thereof not reaching thither, is equally mischievous to the Suitor here as if he actually went out of the Kingdom; and in this Case it is said, that the Condition must be not to go out of the Realm, or to *Scotland*; but in (a) a latter Case it is held, that there is no Occasion that the Order should be particular as to *Scotland*; and that even since the *Union*, the Writ in the general Form will restrain the Party from going into *Scotland* as well as any of the King's other Dominions that are out of the Process of this Court. 1 P. Will. 263. Done's Case. (a) Hunter v. Maccray. Cases in Ld. Talbot's Time 196.

A *Ne exeat Regno* having been awarded against the Defendant, *J. S.* (who was the now Petitioner) became his Surety to the Sheriff; after Answer put in *J. S.* petitions to be discharged, but was denyed; then the Cause was heard, and 19,000*l.* decreed against the Defendant, and he committed for Non-Payment; and then *J. S.* petitions again to be discharged, because being a *Mamucaptor*, and the Party in Prison, there can be no Danger of his going beyond Sea. *Lord Keeper*: If so, then his Surety is in no Danger, and would not discharge him. Preced. Chan. 230. Le Clea v. Trot.

4. That he may command his Subjects to return home; and therein of awarding a Privy Seal.

As the King may restrain any of his Subjects from going abroad, in like Manner it is clearly agreed, that he may command them to return home; and that the disobeying a Privy Seal for this Purpose is the highest Contempt. 1st, It is a Disobedience to the Command of the King himself directed to the Party. 2^{dly}, The Command is, that he shall return upon his Faith and Allegiance, which is the strongest Compulsion that can be used. 3^{dly}, The Thing required by the King is the principal Duty of a Subject, *viz.* to be at the Service of his King and Country. Dier 128. b. Lane 44. Moor 109. 3 Inst. 179.

(a) And when he does return he shall be fined. 1 Hawk. P. C. 59, 60.

Dier 128. b. Vouched in a Cafe there. Lan 44 S. C. cited and said to be proved by other Precedents. (a) 1 Leon. 10. cited.

As that of *William de Brittain* in the 19 Year of *Ed. 2.* who refusing to return upon the King's Writ, his Goods and Chattels, Lands and Tenements, were seised into the King's Hands; and the like was done in the Cafe of (a) *Edward of Woodstock* Earl of *Kent*, in the same Reign.

Dier 176. Jenk Cent. 220. Bartue's Cafe.

So in the Cafe of one *Bartue* who married the Dutcheſs of *Suffolk*, they obtained a Licence from *Q. Mar.* to go out of the Realm, under Pretence of recovering some Debts they were intituled unto as Executors to the Duke; when in Reality it was on Account of the Religion established by *Q. Mar.* and living with other Fugitives under the Protection of the *Palsgrave* of the *Rine* in *Germany*, who was an eminent *Calvinist*, were sent to by Privy Seal; but the Messenger in endeavouring to serve them with his Letters, being obstructed, beat and abused by their Servants and Attendants, a Certificate was made of this, and their Lands and Tenements seised.

1 Leon. 9. Mor 109. Dier 375. 1 And. 95. S. C. Sir Francis Englefield's Cafe. Vid. also 7 Co. 18. Po/b. 18. 4 Leon 135.

So in the Cafe of *Sir Francis Englefield*, who departed the Kingdom on a Licence obtained for three Years; but not returning at the Expiration of the three Years, a Privy Seal was sent to him by *Q. Eliz.* which he not obeying, and this Matter certified into Chancery by the Queen under her Sign Manual, in the fifth Year of her Reign, by Virtue of a Commission under the Great Seal directed to *Sir Henry Nevil* and others, his Lands and Tenements were seised.

Lane 42, &c. The King v. Earl of Nottingham. Pasch. 7 Ja. 1. in scac.

So in the Cafe of *Sir Robert Dudley*, who intending to travel, obtained a Licence from *K. Jam. 1.* to go to *Venice*; but before his Departure he by Indenture inrolled for valuable Consideration, as was expressed in the Deed (but none paid) conveyed the Manor of *Killingworth* with other Lands, to the Earl of *Nottingham* and others in Fee, with a Proviso, that upon Tender of an Angel of Gold all should be void; and with a Covenant on the Part of the Bargainees, that they should make all such Estates as the said *Sir Robert* should appoint; the Bargainees were not Parties to the Deed, nor had they Notice of it 'till some Time after; but afterwards they made a Lease to *Sir Robert Lee*, to the Intent that *Lady Dudley* should take the Profits of Part of the Premises for ten Years, if their Estate continued so long unrevoked. The King hearing that *Sir Robert* had been guilty of some bad Practices beyond Seas, in the fifth Year of his Reign sent his Privy Seal to him, which he not obeying, the great Question in this Cafe was, whether those Lands thus conveyed were forfeited? And adjudged that they were, the Conveyance being fraudulent as to the King.

(a) Lane 48. per Tanfield Ch. Baron.

In these Cafes it hath been held, that the King hath only an Interest in the Offender's Lands 'till he return; and (a) that his restoring of them to him is not a Matter of Grace but of Right.

Sav. 7, 8. 1 Leon. 9. Dier 176. in Marg. Moor 112.

But tho' the Lands are to be restored to the Offender, yet it is held, that 'till his Return the King hath a greater Interest than the Perception of the Profits; and that he may assign or grant them, *quamdiu in manibus suis fore contigerint*; and that he or his Patentee are intituled to Woodfals, may make Leafes, and grant Copyholds, being *Domini pro tempore*.

And on this Foundation it was holden, in Sir Francis Englefield's *Moor* 109. Case, that where Q. Eliz. in the eighth Year of her Reign, and after *Dier* 375. the Forfeiture of Sir Francis, granted a Manor, Part of Sir Francis's Estate, with all the Profits, *quandiu in manibus nostris fere contigerit*; and afterwards the Acts 13 & 14 Eliz. were made for vesting the Estates of Fugitives in the Crown; after which the Queen made a second Seifure of those Lands, and by her Letters Patents appointed a Steward, who held a Court, took Surrenders and granted Admittances in Right of the Queen; yet it was resolved, that this second Seifure, by Virtue of these Acts, gave the Queen no greater Estate or Interest than she had before by the Common Law; consequently that the first Grant was good, and the Courts holden, Surrenders and Admittances by her Steward, were void.

The regular Course in those Cases is for the Messenger to certify *Dier* 176. his Proceedings into Chancery, of which, by *Mittimus*, a Certificate is *1 And. 95.* sent into the Exchequer, out of which Court a Commission issues to inquire, &c. and seife the Lands of the Delinquent; and it is said, that this Certificate admits of no Traverse, because no Venue can be laid here for its Trial, the Matter being transacted beyond Sea; but it is said, that the (a) Messenger ought to make Oath of the Service *(a) The Writ ought to be served by* of the Writ of Privy Seal. *3 Inst. 180.*

some Messenger, who upon his Oath is to make a Certificate of it in Chancery. *3 Inst. 180.*

And it is said, that there is no Need of a Date to the Privy Seal; *1 Leon. 9.* for that the Matter therein contained is not traversable, nor is it returned as other Writs are, but the King who issues it is to receive the Message or Answer of the Party, and he is the Judge of the Contempt.

The Contempt incurs from the very Time Notice is given the Party; *Lane 46.* for the Words of the Writ are *quod indilate, &c.*

It is held, that tho' the Party hath a Licence at the Time of his *Lane 46, & going abroad, that yet he is obliged to obey the Privy Seal; for that vid. Dier 176.* such Licence is countermandable, being only an Authority or Dispensation, and not like an Interest moving from the King.

It is said that the King cannot recall the Party, but by the Great *3 Inst. 180.* Seal or Privy Signet.

(D) Of the King as the Fountain of Justice, and intrusted With the Execution of the Laws: And herein,

1. That all Civil Jurisdiction flows from the King.

ALL Jurisdiction exercised in these Kingdoms that are in Obedience *Fleta, cap. 17.* to our King, is derived from the Crown; and the Laws, whether *Co. Lit. 99. a.* of a Temporal, Ecclesiastical or Military Nature, are called his Laws; *114. vid. Tit. Courts.* and it is his Prerogative to take Care of the due Execution of them. Hence all Judges must derive their Authority from the Crown, by some Commission warranted by Law; and must exercise it in a lawful Manner, and without any the least Deviation from the known and stated Forms.

So

4 *Inst.* 164.
2 *Inst.* 54, 478.
2 *Hal. Hist.*
P.C. 131, 282.
Vaugb. 418.
2 *Salk.* 510.

So altho' the King is the Fountain of Justice, and intrusted with the whole executive Power of the Law, yet he hath no Power to change or alter the Laws which have been received and established in these Kingdoms, and are the Birthright of every Subject; for it is by those very Laws that he is to govern; and as they prescribe the Extent and Bounds of his Prerogative, in like Manner do they declare and ascertain the Rights and Liberties of the People, and therefore admit of no Innovation or Change but by Act of Parliament.

1 *P. Will.*
329.
Christian v.
Corren.

From the inherent Right inseparable from the King to distribute Justice among his Subjects, it hath been held, that an Appeal from the Isle of *Man*, lies to the King in Council without any Reservation in the Grant of the Isle of *Man* of any such Right; and it was said, that tho' there had been Exclusive Words, that yet the Grant must have been construed to be void upon the King's being deceived, rather than the Subject should be deprived of a Right inseparable to him as a Subject, of applying to the Crown for Justice.

2. Of the King's Prerogative in Ecclesiastical Matters.

1 *Hal. Hist.*
P. C. 75.

The Supremacy of the Crown of *England* in Matters Ecclesiastical, is a most unquestionable Right, which as my *L. Hale* says, may be proved by Records of undoubted Truth and Authority; and tho' as he says (a) the Pope made great Usurpations and Incroachments on this Right, yet these were always complained of as illegal; and those Incroachments are now pared off by the Statutes 25 *H. 8. cap. 19, 20, 21.* and 26 *H. 8. cap. 1.*

(a) The Pope by Degrees, and whilst the People were blinded with Super-

stition, usurped the Royal Authority in all Matters Ecclesiastical, as is manifest by the Statute of *Provisors*, which was made as a Remedy for this Grievance, &c. 1 *Ld. Raym.* 25. & *vid.* 5 *Co. Cavdry's Case.* *Cro. Eliz.* 542. and the Statutes 26 *H. 8. cap. 1.* and 1 *Eliz. cap.*— whereby such Authority as the Pope had, claiming as Supreme Ordinary, is annexed to the Crown, and is declared to belong thereto of Right; for which *vid.* 4 *Inst.* 341. *Lit. Rep.* 232. *Moor* 463. *Dier* 273. *Selden Janus Anglo.* 27. *Co. Lit.* 134. *Dav.* 88. 2 *Inst.* 583, 584.

(b) The Laws of *England* have no Dependence on the Civil Law, nor are governed by it, but are binding by their own Authority.

(b) So that the King of *England* doth not recognize any foreign Authority superior or equal to him in this Kingdom, neither do the Laws of the Emperor or Pope of *Rome*, as such, bind in the Kingdom of *England*; but all the Strength and Obligation that either the Papal or Imperial Laws have obtained in this Kingdom, is only because they are and have been received and admitted in this Kingdom, either by Consent of Parliament or by immemorial Usage and Acceptation in some particular Courts and Matters, and not otherwise.

1 *Hal. Hist.* P. C. 16.

1 *Show. Rep.*
218.
1 *Rol. Abr.*
530.
4 *Co.* 29.
7 *Co.* 42.
5 *Co.* 7.
2 *Vent.* 43.

The King therefore is said to have two Jurisdictions, one Temporal the other Ecclesiastical; the latter of which is derived from the Common Law, tho' the Form of the Proceedings, and the coercive Power exercised in the Ecclesiastical Courts, is after the Form of the Canon and Civil Law; and this being indulged to them, 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, altho' against the Reason of the Common Law; and if there be a *Gravamen* it must be redressed by Appeal.

Vid. Tit.
Courts.

But if these Courts exceed their Jurisdiction, and the Bounds and Limits prescribed them by the Laws and Statutes of the Realm, they are subject to the Controul, and may be prohibited by the King's Temporal

Temporal Courts; for the Canon and Civil Law did not bind originally in *England*, nor have they been received universally; and therefore are called *Leges sub graviore Lege*, the Common Law still maintaining its Superintendency over them.

The King being delivered from Papal Usurpation, might by Common Law grant a Commission to hear and determine Ecclesiastical Causes. Hence the Jurisdiction of the High Commission Court was acknowledged as deriving its Authority immediately from the Crown; but it was held, that that Court, without the (a) Help of an Act of Parliament, could not in Matters of Ecclesiastical Conuzance use any Temporal Censure or Punishment, as Fine or Imprisonment.

restoring to the Crown the ancient Jurisdiction Ecclesiastical; and the 16 Car. 1. cap. 11. by which this Court is abolished — and for the Jurisdiction it exercised, *vid.* 12 Co. 45, &c. 13 Co. 2 Rol. Abr. 224. 4 Inst. 332. Noy 149. Moor 917. March 80. Gibf. Cod. 50.

Also the Common Law hath annexed unto certain Offices Ecclesiastical Jurisdiction, as incident to the Offices; thus every Bishop by his Election and Confirmation, even before Consecration, hath Ecclesiastical Jurisdiction annexed to his Office, as *Judex ordinarius* within his Diocese; and divers Abbats anciently, and most Archdeacons at this Day, by Usage have the like Jurisdiction within certain Limits and Precincts; all which they derive from the Crown, altho' the Process in the Ecclesiastical Court runs in the Name and under the Seal of the Bishop or Ecclesiastical Judge.

The Matters of Ecclesiastical Conuzance are of two Kinds, Criminal and Civil; their Criminal Proceedings extend to such Crimes as by the Laws of the Land are of Ecclesiastical Conuzance, (a) as Herefy, Fornication, Adultery, and some others, wherein their Proceedings are *pro reformatione Morum* and *pro salute Animæ*; and the Reason why they have the Conuzance of these and the like Offences, and not of others, as Murder, Theft, &c. is not from the Nature of the Offence, for the one is as much a Sin as the other; and therefore if the Conuzance were of Offences *quatenus Peccata contra Deum*, it should extend to all Sins against God's Law; but the true Reason is, because the Law of the Land hath indulged them with the Conuzance of some Crimes, and not of others.

Ordination it was held, that the Spiritual Court may proceed to deprive him. 1 Sid. 217. 1 Lev. 138. 1 Keb. 721. Kelw. 39. — So where a Parish Clerk was guilty of scandalous Crimes, and being proceeded against in the Spiritual Court, it was held on a Motion for a Prohibition, that they may proceed to deprive him for these Crimes, tho' they were in their Nature only punishable in the Temporal Courts. 2 Ld. Raym. 1507. & *vid.* Dier 293. Comp. Incumb. 53. Hob. Searle's Case L. P. — Cannot punish for Writing a Libel, being an Offence indictable at Law. Comb. 71. — For Saerilege the Party may be proceeded against in the Spiritual Court, altho' the Robbery is likewise punishable in the Temporal Courts. 37 H. 6. 39. Bro. Appeal 31, 45. 2 Inst. 492. 2 Keb. 23. 1 Sid. 281. — So an Action at Law lies for an Assault and Battery on a Spiritual Person, as also a Suit in the Spiritual Court for Irreverence to his Person. 6 Mod. 156. Cro. Eliz. 655. — But for calling a Woman Whore and Thief, the Party cannot be proceeded against in the Spiritual Court and by Action at Law, being one continued Act. 2 Rol. Abr. 259. So for Sollicitation of Chastity which is attended with Force and Violence. *Vid.* 4 Co. 20. 2 Salk. 552. Faref. 78. 2 Ld. Raym. 809, 1101.

The Civil Causes committed to their Conuzance, wherein the Proceedings are *ad instantiam Partis*, ordinarily are the Business of Tithes, Rights of Institution and Induction to Ecclesiastical Benefices, Matters of Matrimony and Divorce, and Testamentary Causes and the Incidents thereunto, as the Insinuation of Testaments, Legacies of Goods and Money, &c. wherein they proceed according to the Canon Law and the Civil Law, which is taken as a Director in Points of Exposition and Determination.

(a) *Vid.* 1 Eliz. cap. 1. a Statute intituled An Act for restoring to the Crown the ancient Jurisdiction Ecclesiastical; and the 16 Car. 1. cap. 11. by which this Court is abolished — and for the Jurisdiction it exercised, *vid.* 12 Co. 45, &c. 13 Co. 2 Rol. Abr. 224. 4 Inst. 332. Noy 149. Moor 917. March 80. Gibf. Cod. 50.

Vid. Tit. Ecclesiastical Courts. 2 Inst. 488. Vaugh. 212. (a) They cannot hold Plea of a Legal Perjury or Perjury in Contracts, but for Perjury in their Courts they may punish. — So where one forged Letters of

Vid. Tit. Ecclesiastical Courts, Lett. (D)

3. Of his Prerogative in Creating Officers.

The King as the Fountain of Justice hath an undoubted Prerogative in Creating Officers, and all Officers are said to derive their Authority mediately or immediately from him; those who derive their Authority from him are called the Officers of the Crown, and are created by Letters Patents; such as the great Officers of State, Judges, &c. and there needs no greater or stronger Evidence of a Right in the Crown herein, than that the King hath created all such Officers Time immemorial.

But tho' all such Officers derive their Authority from the Crown, and from whence the King is termed the universal Officer and Disposer of Justice, yet it hath been held, that he hath not the Office in him to execute it himself, but is only to grant or nominate; nor can the King grant any new Powers or Privileges to any such Officers, but they must execute their Offices according to the Rules established and prescribed them by the Law.

Neither can the King create any new Office inconsistent with our Constitution or prejudicial to the Subject.

And on this Foundation it was held, that an Office created by Letters Patents for the sole making of all Bills, Informations and Letters Missive in the Council of York was unreasonable and void.

So it hath been held, that the King could not grant to any Person to hold a Court of Equity, it being a special Trust committed to the King, and not by him to be intrusted to any other except his Chancellor.

So a Commission to seize the Goods and imprison the Bodies of all Persons who shall be notoriously suspected of Felonies or Trespasses, without any Indictment or legal Process against them, was held illegal and void.

So Commissions to assay Weights and Measures, being of new Invention, were condemned by (a) Parliament.

So where one *Chute* petitioned the King to erect a new Office for registering all Strangers except Merchant Strangers, and to grant the said Office to the Petitioner with or without a Fee; and it was resolved by all the Judges, that the Erection of such Office for the Benefit of a private Person was against Law.

So it is held by *Ld. Coke*, that the King could not authorise 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.

Vide Head of Office and Officers.

4. Of his Prerogative in making War and Peace.

The Power of making War or Peace is *inter Jura summi Imperii*, and in (b) *England* is lodged (c) singly in the King; tho' as my Lord *Hale* says, it ever succeeds best when done by Parliamentary Advice.

(a) The *Jus Gladii* both Military and Civil, is one of the *Jura Majestatis*; and therefore no Man can levy War in this Kingdom without the King's Commission. (b) The Disputes touching the Disposition of the *Militia* are now settled, and declared to be the Right of the Crown, by the Statutes of 13 *Car. 2. cap. 6.* and 13 & 14 *Car. 2. cap. 3.* 1 *Hal. Hist. P. C. 130.*

A general War, according to my Lord Hale, is of two Kinds; ^{1 Hal. Hist. P. C. 163.}
 1. *Bellum solemniter denunciatum.* 2. *Bellum non solemniter denunciatum.* The first is, when War is solemnly declared or proclaimed by our King against another Prince or State, which is the most formal Solemnity of a War now in Use. 2dly, When a Nation slips suddenly into a War without any Solemnity, which happens by granting of Letters of *Marque*, by a foreign Prince invading our Coasts, or setting upon the King's Navy at Sea; and hereupon a real tho' not a solemn War may and hath formerly arisen; and therefore to (a) prove a Nation to be at Enmity with *England*, or to prove a Person to be an *Alien Enemy*, there is no Necessity of shewing any War proclaimed; but it may be averred, and so put upon the Trial of the (b) Country whether there was a War or not.

(a) When the Courts of Justice are open, and the Judges and Ministers of the

same may by Law protect Men from Oppression and Violence, and distribute Justice to all, it is said to be Time of Peace; so when by Invasion, Insurrection and Rebellions, &c. the peaceable Course of Justice is disturbed, then it is said to be Time of War; and the Trial hereof is by the Records and Judges of the Courts of Justice. *Co. Lit.* 249. (b) *Owen* 45.

Peace is of two Kinds; 1st, Positive or Contracted. 2dly, Such a Peace as is only a Negation or Absence of War. A Positive Peace is such as ariseth by Contracts, Capitulations, Leagues or Truces between Princes or States that have *Jura summi Imperii*, and is of two Kinds. ^{1 Hal. Hist. P. C. 159.}
 1. Temporary, which is properly (c) a Truce, which is a Cessation from War already begun; and then the Term being elapsed, the Princes or States are *ipso facto* in the former State of War, unless it be protracted by new Capitulations, or be otherwise provided in the Instrument or Contract of the Truce. (c) The Difference between a League and Truce is, that a Truce is a Cessation from War for a certain Time, but a League is an absolute Striking of Peace. ^{4 Inst. 156. vid. Molloy, cap. 7, 8.}
 2. Perpetual *sine termino* or indefinite, which regularly continues according to the Tenor or Conditions of the Agreement, until some new War be raised between the Princes or States upon some emergent Injury supposed to be done by the one Party or the other; and this is properly called a (d) League *Fœdus*, and makes the Princes and States *Confederati*; and tho' this may be variously diversified, according to the Capitulations, Conditions and Qualifications of such Leagues, yet they are ordinarily of these Kinds. 1st, Leagues offensive and defensive, which oblige the Princes not only to a mutual Defence, but also to be assisting to each other in their military Aggresses upon others, and makes the Enemies of one in Effect the common Enemies of both. 2dly, Defensive but not offensive, obliging each to succour and defend the other in Cases of Invasion or War by other Princes. 3dly, Leagues of simple Amity, whereby the one contracts not to invade, injure, or offend the other, which regularly includes also Liberty of mutual Commerce and Trade, and Safeguard of Merchants and Traders in either's Dominions. (d) In all Leagues the Municipal Laws of each Country are excepted. ^{2 Show. 369.}

2. A Peace which is only a Negation or Absence of War, is where no League or Articles of Peace intervene, nor yet any Denunciation of War; as among divers Princes in the World who never capitulated one with another, and yet there is no State of War between them; and the general Rule is, *ubi Bellum non est, Pax est.* ^{1 Hal. Hist. P. C. 160.}

The King in Consequence of his Power in making War and Peace, hath a Prerogative in the Coin and Royal Mines, in Salt-Peter and Gunpowder; may (e) enter into a Man's Lands to make Fortifications; may lay on Embargo's, grant (f) Letters of *Marque* and Reprisal, ^{(e) 1 Rol. Rep. 152. (f) Molloy 30. 2 Rol. Abr. 175. — No Person can take the Ship} or Goods of the adverse Party unless he hath a Commission from the King, the Admiral, or those that are specially appointed thereunto. ^{1 Hal. Hist. P. C. 162. 1 Vern. 54. — By the Law of the Admiralty, the Property of a Ship taken upon the High Sea without Letters of *Marque*, vests}

vests in the King upon the taking. *Carth.* 399. — Clause in a Charter which impowers the Seizing the Goods of every Person is illegal and void. *1 Show.* 137. (a) *6 Co.* 27. *Hutt.* 134. *Comb.* 245.

1 Ld. Raym. 283. *per Treby* Ch. J. The King may declare War against one Part of the Subjects of a Prince, and may except the latter Part; as was done by *K. Will.* in his Declaration of War with *France*, where he excepted the *French* Protestants; and of such Proclamations all ought to take Notice, because the War begins only by the King's Proclamation.

5. Of his Prerogative as *Parens Patriæ*, in taking Care of Infants, Ideots, Lunaticks and Charitable Uses.

Vid. Head of *Infants.* The King, as *Parens Patriæ*, hath the Protection of all his Subjects; and in a particular Manner is to take Care of all those who by Reason of their Want of Understanding are incapable of taking Care of themselves and their Affairs. By Virtue of this high Trust, Infants who by Reason of their Nonage are under Incapacities, are under the Protection of the Crown; and hence arises Allegiance, as a Debt of Gratitude, which can never be cancelled tho' the Subject owing it goes out of the Kingdom, or swears Allegiance to another Prince.

2 P. Will. 103. This Trust lodged in the King, and the Jurisdiction exercised herein, originally belonged to the Court of Chancery, and now upon the Dissolution of the Court of Wards, is again devolved on that Court. Hence it is every Day's Practice in that Court to determine as to the Right of Guardianship, to punish Abuses in Relation to their Persons, &c.

1 P. Will. 706. *in the Case of Duke of Ormond* who was appointed Guardian to the Duke of *Beaufort*. If a Person appointed Guardian is attainted, or otherwise becomes incapable, the Trust devolves on the Great Seal as the General Guardian of all Infants.

Vid. Head of *Ideots and Lunaticks.* In the like Manner and for the same Reason it is, that Ideots and Lunaticks, who are incapable of taking Care of themselves, are provided for by the King as *Pater Patriæ*.

Vid. Head of *Charitable Uses and Mortmain.* *2 P. Will.* 119. In like Manner in the Case of Charities, the King *pro bono publico* has an original Right to superintend the Care thereof; so that abstracted from the Statute 43 *Eliz.* relating to Charitable Uses, and antecedent to it as well as since, it has been every Day's Practice to file Informations in Chancery in the Attorney General's Name, for the Establishment of Charities, &c.

6. Of his Prerogative in Pardoning.

Co. Lit. 114. b. *H. P. C.* 104. *3 Inst.* 233. *1 Show.* 284. This high Prerogative is (b) inseparably incident to the Crown, and the King is intrusted herewith upon a special Confidence, that he will spare those only whose Case, could it have been foreseen, the Law itself (b) It is a personal Trust and Prerogative in him for a Fountain of Bounty and Grace to his Subjects, as he observes them deserving or useful to the Publick; which he can neither grant or otherwise

self may be presumed willing to have excepted out of its general otherwise ex- Rules, which the Wisdom of Man cannot possibly make so perfect as tinguish; per Holt Ch. J. to suit every particular Case. 1 Ld. Raym.

214. & per Rokeby J. As he cannot but have the Administration of publick Revenge, so he cannot but have a Power to remit it by his Pardons when he judges it proper. *Idem.*

Vid. Tit. Pardon.

7. Of Dispensations and Non Obstantes.

The Power and Prerogative of dispensing with Laws and granting *Non Obstantes*, hath been always looked upon with a jealous Eye, and are said to have been first invented in Rome and brought into this Kindom by the Pope and Clergy. 2 Rol. Abr. 179. Dav. 69. 2 Mod. 261.

But tho' they have not been favoured in the Courts of Justice, yet it hath always been held, that the King had a Prerogative in certain Cafes to grant Dispensations and *Non Obstantes*, which is founded *Plenitudine Potestatis*; and upon this Reason, that it is impossible for Law Makers by human Prudence to foresee several particular Cafes that may happen, wherein a Law that is good in general might be mischievous in some particular Cafes; and therefore and for the publick Good the Law intrusts the King (who is intrusted with the Execution of the Law) to judge of such Circumstances; and when such particular Case happens, to exempt it out of the Penalty of the General Law. 11 Co. 88. Finb 254. Dier 54. pl. 17.

The prevailing Distinction herein hath been, that the King cannot by any previous Licence or Dispensation make an Offence dispunishable which is *Malum in se*; but that in certain Matters, which are only *Mala prohibita*, he may, to certain Persons and on some special Occasions; and this Distinction the Ch. J. (*b*) *Vaughan* admits, being well understood and rightly applied, is the best Guide in these Matters. 12 Co. 29. Dav. 75. 5 Co. 35. (b) In the Case of Thomas and Sorrel, Vaugh. 330 to 339. where this Learning is fully discussed; and in 1 Lev. 217. 1 Sid. 6, 7. S C.

On this Distinction it was always held, that the King could not dispense with the Laws against Murder, Adultery, Stealing, Incest, Sacrilege, Extortion, Perjury, Trespafs, and others of the Kind; and that a Pardon for any such like Offence that was *Malum in se* before it happened, was void. (c) like (a) Hence the Resolution in the Year Book Vaugh. 334.

11 H. 7. 11, 12. pl. 35. that the King's Grant to the Bishop of *Salisbury* and his Successors having the Custody of a Prison, that they shall be quit from all Escapes, &c. having been allowed in *Eyre* shall be a good Discharge from any Fine for a negligent Escape out of such Prison, is doubted of in *2 Hawk. P. C. 389.*

But where a Thing lawful in its own Nature is made unlawful by Act of Parliament only, as the Carrying Bell Metal or Beer, &c. of the Realm, Importing certain Merchandizes in foreign Ships, &c. Selling Wines beyond a certain Price, Exporting Wool to any Place than *Calais*, Coining Money of a base Alloy, and other Matters of the like Nature; it seems to have been formerly taken for granted, that generally the King might dispense with it as to a particular Time or Place, or Person, or even Corporation aggregate, so far as the Publick was concerned in it. 2 Hawk. P.C. 390. and several Authorities there cited.

Yet where such Dispensation could not but be attended with great Inconvenience, as the Introducing a Monopoly, or Frustrating the End for which the Law was made, as the Licensing a particular Person to import foreign Cards or Wines prohibited by Parliament, and

a fortiori, if it tended to suspend the whole Statute in general, it was commonly agreed to be void.

¹ *Hawk.*
P. C. 390.
Hob. 214.
Hard. 110.

Also wherever an Act of Parliament gives a particular Interest or Right of Action to the Party grieved by the Breach of it, as the Statutes of Mortmain, which give an Entry to the next immediate Lord for an Alienation to a Corporation, the Statutes against Maintenance, Forcible Entries, Carrying Distresses out of the Hundred, Suffering one in Execution to escape, &c. which give an Action to the Party grieved by the Offence prohibited; it seems to have been always agreed, that no Charter by the King can be of any Force to bar the Right of the Party grounded upon such Statute; because it is a settled Rule, that the King cannot prejudice the Interest of the Party.

² *Hawk.*
P. C. 390.
(a) 12 Co. 18.

Also where a Statute is express, that the King's Charter against the Purport of it, whether with or without a Clause of *Non Obstante*, shall be void; it is said by (a) Sir *Ed. Coke*, that no Clause of *Non Obstante* can dispense with it, unless it tend to restrain some Prerogative solely and inseparably incident to the Person of the King; as the Right of Pardoning or of Commanding the Service of the Subject for the Publick Weal; which being, as he seems to argue, founded on the Law of Nature, are so far inseparable from the King, that by a Clause of *Non Obstante* he may dispense with any Statute whatsoever which tends to deprive him of them.

² *H.* 7. 6. b.
vid. 2 *Hawk.*
P. C. 390.

On this Foundation the Resolution of the Judges in the *Year Book H. 7.* is said to be maintainable; in which it is adjudged, that where the Statute of 23 *H. 6. cap. 8.* expressly enacts, that Patents to Sheriffs to continue longer than a Year shall be void, and the Party disabled to bear the Office of Sheriff notwithstanding any Clause of *Non Obstante*; yet the King by the Clause of *Non Obstante* might make a good Patent of such Office for Life.

In the Reign of *K. Jam. 2.* when the King's dispensing Power was endeavoured to be extended, a Difference was taken and attempted to be established in those Cases, which was, That as to a General Law made for publick Government, and in which all the King's Subjects were equally interested, the King might dispense with it, but not where any Right or Interest vested in a particular Person; and it was said to be no Objection to such dispensing Power, that the Law was made *pro bono publico*; for that tho' it was *pro bono Subditorum*, yet not being *Singulorum* but *Populi Complicati*, the King might dispense with it.

Comb. 21.
² *Show.* 478.

Also the following Points were determined in Sir *Ed. Hale's* Case in the same Reign. 1. That the King is Sovereign or absolute Prince. 2. That the Laws of the Land are the King's Laws. 3. That to dispense with Penal Laws, where the Subject hath no particular Damage, for necessary and urgent Occasions, is an inseparable Prerogative of the King. 4. That the King is sole Judge of such Necessity. 5. That this Trust residing in him came not from the People, but was a Sovereign Right of the King *ab Antiquo*. 6. That the Dispensation in this Case, because it came within three Months before any Disability incurred, was a good Bar to the Plaintiff's Action.

These Resolutions being thought of dangerous Consequence, as tending in Effect to make the Execution of the most necessary Laws precarious and merely dependent on the Pleasure of the King;

By the 1 *W. & M. sess. 2. cap. 2.* it is declared and enacted, 'That no Dispensation by *Non Obstante* of or to any Statute or any Part thereof be allowed, but that the same shall be held void and of none Effect, except a Dispensation be allowed in such a Statute.'

As the abovementioned Case of Sir *Ed. Hale* is the most remarkable Case on this Subject, it may not be improper to insert it at large

as taken from a MS. Report, together with the Argument of Sir *Ed. Northey*.

This is an Action of Debt for 500 *l.* founded on a Conviction of the Defendant for exercising the Office of a Colonel of a Foot Regiment, after Neglect to take the Oath of Allegiance and Supremacy enjoined to be taken by the Statute 25 *Car. 2. cap. 2.* by which Statute the Defendant hath forfeited the Sum of 500 *l.* to him that sues for the same.

Anthony Godden v. Sir Ed. Hale, Trin. 2 Jac. 2. in B. R.

The Declaration sets forth, that the Defendant Sir *Ed. Hale*, the 20th of *Nov. Anno 1 Regni* of this King, at *Hackington* in the County of *Kent* was advanced to be a Colonel of a Foot Regiment in the said County (which the Plaintiff avers to be a Military Office and Place of Trust under his said Majesty and by Authority from him derived); and that the Defendant held and exercised the said Office for three Months then next following, and to the Time of exhibiting the Bill of the Plaintiff, and did and doth inhabit in the said Parish and County, and did not either in the Court of Chancery or in this Court, in the next Term or in the next Quarter-Sessions of the Peace holden for the said County of *Kent* or Place where he did reside, or within three Months after his Admission to the same, take the several Oaths of Supremacy and Allegiance; but did wholly neglect to do the same, and did continue after his Neglect to execute the said Office, and yet doth execute the same, contrary to the Form of the Statute in that Case made and provided.

The Declaration further sets forth, that the said Sir *Ed. Hale* the Defendant 29 *March* last, at the Assises held at *Rockester* in the County of *Kent* before the late *Ld. Ch. J. Jones* and *Mr. Jo. Withens* Justices of *Oyer and Terminer* for the said County, was indicted for the said Neglect, and for executing the said Office after the said Neglect contrary to the Form of the said Statute; and thereon was in due Form of Law convicted, as by the Record thereof may appear; and the Plaintiff intitles himself to the said 500 *l.* forfeited by the Defendant by the said Act on his said Conviction, and saith the Defendant hath not paid him the same.

To this Declaration the Defendant pleads in Bar, that the King's Majesty that now is, after the Defendant's Admission to the said Office, and within the three Months next ensuing, and before the next Term or Quarter-Sessions of the Peace after the same, and before the exhibiting the Bill of the Plaintiff in this Court, *viz.* the 9th Day of *January* in the first Year of the Reign of his present Majesty, his said Majesty by his Letters Patents under the Great Seal of *England*, did dispense, pardon, remise and discharge, to and with the said Defendant, of and from taking the said Oaths of Allegiance and Supremacy, and from receiving the Sacrament according to the Use of the Church of *England*, and from subscribing the Test mentioned in the Act of 25 *Car. 2.* or mentioned and contained in any other Acts of Parliament, and of and from all Crimes, Convictions, Penalties, Forfeitures, Damages and Disabilities incurred or to incur at any Time then after for executing the said Office, after he should omit, neglect or refuse to do and perform any of the said Matters enjoined to be done by the said Act; and further, that his said Majesty by his said Letters Patents did grant unto the Defendant, that he should be enabled to hold the said Office without taking the said Oaths or subscribing the said Test, as if the said Act had never been made.

To this Plea the Plaintiff demurred, and the Defendant joined in Demurrer.

I am of Counsel with the Plaintiff in this Case, and am humbly to shew your Lordship and the Court the Causes of this Demurrer. *Mr. Northey.*

This

This Action is grounded on the Statute made 25 *Car. 2. cap. 2.* which requires, that all and every Person or Persons, that should be admitted, entred, placed or taken into any Office or Offices Civil or Military, or should receive any Pay, Salary, Fee or Wages by Reason of any Patent or Grant of his then Majesty, or should have Command or Place of Trust from or under his said late Majesty, his Heirs or Successors, or by his or their Authority, or by Authority derived from him or them within this Realm of *England, &c.* after the first Day of *Easter Term* 1673. and shall inhabit, be or reside, when he or they is or are so admitted or placed, within the Cities of *London* or *Westminster*, or within thirty Miles of the same, shall take the several Oaths of Supremacy and Allegiance in his Majesty's High Court of Chancery or in the Court of King's Bench in the next Term after such his or their Admittance or Admittances into the Office or Offices, Employment or Employments aforesaid; and that all and every such Person or Persons to be admitted as aforesaid, not having taken the said Oaths in the said Courts aforesaid, shall at the Quarter-Sessions of that County or Place where he or they shall reside, next after such his Admittance or Admittances into any of the said respective Offices or Employments aforesaid, take the said several respective Oaths as aforesaid, and shall receive the Sacrament of the Lord's Supper, according to the Usage of the Church of *England*, within three Months after his or their Admittance in or receiving the said Authority and Employment, in some publick Church on some Sunday immediately after divine Service and Sermon, and shall subscribe the Test in the said Act mentioned at the Time when he shall take the said Oaths.

And by the said Act it is further enacted, that all and every the Person and Persons aforesaid, that do or shall neglect or refuse to take the said Oaths and Sacrament in the said Courts and Places, and at the respective Times aforesaid, shall be *ipso facto* adjudged incapable and disabled in and to all Intents and Purposes whatsoever to have, occupy and enjoy the said Office or Offices, Employment or Employments, &c. and every such Office and Place, Employment and Employments shall be void, and is by the said Act adjudged void.

Then comes the Clause of Forfeiture, by which the Plaintiff is intitled to this Action, which is, That all and every such Person or Persons that shall neglect or refuse to take the said Oaths, or the Sacrament as aforesaid, within the Times and in the Places aforesaid, and yet after such Neglect and Refusal shall exercise any of the said Offices or Employments after the said Times expired wherein he or they ought to have done the same, and being thereupon lawfully convicted in or upon any Information, Presentment or Indictment in any of the King's Courts at *Westminster* or at the Assises, every such Person and Persons shall be disabled from thenceforth to sue or use any Action, Bill, Plaint or Information in Course of Law, or to prosecute any Suit in any Court of Equity, or to be Guardian of any Child, or Executor or Administrator of any Person, or capable of any Legacy or Deed of Gift, or to bear any Office within the Realm of *England, &c.* and shall forfeit the Sum of 500 *l.* to be recovered by him or them that shall sue for the same, to be prosecuted by any Action of Debt, Suir, Bill, Plaint or Information in any of his Majesty's Courts at *Westminster*, wherein no Effoin, Protection or Wager of Law shall lie.

In this Case, my Lord, I shall lay down and endeavour to maintain these two Things:

First, That the Plaintiff hath well intitled himself by his Declaration to recover the 500 *l.* demanded by him against the Defendant, according to the said Act 25 *Car. 2.* of the late King.

Secondly, That the Defendant hath not by his Plea alledged any Matter that can bar the Plaintiff from the Recovery of the same.

As to the first, I conceive, that by the said Act four Things are necessarily required before the Informer can be intitled to bring an Action for the 500 l.

First, That such Person hath been admitted into some Office, Place or Employment within the Description and Intention of the said Act.

Secondly, That such Person after his Admission into such Office hath neglected or refused to take the said Oaths at the Times and Places by the said Act directed.

Thirdly, That such Person after such Neglect or Refusal hath continued to execute such Office.

Fourthly, That such Person be convicted thereupon in one of his Majesty's Courts at *Westminster* or at the Assises, at the Suit of the King, by Information, Presentment or Indictment.

The Plaintiff hath shewn all these Things in his Declaration.

1. It is set forth, that the Defendant was admitted to be Colonel of a Foot Regiment, which is expressly averred to be a Military Office and a Place of Trust under his present Majesty, and by Authority from him derived, according to the Words of the said Act of Parliament.

2. It is expressly shewn, that the Defendant did neglect to take the Oaths of Allegiance and Supremacy in the next Term in the Court of Chancery or this Court, or in the next Quarter-Sessions for the County or Place where he did then inhabit, or within three Months next after his Admission to the same, which are Times and Places limited and appointed by the said Act for the taking of the said Oaths.

3. It is expressly averred, that the Defendant did execute the said Office after the Times expired, and his Neglect to take the said Oaths.

4. Lastly it is set forth in the Declaration, that the Defendant was by Indictment at the Assises in *Kent* before Sir *Tho. Jones* and Mr. Justice *Wibens*, Justices of *Oyer* and *Terminer* for the said County of *Kent*, lawfully convicted for executing the said Office after his Neglect to take the said Oaths, contrary to the Form of the said Statute; which is a Conviction by one of the Means, *viz.* by Indictment, and in one of the Courts, *viz.* at the Assises, in the said Statute mentioned.

These, my Lord, I conceive are made necessary by the Statute, but it is not incumbent on the Informer to make them all appear to be so; for as to the three first, they must be proved on the Information, Presentment or Indictment at the King's Suit, before such Officer can be convicted; but when there is a Conviction, the Informer need only shew the Record thereof.

If then the Plaintiff hath intitled himself to his Action, the next Thing to be considered is, the Matter alledged by the Defendant in Bar thereof.

In speaking to this I shall consider two Things.

First, Whether the Defendant shall be now admitted to plead this Dispensation in Bar of this Action, and whether he hath not lost the Benefit of it by not pleading of it in Bar to the Indictment whereon he hath been convicted.

Secondly, Admitting he may plead the same now, whether the same be good in Law to enable the Defendant to execute the said Office without taking the said Oaths, so that he shall be exempted from the Penalty inflicted by the said Act of Parliament for executing the said Office after his neglecting to take the Oaths.

Vol. IV.

A a a

As

As to the first Point, I shall observe to your Lordship the Times mentioned in the Record now before you; the Defendant was admitted to the Office of Colonel the 20th of *Nov. Anno 1.* of this King; the Offence in executing the said Office after his Neglect to take the Oaths of Allegiance and Supremacy, is alledged to be the 10th of *March Anno 2.* of this King; and the Conviction for the same appears to have been the 29th of *March Anno 2.* of this King; and the Dispensation pleaded by the Defendant was granted to him the 9th Day of *January Anno 1.* of this King, which was before the Offence and Conviction; so that as to this Point the Case will be but this.

An Act of Parliament doth enact, that he who doth neglect to take the Oath of Allegiance within the certain prefixed Time, and shall be convict of the same by Indictment, shall forfeit 500 *l.* to him who will sue on such Conviction for the same; the Defendant neglects to take the said Oath, having a Dispensation of the same granted to him before the Time lapsed for taking the said Oath; and which (to make a Case) is admitted to be a good Excuse, and may be pleaded in Bar of any Indictment for that Neglect.

The Defendant is after indicted for that Neglect, and pleads Not guilty to the same; and an Action is brought by the Plaintiff against him for the 500 *l.* on the said Conviction, and the Defendant pleads the said Dispensation in Bar. I conceive, with Submission, he comes too late; for the Defendant had his Election to have pleaded the said Dispensation in Bar of the Indictment, and to have relied on it; and that was his proper Time to make Use of the same or to waive it, and insist on his Innocence, and plead Not guilty; and when he pleads Not guilty, and does not make Use of the Dispensation for his Defence, the Law construes it to be a Waiving of it; and he shall at all Times after beestopped by his Plea and Conviction thereon to say, that he did not waive the same.

To make this plain, I humbly submit to your Lordship's Consideration, that after the Conviction the Defendant could never have made Use of his Dispensation to have stayed the Judgment on the same, which is the express Opinion in the 11 *H. 4. Bro. Tit. Charters de Pardon, pl. 15.* the Words of the Book are, 'He who pleads Not guilty cannot plead a Pardon afterwards, unless the Pardon be of a later Date than the Time of his Plea.

In 3 *Cro. 4. Margaret and Marshall's Case*, the Difference there taken makes out the Reason of it to be what I have before offered. *Marshall* in the Reign of *Q. Mary* had committed Petit Treason; the 10 *Eliz.* there was a general Pardon, notwithstanding which she was outlawed for the Petit Treason after, and she brought a Writ of Error to reverse the same; and it was there resolved, that she may assign the general Pardon for Error, because she had no Day in Court to have pleaded it, but always made Default; but that it had been otherwise if she had ever appeared in Court, and had not pleaded the same.

In a *Sci. Fa.* upon a Recognizance, if the Defendant appear, and having a Release that he may plead, does not plead it, and Judgment is given against him, he hath totally lost the Benefit of his Release, and shall not be relieved in an *Audita Querela* on the same against the said Judgment; for that he hath waived the Benefit of it himself; but if Judgment had been given against him by Default on a *Nihil* returned, there he should be relieved by *Audita Querela*; for that he never had any Time before to have pleaded it: This is agreed; my Lord, in the Case cited of *Marshall*; and in 1 *Rob. Abr. 306.* where divers Cases to this Purpose are collected together.

By this I conceive it is very clear, that as to the King, the Defendant by pleading Not guilty to the Indictment did thereby lose the Benefit

Benefit of his Dispensation, and could not help himself by the same against the Conviction on the said Indictment, either in Arrest of Judgment, or by Error. In the next Place, I conceive, that the Defendant shall be no more admitted to use the said Dispensation against the Plaintiff than he could against the King; for on the Plaintiff's bringing his Action for the 500*l.* forfeited, the Statute vests the Benefit of the Conviction in him, and creates a Privity between the Plaintiff and Defendant as much as if the Plaintiff had been Party to the Record of the Conviction; by the Words of the Statute this appears very plain, for the Words are, *And being thereof convicted shall forfeit the Sum of 500*l.* to be recovered by him who will sue for the same*; this Action I take therefore to be in Nature of an Execution of that Conviction, and therefore the Defendant shall not be admitted to plead any Matter precedent to the same in Bar of this Action.

The Plaintiff in this Action may, I conceive, be resembled to an Administrator *de bonis non*, who by the Statute 18 *Car. cap. 8.* may sue forth Execution on a Judgment obtained by an Executor or Administrator before him; and certainly no Man ever thought but that Statute put the Administrator *de bonis non*, to all Intents and Purposes, in the same Condition as the Executor or Administrator who obtained the Judgment was in; and that the Defendant cannot alledge any Matter whatsoever against him, which he could not have alledged against him who obtained the said Judgment.

My Lord, I conceive there is a great Difference where a Record of a Conviction is the Foundation of an Action, such as without which the Action will not lie; and where it is an Evidence only which the Plaintiff may make Use of or may let it alone, and yet maintain his Action; as in Case of a Conviction on an Indictment of Battery, which is Evidence the Plaintiff in an Action for the same Battery may make Use of, or maintain his Declaration by other Proof. In the first of these Cases the Record must be taken to be true according to the Tenor of it, 'till it be reversed by Error; but in the other Case the Defendant is not at all concluded by it, for the Plaintiff doth not, nor can rely on the same as he doth on the first; for there the Conviction is so much the Foundation of the Plaintiff's Action, that I conceive he might have declared only on the same, and have set nothing out in his Declaration, but that the Defendant was indicted and convicted for the Offence contained in the Indictment.

If the Defendant shall be admitted to plead this Plea now, he shall thereby falsify the Record of the Conviction in the very Point tried; which he shall never be admitted to do, as appears by *Ld. Coke's P. C. fol. 230.*

For these Reasons and Authorities, I shall conclude as to the first Point, that the Defendant, by pleading Not guilty to the Indictment, hath waived the Benefit of his Dispensation, and shall never have Advantage of the same to avoid the Execution of the Judgment in the Conviction on that Indictment, which is to be executed by this Action according to the Direction of the Statute.

But admitting this Point to be against the Plaintiff, and that the Defendant hath Liberty to plead the Dispensation to this Action, I conceive it is no Bar; but that notwithstanding the same, the Plaintiff shall recover; for that the Dispensation was meerly void in Law, and could not enable the Defendant to execute the said Office without taking the said Oaths, nor exempt him from the Penalties inflicted by the said Act on his executing the said Office after his Neglect to take the said Oaths according to the said Act.

The second
and grand
Point.

I shall

I shall not trouble your Lordship with a Discourse on *Non Obstantes* in general, nor how nor where they were brought into the World; and shall not deny but agree, that the King hath, by his Prerogative, a Power of dispensing with Penal Laws in many Cases; and it is a great Use and Advantage to the Subject as well as to himself, that he hath such a Power; for altho' Acts of Parliament pass with the greatest Deliberation that can be, yet the Judgments of the Law-Makers are but finite and failable, and they cannot possibly foresee all Events that may happen; and that which was well intended and specious in the Theory, may be fatal in the Practice; and to particular Persons there may be, without the Aid of this Prerogative, the greatest Injustice many times done by the Help of a Law; but tho' the King have such a Prerogative, yet that Prerogative is bounded by the Law; and with some Acts of Parliament the King cannot dispense at all to any Persons in any Cases; with other Acts tho' he may dispense, yet not to all Persons nor in all Cases.

That the King cannot dispense with some Acts of Parliament to any Person, will appear from 11 *H. 7. fol. 11, 12.* the King cannot dispense with a Law that prohibits an Act that is *Malum in se*; as the King cannot license a Man to kill another, nor do any Nufance to the Common Highway; and if such Licences be granted they are void.

The King cannot dispense with an Act of Parliament which is of publick Concernment, and in which the People have any Interest; for that is so vested in them that the King cannot devert. The Statutes of 13 *R. 2. cap. 3.* 15 *R. 2. cap. 5.* and 2 *H. 4. cap. 11.* being Statutes declaring the Jurisdiction of the Court of the Admiral, for that all the Subjects of the Realm have Interest in them, cannot be dispensed with by any *Non Obstante*; this appears by *Coke's Juris. of Courts, fol. 135.* Whether the Law now dispensed with be not of publick Concernment, and the People have not an Interest in it, I shall leave to the Consideration of the Court, on Consideration of the Statute.

This I only offer to your Lordship, to shew your Lordship, that this great Prerogative of the King may be bounded.

I shall confine myself in my further Discourse touching the Bounding of this great Prerogative of the King, purely to the Statute now before your Lordship; and I shall lay down this Rule, that wherever an Act of Parliament doth absolutely and directly injoin or prohibit the Doing of any Action, and doth create a Disability to any Purpose to fall on any Person on the Doing or not Doing of such Act (let the Concern of such Statute be what it will) the King, with Submission I conceive, by Reason of the Clause of Disability, cannot dispense with such Law by a *Non Obstante*, either before the Doing or not Doing such Action enjoined or prohibited, or after; altho' he might have dispensed with the same, if such Action had been prohibited only *sub Modo*, as on a Penalty given to the King. This I shall endeavour to make out by Authorities; for that the clearing the same will, I conceive, determine the Question on this Statute now before your Lordship; which I shall then come shortly to consider.

By the Statute 31 *Eliz. cap. 6.* it is enacted, that every Admission, Institution and Induction, on any Simoniack Contract to any Ecclesiastical Benefice, shall be utterly void; and the Person so corruptly taking such Benefice, shall thereupon and from thenceforth be adjudged a disabled Person in Law to have and enjoy the same. If a Person be Simoniackly inducted to any Benefice, the same by this Act immediately becomes void; and the Incumbent is so absolutely disabled for ever after to be presented to that Church, as that the King himself (to whom the Law giveth the Title of Presentation in that Case) cannot present him again to that Living; for the Act binds the King

in that Case, and he cannot dispense with the same; and this only by reason of the Disability therein.

This, my Lord, appears by *Co. Lit.* 120. 3 *Inst.* 154. where the Difference between an Act of Parliament's making a Disability, and prohibiting any Matter *sub modo*, is taken; and so it hath been often resolved on the Statute; *Cro. Jac.* 385. *The King against The Bishop of Norwich* and others, and the same Case *Hob.* 75. are expressly so resolved; so is the Case of *Smitth v. Sherborn*, *Moor pl.* 1299.

By the Statute 5 *E. 6. cap.* 16. it is enacted, that every Person that shall give or contract to give any Sum of Money for any Office, or shall make any Promise, Agreement or Assurance for any Office mentioned in the same Act, shall immediately thereon be adjudged a disabled Person in Law to all Intents and Purposes to have and enjoy such Office. Sir Robert Vernon being Cofferer to K. *Jam.* 1. contracted with Sir Arthur Ingram to sell his Office (the same being an Office within the said Act) to the said Sir Arthur, and agreed to surrender it, to the Intent that Sir Arthur might obtain a Grant thereof; which was done, and Sir Arthur obtained a Grant from the King of the same: The Office was adjudged after to be void; and that Sir Arthur was a Person disabled by the Statute to take that Office at any Time during his *Life*; and that no *Non Obstante* could dispense with the said Act to enable him. *Co. Lit.* 234. *Hob.* 75. *Cro. Jac.* 386.

From these Cases it is plain, the King cannot dispense with an Act enacting a Disability on the Doing or not Doing any Action, after the Action enjoined or prohibited to be done is done, or omitted to be done, contrary to the Act; and that if this Dispensation to Sir *Ed. Hale* had come after his Refusal to take the Oaths, and his exercising the Office contrary to the Act, it had been ineffectual to enable him against this Statute.

Now, my Lord, I shall consider whether the King may dispense with such Act enacting such Disability on the Doing or not Doing any Action, after the Action enjoined or prohibited to be done is done, or omitted to be done, contrary to such Statute; and I conceive he cannot; for with Submission, the Reason why the King cannot in the Cases cited dispense with these Persons, is, not because the Disability is attached, but because the King cannot controul an Act of Parliament, and make a Person capable against the express Provision of the same; which he doth as much do when he grants a Dispensation precedent to the Offence, as when it is granted subsequent. This, my Lord, I shall a little enlarge on when I come to consider the Statute now in Question.

As for Instance; If the King should licence any Person who hath an Office within the Statute of *E. 6.* to sell the same, and another to buy it *Non Obstante* the said Statute of *E. 6.* this certainly would be a void *Non Obstante*, altho' it were before any Contract made for such Office; and such *Non Obstante* would not hinder, but that the Statute would avoid the said Office, and the Purchaser would become and remain disabled to hold such Office. This was agreed by all the Judges who argued for the King's Prerogative to dispense with Penal Laws in the Case of *Thomas v. Sorrel*, touching Wine-Licences, which was in the Exchequer Chamber about ten Years since; and so it doth appear by my Lord *Vaughan's* Argument in his *Rep. fol.* 354. which cannot, I humbly conceive, be distinguished from this Case now before your Lordship.

Now, my Lord, I shall consider this Statute whereon this Question arises; and with Submission I conceive this Dispensation of that Statute, tho' granted before the Offence committed, can no more be maintained to be lawful than can the Dispensations in the Cases before cited on the

Statutes of the 5 E. 6. of Offices, and 31 Eliz. of Simony; but this shall be ineffectual for enabling the Defendant against this Act, for the same Reasons that those Dispensations were useles against the Disabilities created by those Laws.

For by this Statute it is directed and positively enacted, That every Person admitted to any Office, &c. shall take the Oaths of Allegiance and Supremacy, either in the Court of Chancery or in this Court, in the next Term after his Admittance to the same, or at the Quarter-Sessions for the County or Place where he shall reside, next after such his Admittance; and shall receive the Sacrament within three Months after his Admittance to the same.

Then comes the disabling Clause, That every Person that doth or shall neglect or refuse to take the said Oaths and Sacrament in the said Courts and Places, and at the respective Times aforesaid, shall be *ipso facto* adjudged incapable and disabled in Law to all Intents and Purposes whatsoever, to have, occupy or enjoy the said Office; and every such Office shall be void, and is thereby void.

Every Man by the Common Law had a double Capacity as to Offices.

1. He was capable to take the same.

2. He had a Capacity to hold the same for any Time whatsoever.

The Statute works not at all upon the first Capacity, but every Person remains notwithstanding as capable of taking as ever; but it quite changes his Capacity of holding, and annexes a Condition precedent to the same; on performing which Condition only he shall be capable; and 'till that be performed, by Judgment of this Act he is incapable.

This, I conceive, may properly be called an Incapacity; for that he, that is incapable to any one Purpose, is as properly said to be a Person incapable as if he was disabled to all Purposes.

The Intent of the Statute appears to be the same as if it had been enacted in these Words, That no Man shall hold an Office above three Months, unless within the three Months he take the Oath of Allegiance; in which Case it would be plain, that a Disability to hold beyond three Months would attach on every one who should accept of an Office so soon as he should accept the same; which could not be removed but by qualifying himself as the Act directs.

If the Dispensation pleaded will enable the Defendant to hold the Office without qualifying himself by taking the Oaths, then may the King enable a Man in a Point wherein he is disabled by Act of Parliament; which is expressly contrary to the Reason of the Cases I before cited; and here it doth appear the Disability was attached in the Defendant before the Dispensation granted; for he was admitted to the Office the 28 Nov. and the Dispensation was not granted 'till January; and therefore according to what I have offered it comes too late.

By the Statute 7 Jac. cap. 6. for taking the Oath of Allegiance, it is enacted, That every Member of the House of Commons, at any Parliament or Session to be assembled, before he shall be permitted to enter into the said House, shall take the said Oath before the Persons mentioned in the said Statute.

By the Opinion of L. Vaughan, the King cannot dispense with that Act; for that every Member, so soon as chosen, is *Persona inhabilis*, and not to be permitted to enter the House without the Oath taken.

My Lord, by the very Dispensation it appears, that the King's Counsel who drew it, were willing to make what Provision they could against the Disability incurred by the Taking the said Office of a Colonel, which the Defendant had not three Months when the Dispensation was granted; yet he is thereby expressly discharged from all Disabilities incurred by the said Act; which seems to admit there was a

Sort of Incapacity then on the Defendant; to remove which the Dispensation cannot be of any Avail for the Authorities I have before cited.

I shall humbly offer this farther Matter to your Lordship's Consideration, that this Case as to this Statute is *Primæ impressionis*; and that this Prerogative was never made use of herein since the making of the Statute, altho' many Persons at the Time of making of this Act stood in Need of the Aid of it, and for Want of which they lost their Employments, and the late King the Benefit of their Services.

I shall in the next Place consider the Authorities of Sir *Ed. Coke* in his 12 *Rep.* 18. which I foresee will be objected to me; and I shall state it, and give such Answer to it as occurs to me, and submit the whole Matter to your Lordship's Consideration.

There my Lord *Coke* saith, that no Act can bind the King from any Prerogative which is sole and inseparable to his Person, but that he may dispense with by a *Non Obstante*, as a Sovereign Power to command any of his Subjects to serve him for the Weal Publick; and that this Royal Power cannot be restrained by any Act of Parliament; and for that he relies on a Case 2 *H. 7. fol. 6.* which is on the Statute 23 *H. 8. cap. 8.* which enacts, that all Patents made or to be made of any Office of a Sheriff, &c. for Term of Years, for Life or longer, shall be void and of no Effect, any Clause or Parol of *Non Obstante* put or to be put in such Patents to be made notwithstanding; and further, whoever shall take upon him or them to accept or occupy such Office of Sheriff, by Virtue of such Grants or Patents, shall stand perpetually disabled to be or bear the Office of Sheriff within any County in *England*; yet, saith my Lord *Coke*, there the King by his Royal Prerogative may command any Person to serve him for the Weal Publick as Sheriff of any County for Years or for Life; so he saith it was resolved by all the Judges of *England* in the Exchequer Chamber in that Case.

This and some other Matters of the like Nature, which are put together by my Lord *Coke*, are, with Submission the only Authorities in the Law that seem to give Countenance to this Dispensation now before your Lordship. I shall very briefly consider, whether that be any Authority or not; and if it be, whether it differs from the Case now before your Lordship.

To the first, I conceive it is the single Opinion of Sir *Ed. Coke*, but he is mistaken in the Case on which he relies; for by the Book 2 *H. 7. 6.* on which he relies, it appears plainly that there never was any such Resolution as he cites, but a sudden Opinion given; and at which Time the Judges declared they would not be bound by what they then said, but advised the King's Counsel to consider well the Point; and so they said they would; and by *Bro. Abr. Tit. Pard. 45. 109.* where he rather repeats than abridges the Cases, it appears, nothing more was ever done in that Matter, but it rested and was never adjudged. The great Foundation failing, the Superstructure of Lord *Coke* thereon, and his Opinion, must needs fall and be rejected as an Opinion grounded on a palpable Mistake.

But admit that Case and the Reason of it to be Law, that the King cannot be deprived of the Power of Commanding any of his Subjects to serve him, yet I think it differs quite from the Case now before your Lordship; and the Reason of it can be no Rule in this Case, for these Reasons.

The Statute 23 *H. 8. cap. 8.* was an Act purely restraining that Power the King had of Commanding, and was rather a Disabling the King than the Subject; for it took away the Power the King had of granting the Office for Years, Life and Inheritance, and by Consequence

was

was a total Depriving him of the Use of some of his Subjects at some Times; and I may very well allow, that such Act of Parliament did not, nor can bind the King; but my Lord, in the Act of Parliament now in Question, the Prerogative nor the Power of the King is not in any Manner touched; for the King may grant an Office to any Person or may command any Person to serve him, as he might have done before this Law; and he is in no Sort deprived of the Use of his Subject by any Thing in the Statute; for this Statute is a Direction and Obligation on the Subjects to qualify themselves according to the Act, to obey the Command the King shall lay on them; and there is nothing in this Act that excuses any Person from serving the King, when he by his Royal Command requires his Service, but he is at his Peril to qualify himself for that Service and to do the same; and if he be one incapable, it is by his own voluntary Neglect, and he is punishable by Law for the same, as every other Man is who without any Reason refuses to serve the King in what Station he is pleased to require his Service in.

This my Lord will appear plain from the Resolution of the Case of Sir *John Read*, which was in the Exchequer *Hill. 27 and 28 Car. 2.* Sir *John Read* was by the late King made Sheriff of *Hertfordshire*, and Sir *John* was duly sworn into the said Office; but after neglecting to take the Oaths and receive the Sacrament enjoined by the Law now before your Lordship, the Office became void; whereupon an Information was exhibited against Sir *John Read* in the Exchequer, setting forth the Statute of *25 Car. 2.* and that he was appointed and sworn Sheriff for that County, and did neglect to qualify himself by taking the Oaths according to the said Act, whereby the Office became void by his voluntary Neglect; and the publick Justice in the Administration thereof in that County, as to the Office of Sheriff, was obstructed. On this Information the said Sir *John Read* was convicted and fined in the said Court; for the Court there was of Opinion that the Statute never intended to put it in the Power of any Man by his own Act to discharge himself of that Duty he owed the King, but hath positively enacted, that every Officer shall qualify himself for his Duty, the not Doing of which is an Offence for which he is punishable; so that from hence it is plain there is no Resemblance between the Sheriff's Case and any Case on this Statute.

There is likewise another Difference between the Sheriff's Case and this Case at Bar. In the Sheriff's Case, the Dispensation is in the very same Patent that the Office is granted, and in the same Clause, and enables the Grantee before the Disabilities are in any sort attached on him; but here the Office was granted in *November* to the Defendant, and by which immediately, for the Reasons I have before offered, he is disabled by this Act; and in *January* after is this Dispensation granted, which for Reasons I have before offered, I conceive comes too late.

For these Reasons and Authorities I conclude therefore, that this Dispensation granted to the Defendant, is void in Law.

8. Of his Proclamations.

Fortef.deLaud. cap. 9.
12 Co. 74, 75.
11 Co. 87.
Dalf. 20. pl. 10.
2 Rol. Abr. 209.

It is plain that the King by his Prerogative may in certain Cases and special Occasions make and issue out Proclamations for Prevention of Offences, to ratify and confirm an ancient Law, or as some Books express it, *quoad terrorem Populi*, to admonish them that they keep the Laws

Laws on Pain of his Displeasure; and such Proclamations being grounded on the Laws of the Realm are of great Force. *3 Inst. 162.*

It is likewise clear, that the Subject is obliged on Pain of Fine and Imprisonment to obey every Proclamation legally made; and that tho' the Thing prohibited were an Offence before, that yet the Proclamation is a Circumstance which highly aggravates it; and upon which alone the Party disobeying may be punished. *12 Co. 74. Hob. 251.*

It is clearly agreed, that no (a) private Person can make any Proclamation of a publick Nature except by Custom, as is usual in some Cities and Boroughs; this being a Prerogative Act, with which alone the King is intrusted. *Bro Proclam. pl. 1. 12 Co. 75. Crom. Jur. 41.*

(a) Sir Edmund Knightly Executor of Sir William Spencer made Proclamation in certain Market-Towns, that the Creditors should come in by a certain Day and prove their Debts; he was fined and imprisoned for this, because as the Book says, he did it publickly and without any Authority. *Bro. Proclam. pl. 10.*

But notwithstanding the King's Prerogative herein, it seems clearly agreed, that the King cannot by his Proclamation change any Part of the Common Law, Statutes or Customs of the Realm; nor can he by his Proclamation create any Offence which was not an Offence before; for that these Things cannot be done without a (b) Legislative Power, of which in our Constitution the King is but a Part. *Dalf. 20. pl. 10. 12 Co. 75. 11 Co. 87. b.*

(b) By the Act of Parliament (now repealed) it was enacted, that Proclamations made by the King and the greater Part of his Council, should have the Force of Acts of Parliament; but there was a Proviso that such Proclamation should not cross any Statute or laudable Custom of the Realm. *N. Bacon's Hist. 2 Part. fol. 215.*

And on this Foundation it hath been held, that the King's Proclamation prohibiting the Importation of Wines from France upon Pain of Forfeiture, was against Law and void; there being no War at that Time subsisting between the Nations. *2 Inst. 65.*

So where an Act was made by which Foreigners were licensed to merchandise within London; and Hen. 4. by Proclamation prohibited the Execution of it, and ordered that it should be in Suspense *usque ad proximum Parliamentum*; and this was held to be against Law. *12 Co. 75.*

Upon a Conference between some Lords of the Privy Council and the two Chief Justices (of which the Lord Coke was one) and Ch. B. and Baron Altham, the Questions were, 1st, Whether the King by Proclamation might prohibit new Buildings in and about London. 2^{dly}, If the King might prohibit the Making of Starch of Wheat. And the Judges were of Opinion, that the Subject could not be restrained in these Particulars by the King's Proclamation. *12 Co. 74.*

But notwithstanding the abovementioned Opinion, there are Instances of Persons who have been sentenced in the Star-Chamber upon Proclamations against the Increase of Buildings; and particularly in *Hob.* where a Person was fined in the Star-Chamber for Building without Brick, tho' upon an old Foundation; and it is there said, that such Buildings had an ill Effect from the Danger of Fire, Consumption of Timber, and Difficulty of Feeding, Cleansing and Governing the City; and it was said in general, that Proclamations were so far just as they were made *pro Bono Publico*, and for publick Utility. *Hob. 251. Armesed's Case.*

The King by Proclamation may call or dissolve Parliaments, may declare War or Peace; for these are Prerogative Acts with which he is intrusted as the Executive Part of the Law; but (c) if there be an actual War between us and a foreign Nation, it is not necessary in Pleading to shew that such War was proclaimed. *3 Inst. 162. Hal. Hist. P. C. 163. (c) Owen 45. Raf. Ent. 605.*

The King by Proclamation may legitimate foreign Coin, and make it Current Money of this Kingdom, according to the Value imposed by *Co. Lit. 207 b. 5 Co. 114. b. Dav. 21.*

1 Hal. Hist. P. C. 192, 197. by such Proclamation; he may legitimate Base Coin or mixt below the Standard of Sterling; he may inhance Coin to a higher Denomination or Value; and may decay Money that is current in Use and Payment; and in all these Cases a Proclamation with a Proclamation Writ under the Great Seal is necessary.

Comp. Incumb. 354. The King by Proclamation may appoint Fasts and Days of Thanksgiving and Humiliation; and issue Proclamations for preventing and punishing Immorality and Profaneness; and injoin the Reading the same in Churches and Chappels.

Cro. Car. 180. Keley v. Manning, & vid. 1 Rol. Rep. 172. A Proclamation must be under the Great Seal, and if denied is to be tried by the Record thereof; but if a Man pleads that he was prevented doing a Thing by Proclamation, it seems the better Opinion that he need not aver that such Proclamation was under the Great Seal; for alledging that such Proclamation was made, it shall be intended to have been duly made.

(E) How the Rules of Law differ With Respect to the King and a private Person: And herein,

1. Of what Things incapable from the Dignity of his Person and Office.

(a) Cannot do any Wrong. Co. Lit. 19. 1 Co. 45. 11 Co. 72, 85. Bracton lib. 3. cap. 9. Stansf. P. C. 102. 1 Hal. Hist. P. C. 43, 44. FROM the Dignity of his Office and Person the Law presumes him *(a)* incapable of doing any Wrong; but if the King command an unlawful Act to be done, the Offence of the Instrument, as my Lord *Hale* says, is not thereby indemnified; for tho' the King is not under the Coercive Power of the Law, yet in many Cases his Commands are under the Directive Power of the Law; which consequently makes the Act itself invalid, if *(b)* unlawful, and so renders the Instrument of the Execution thereof obnoxious to the Punishment of the Law.

(b) If two Men combat together at Barriers in Time of Peace for Trial of Skill, and one kill the other, it is Homicide; but if it were by Command of the King, not Felony. 11 H. 7. 23. a. & vid. 3 Inst. 56, 160.

2 Inst. 187. 2 Hal. Hist. P. C. 131. The King cannot arrest in Person nor imprison, nor can he command another to imprison; but it must be done by some Order, Writ or Precept, or Process of some of his Courts.

— cannot sit in Judgment upon any Indi&ment. *2 Hawk. P. C. 2* — Cannot be a Witness. *2 Hal. Hist. P. C. 282.*

Bro. Prerog. 125. Co. Lit. 3. b. 8 Co. 55. The King cannot execute any Office relating to the Administration of Justice, altho' all such Offices derive their Authority from the Crown, and altho' he hath such Offices in him *(c)* to grant to others.

2 Vent. 270. *(c)* If Lands with the Office of Forrester be granted to *F. S.* Remainder to the King in Fee, this is a good Remainder, tho' the King cannot be an Officer to any Man, because he may grant it over. *1 H. 7. 31. Bro. Done, pl. 51.*

Bro. Feof. to Uses 338. Pop. 72. The King cannot be feised to an Use, because there is no Means to compel him to perform it; for the Chancery has only a delegated Power

Power from the King over the Consciencies of his Subjects; and the King who is the universal Judge of Property, and who is equally concerned for the Good of all his Subjects, ought to be perfectly indifferent, and not to take upon him the particular Defence of any Man's Estate as a Trustee.

Dier 383. pl. 3.
Cro. Fac. 50.
Hard. 468.

If one hath the Nomination to a Church, and another the Presentation, and such Right of Presentation doth accrue to the King, he that hath the Nomination shall have (a) all; by Reason that it is indecent for the King to do any thing as Servant to another.

Dier 43.

(a) But by *Dodderidge J.*
the Nomina-

tor shall in such Case nominate to the Lord Chancellor, who in the Name of the King shall present to the Ordinary. *Pop.* 158.

The King cannot be Tenant, nor can he hold by any Services from his Subjects; for his Possessions are called *Sacra Patrimonia* and *Dominica Coronæ Regis*; and on this Foundation it hath been adjudged, that where Lands holden of the Subject, came to the Possession of the King by the Statute of 1 E. 6. cap. 14. of *Chantries*, and the King granted those Lands over to another, tho' there was a Saving in the Statute to the Donor of the *Ancient Rents, Services, &c.* that yet the Patentee should hold of the King, according to his Patent, and not of the Ancient Lord; and that the Saving in the Statute, as to the Services, was controuled and made void by the Common Law; so that the Patentee was to pay the Rent, by which the said Land was before holden, as a Rent Seck distrainable of Common Right, to the Lord and his Heirs, of whom the Lands were before holden but discharged of the Services.

Co. Lit. 1.
Dro. 2.
4 *Leon.* 40.
Dier 313.
1 *And.* 45.
Stroud's Case;
Et vid. 1 Co 47.
8 Co. 114. b.
Cro. Car. 82.
2 *Rol. Rep.*
246.
1 *Fon.* 234
Lit. Rep. 43.

The King, in Regard to Decency and Order, cannot suffer a common Recovery; for in such Recovery he must be either Tenant or Vouchee; and in both Cases the Demandant must count against him, and there must be Judgment against him, which the Law does not suffer, so cannot come in as Tenant by Receipt; but if the Party have any Warranty he must pray in Aid.

Cro. Car.
96, 97.
Pigot 74-5.

The King cannot be Tenant at Will; so that if he makes a Lease at Will, tho' he may determine his Will, yet the Tenant cannot otherwise do it but by Surrender.

1 *Ld. Raym.*
51.

The King may be appointed an Executor; but as it cannot be presumed that he has sufficient Time and Leisure to engage in a private Concern, the Law allows him to nominate such Persons as he shall think proper to take upon them the Execution of the Trust; against whom all Persons may bring their Actions; also the King may appoint others to take the Accounts of such Executors.

4 *Inst.* 335.
Godolp. Report 76.

2. What Things enure to him in his Natural, what in his Political Capacity.

The King has two Capacities, the one Natural the other Politick; in which last he is considered as a sole Corporation, capable of taking in Succession, as a Bishop or Dean. In his Natural Capacity it is said, that he may purchase Lands to him and his Heirs; and that such Lands, as also Lands descending to him from an Ancestor, shall go to his Heir, in Case he is removed from the Royal Estate.

Plow. 254. in
the Case of
Wilson v. Ld.
Berkley.

But my Lord Coke says, that all the Lands and Possessions whereof the King is seised *Jure Coronæ*, shall *secundum Jus Coronæ* attend upon and follow the Crown; and therefore, to whomsoever the Crown descends,

Co. Lit. 15. b.
7 Co. 10, 12.
in *Calvin's*
Case.
9 Co. 123.

- scends, those Lands and Possessions descend also; and that the Lands and the Crown are *Concomitantia*.
- Co. Lit.* 16. a. If the King purchase Lands to him and his Heirs, he is seised thereof in *Jure Coronæ*; *a fortiori* when he purchases Lands to him, his Heirs and Successors.
- Plow.* 205. a. So if Lands in Gavelkind descend to the King and his Brother, the King shall take one Moiety and his Brother the other; but if the 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.
- Forest.* 78. per *Holt.* Ch. J. The King can have Nothing in his Natural Capacity, unless in Right of his Duchy, or an Estate-Tail, by the Statute *de donis*; and Duchy Lands would now be in the Crown if not kept separate by (a) Act of Parliament.
- (a) The Statute of 1H.4. provides that when the Duchy Lands come to the King, they shall not be under such Government and Regulation as the Demesnes and Possessions belonging to the Crown; for the Act says, *quod taliter, & tali modo & per tales officarios & ministros gubernentur, ac si ad culmen Dignitatis Regiæ assumpti minime fuissent.* *Raym.* 90.
- 2 *Rol. Abr.* 211. If the King has a Title to present to a Church which is void, and dies before Presentment, his Successor shall have the Presentment, and not his Executor.
- 2 *Rol. Abr.* 211. So if the King be seised of a Ward, and dies, his Successor shall have it, and not his Executor.
- 11 *Co.* 92. The Treasure and other valuable Chattels are so necessary and incident to the Crown, that in Case the King dies, they shall go with the Crown to the Successor, and not to the Executors.
- 2 *Rol. Abr.* 211. So a Lease for Years to the King and his Successors is good, and shall go accordingly; and not to his Executors or Administrators.
- Co. Lit.* 90. a. The ancient Jewels of the Crown are Heir-Looms, and shall descend to the next Successor, and are not devisable by Testament; but (b) the King may dispose of them in his Life-time.
- 11 *Co.* 92. a. (b) *Cro. Car.* 344. If the King be seised in Fee of an Advowson, and he creates the Incumbent Bishop, he shall present as Patron, that being a Title precedent that of the Prerogative.
- 1 *Ld. Raym.* 26.

3. Of the Difference in the Rules of Law as directing the King's Property otherwise than that of a Subject's.

- Co. Lit.* 47. The King may reserve Rent out of Inheritances which are Incorporeal, as Commons, Tithes, Fairs, &c. because the King by his Prerogative may distrain in all (c) other the Lands of the Lessee for such Rent; and having such Remedy, the Law adjudges the Reservation good.
- Plow.* 227. in *Ld. Berkley's Case.* (c) That this must be understood of all such other Lands as his Tenant has in his actual Possession, and not in the Possession of his Lessee for Life, Years or at Will. 2 *Inst.* 134. 4 *Inst.* 119. & *vid.* 5 *Co.* 4. 56. 1 *Rol. Abr.* 670. 2 *Rol. Abr.* 159. *Lane* 39. — Whether he may distrain on other Lands of the Tenant that are under Sequestration out of Chancery, *vid.* 2 *Vern.* 714. 1 *P. Will.* 306—7. — That this Prerogative shall not extend to the King's Grantee. *Bro. Prerog.* Tit. 68.
- Bro. Prerog.* 77. So if a Rent-Charge is granted to the King to be issuing out of the Manor of D. the King may distrain in any other the Lands of the Grantee; so the King may distrain for a Rent-Seck, which in the Case of a common Person is not distrainable by Common Law.
- 3 *Leon.* 124-5.

The King may reserve Rent payable to a Stranger, contrary to the Rule of Law, which makes void such Reservation in the Case of a common Person. *Moor* 162. *Co. Lit.* 143. *2 Rol. Abr.* 447.

But where the King made a Lease of his House belonging to his House-keeper of *Whitehall*, reserving a Rent to the House-keeper for the Time being, it was held an ill Reservation; for tho' the King may reserve Rent to a Stranger, yet such a Reservation as this is ill, because he cannot reserve Rent to such an Officer who is removeable at the Will of the King. *1 Ld. Raym.* 36.

The Rule of *Possessio Fratris* does not hold in the Descent of the Crown or its Possessions, neither is Half Blood any Impediment in such Case; for the Brother of the Half Blood shall be preferred to the Sister in the Enjoyment of the Crown, as the most capable Person of the two, by the Advantages and Prerogative of his Sex, to discharge the important and weighty Business of the Crown. *Co. Lit.* 15. b.

So if the King hath Issue a Son and a Daughter by one *Venter*, and a Son by another *Venter*; and purchases Lands and dies, and the eldest Son enters and dies without Issue, the Daughter shall not inherit these Lands nor any other Fee-Simple Lands of the Crown, but the younger Brother shall have them together with the Crown. *Co. Lit.* 15. b.

If Lands are given to the King by Deed inrolled, without the Words (*a*) *SUCCESSORS* or *Heirs*, a Fee-Simple passeth; for he is considered as a Corporation that never dies. *Co. Lit.* 9. *Plow.* 250. *S. P.* and that the adding of Successors in Grants to the King, was but of late Time, and a new Device; *per Dier Ch. J. Jenk.* 209, 271. *S. P.* (*a*) So a Grant by the King, without mentioning Successors, shall bind the Successors. *Plow.* 176. *Yelv.* 13.

If the King gives Lands to a Man and a Woman and the Heirs of their Bodies, and the Woman dies without Issue, the Man shall be Tenant in Tail *apres* Possibility, &c. but if the King gives Lands to a Man with a Relation of his in Frank-marriage, and the Woman dies without Issue, the Man shall not be Tenant *apres* Possibility, &c. but his Interest in the Land ceases upon the Death of his Wife without Issue; this is a Privilege of the King's which is not extended to a common Person; and the Reason of it may be this; the Wealth and Demesne Lands of the Crown are not only necessary for the Honour and Credit, but also for the Safety and Protection of the Nation; and therefore in this particular Case it is but reasonable, that if Land applied to such particular Uses and Purposes be granted away, such Grant should bind the King no longer than the Consideration and Cause of the Grant continues; and therefore in the first Case, the Man may be Tenant in Tail *apres* Possibility, &c. because the Services, which were the Cause of the Gift, are still owing, and to be performed by the Tenant to the King; but in the last Case, where the Woman, which was the Cause of the Gift, dies without Issue, the Cause of the Gift, which was the Provision for the Descendants of that Marriage, ceases; and consequently if the Grant continued, the Tenant would hold the Land free from all Services. *Co. Lit.* 21. b.

The King may grant a *Chose in Action*, as an Obligation forfeited to him upon an Outlawry, &c. and the Grantee may sue by Action in his own Name, or by Extent in the King's Name, altho' there are not the usual Words in the Grant to sue in the King's Name. *Dier* 1. pl 7. *Cro. Jac.* 179. 180.

So a *Chose in Action*, as an Obligation, may be granted or assigned to the King, and he may bring an Action in his own Name, tho' the Deed of Gift be not inrolled. *31 H.* 7. 19. *Pro. Prerog.* 40.

Tr. Prerog. pl. 23. If a Man enters into an Obligation to two, and one of the Obligees assigns to the King, or is outlawed, the King may bring an Action in his own Name, and shall recover the (a) whole Debt to his own Use. tho' one of the Obligees might have released the Obligation. *Lucas Rep. 245. S. P. per Parker Ch. J.* (a) If Lands descend to the King and a common Person, the King shall have but a Moiety; for to take the Whole would be a Wrong, which the King cannot do by his Prerogative. *Plow. 247. a.*

Bro. Assur. p. 6. Before the Statute *De donis*, when the King created a Conditional Fee, there was no Reversion but a Possibility; and if the Donee had Issue and aliened, the King's Possibility was barred as well as that of a common Person; but after the Statute *De donis* had turned that Possibility into a Reversion, and after Common Recoveries were allowed to be common Conveyances, and to bar Remainders and Reversions, it became a Question, how far a Recovery could bar a Remainder or Reversion vested in the King; and herein the Judges determined, that tho' a Recovery suffered by Tenant in Tail barred the Estate-Tail, that yet it did not (b) devert any Interest the King had in the Remainder or Reversion, it being unreasonable to strip the King of any Part of his Revenue upon the Consideration of an imaginary Recompence; but they allowed that the Estate-Tail, as to the Issue, was barred; for that otherwise the Estate-Tail in the Subject must be perpetuated, which is against the Policy of the Law.

(b) The Act of the Party, as a Fine or Common Recovery, shall never devert any Estate, Remainder or Reversion out of the King; but by Act in Law a Remainder or Reversion may be deverted out of the King. — As if there be Tenant in Tail, Remainder to A. in Fee, Tenant in Tail discontinues in Fee, and takes back an Estate to himself for Life, Remainder to the King in Fee; Tenant in Tail dies; the Issue is remitted, and the Remainder pulled out of the King, and vests in A. — So if a Recovery be on a good Title against Tenant in Tail, and the King has the Remainder by a defeasible Title, there it shall devert the Remainder out of the King, and restore and remit the right Owners. — But if a Gift be made to A. in Tail, Remainder to B. in Tail, Remainder to the King in Fee; if in this Case A. suffers a Common Recovery, this bars A. and his Issue, and the Remainder to B. but not the King's Reversion; for that cannot be discontinued or put to a Right, or plucked out of him by the Act of a third Person. *Piggot of Recoveries 86, 87.*

2 *Jon 252.* But in the Reign of *Hen. 8.* an Act of Parliament was made to invalidate Recoveries even against the Issue in Tail, where the Reversion or Remainder was in the Crown; the Intention of which Act was, to perpetuate those Estates in Families which the King himself had given, or for Money or other Consideration had procured to be given to any Subject, as a Reward for his Services to the Crown; that the Descendants of that Stock might never forsake the Interest of the Crown which had so liberally rewarded their Ancestor's Loyalty.

And therefore by the 34 & 35 *H. 8. cap. 20.* it is enacted, that if the King give any of his own Manors, Lands, &c. or cause or procure another, in Consideration of Money or other Lands, to give any Manors, &c. to any of his Subjects or Servants in Tail, in Recompence of their Service, Remainder to the King in Fee-Simple or Fee-Tail, such Estates-Tail are not to be barred; nor shall any feigned Recovery to be had by Assent of Parties against any Tenant or Tenants in Tail of any Lands, &c. whereof the Reversion or Remainder at the Time of such Recovery had shall be in the King, bind or conclude the Heirs in Tail; but that after the Death of every such Tenant in Tail, against whom such Recovery shall be had, the Heirs in Tail may enter, hold and enjoy the Lands, &c. recovered, according to the Form of the Gift in Tail, the said Recovery notwithstanding.

In the Construction of this Statute, the following Opinions have been holden:

Moor 195.
Yelv. 149.
2 Co. 15 *Wife-*
man's Case.

That if a Reversioner or Remainder Man upon an Estate-Tail grant the Reversion or Remainder to the King, this is no Security to the Issue

due in Tail, because the Estate-Tail was neither of the Gift or other Provision of the King, and consequently not within the Act.

So if a Man make a Gift in Tail, and the Crown descend on him, ^{2 Co. 15.} or if the King's Ancestor not being King make a Gift in Tail, and ^{Co. Lit 372.} the Reversion descends on him, the Estate-Tail may be barred.

If a Man makes a Gift in Tail, Remainder in Fee, he in Remainder ^{2 Co. 52.} grants his Estate to another for Life, Remainder to the King in Fee, ^{Noy 132.} on Condition to be void on Payment of Money; a Recovery by 'Tenant in Tail bars the King's Remainder and Condition; for the Grant ^{Yelu. 149.} was void. ^{1 Leon. 8.}

If a Subject by the King's Provision or Procurement makes a Gift in Tail, and then grants the Reversion to the King for Life or Years ^{Piggot of Recoveries 88,} only, in this Case the Estate-Tail, Remainders and Reversions may ^{89.} be all barred; for the Reversion or Remainder in the King, must be in Fee or in Tail.

If the King grant an Estate-Tail, reserving the Reversion to himself, and after grants the Reversion to another, Tenant in Tail may suffer a Recovery, and thereby bar the Reversion. ^{Pigot 88.}

Therefore where *Hen. 8.* gave Lands to *Michael Stanhope* and his Wife and the Heirs of their Body, in Consideration of Services, &c. ^{Raym. 288.} *Michael* died, and his Son and Heir petitioned the Queen, to grant ^{358.} the Reversion to some Persons in Fee, to the Intent that he might ^{2 Fon. 251.} make a Lease for ninety-nine Years by Way of Mortgage; and entered into a Recognizance to the Queen, conditioned that nothing ^{Gardner v. Bambridge.} should be done whilst the Reversion was out of the Crown, prejudicial to the Crown; and accordingly the Queen conveyed the Reversion to the Lord *Burleigh* and Sir *Walter Mildmay*, in Fee; then the Son made a Lease for ninety-nine Years, and suffered Recovery; and then the Trustees re-convey to the Queen; and it was resolved, *1st*, That the Grant of the Queen was good. *2dly*, That during the Time the Reversion was out of the Crown, the Son was not restrained from aliening within the Statute, and so the Recovery good to bind the Issues; but a Fine or Recovery, after the Regrant to the Queen, would not have been good to bind the Issue, as it seems; because that Act doth not require that the Reversion should continue ^(a) always in the King, but it sufficeth if it be in him at the Time of the Fine levied or Recovery suffered. ^{(a) Q. & vid. Hurd. 409.}

If Tenant in Tail of the Gift of the King, makes a Gift in Tail, ^{2 Fon. 250—1} the second Donee is not within the Statute; for his Estate, as far as it ^{Earl of Ormond's Case} could, disaffirms the Reversion of the King, tho' it could not take it ^{cited to have} out of him; and his Possession was injurious to the Estate given by ^{been adjudged by eleven} the King. ^{Judges,}

King *R. 3.* by Letters Patents gave several Lands to the Earl of *Derby* and the Heirs Male of his Body, in Consideration of great Services to the Crown, &c. afterwards by a private Act made *4 Jac. 1.* several Alterations were made in this Estate; as that *Charles* then Earl of *Derby*, should hold and enjoy them for his Life; and after his Death, to *James* his Son and Heir Apparent, and the Heirs Male of his Body; and so to the second, third, &c. and seventh Son of Earl *Charles*; and then to several others in Tail Male, who by the Limitation of the Letters Patents would have succeeded to the Estate upon Failure of Issue Male of Earl *Charles*; with Power for Earl *Charles* and the Sons successively to make Leases for Lives or Years, and Jointures for Wives. After Earl *Charles's* Death, his Son Earl *James* levied a Fine of these Lands, and sold them to a Stranger; yet upon special Verdict in Ejectment, brought after his Death by his Son, it was resolved by all the ^{Raym. 260,} Judges ^{286, 319, 350.} ^{2 Fon. 249.} ^{Earl of Derby's Case.}

Judges in the Exchequer Chamber, except three, that the Fine was no Bar; for that the Reversion continued in the Crown, and that these Estates given by 4 Jac. 1. were no new Estates, but all within the Compass of the first Tail created by the Letters Patents, and only a Distribution of the Enjoyment of them, and all to the same Persons who would be intitled under the Letters Patents; and the Power to make Leases was with Conformity to the Power of Tenant in Tail; and that to make Jointures was in lieu of Dower; besides, there was a Saving to the King, and all other Persons, all such Rights, &c. so as the Prerogative of the King, by his Reversion to restrain the Tenant in Tail from barring his Issue, was saved; and the eighth, ninth and all other Sons inheritable by Virtue of the Entail let in, tho' the first, &c. and seventh only were named; and the Alterations were only in Accidents, not in the substantial Parts of the Limitations; and so within 34 H. 8.

Co. Lit. 372.
Piggot 91.

If the King in Consideration of Money, or other Consideration by Way of Provision, procure a Subject to settle his Lands on one of his Servants in Tail, for Recompence of Service, by Deed of Bargain and Sale inrolled, with Remainder to the King in Fee; and all this appears on Record; the Tenant in Tail cannot bar his Issue, being protected by the express Words of the Statute.

11 Co. 78.
1 And. 46.
Co. Lit. 373.
Moor 467.
Cro. Car. 13.
Cro. Eliz. 595.
Yelv. 72.
8 Co. 77.
1 Sid. 166.

It hath been held, that the latter Words of this Act, *viz. had done or suffered by or against any such Tenant in Tail*, must be intended where Tenant in Tail is Party or Privy to the Act, be it by doing or suffering that which should work the Bar, and not by mere Permission. As if Tenant in Tail of the Gift of the King, Reversion to the King, is disseised, and Disseisor levy a Fine, and five Years pass, this bars the Estate-Tail; and so if a Collateral Warranty be made by the Ancestors of the Donee, and the Donee suffer the Warranty to descend, without any Entry made in the Life of the Ancestor, this binds; because he is not Party or Privy to any Act either done or suffered by or against him.

2 H. 7. 8. Bro.
Prerog. pl 101.
(a) But this
Prerogative
is not to be
extended to
the Dutchy
Lands.
Moor 149,
154, 161.

If the King make a Lease reserving Rent, with a Clause of Re-entry for Non-Payment, the King (a) is not obliged to make any Demand previous to his Re-entry, but the Tenant is obliged to pay the Rent for the Preservation of his Estate; because it is beneath the Royal Dignity of the Crown to attend a Subject, to demand the Rent; but the Law for the Support of that Dignity obliges every private Person to attend the King with the Services due to him.

4 Co. 73.
Moor 404.
Cro. Eliz. 462.
Dier 87.
1 And. 304.

But if the King, in Cases where he need not make a Demand, assigns over the Reversion, the Patentee cannot enter for Non-Payment without a previous Demand, because the Privilege is inseparably annexed to the Person of the King, for the Support of his Royal Dignity; and therefore shall not be extended to Cases where the King is no Way concerned.

Moor 210.
Dier 87.

So if a Prebend make a Lease rendring Rent, and if the Rent be Arrear and be demanded, that it should be lawful for the Prebend to re-enter; if the Reversion in this Case comes to the King, the King must in this Case demand the Rent, tho' he shall be by his Prerogative excused from an Implied Demand; for the Implied Demand is the Act of the Law, the other the express Agreement of the Parties, which the King's Prerogative shall not defeat; therefore in the Case of the King, if he make a Lease reserving Rent, with a Proviso that if the Rent be in Arrear for such Time (being lawfully demanded, or demanded in due Form) that then the Lease shall be void; it seems that not only the Patentee of the Reversion in this Case, but also the King himself, whilst he continues the Reversion in his own Hands, is obliged

ged to make an actual Demand by reason of the exprefs Agreement for that Purpose.

There can be no Occupant of any of the King's Possessions; and therefore if the King grants Lands to *A.* during the Life of *B.* and *A.* dies, living *Cestui que vie*, the Law allows no Man to gain the Possession which is now vacant by the Death of *A.* but preserves it for the King; for this Reason, that he is presumed to be taken up in the publick Affairs of this Kingdom, and therefore not at Leisure to attend his own private Concerns; also the King's Grants proceeding from his own Bounty and Liberality, none ought to have any Benefit from them but those for whom he first designed them; and therefore when he made the Grant to *A.* during the Life of *B.* tho' he intended *A.* should have the Benefit of it during the Life of *B.* yet if *A.* dies before *B.* none can make himself a Title under the Grant, because it was made only to *A.* nor ought any one by Way of Occupancy to take Advantage of a Grant made to *A.* for his particular Services; because that were to extend the King's Bounty farther than he designed it, whereas such a Grant in the Case of a common Person ought to be taken most strongly against the Grantor, because he parted with his Land for the Life of *B.* upon a valuable Consideration, and therefore is no Sufferer if he does not enjoy it during the Time for which he granted it away. Also no Man can make himself a Title to any of the King's Possessions, without Matter of Record; and therefore none can claim any of them as Occupant, because that is an Act in *Pais*, and no Matter of Record.

If the King makes a Lease reserving Rent, the Tenant must pay it without Demand, either to his Receiver for that Purpose, or at the Receipt of the Exchequer, as well as if by the Words of the Lease the Rent had been made payable at the Exchequer, or into the Hands of his Receiver; but if the King grants the Reversion, the Patentee must demand the Rent upon the Land, that being the Place appointed by Law for a common Person to demand it on.

If the King make a Feoffment on Condition, that upon Payment by the King of 100 *l.* such a Day, the Feoffment shall be void; the Feoffee must apply to the King at the Day; for the King is not obliged to make a Tender, as in the Case of a common Person.

The Deed of a private Person hath a Relation only to the Time of the Delivery, and not to the Time of the Date; but the King's Charter hath Relation to the Time of the Date; for being of Record, it cannot be averred to have been executed on any Time than that on which it bears Date.

If the King presents to a Church, and his Clerk is admitted and instituted, yet before Induction the King by his Prerogative may revoke such Presentation; nay the Presentment of another is in Law a Repeal and Revocation of such Presentment, and that without any Notice to the Ordinary; but in the Case of a common Person, by Presentation and Institution he hath given up his Power to the Ordinary, and cannot afterwards vary, alter or revoke his Presentation; but some (*a*) Books hold, that after a Presentment only he may vary; and this seems to be the right Distinction and better Opinion at this Day.

4. That his Rights shall be preferred to the Subject's where they happen to meet.

Co. Lit. 50. b. It is an Established Principle in Law, that where the King's Right
4 *Co.* 55. and that of the Subjects meet at one and the same Time, the King's
9 *Co.* 129. shall be preferred.
Hard. 24. —
In Case of concurrent Titles between the King and Subject, the Rule is *Detur Digniori.*
2 *Vent.* 268.

3 *Leon.* 251. Hence it is said, that if there be Lord Mesne and Tenant, and the
Tenant pays his Rent at the Day to the Mesne, before Noon; and
after on the same Day, the Mesne dies, his Heir within Age, the Ten-
nant shall pay it over again to the King.

Co. Lit. 30. b. 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 Lands shall be seized for the King, according to this
Maxim, That when the Title of the King and a common Person begin
at one Instant, the Title of the King shall be preferred.

Co. Lit. 30. b. So if the Woman had been the King's Nief, and one had married
4 *Co.* 55. her without the King's Licence, &c. and Lands had descended before
or after Issue, yet the King, upon Office found, should have them.

Dier 108. Baron and Feme Joint Purchasers of a Term for Years, the Hus-
Plow. 260. band drowns himself, the Lease is forfeited, and Wife surviving shall
Dame Hale's not hold it against the King or his Almoner; because the Title of
Case. the King and a common Person coming together, the King's shall be
preferred.

5. Of Acts of Parliament which extend to or bind not the King.

Plow. 136, Herein a general Rule hath been laid down and established, *viz.*
137. *in Ld.* that where an Act of Parliament is made for the Publick Good, the
Berkley's Case. Advancement of Religion and Justice, and to prevent Injury and
11 *Co.* 68. b. Wrong, the King shall be bound by such Act, tho' not particularly
5 *Co.* 14. named therein.
7 *Co.* 32.

11 *Co.* 68. But where a Statute is general, and thereby (a) any Prerogative,
(a) And it Right, Title or Interest is devided or taken from the King, in such
seems that Case the King shall not be (b) bound; unless the Statute is made by
the usual Sa- exprefs Words to extend to him.
ving of the King's Right

Et c. is only *ex abundanti Cautela*, and not of absolute Necessity. *Shew. P.C.* 179. (b) But may take
Advantage of an Act of Parliament, tho' not particularly named. 11 *Co.* 68. b. 1 *Leon.* 150.

On this Foundation and these Distinctions it hath been held,
Plow. 238, &c. That the Statute of *Westm. 2. De donis* extends to and binds the
Ld. Berkley's King; as where Lands were given to the King and the Heirs of his
Case, cited Body, it was adjudged, that the King's Prerogative had not given him
in 11 *Co.* 72. a greater Estate than in the Case of a common Person; and that an
5 *Co.* 14. Alienation by him would be a Tort and an Injury to the Donor, which
1 *Co.* 44. the King cannot do.

11 *Co.* 75. So it hath been adjudged, and also held in Parliament, that the
Case of *Mag-* King is bound, tho' not named, by the (a) 13 *Eliz. cap.* 10. which re-
dalen College. strains
5 *Co.* 15. b. 2

1 *Rel. Rep.* 151. (a) The Statute 1 *Eliz.* which restrains Bishops from making Estates, &c. hath
a Proviso

restrains Ecclesiastical Persons from making Leases, &c. this being a General Law, and for the Publick Good.

a Proviso that it shall not extend

to the King; which my Lord Coke says, was of absolute Necessity; for that otherwise the King would be bound by it. 5 Co. 14. b.—It seems the Law was held otherwise on the Statute 12 Eliz. and therefore where a Lease was made to the King by a Dean and Chapter, and the King had assigned it over, after that the Law came to be held, that the King was bound, the Assignee had his Lease made good to him in Chancery against the Statute, because he could not know the Law in a Matter so dubious. 1 Rol. Abr. 378.

So the King is bound, tho' not named, by the Statute 32 H. 8. cap. 28. against Discontinuances by Husbands of their Wives Estates, &c. for this being an Injury to the Wife, it shall extend to the King, whose most immediate Concern it is to relieve his Subjects from any Injury or Wrong. 2 Inst. 681. 1 Show. Rep. 209.

So the King, tho' not named, is bound by the Statute of Merton, 35 H. 6. 61. cap. 5. made against Usury in doubling the Rent, in the Case of an Infant Heir who has made Default in Payment. Plow. 236. b. 2 Inst. 89.

So the King, tho' not named, is bound by the 10 cap. of the Stat. Merton, which ordains, that Suit to the Lord may be done by Attorney, &c. Plow. 236. b. 2 Inst. 99.

The King is bound by the 31 Eliz. against Simony; being a Law made for the Advancement of Religion. Co. Lit. 120.

So the King, tho' not named, is bound by the 27 Eliz. against Voluntary Conveyances to defraud Purchasers; so that a Voluntary Conveyance to the King is as much void against a subsequent Purchaser for a valuable Consideration, as in the Case of a common Person. 11 Co. 74. b.

Bound by the Statute West. 1. cap. 5. that none shall disturb Elections upon Pain of great Forfeitures. 2 Inst. 169. 4 Mod. 207.

Bound by the Statute of Malbridge, cap. 22. that none may distrain his Freeholders without the King's Writ. 2 Inst. 142. 1 Show. Rep. 209.

By an Act of Parliament 22 Car. 2. cap. 11. the Parishes of St. Michael Woodstreet and St. Mary Staining in London, were united and established as one Parish Church; and it was provided, that the first Presentation should be made by the Patron of such of the said Churches, the Endowments whereof were of the greatest Value; the King was Patron of St. Mary Staining (of far less Value), and a common Person Patron of St. Michael Woodstreet, who presented Mr. Crooke; on a Cause entered against the Institution, it was determined by Civilians, by the Advice of Lawyers at Doctors-Commons, that this Statute tho' in the Affirmative, and without any Negative Words, extended to, and so far bound the King, as to deprive him of any Preference he might have by his Prerogative, as in Cases where his Interest is intermixed with others; and that the Act of Parliament giving a new Estate to the King, and prescribing the Manner of Enjoyment, the Method limited must take Place of the King's Prerogative. 4 Mod. 207. 1 Show. Rep. 208. Croke's Case—at the End of the Case it is said, that there were two Instances in London, where under Colour of this Prerogative the King's Preference was preferred; but this is said to have been done by Jefferies, and never contested.

But as Acts of Parliament are to be construed according to the Subject Matter, and not to be extended further than the Intention of the Legislature; hence in Variety of Cases we find it determined, that General Words in an Act shall not oust the King of his Prerogative. Plow. 240. Hob. 146. 7 Co. 32. Moor 540.

As on the Statute *Quia Emptores Terrarum*, which enacts, That none shall alien Lands in Fee to hold of himself; yet it is held, that the King may give Lands in Fee to hold in Frankalmoigne or other Services. Lit. Sett. 140. Co. Lit. 98. Plow. 240. 11 Co. 68. b.

So the 12 cap. Mag. Cha. which provides, *quod communia Placita non sequantur curiam nostram sed teneantur in aliquo certo loco*, does not bind the 244. 11 Co. 68. b.

the King; but that he may bring an Action of Debt or *Quare Impedit* in *B. R.*

- Plow. 240. a.* So of the Statute *West 2. cap. 17.* which provides, that where divers Inheritances by Knight's Service descend, *quod ille dominus de cætero habeat Maritagium de quo Antecessor suus prius fuerit Feoffat'.*
- Plow. 240. b.* Not bound by the Statute of *Marlbrige, cap. 9.* but all Coparceners in Respect of the Lands descended on them, must each of them do Service, as before the making of the Statute.
- 11 Co. 68.* Not bound by the Statutes of (a) Limitation, nor by the Statute of *Westm. 2. cap. 5.* which makes a Plenarty for six Months a good Plea.
- Plow. 244.*
Comp. Ins. 108.
(a) Vid. 3 Ir. B. 188.
11 Co. 68. Nor by the Statute *27 E. 1.* which gives the Trial by *Nisi Prius* in the Country.
- 1 Jon. 203.*
Cro. Car. 148.
Salk. 162. Neither the Statute Merchant, those concerning the Staple, the Statute of Frauds, nor those relating to Bankrupts, extend to, nor bind the King.
- Hob. 126.* There are also Statutes which, as my Lord *Hobart* says, were made to put Things in an orderly Form, and to ease a Sovereign of Labour, but not to deprive him of Power, which cannot be said to bind the King.
- Dier 50 a.* As the *28 H. 8.* which enacts that all Grants concerning the Court of Augmentations should be under the Seal of that Court; yet Grants under the Great Seal have been held good.
- Hob. 145.* So the Statute *25 H. 8. cap. 21.* which directs the Manner of granting Dispensations, tho' it says that Dispensations shall not otherwise be granted; yet the King's Power is not thereby restrained, but that by Virtue of his Prerogative he may grant them as before.
- Dier 225.*
Hob. 146. So on the Statute *28 H. 8. cap. 15.* for the Trial of Piracy by Commission, it hath been held, that the Trial may be, tho' the Chancellor does not nominate the Commissioners, as that Act appoints.
- Dier 303.* So on the Statute *9 E. 2.* that the Queen may make Sheriffs without the Judges.
- Hob. 146.* So on the *31 H. 6. cap. 5.* the Office of Alnage was granted by the Queen, without the Bill of the Treasurer; and held good.
- Show. P. C. 164.*
4 Mod. 200.
2 Salk. 540.
1 Show. Rep. 413, 493.
3 Lev. 382.
Comb. 301.
1 Ld. Raym. 23. S. C. between *The Queen and Bishop of London* and *Dr. Birch.* By a private Act of Parliament *1 Jam. 2.* the Parish of *St. James* was taken out of the Parish of *St. Martin*, and made an independant Parish; and it was provided by the Statute, that *Dr. Tenison* the then Vicar of *St. Martin's*, should be the first Rector of *St. James's* Parish; and that the Patronage of the Advowson should belong to the Bishop of *London* and the Lord *Fermin, alternis Vicibus*; the first Rector after Vacation by *Dr. Tenison*, to be presented by the Bishop of *London*, and the next by the Lord *Fermin* and his Heirs, and so on. *Dr. Tennison* was promoted to the Bishoprick of *Lincoln*, by which the Church of *St. James* became void; and it was adjudged, that altho' it was by the Statute expressly appointed, that the Bishop of *London* should present to the Avoidance, yet the Statute designed only to direct the Methods and Turns between the Patrons, and not to exclude the King of his Prerogative; and altho' this was a Church newly erected, yet the King having the Prerogative to present to all Churches where the Incumbent is promoted, shall have it in this Church when 'tis erected.

6. That no Laches can be imputed to him; and therein of the Maxim, Nullum tempus occurrit Regi.

- Stamf. Prerog. 32, 33.*
Plow. 143.
7 Co. 28. From the Presumption that the King is daily employed in the weighty and publick Affairs of Government, it hath become an established

blished Rule at Common Law, that no Laches shall be imputed to him, nor he any way to suffer in his Interests, which are certain and permanent; and this his Privilege (a) *quod Nullum tempus occurrit Regi*, has been confirmed by the Statute *de Prærogativa Regis*.

¹ Jon. 79.
Hard. 24.
(a) *Vigilantibus & non dormientibus*

Fura subveniunt, is a Rule for the Subject; but *Nullum tempus occurrit Regi*, is the King's Plea; for there is no Reason that he should suffer by the Negligence of his Officers, or by their Compacts or Combinations with the adverse Party. *Hob. 347.*

Hence it was held, that if the King's Villein had purchased Land, and aliened before Entry by the King, yet upon Office found the King might have entered, *quia Nullum tempus occurrit Regi*; tho' it was otherwise in the Case of a common Person.

Lit. Off. 178.
Co. Lit. 118. a.

So in a Writ of Right of Advowson brought by the King, the Tenant shall not tender the *Di Mark*, because *Nullum tempus occurrit Regi*; and therefore the King shall alledge, that he or his Progenitor was seised without shewing any Time.

Co. Lit. 294.

So an Action of Account lay at Common Law against the Executors or Administrators of the King's Debtor or Receiver; for being supposed busied and employed in the weighty Affairs of the Kingdom, it was not thought reasonable that he should suffer in his Treasure by an Omission occasioned perhaps by such his Attendance.

Co. Lit. 90. b.

For this Reason it is that there can be no Occupant against the King; so that if the King grants Lands to *A.* for the Life of *B.* and *B.* dies, no Man by his Entry can gain himself a Title against the King; tho' it was otherwise in the Case of a common Person.

Co. Lit. 41. b.

So there can be no Tenant at Sufferance against the King; but he who holdeth over is an Intruder, because no Laches can be imputed to the King for not entering.

Co. Lit. 57.

Therefore if the King be seised in Fee of the Manor of *B.* and a Stranger erects a Shop in a vacant Plot of it, and takes the Profit of it without paying any Rent to the King; and after the King grants over the Manor in Fee, and the Stranger continues in the Shop and occupies it as before, this is no Disseisin; for the first Entry of the Stranger was no Disseisin, but an Intrusion on the King's Possession; for that the King's Title appearing on Record, the Entry in *Pais*, which is not an Act of equal Notoriety, will not devert it out of him; if then the King is not disseised, his Conveyance of the Freehold is good, and the Grantee is seised by Virtue of it; and consequently cannot be said to be disseised by the Stranger who has made no Entry on him after the King's Conveyance, but only continued the old Interest which he had before the Grant; and so remains an Intruder still, and liable to an Action of Trespass or Ejectment for it.

Bro. Tit. Disseisin (4).
Hob. 322.
¹ *Rot. Abr. 659.*

A Person cannot be indicted on the Statutes against Forcible Entries for entering into the King's Possessions, because he cannot be disseised.

¹ *Co. 69.*
¹⁰ *Co. 112.*
Dalt. Just.

A Descent cast is no Plea against the King, nor does it take away his Right of Entry.

303.
Plow. 243. a.
² *Leon. 31.*

If the King's Goods become Wreck, the Lord of the Manor cannot take them, but the King may claim them after the Year and the Day; for this Reason, that he is supposed employed in the publick Affairs, and therefore no Lapse of Time shall injure him.

² *Inst. 168.*
Plow. 243.

For this Reason the Lord of the Manor cannot take the King's Beasts, as Strays; as also that this Privilege of Waifs and Strays is derived from the Crown, and cannot be supposed to extend farther than a Liberty to take the Goods and Cattle of a common Person.

⁴⁹ *E. 3. 4.*
Kitchin 81.

If a Grant be made to the King of the next Avoidance of a Living, and a Stranger upon the Death of the then Incumbent presents, and his Presentee continues in six Months and dies, yet the King may pre-

Plow. 243. a.

sent another, *quia Nullum tempus occurrit Regi*; so if a Grant had been made to the King of all such Presentments as should happen within twenty Years, and in the twenty Years there happen ten Presentments which are all filled up by a Stranger, yet the King shall present to them over again.

Bro. Tit. Presentment (24). Comp. Incumb. 118. If the King be Patron of a Church, and he omits to present within six Months, the Ordinary cannot present for the Lapse, but is only to sequester the Profits, and serve the Cure 'till the King thinks proper to present; but if in this Case the Ordinary collates his Clerk, and afterwards the King presents, the Clerk so collated cannot be turned out without a *Quare Impedit*.

7 E. 4. 32. Dier 290, 360, 327. If the King presents to a Church, and his Clerk is admitted and instituted, yet the King may before Induction repeal and revoke his Presentation; and it is held in this Case, that the Presenting another is a Repeal in Law, without any other Notice to the Ordinary.

1 Leon. 156. Wright v. Bishop of Norwich. So where a Title by Lapse comes to the King, if the King doth present, and his Presentee is instituted, yet the King may revoke his Presentation, and so null the Institution at any Time before his Clerk is inducted; or if his Clerk be instituted upon such Title, and die before his Induction, the King may present another, his Turn not being served by the Institution only of his Clerk.

7 Co. 28. Owen 2. 1 And. 148. Cro. Eliz. 44. Cro. Jac. 53, 216. Hetley 125. 1 Bull. 28. Moor 269. Fitzg. 30. But tho' the King may remove the Patron's or Stranger's Clerk that comes in upon his Lapse, yet if such Clerk happens to (a) die Incumbent of the Church before the King doth present, the King hath lost the Advantage of the Lapse, and shall not present afterwards, or remove the Patron's second Presentee, because the King is to have but one Turn, and that the next; and if the Law should be otherwise, the King by suffering divers Usurpations upon his Lapse, might even disinherit the very Patron; and the Rule *Nullum tempus occurrit Regi*, (a) Or if the Church becomes void by Resignation or Deprivation, unless such Resignation were by Fraud or Covin. *Cro. Jac. 216. Owen 89. 4 Leon. Case 351.*

7. Of his Prerogative in his Suits and Proceedings in Courts of Justice.

Co. Lit. 139. Bro. Nonsuit (68). Sav. 56. As the King is the Fountain of Justice, and all Courts of Justice derive their Authority from him, hence he is supposed to be always present in Court; and therefore it hath become an established Principle of Law, that the King cannot be Nonsuit in any Action or Information in which he is sole Plaintiff.

Co. Lit. 139. 2 Rol. Rep. 33, 136. But it seems that any Informer *qui tam*, or Plaintiff in a popular Action, may be Nonsuit, and thereby wholly determine the Suit, as well in Respect of the King as of himself.

Co. Lit. 139. 1 Sid. 420. Salk. 21. like Point, where Also the King's Attorney General may enter a *Nolle Prosequi*, which has the Effect of a Nonsuit to any Information or Action brought by the King only.

it is said by the Ch. J. that the Crown, notwithstanding a *Nolle Prosequi*, may award new Process upon the same Indictment.

1 Vent. 33. The King v. Benson. In an Information for Extortion, Issue was joined, and the Day the Jury were returned, the King sent a Writing under his Sign Manuel to Sir Thomas Fanshawe Clerk of the Crown, to enter a Cesser of Prosecution; and Palmer Attorney General affirmed, that the King may

may stay Proceedings; yet notwithstanding the Court proceeded to swear the Jury, and said they were not to delay for the Great or little Seal; whereupon the Attorney entred a *Nolle Prosequi*.

No Prosecutor upon an (a) Indictment can enter a *Nolle Prosequi*, ^{1 Ld. Raym. 721.} without the Leave of the Attorney General.

entring *Nolle Prosequi's* upon Indictments, began in Charles 2d's Time. ^{6 Mod. 262. per Holt Ch. J.}

It is a Rule of the Common Law, that the King by his Prerogative may sue in what Court he pleases; and therefore may bring a Writ of Right or a *Quare Impedit* in the Court of King's Bench. ^{4 Inst. 17. Plov. 243. 1 Rol. Rep. 290.}

In an Action for imbeziling of the King's Goods, which was laid in the Declaration to be in London, it was moved for the King, that the County might be changed; and the Court held, the King might chuse his County, and might waive that which he had seemed to have elected before, as he may waive his Demurrer and join Issue. ^{1 Vent. 17. The King v. Web.}

If a Person be guilty of two capital Offences, the King may elect which of them to try him on first; and accordingly, where two Persons murdered the Post-Boy in *Lincolnshire*, and afterwards committed a Robbery in *Wilts*, for which they were taken and in Custody in *Wilts*; the Attorney General moved for a *Habeas Corpus* to the Sheriff of *Wilts*, to deliver them to the Sheriff of *Lincoln*, and another to the Sheriff of *Lincoln* to receive them; which was granted; the Court allowing the Crown had such Election. ^{Hill. 6 Geo. 2. in B. R. Rex v. Hallam, &c.}

(F) Of the King's Grants and Letters Patents: And herein,

1. What Things the King may grant; and therein;

1. Of Grants arising from his Prerogative of Power, and which are inseparably annexed to the Crown,

FROM the great Trust and Confidence reposed in the King, and the high Authority with which he is invested, the Law hath inseparably annexed to the Crown a Power of granting and disposing of divers Rights and Privileges, which cannot be granted or established by any less Authority; of these there are some that have no Existence 'till created, such as Franchises, Liberties, Fairs, Markets, Hundreds, Leets, Parks, Warrens, which the King (b) only by his Prerogative can (c) establish. ^{Bro. Pat. 16. 2 Rol. Abr. 187. 9 Co. 23, 87. Co. Lit. 199. Godb. 254. Jenk. 79, 307. (b) And therefore a Subject cannot build a}

Castle or other Place of Defence without the King's Licence. ^{Co. Lit. 5. (c) May be created by Ordinance, as my Lord Hobart expresses it. Hob. 15.}

So the King may grant *Pontage* or *Murage* to be taken by them who erect new Bridges or Walls; but the Payment thereof shall continue no longer than the Bridge remains useful, or the Wall necessary for the Defence of the Subject. ^{Bro. Patent 12. Noy 176. Darcy v. Allen.}

So a Grant of a Ferry, and that every Person going over shall pay a Half-penny, is good, being for the publick Utility; and the Payment is in Consideration of the particular Benefit. ^{13 H. 4. 14. Bro. Patent 12.}

But

- Bro. Patent
100.
Noy 176. But the King cannot grant Toll to be taken in the Highways, which are to be free to all People; and therefore a Toll-Traverse or Toll-thorough cannot commence by Grant at this Day, but must be claimed by Prescription.
- Moer 476. vid.
Tit. Fairs
and Markets.
(a) F. N. B.
220. And indeed in all Grants of this Kind, the Good of the Publick seems to be principally regarded, as appears by the Writ of (a) *Ad quod damnum*; and in this, that if the King creates or grants a Fair or a Market to a Person, and afterwards grants another to another Person to the Prejudice of the first, the second Grant is void.
- Bro. Patent
53.
7 Co. 17, 18. All Extraparochial Tithes belong to the King by his Prerogative, and may be granted by him.
- Flow. 559. So the King may grant a Swan-Mark or the Game of Wild Swans in such a River, and such Grant is good; but none can have a Swan-Mark unless he hath an Estate of Freehold of five Marks *per annu*.
- Carter 90. So all Royal Mines belong to the King, and he may grant them, but it must be by express Words.
- Carter 92. None but the King can erect a *Beacon* or Sea-Mark, unless he hath a Licence or a Grant for that Purpose.
- 4 Inst. 87.
1 Sid. 338.
Co. Lit. 114.
1 Lev. 219. Where the King hath Suit to a Mill *ratione Prerogativæ*, he may grant it.
- 4 Inst. 163,
245. All Judicial Offices which have been usually granted by the Crown, are of the *Insignia Majestatis*, and so inseparably annexed to the Crown, that they cannot be granted by any less Authority, nor in any other Manner, nor with other Powers than as warranted by the known and approved Forms in such Cases.
- 2 Inst. 54. Hence Commissions of a new Invention, tho' under Pretence of publick Good, have been condemned; as Commissions to assay Weights and Measures.
- 4 Inst. 161. So 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, have been held illegal and void.
- 2 Inst. 47. So it has been held, that the King could not authorise Persons to take care of Rivers and the Fishery therein, according to the Method prescribed by the Statute *West. 2. cap. 47.* before the making of that Statute.
- (b) 1 Sid. 441.
1 Vent. 47. So a Grant by *Hen. 6.* to the Corporation of *Dyers in London*, of a Power to search, &c. and if they found any Cloth dyed with Logwood, that it should be forfeit, was adjudged void; it being against Law that any (b) Forfeiture should incur by Letters Patents.
- Jit. Rep. 304.
Hob. 48.
Lu. as 125. The Crown may grant Cognizance of Pleas to proceed *secundum Legem Terræ*, but not to proceed by other Laws; for that would be to make new Laws, which the Crown, being but one Branch of the Legislative Power, cannot do.
- Hob. 63.
Noy 147.
2 Rol. Abr.
192. The King cannot grant to any to hold a Court of Equity, because this is in Derogation of the Common Law; and the Chancery in *Chester* and *Durham* are Incidents to a County Palatine which had *Jura Regalia*.
- 1 Vent. 407. A Grant to the Town of *Berwick* that they should be a County, but no Grant of having a Sheriff, was adjudged to be void, because there would be no Officer to execute and do Justice.
- Dier 300.
Bro. Patent
111.
Skin 606. There are likewise Personal Prerogatives which the King only can grant, and which are of so high a Nature, as that they cannot be delegated to any other; such as the Power of making an Alien a Denison, the Power of Pardoning Felonies, &c.

2. Of Grants arising from his Interest.

It seems to be clearly agreed, that the King may alien, grant or charge any Branch of his Revenue in which he hath an Estate of Inheritance, as also his Lands in Fee-Simple, tho' he is seized of them *Jure Coronæ*; and this Power is said to be founded on Reasons of State, and arises from the Nature of our Constitution, by which the King is disabled to levy Money on the Subject without an Act of Parliament; so that if this Power were not inherent in the Crown, the Kingdom might suffer by a sudden Invasion, &c. Also as Rewards and Punishments are the Supporters of all Governments, it is but highly reasonable that the Crown should have the Power of rewarding those who deserve well; and this hath been the constant Usage of the Kings of England, by granting out of the Crown-Revenue Pensions and Estates to those whose Services have been meritorious, as also to such of the Nobility whose Fortunes have come to Decay.

Lands in Ancient Demesne, tho' they seemed most appropriate to the King's Use of any of his Revenues, for they had several Privileges all relating to the King, as not to be impleaded out of the Manor, to be free of Toll for all Things concerning their Sustenance and Husbandry, not to be inpanelled on any Inquest; and yet notwithstanding all this, those Lands were always alienable.

The Goods of Felons, Fugitives, Persons outlawed, &c. Waifs, Strays, Deodands, Wreck, &c. are deemed the Flowers of the Crown, and distinguished by that Name; and these the King clearly may grant; and between these and Liberties and Franchises, which have no Existence till created, a Distinction hath been established, viz. That if the first of these, and the Possessions to which they are appendant or annexed, come to the Crown, they sink in the Crown, and the King is seized of them again *Jure Coronæ*; but if the Possessions, to which Liberties or Franchises, such as Fairs, Markets, &c. are appendant, come to the Crown, yet these last are not extinct, but continue to exist according to their first Establishment.

If the King grants to *J. S.* Felons Goods, or Waifs and Strays within his Manor, *J. S.* shall have them in the Lands of the Freeholders; for they are Liberties due to the King, which he may grant, and are not Charges to the Subject; for the King hath this Right in every Man's Land, and therefore may grant it to another.

The Forfeiture of Goods and Chattels in an Outlawry in a Personal Action, belongs to the King, which the King may, and usually does grant to the Person who is at the Expence of suing out the Outlawry; yet this is but *ex Gratia Regis*, and not *debito Justitiæ*.

All Fines for Offences *de Jure* belong to the King, because it is his Correction, and the publick Revenge is in his Hands; but the King may grant them to others.

It was agreed in the Bankers Case, that King *Car. 2.* having the Revenue of Excise vested in him, his Heirs and Successors, by Act of Parliament, might grant or charge the same or any Part thereof; and that accordingly, the Letters Patents and Grant of 25,000*l.* per *ann.* out of the Hereditary Revenue of Excise, for the Payment of Interest to Sir Robert Vinor and others, of whom the King had borrowed large Sums of Money, till such Time as the principal Debt should be discharged, were good and valid in Law, and bound the King's Successors; altho' it was objected, that this Revenue was granted by Act of Parliament; that it arose out of the Purses of the People,

Plow. 236. in Ld. Berkley's Case. Vaugh. 62. Co. Lit. 19. 7 Co. 12.

5 Mod. 55. per Holt Ch. J. vid. Tit. Ancient Demesne.

9 Co. 25. The Abbot of Strata Marcella's Case.

Moor 474. Palm. 78. 1 And. 87. 1 Mod. 232.

Cro. Eliz. 465. Heigham v. Best.

Yelv. 19. 1 P. Will. 690.

1 Ld. Raym. 213, 214.

5 Mod. 46. Comb. 270. Skin. 601. The Bankers Case.

ple, and that it was given in lieu of Wards, Liveries, Purveyances, &c. which were Inheritances unalienable. But to these it was answered and resolved, that being given in Fee, tho' by Act of Parliament, it must have the same Incidents as other Inheritances in Fee have, one of which is to be alienable at Pleasure; and as to its being granted in lieu of Inheritances which were unalienable, that was held not to be material, as those Inheritances were extinct, and so could not effect Inheritances of another Nature newly given; besides those Inheritances of Wards, Liveries, &c. were in Effect alienable, for they might have been released or discharged.

3. How far the King must have an Interest in Order to enable him to grant.

8 Co. 55 b.
56. a.

There are three Kinds of Inheritances which the King may grant, tho' different as to the Manner; which Differences arise from the Nature of his Interest. 1st, All his Lands, Tenements, Rents, Commons, &c. he may grant in Possession, Reversion or Remainder. 2^{dly}, A Corody in a Religious House, or Presentation to a Church, which he can only grant in Possession, or when the Corody or the Church become vacant; for of these he hath only the Presentation or Recommendation, and therefore cannot grant them in Reversion. 3^{dly}, Offices which he may grant, but cannot himself occupy.

5 Co. 95. Berwick's Case.
Moor 393.
S. C.

If the King grants for three Lives, *habendum a die consecrationis Literarum Patentium*, this is void; because an Estate of Freehold cannot commence *in futuro*, and Letters Patents under the Great Seal amount to a Livery; and if the Freehold should pass immediately from a Day to come, then the King would have a particular Interest in the mean Time without any Donor, which is against the Rules of Law.

4 Mod. 275.
The King v. Kemp.
Salk. 465.
Carth. 350.
Comb. 334.
S. C.

Upon a Grant of the Office of a Searcher in the Port of *Plimouth*, it was adjudged, that the King may grant an Estate in an Office to commence *in futuro*, or upon a Contingency; for he hath no Inheritance in the Office or to the Execution of it, but in Point of Interest only to grant; and it was said in this Case, that there was a Diversity between Offices in Fee existing, and such as were granted only for Life; which being as a new Thing created might, as a Rent *de Novo*, be granted to commence *in futuro*.

Dier 108.
2 Rol. Abr.
198.
Fenk. 246.

The King may grant that which is not actually in him at the Time of the Grant; as the Marriage of (a) a Ward, *quando acciderit*; altho' he had the Ward in Right of his Prerogative.

(a) Wards, Liveries, Purveyances, &c. were always in effect alienable, as they might be released or discharged. 5 Mod. 56. *Skin. 605. per Holt Ch. J.* in his Argument in the *Bankers Case*.—But the King cannot grant Land when it shall escheat. *Raym. 241.*—Whether he can grant Land when it shall become derelict. *Raym. 241. 2 Lev. 171.*

Salk. 58. per Barones Scaecar.

The King cannot grant an Annuity, for his Person is not chargeable as the Person of a Subject; but if he grant it out of his Excise, or any Branch of his Revenue, 'tis good, for there is somewhat therewith chargeable.

4. Grants tending to a Monopoly; and therein of Things of a new Invention.

Vid. Tit. Monopoly.

The King's Grant of a Monopoly, as of the sole Buying, Selling, Working, Making or Using of any Commodity, is not only void by

the Common Law ; but the Persons procuring such Grants are said to be punishable by Fine and Imprisonment.

And indeed the Freedom of Trade and Labour is of such Consequence, that as no Person can by his own Act totally debar himself of this Privilege, much less can he be restrained by the King's Letters Patents. 3 Mod. 128.
Noy 182.

But notwithstanding this, it is agreed, that the King may for a reasonable Time grant to a Person the sole Use of any Art first invented by him ; and this it seems the King might do at Common Law, and is therefore a Matter excepted out of the Statute of Monopolies, 21 Jac. 1. cap. 3. by which it is provided, ' That no Declaration in the Statute ' shall extend to any Letters Patents and Grants of Privilege for the ' Term of fourteen Years or under, of the sole Working or Making ' of any Manner of new Manufactures within this Realm, to the true ' and first Inventor and Inventors of such Manufactures, which others ' at the Time of making such Letters Patents and Grants shall not ' use ; so as also they be not contrary to the Law, nor mischievous to ' the State, by raising Prices of Commodities at Home, or Hurt of ' Trade, or generally inconvenient ; the said fourteen Years to be ac- ' counted from the Date of the first Letters Patents or Grants of such ' Privilege ; but that the same shall be of such Force as they should ' be if the said Act had never been made, and of none other.'

In the Construction of this Branch of the abovementioned Statute, the following Points have been held :

' That no new Invention concerning the Working any Manufacture is within the Meaning of this Exception, unless it be substantially new, and not barely an additional Improvement of an old one. 3 Inst. 184.

' That no old Manufacture in Use before, can be prohibited in any Grant of the sole Use of any such new Invention. 3 Inst. 184.

' That if a Patent be granted in Case of a new Invention, the King cannot grant a second Patent ; for the Charter is granted as an Encouragement to Invention and Industry, and to secure the Patentee in the Profits for a reasonable Time ; but when that is expired, the Publick is to have the Benefit of the Discovery. Lucas 151.

' It is held by my Lord Coke, that a new Invention to do as much Work in a Day by an Engine as formerly used to employ many Hands, is not within the said Exception ; because it is inconvenient in turning so many labouring Men to Idleness. 3 Inst. 184.

' If the Invention be new in England, tho' the Thing was practised before beyond Sea, the Patent is good ; because the Act intended to encourage new Devices useful to the Kingdom ; and it is not material whether the Discovery be owing to Study or Travel. Salk. 447.

' If a Man invent a new Art, and another happens to learn it before the Inventor can obtain a Patent, a Patent afterwards obtained, is void. 3 Mod. 77.
said arguendo.

' If a Person obtains a Patent for a new Invention, and another makes Use of the Invention without the Licence or Consent of the Patentee, an Action lies against him. Skin. 204.

5. Grants of the sole Liberty of Printing.

' The King's Prerogative in granting Letters Patents for a Privilege of Printing, hath in many Instances been disputed, and his Power herein greatly doubted, on this Foundation and these Reasons, that Grants of this Kind which exclude all other Persons, and confine this Liberty or Privilege to the Patentees, tend to a Monopoly in handing, Carter 89.
1 Mod. 256.
Skin. 233.
3 Mod. 77.
1 Vern. 275.

fining the Prices of Books, restraining Trade, discouraging Industry, and in making the Patentees careless and remiss in their Duty.

But notwithstanding these Reasons, and the Uncertainty that appears in some of the Cases in the Books on this Subject, it seems the better Opinion, that the King hath a peculiar Prerogative in Printing, which hath been countenanced and allowed in all (a) Ages, and seems established on the fundamental Maxims of Government, as being a Matter of a (b) publick Nature, first (c) introduced by the Kings of England; and in which an (d) unrestrained Liberty might be of dangerous Consequence to the Publick.

(a) *Carter* 90. it is said, that fifty such Patents have been granted since *Ed. 6.* Time. — And that before such Grants, this Business was managed by the King's Servants. (b) In *3 Mod* 75. a Difference is made between Things of a publick Nature, and those only of publick Use; and on this Distinction the Court inclined to think, that the Letters Patents granted for the sole Printing of Blank Warrants, Bonds and Indentures, were not good, these being only of publick Use, and not so in their Nature. (c) The Art of Printing was first at *Harlem*, the News of it came to *Hen. 6.* who at the Desire of the Archbishop brought it over at his own Charge, at the Expence of 1500 Marks; the Person assigned for this Service was a Merchant. *Carter* 91. — Said to be introduced by *Hen. 6.* *Skin.* 234. — And that the King printed the Bible at his own Charge. *1 Vern.* 275. (d) Printing is a Conveyance by which Men communicate their Notions in the most publick Manner, and with the most lasting Impression; and therefore if they are good, this is a Means to spread them and to give them a more diffusive Influence; and if they are bad Notions, this is likewise a Method to spread the Mischief wider. *Skin.* 234.

Moor 673. *Noy* 173. Accordingly we find this Prerogative admitted in the Case of *Darcy v. Allen*, the great Case of Monopolies, and the Reason thereof given by *Dodderidge*, who argued against Monopolies, because it is necessary for the Peace and Safety of the Realm.

1 Mod. 256. It seems agreed, that if a Book has no certain Author, the King has the Property of the Copy, and may grant it to whom he pleases; hence (e) Almanacks are deemed Prerogative Copies. (e) So of the Translation of the Bible, Year Books, Common Prayer, and Statute Book. *Lucas* 105. *2 Chan. Ca.* 76.

Carter 89. *Mich.* 18. *Car.* 2. *Lucas* 106. S. C. cited to have been decreed in Chancery in Favour of the Patentees, and affirmed in the House of Lords. In the 15 Year *Jac. 1.* a Patent for Printing Law Books was granted to one *Moor*, which came to Colonel *Atkins* on his Marriage with *Moor's* Daughter. The Company of Stationers obtained Copies of *Roll's* Abridgment, which they printed; and this being complained of in Chancery by Colonel *Atkins*, an Injunction was awarded, not only against those of the Company (*viz. Tyton* and *Roper*) who were principally concerned, but against every Member thereof; and this Matter coming afterwards before a Committee of Parliament, it was there likewise determined in Favour of the Patentee; and in this Case it was said, that the King hath a particular Prerogative over Law Books, and that so he would have had, if the Art of Printing had never been known.

Skin. 234. S. C. cited and said to have been so determined in *B. R.* *Mich.* 22. *Car.* 2. but reversed in the House of Lords. But the Case of the greatest Weight on this Head, is that of *Roper* and *Streater*, which was this: *Roper* bought of the Executors of Justice *Croke*, the third Part of his Reports, which he printed; Colonel *Streater* had a Grant for Years from the Crown for Printing all Law Books, and printed upon *Roper*; on which *Roper* brought an Action on the Statute *14 Car. 2.* *Streater* pleaded the King's Grant; and on Demurrer it was adjudged in *B. R.* for the Plaintiff against the Validity of the Patent; on these Reasons, that this Patent tended to a Monopoly; that it was of a large Extent; that Printing was a Handicraft Trade, and no more to be restrained than other Trades; that it was difficult to ascertain what should be called a Law Book; that the Words in the Patent, *touching or concerning the Common or Statute Law*, were there the Judgment given in *B. R.* is called a sudden Judgment, and said to be reversed in Parliament. *Lucas* 106. S. C. cited, and there said, that the Validity of the Patent is now established by the Judgment in Parliament. *1 Vern.* 120. S. C. cited, and said it was not now to be shaken.

loofe and uncertain ; that if this were to be considered as an Office, the Grant for Years could not be good, as it would go to Executors and Administrators; and that there was no adequate Remedy in the Way of Redrefs in Cafe of Abufes by Unskilfulness, Selling dear, Printing ill, &c. But this Judgment was reversed on a Writ of Error in Parliament, for the following Reasons; that the Invention of Printing was new; that this Privilege had been always allowed, which was a strong Argument in its Favour, altho' it could not be said to amount to a Prescription, as Printing was introduced within Time of Memory; that it concerned the State, and was Matter of publick Care; that it was in Nature of a Proclamation, which none but the King could make; that the King had the making of Judges, Serjeants and Officers of the Law; that as to the Uncertainty, these Words in the Patent were to be taken *secundum subjectam materiam*, and not to be extended to a Book containing a Quotation of Law, but where the principal Design was to treat on that Subject; that as to its being an Office, it was not so properly an Office, as an Employment which may well enough be managed by Executors or Administrators; and that as to Abufes, these like all others were punishable at Common Law, or the Patent itself might be repealed (a) by *Sci. Fa.*

(a) Tho' it cannot pro-

perly be called an Office, yet it is a Trust, and a *Scire Fa.* will lie to repeal the Grant. 3 *Mod.* 77.

In an Action of Debt by the Company of Stationers against *Seymour*, for printing *Gadbury's Almanack*, it was adjudged, that the Letters Patents, granted that Company for the sole Printing of Almanacks, were good; and tho' the Jury found, that the Almanack so printed contained some Additions; yet having likewise found, that the said Almanack had all the Essential Parts of the Almanack that is printed before the Book of Common Prayer, the Additions were looked upon as immaterial.

1 *Mod.* 256.
3 *Keb.* 792.
S. C. 2 *Show.* 260.
3 *Mod.* 76.
S. C. cited, and a like Judgment said to be given in the Case of the

Stationers Company v. Wright, for printing Psalters and Psalms. *Hill.* 35 *Car.* 2. *Skin.* 234. *Lucas* 106. like Point, but no Judgment.

So an Injunction was granted against *Lee*, on the Application of the Stationers Company to restrain him from selling Primars, Psalters, Almanacks and Singing Psalms imported from *Holland*; the sole Privilege of Printing these belonging to that Company; and that (b) without any Trial directed as to the Validity of the Patent.

(b) An Injunction was refused to

stay the Sale of *English Bibles*, and to quiet the Right of the Patentees, because not a plain Right; and therefore an Issue directed. 1 *Vern.* 120.—So where the University of *Oxford* claimed by Patent a Right of Printing Bibles, tho' the Lord Keeper was of Opinion, that the University Patent extended to no more than were for their own Use, or to some small Number to compensate their Charge; yet he refused to grant an Injunction until the Right was settled by a Trial at Law. 1 *Vern.* 275. & *vid.* 2 *Chan. Ca.* 76, 93. & *Q.* as to these Cases; for Injunctions seem frequently to have been since granted in Favour of Patentees and Owners of Books, upon producing the Patent in Court under the Great Seal.

Here it may be proper to take Notice of the Acts of Parliament relative to this Matter, and the rather as they have been urged as Arguments for the King's Prerogative in these Concerns. The first Statute is that of 25 *H.* 8. *cap.* 15. which expressly provides in Cases of Books, that the Lord Chancellor, Lord Treasurer, or any of the Chief Justices, may set and limit the Prices as well of Books as of Binding.

In the Statute 21 *Jac.* 1. *cap.* 3. against illegal and mischievous Monopolies, it is particularly declared, that this Statute should not extend to, or any ways impeach Patents for sole Printing thencefore made or then after to be made.

1 *Show.* 260.

1 *M.d.* 257.
2 *How.* 260.

The Statute 14 *Car.* 2. (now expired) recites, that Printing is a Matter of publick Care, and every where countenances the sole Privilege of Printing, and seems to be founded on the King's Prerogative; but was a hard Law and injurious to the Liberty of the Subject, in restraining the Number of Presses, licensing Books, and imposing Penalties and Forfeitures.

(a) It seems also a good Foundation for an Action at Common Law, or for an Application to a Court of Equity; but in Order to entitle the Party to the Penalty in the Statute, the Terms of the Act as to registering the Book in the Stationers Company, &c. must be complied with.

By the 8 *Ann. cap.* 19. 'The Author of any Book not yet printed, and his Assigns, shall have the sole Liberty of Printing it for fourteen Years, to commence from the Day of publishing thereof; and (a) if any Person within the said Time shall print, reprint or import any such Book without the Consent of the Proprietor in Writing signed in the Presence of two credible Witnesses, or shall knowingly publish it without such Consent, the Offender shall forfeit the Books and Sheets to the Proprietor, who shall forthwith damask and make them Waste-Paper, and shall forfeit 1 *d.* for every Sheet found in his Custody, either printed or printing, one Moiety to the Crown, the other to him who will sue in any Court at *Westminster*.'

2. Of the Construction of the King's Grants and Letters Patents, as to their being good or void; and herein of the King's being deceived in his Grant.

Plow. 333.
1 *Co.* 44.
6 *Co.* 55.
7 *Co.* 12.
8 *Co.* 56.
(b) 2 *Co.* 24.
8 *Co.* 145.
Hob. 224.
Pollexf. 418.

As the King's Grants proceed chiefly from his own Bounty, and his Letters Patents are Records of a high Nature, they ought to contain the utmost Truth and Certainty, and have in all Times been construed most favourably for the King (b) contrary to the Grants of common Persons; and accordingly in a great Variety of Cases we find Uncertainty, Misrecitals, false Suggestions, and all such Matters as shew that the King was deceived in his Grant, held such Reasons as have been sufficient to vitiate the Grants.

In a Matter therefore in which such great Exactness has been required, it may be necessary in the first Place to lay down the following general Rules.

(c) 5 *Mod.* 297.
2 *Salk.* 560.
Carth. 440.
Skin. 651.
1 *Ld. Raym.* 292. S. C.

First, That in the Construction of Letters Patents every false Recital in a Part not material will not vitiate the Grant, if the King's Intent sufficiently appears; this was so held in the Case of (c) *The King and Bishop of Chester*, where the Grant was made to a Knight who in Truth was no Knight; and tho' the Grant was held void for this Reason in *B. R.* yet the Judgment was reversed in Parliament.

(d) 4 *Mod.* 277.
Carth. 350.
Comb. 334.
Salk. 465.
1 *Ld. Raym.* 50. S. C.

Secondly, That if the King is not deceived by the false Suggestions of the Party, but only mistaken by his own Surmises, this will not vitiate his Grant; and so was the Resolution in the Case of (d) *The King v. Kemp*.

(e) 6 *Co.* 55.
Ld. Chandos's Case.

Thirdly, That tho' the King mistakes either in Matter of Law or Fact, yet if this is not any Part of the Consideration of the Grant, it will not vitiate it; and so is (e) *Lord Chandos's Case*, which was thus: *Hen.* 7. granted to *Lord Chandos* a Manor in Tail, and the same King by other Letters Patents reciting the former Grant, and that in Consideration thereof to be cancelled that he was and is seised in Fee, did

grant the said Manor to Husband and Wife and to the Heirs of the Husband, &c. Now, tho' by the Surrender of the first Letters Patents, the Estate-Tail was not determined; and so the King not seised of the Manor in Fee as he recited he was in the second Grant; for he had only a Reversion in Fee expectant upon the Determination of the Estate-Tail; yet the Clause, viz. by Virtue whereof we are seised in Fee, being what the King collected to be the Consequence of the Surrender, and not at all owing to the Misinformation of the Party, either as to the Intail or Surrender, the Mistake which he made being no Part of the (a) Consideration, the Grant was held good.

(a) It is said the King may

grant without any Consideration. *Hob* 230.—So if the Consideration be not a full one, it is no Objection; for Kings are supposed to be bountiful. *1 Vern.* 279.—If the King be deceived in a Consideration real Executory, it will avoid the Grant; but not in a Consideration personal Executed. *Frem.* 332. For this Difference *vid.* *5 Co.* 93. *Jenk.* 304. *10 Co.* 67. but in *5 Co.* 94. *Berwick's* Case, it is said to be a Maxim, that if the Consideration which is for the Benefit of the King, be it executory or executed, or be it of Record or not of Record, if it be not true or not truly performed, or if any Prejudice may arise to the King by Reason of the Non-Performance thereof, the Letters Patents are void, & *vid.* *Moor* 393. *Hob.* 221. *3 Leon.* 248. *Plow.* 454. *Skin.* 663. *Lane* 3. 76. *Dier* 252.

Fourthly, That the Words *ex certa Scientia & mero Motu*, in the King's Charters and Letters Patents, do occasion them to be taken in the most benign and liberal Sense, according to the Intent of the King expressed in his Grant.

Bro. Patents
pl. 80.
Pl. w. 337.
6 Co. 56.
7 Co. 14.

3 Leon. 249.—But where the King in his Grant recites a Thing which is false, that shall not make the Patent good, altho' the Words be *ex certa Scientia & mero Motu*. *10 Co.* 112. *3 Leon.* 249. *Plow.* 502. *3 Co.* 4. *Savil* 5, 37. *Dier* 300. *Salk.* 561.

Fifthly, That tho' in some Cases, general Words of a Grant may be qualified by the Recital, yet if the King's Intent is plainly expressed in the Granting Part, it shall enure according to that, and is not to be restrained by the Recital.

So held in the Case of *The King and Bishop of Chester* which is grounded on *Legatt's* Case, *10 Co.* 112.

In a *Quare Impedit*, it was found by special Verdict, that King *H. 8.* was seised in Fee of the Manor of *Leyburn* in *Kent*, to which the Advowson of the Church of *Leyburn* is appendant (which Manor came to the King by the Dissolution of Monasteries, having been Part of the Possessions of the Abbot of *Gray Church*) and that he granted the Manor to the Archbishop of *Canterbury* and his Successors, saving the Advowson; afterwards the Archbishop regranted the Manor and the Advowson to the King, his Heirs and Successors; after which the King grants the Manor with the Appurtenances, and this Advowson (naming it in particular) which lately did belong to the Archbishop of *Canterbury* and to the Abbot of *Gray Church*, together with all Privileges, Profits, Commodities, &c. in as ample Manner as they came to the King's Hands by the Grant of the Archbishop, or by Colour or Pre- tence of any Grant from the Archbishop, or by Surrender of the late Abbot of *Gray Church*, or as amply as they are now or at any Time were in our Hands, to *Sir Edward North* and his Heirs; and the Question was, whether by this Grant the Advowson did pass; and adjudged that it did; for tho' here was a Falsity or Misrecital, the Advowson never having been in the Hands of the Archbishop, yet that not being material, as the King could not be said to be deceived, having granted the Advowson expressly by Name, it was adjudged *ut supra*.

1 Mod. 195.
2 Mod. 1.
2 Keb. 442.
The King v.
Sir Francis
Clark.

In the Argument of the above Case, the following Points were laid down as supported by the Authorities in the Margin.

1. Where

- Cro. Eliz.* 1. Where a particular Certainty precedes, it shall not be destroyed
 34, 48. by an Uncertainty or a Mistake coming after.
Yelv. 42.
 3 *Leon.* 162. 1 *And.* 148. 2 *Godb.* 423. *Markham's Case.* 10 *Co.* *Legatt's Case.*
- 21 *E.* 4. 49. 2. That there is a Difference when the King mistakes his Title to
 33 *H.* 7. 6. the Prejudice of his Tenure or Profit, and when he is mistaken only in
 36 *H.* 8. 37. some Description of his Grant, which is but supplemental and not
 9 *E.* 4. 11, 12. material nor issuable.
Lane 111.
 2 *Co.* 54.
 1 *Bull.* 4. 3. That distinct Words of Relation in the King's Grant are
Dier 350. good to pass away any Thing.
 9 *Co.* 24.
 10 *Co.* 4. *Whistler's Case.*
- 2 *Inst.* 446-7. 4. That when the King's Grants are upon a valuable Consideration,
 6 *Co.* *Sir John* they shall be construed favourably for the Patentee for the Honour of
Molin's Case. the King.
 10 *Co.* 65.

Hob. 220. One *Southwell* and his Wife being seised of the Parsonage of *Horsham*
Needler v. Bi- to them and the Heirs of the Husband, by Deed dated 10 *May* gran-
shop of Win- ted the same to *K. Hen.* 8. in Consideration whereof the same King,
chester. by his Letters Patents dated the 21 *July* following, granted the Vi-
 carage of *Horley* to them and the Heirs of the Husband; after
 which, and on the 26 *July* following, the Deed 10 *May* was in-
 rolled; and it was objected, that the King was deceived in the Con-
 sideration, as nothing passed by the Deed before Inrolment, and there-
 fore the Grant void; but notwithstanding this it was held, that here
 was no Deceit in Effect, that tho' the Deed could not be pleaded as
 such before inrolled, yet it took its Force and Effect from the Execu-
 tion; and to that the Inrollment shall have relation, so as to make it
 good *ab initio*.

Plow. 455. If the King recites the Consideration to be the Services of the Pa-
Sir Thomas tentee, tho' none were done by him, or if he recites that a Manor
Wroth's Case. came to him by Escheat, when in Truth it was his Inheritance; these
 will not vitiate the Grant; *secus* if they are the Surmises of the Party.

1 *Leon.* 30. 1 Queen *Eliz.* being seised of a great Waste in the Parish of *Chipnam*;
Sir Walter granted a Moiety of a Yard-Land in the said Waste to the Mayor and
Hungerford's Burgesses of *Chipnam*, without any Certainty, Name or Description;
Case. and afterwards granted the said Waste to *H.* And it was adjudged, that
 this first Grant was void, not only against the Queen, but against the
 second Patentee, for Incertainty; and (a) that it could not, as in Case
 of a common Person, be made good by any Election of the Pa-
 tentee.

(a) 12 *Co.* 86. *Ed.* 6. granted *totam illam rectoriam de Dale, ac omnes decimas, &c.*
L. P. & vid. *quæ quidem omnia & singula Præmissa* are of the true yearly Value of
Tit. Election. 32 *l.* and at the Time of this Grant there was a Farm in the Parish of
Dale in Lease under a yearly Rent; and tho' the Words *quæ quidem*
omnia, &c. refer only to Tithes of that yearly Value, and it might
 be the King intended to pass no more, yet having granted *totam illam*
rectoriam generally, it was adjudged, that the Tithes of that Farm,
 should pass, tho' it made it more than 32 *l. per ann.*

8 *Co.* 167. If the King grants *totum illud manerium suum, sive totam illam rector-*
Lane 39. *riam sive Advocationem, &c.* if he had a Manor and no Rectory, or
Cumberland's an Advowson and no Rectory, or a Manor or a Rectory inappropriate,
Case. yet that which he had shall pass, because it was the Effect of the
 Grant; and in this Case a Rule was laid down, *viz.* that (b) if the
 King's Grant may be taken to two Intents, one of which may be good,
 and

and the other not, it shall be construed to such Intent that the Grant may take Effect.

If the King grants a Manor with such Privileges and Franchises as the Dean and Chapter of *St. Paul's* formerly enjoyed therein, it is a good Grant because of the Certainty to which it relates.

So a Grant of a Manor, *Habend.* to the Grantee and his Heirs *adeo plene & integre*, as it came to the Hands of the King by the Attainder of *J. S.* or as is contained in such Letters Patents, or the like, is good according to the Rule, *id certum est quod certum reddi potest.*

King *Ed. 6.* being seised of the Manor of *Cleobery*, then late Parcel of the Possessions of the late Earl of *March*, whereof a great Wood was Parcel, grants this Wood to the Lord *Paget* in Fee; from the Lord *Paget* it came to the Lord *Seymour*, and by his Attainder it returned to *Ed. 6.* again, from *Ed. 6.* the Manor and Wood came to *Q. Mary*, and from her to *Q. Eliz.* who grants to the Earl of *Leicester* this Manor, *nuper parcell. Possessionum nuper comitis Marchie, et omnia ab' ter', bosq' & hereditamenta manerio præd' spectant', vel ut pars, parcell' sive membrum inde antebac habita, cognita sive reputata existant'*; and it was adjudged that these Woods did pass.

Sir *Francis Fortescue* being seised of a Manor, grants the same to the Earl of *Denbigb*, except such Lands as were then held for Life by Copy; afterwards the Inheritance of this Copyhold was granted to the Earl of *Denbigb*, and then the Copyholder dies, and the Earl grants by Copy again, and afterwards forfeited all to the King, who granted the Manor and every Part and Parcel thereof, or that is reputed Parcel thereof, to the Earl of *Clarendon*; and the Question was, whether this Copyhold, having been thus severed, passed by the Words *reputed Parcel*, or not; and adjudged that it did.

If the King grants to *J. S.* Lands and the Mines therein contained, and Royal Mines are found in them, they shall not pass; for the King's Grant shall not be taken to (a) a double Intent; and the most obvious Intent is, that they should only pass the common Mines that are grantable to a common Person.

all shall not pass by general Words of all Mines, Amercements and Escheats. *Dav. 17, 57.*

So a Grant of *Bona Felonum, &c.* will not pass the Goods of one who stands mute and will not plead.

1 *Roll. Rep.* 399. 12 *Co.* 75. *Jenk* 325. 2 *Roll. Abr.* 194. *Owen* 155. 1 *Sand.* 275. 2 *Show.* 133. 1 *Vent.* 32. 1 *Sid.* 142. 2 *Mod.* 107.

By the Statute 17 *E. 2. de Prærogativa Regis*, the King's Gift or Grant of Land, Manors, *cum Pertinentiis*, conveyeth not Knight's Fees, Advowsons or Dowers, without express Words; tho' it be otherwise in the Case of a common Person.

But if a Manor with an Advowson appendant be in the Hands of the King by Escheat or by Purchase, and he at this Day gives it as intirely as *J. S.* held it before it came into our Hands by way of Escheat, or as *J. S.* held who infeoffed us, in such Case the Advowson shall pass without saying in the Charter *cum feodis & advocacionibus*; because the Law in such Case intends, that the King is apprised of his Right.

So if the King grants *Ecclesiam*, the Advowson passes, the (b) Intent, and not the precise Words, being to be regarded in the King's Grants of the Vicarage of *D.* will not pass the Advowson of the Vicarage of which the King was seised.

A Grant of a Stewardship of several Manors by Name, without mentioning in what County, has been held good tho' uncertain; because

Cro. Eliz. 512, 513. *Ld. Darcie's* Case.

10 *Co.* 63. *Whistler's* Case.

Dier 362. *Co. Ent.* 383. *The Queen v. Thornton.*

Pollex. 410. *Freem.* 207. *Lee v. Browne.*

Plow. 336. (a) Mines Royal, Amercements Royal, Escheats Roy

8 *H. 4.* 2. pl 2. *Raym.* 242. cited, & *vid.*

10 *Co.* 64. *Plow.* 251.

Latib 248. (b) The King's Grant

9 *Co.* 42. 4 *Mod.* 279. cited.

cause the King may have divers Manors of the same Name, and no Issue can be taken which Manors the King intended to pass.

8 Co. 45.
4 Mod. 279.
cited.

So a Grant to the Earl of Rutland, *a tempore plenæ ætatis*, when in Truth he was of Age long before, was adjudged a good Patent, because it was the Intent of the King that it should commence from that Time; and if that could not be, then for the Time to come.

1 Co. 46.

If the King, being Tenant in Tail or for Life, grants *totum statum suum*, nothing passes.

Dav 43, 45.

1 Rol. Abr.

845.

1 Co. 43.

So if the King, being seised in Fee, grants the Lands or a Rent, and limits no particular Estate in the Gift, the Grant is void, and the Patentee has no Freehold either for his own Life or for the Life of the King, nor even an Estate at Will; because most Grants proceeding from the Application of the Subject, they ought to know what they ask; and if that do not appear, nothing shall pass from the King by Reason of the Incertainty.

Co. Lit. 27. a.

Jenk. 199.

So if Lands are given to a Man and his Heirs Male, this is void, for there can be no such Tenure; and therefore the King is deceived in his Grant.

3 Lev. 134.

Travel v. Carteret.

So if the King possessed of a Chattel Interest grants it in Fee, this is void.

3. Where the King's Grantee shall partake of his Prerogative.

Dier 1. pl. 7.

8. in Marg.

Kelw. 169.

(a) 1 P. Will.

252.

A *Chose in Action* may be assigned to the King, as also granted or assigned by him; and in this latter Case, the Grantee may either sue in his own or in the King's Name; but it is (a) said to be most usual to sue in the King's Name, in order to take Advantage of his Prerogative.

Dier 30.

Sav. 2.

(b) Owen 113.

Cro. Jac. 82.

like Point.

J. S. attainted of Treason, and being possessed of certain Obligations which became forfeited, the King granted them to the Wife (b) without any Words enabling her to sue for them in her own Name; and she having sued in her own Name, it was held, that she well might; for the Law allowing the Grant good, gives by Implication the Grantee the necessary Means of attaining the Benefit of it.

Cro. Jac. 179.

The King

v. Twine.

Sav. 133.

So where *J. S.* in an Action on the Case recovered 4000*l.* Damages, and afterwards became outlawed in a Personal Action; and the King having granted this 4000*l.* it was held, that the Grantee may levy this Debt by Action in his own Name, or by Extent in the King's Name; tho' he has no Words in his Grant to sue it in the King's Name, as is usual in such Cases; but in this Case an (c) Assignment by the King's Patentee was held void.

(c) 2 Lev.

49, 50.

Bro. Disseif. 65.

(d) That the

King's Pa-

tentee shall

not take Ad-

vantage of

the Maxim

Nullum tempus occurrit regi. Poph. 25.

If the King enters without Title, or seises Lands by a void or insufficient Office, he is no Disseisor; but (d) if the King by Letters Patents grants Lands so seised, and the Patentee enters, he is a Disseisor; because he has Time to inquire into the Legality of his Title, which the King is supposed to want Leisure for.

Ero. Prerog.

68.

The King may distrain for his Rent-Service in any Lands of his Tenant; so if he hath a Rent-Charge issuing out of certain Lands, he may distrain in any other Lands of the Party; but his Grantee cannot do so.

6 Mod. 149.

Originally all Wrecks were in the Crown, and the King has a Right to a Way over any Man's Ground for his Wreck; and the same Privilege goes to the Grantee thereof.

Privilege.

PRIVILEGE is an Exemption from some Duty, Burthen or Attendance, to which certain Persons are intitled, from a Supposition of Law, that the Stations they fill, or the Offices they are engaged in, are such as require all their Time and Care; and that therefore without this Indulgence it would be impracticable to execute such Offices to that Advantage which the publick Good requires.

Under this Description we shall consider,

(A) The Duties and Offices from which certain Persons by reason of their Privilege are exempt.

(B) The particular Privileges in Suits allowed Officers and Attendants in the Courts of Justice: And herein,

1. What such Officers are that are intitled to Privilege.
2. Of the Privilege and Protection allowed those whose Attendance is necessarily required.
3. In what Cases this Privilege is to be allowed.
4. Of claiming and allowing Privilege; and therein, that it must be set forth and pleaded.
5. How privileged Persons are to sue and be sued.
6. Whether there can be Privilege against Privilege.

(C) Privilege of Peers and Members of Parliament.

1. Who such Persons are that are intitled to this Privilege.
2. How far this Privilege extends to their Servants and Attendants.
3. In what Cases this Privilege is to be allowed.
4. Of the Commencement and Continuance of this Privilege.
5. How Privilege is to be claimed and taken Advantage of.
6. What shall be deemed a Breach of Privilege.
7. Of the Proceedings in Courts by and against Persons intitled to Privilege of Parliament.

(A) The

(A) The Duties and Offices from which certain Persons by reason of their Privilege are exempt.

2 *Inst.* 531.
704.
Skin. 21.
2 *Chan. Rep.* 196. 2 *Show.* 84.—Privileged from Arrests. *Raym.* 152. *vid.* 1 *Mod. Cases* 12.
Sir Hans Sloan's Case.

THE King's Servants are privileged in some Cases in respect to their necessary Attendance.

(a) 1 *Sid.* 287. One (a) *Swallow*, being the King's Minter or Monyer, was elected
1 *Mod.* 10. an Alderman of *London*, but refusing to take the Oath of an Alderman was fined, and committed for the Fine by the Judgment of the
2 *Keb.* 50. Court in *London*, which appeared on the Return to a *Habeas Corpus*.
54. S. C. He alledged in *B. R.* that he was an Officer of the Mint, and that
Swallow's Case. by an ancient Charter of Privilege granted such Officers, he ought to be exempt; and offered to plead this Matter to the Return of the *Habeas Corpus*, as a Matter consistent with it; but this the Court refused to admit, as he might have pleaded it in the Court below; however he was directed to set it forth in a Suggestion in the Crown-Office, which he did, and obtained a Writ of Privilege, which at another Day he brought into Court. The Recorder objected to its being allowed against the ancient Privilege of the City, confirmed by Acts of Parliament; but the Court held it a reasonable Privilege, the Office being ancient, and the Attendance necessary elsewhere; they said, that if there were not Persons sufficient besides to serve, this might have been shewn, and it would be a good Reason to suspend his Privilege; and tho' Aldermen were not mentioned in the Charter, yet as superior and inferior Officers were mentioned, as Mayor, Sheriff, Escheator, Collector of Tenths, &c. they said the Middle were included; and accordingly he was discharged.

1 *Sid.* 272. But where some Persons belonging to the Custom-House *London*
1 *Keb.* 933. were indicted for not keeping Watch and Ward, tho' they pleaded a
The King v. Clark. special Privilege granted them by the King to exempt them from this Duty; yet as they did not aver that there were sufficient Persons besides, the Plea was over-ruled.

1 *Sid.* 243. The King by his Charter may exempt some Persons from serving on
1 *Lev.* 159. Juries if there be enough besides; but such Charter of Exemption
Raym. 113. does not extend to the Court of King's Bench, unless particularly named;
1 *Keb.* 840. nor to any Case where the King is concerned, unless it has these Words, *licet tangat nos*; also the Sheriff must not return such Privilege, but the Persons who would have the Benefit of it must claim it.

1 *Leon.* 207. A Juror surmised at the Bar, that he was Tenant in Ancient
Mills v. Snowballs, vid. Tit. Ancient Demesne. Demesne, and had his Charter in his Hand, and prayed to be exempted from serving on the Jury; but the Court did not regard it, but caused him to be sworn; it was said (b) he might have his Remedy against the Sheriff, or if he had made Default and lost Issues, he might
(b) *Q. & vid. Co. Lit.* 130. shew his Charter in the Exchequer upon the Amercement estreated,
1 *Sid.* 243. and there he should be discharged.

2 *Mod.* 182. Where a Peer is Party, either Plaintiff or Defendant, two or more
1 *Mod.* 226. Knights must be returned on the Jury; and it was said, that in *Cumberland* there was but one Freeholder who was Knight, besides *Sir Richard Stote*, a Serjeant at Law; and the Court were of Opinion, that
Comb. 117. rather than there should be a Failure of Justice, a Serjeant at Law
Dier 107. ought
pl 27.

ought to be returned a Juryman; for that his Privilege would not extend to a Case of Necessity.

If a sworn (a) Attorney or other Officer of any of the Courts of *Westminster Hall* be chosen Constable, he may have a Writ of Privilege for his Discharge; and it is held, that such Officers shall have this Privilege, 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 supposed to be more ancient than the Usage of those Courts, and therefore shall give way to them.

March 30. Noy 112. Cro. Car. 389. 2 Keb. 477. (a) This Privilege is thought to extend to Barristers at Law, and the Servants

of Members of Parliament. *2 Hawk. P. C. 63.*

So an Attorney being chosen Church-warden of a Parish, may have a Writ of Privilege; so a Writ of Privilege was signed by all the Court of *C. B.* for *G.* a Clerk under the *Custos Brevium*, to free him from being a Soldier; and it is therein recited, that it is the Privilege of the Court, that neither the Attornies nor Clerks of it should be elected to any Office without their Consent, but ought to attend the Service of the Court.

2 Rol. Abr. 272. Palm. 392. 2 Rol. Rep. 1 Lev. 265. 1 Vent. 16, 29. Raym. 180. Cro. Car. 11. 389, 585.

and *Co. Ent. 436.* the like Writ of

Privilege.

Gale an Attorney of *B. R.* was elected one of the twenty-four Burgeffes in the Town of ——— and because he refused to serve was fined ten Pounds; then he procured a Writ of Privilege, which he shewed; after which Debt was brought for the ten Pounds in *B. R.* and it was prayed after Impar lance to stay the Action against *Gale*, because that after Impar lance he could not plead his Privilege to the Action; and *Stone's Case* was cited, who was elected Reeve to collect the Rents of the Lord at *Harrow the Hill*, and was discharged by his Writ of Privilege. The Court held, that the Privilege of an Attorney was a good Discharge in this Case; they likewise held, that the Writ of Privilege had a Retrospect to the Whole, and that being discharged from the Office, he was discharged from the Fine also.

Trin. 27 Car. in B. R. Gale's Case. 3 Keb. 512. S. C.

It seems to be the better Opinion, that if a Captain of the King's Guards, a Gentleman of Quality, or practising (b) Physician, be chosen Constable in a Parish, where there are Persons sufficient to serve, and in which there is no special Custom directing such Election, that every such Person may be relieved or discharged by the Court of King's Bench, which hath a supreme and mandatory Power in Cases of this Nature; but in Case of a special Custom in respect of Estate or otherwise, it hath been holden, that such Persons are not to be excused; and the rather because they may execute the Office by Deputy.

1 Sid. 272, 355, 431. 1 Mod. 22. 1 Lev. 233. 1 Keb. 439. 933. 2 Keb. 309, 578. (b) Members of the College of

Physicians in *London* exempted by the Statute *32 H. 8. cap. 40.*

By the Statute *5 H. 8. cap. 6.* Surgeons are exempt from serving Parish Offices. *2 Keb. 578.*

By the *6 W. 3. cap. 4.* 'All Persons using the Art of an Apothecary, and who shall be brought up and serve in the said Art as Apprentices seven Years, shall be exempted from the Offices of Constable, Scavenger, Overseer of the Poor, and all other Parish, Ward and Leet Offices, and from serving on Juries.'

If an Alderman of *London* has a House in the Manor of *R.* in the County of *Essex* (in which Manor the Lord has by Prescription a Leet) and he as an Inhabitant is chosen Constable there, 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.—And a Writ awarded to the Lord of the Manor to discharge him.

Cro. Car. 585. 1 Fon. 462. Alderman Abdy's Case.

2 *For.* 46.
Price's Calc.

One *Price* being High Constable of the Hundred of *Wanslead*, was elected Overseer of the Poor in the Parish of *St. Peter the Poor* in *London*; and upon producing the Certificate of the Justices of the Peace of the County, and their certifying that his Service in the Office of Constable was of great Use and Importance to his Majesty, he was by the Court of *B. R.* discharged from the Office of Overseer 'till such Time as his Office of Constable expired.

1 *Vent.* 344.
 2 *Show.* 75.
The King v. Bettefworth.

But where *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 further than the Demesnes; and it was adjudged that he might.

1 *Vent.* 105.
 1 *Lev.* 303.
Dr. Lee's Case, and
 1 *Mod.* 282.
S. C. where it is said,
 the Reason was,

because the Land was in Lease, and the Tenant, if any, ought to do the Office. Doctor *Lee* having Lands within the Level, was made an Expenditor by the Commissioners of *Sewers*; whereupon he prayed his Writ of Privilege, which was granted; for the Register is, *Vir militans Deo non implicetur secularibus negotiis*; and the ancient Law is, *quod Clerici non ponantur in Officia*—Clergymen are not to serve in the Wars.

6 *Mod.* 140.

A Writ of Privilege was moved for to have a Clergyman, who appeared to have no Cure of Souls, privileged from the Office of Overseer of the Poor, which three Judges thought reasonable; but *Holt Ch. J.* seemed against it, who thought that their Privilege of Exemption was only extendible to their spiritual Revenues; and if in any Case they were personal, it was only from Common Law Offices, especially if they were without Cure, as in the present Case; and in Deference to his Opinion it was directed to be moved for again.

Mich. 9 Geo. 2.
in B. R. Evedon's Case.

In the Case of *Evedon* an Attorney of *B. R.* it was determined, that he was not obliged to serve in the Train-Bands, or to find a Deputy for that Purpose, altho' the Array and Muster of these is directed by several Acts of Parliament which contain general Words; for his Privilege shall exempt him from Offices, as well created by Statute as those at Common Law, if there be not an express Clause for taking away his Privilege.

(B) The particular Privileges in Suits allowed Officers and Attendants in the Courts of Justice: And herein,

1. Who such Officers are who are thus intitled to Privilege.

2 *Inst.* 551.
 4 *Inst.* 71.
Vaugb. 154.
Dier 377. a.
 11. 30.

THE Officers, Ministers and Clerks of the Courts in *Westminster-Hall* are allowed particular Privileges in respect of their necessary Attendance on those Courts; they are regularly to sue and be sued in the Courts they respectively belong to, and cannot, except in certain Cases, be impleaded elsewhere; which Privilege arises from a Supposition of Law, that the Business of the Court or their Clients Causes would suffer by their being drawn into any other than that in which their personal Attendance is required.

Anderson Ch. J. of the C. B. brought Trespass by Bill for breaking his House in the City of *Worcester*, against a Citizen of the said City; the Mayor and Commonalty came and shewed a Charter granted by E. 6. and demanded Conuzance of Pleas; but it was refused, because the Privilege of that Court, of which the Plaintiff was a chief Member, is more ancient than the Patent; for the Justices Clerks and Attornies of this Court ought to be here attending to do their Business, and shall not be impleaded or compelled to implead others elsewhere; and this Privilege was given this Court upon the original Erection of it.

An Attorney, so long as he remains on Record, shall have his Privilege; and therefore where it was moved, that *J. S.* should put in special Bail, being an Attorney at large, and having (a) discontinued his Practice, the Court said, that Attornies at large have the same Privilege with the Clerks of the Court, and are to appear *de die in diem*; and they were not satisfied that he had discontinued his Practice. *absents himself for a Year, by the new Rules he loses his Privilege.* *2 Lill. Reg. 371. per Glin Ch. J.*

But where *J. S.* was arrested in *B. B.* and after the Arrest he procured himself to be made an Attorney of C. B. and prayed his Privilege; it was disallowed, because it accrued *pendente lite.*

In Debt against the Warden of the *Fleet*, by Bill of Privilege, he refused to appear; the Court doubted how they could compel him, as they could not forejudge him the Court, he having an Inheritance in his Office; but it being surmised that he made a Lease of his Office, it was held, that he should not have his Privilege, for that the Lessee, and not he, was the Officer during the Lease.

So if the Marshal of *B. R.* grants his Place for Life, the Grantor has no Privilege during that Time.

A Clerk of *B. R.* was sued in an inferior Court for a Debt under five Pounds, and had a Writ of Privilege allowed; for the *Stat. 21 Jac. 1. cap. 23.* never intended to take away the Privilege of Attornies.

In the Court of (b) Exchequer there are three Sorts of Privilege: *1st*, As Debtor. *2dly*, As Accountant. *3dly*, As Officer.

Minister of the Exchequer is one of the Parties in a personal Action, he shall be sued in that Court, because his Absence might hinder the King's Affairs; so a Prisoner of this Court, or any Accountant that is entered into his Account, shall have the like Privilege; and a Farmer or one indebted to the King, for the King's more speedy Satisfaction of his Debt or Duty, may sue his Debtor by a *Quo minus* in the Exchequer. *2 Inst. 531.*

J. S. was sued in an Action of Battery in *London*, which he removed into *B. R.* and afterwards prayed his Privilege of the Court of Exchequer; and upon the Puisne Baron's coming into Court, and bringing the Red-Book of the Exchequer, which shewed that he was an Escheator, and so an Accountant to the King, the Privilege was allowed.

If one holds of the Queen as of her Manor, he shall not have the Privilege of the Exchequer for that Cause; but (c) if the King grants Tithes, and thereupon reserves a Rent *Nomine Decimæ*, and a Tenure of him, there he shall have Privilege.

nant of the King in Chief, or he who pays First Fruits, or he who holds of the Queen in Fee-Farm, shall not have Privilege. *Q. & vid. 3 Leon. 258.*—That commencing a Suit in the Exchequer on a *Quo minus* 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. *Hard. 316. 2 Vent. 362.*

3 Leon. 149.
Ld. Anderson's Case

Bro. Tit. Attorney 67. Tit. Bill 24.
1 Vent. 1.

Sir John How v. Walley.

(a) That if an Attorney

2 Lill. Reg. 371. per

2 Rol. Rep. 115.

2 Leon. 173.
Gittirson v. Tyrrel.

1 Vent. 65.

Palm. 403.

21

Jac. 1.

cap. 23.

never

intended

to

take

away

the

Privilege

of

Attornies.

In

the

Court

of

(b)

Exchequer

there

are

three

Sorts

of

Privilege:

1st,

As

Debtor.

2^{dly},

As

Accountant.

3^{dly},

As

Officer.

(b)

Where

an

Officer

or

Minister

of

the

Exchequer

is

one

of

the

Parties

in

a

personal

Action,

he

shall

be

sued

in

that

Court,

because

his

Absence

might

hinder

the

King's

Affairs;

so

a

Prisoner

of

this

Court,

or

any

Accountant

that

is

entered

into

his

Account,

shall

have

the

like

Privilege;

and

a

Farmer

or

one

indebted

to

the

King,

for

the

King's

more

speedy

Satisfaction

of

his

Debt

or

Duty,

may

sue

his

Debtor

by

a

Quo minus

in

the

Exchequer.

2

Inst.

531.

Noy

40.

Wal-

rend

v.

Wiz-

roll.

2

Leon.

21.

Lightfoot

v.

Butler.

(c)

In

2

Leon.

146.

it

is

said,

that

the

Ten-

ant

of

the

Queen

in

Fee-

Farm,

shall

not

have

Privilege.

Q. & vid.

3

Leon.

258.

—That

commencing

a

Suit

in

the

Exchequer

on

a

Quo minus

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.

Hard.

316.

2

Vent.

362.

2 *Show.* 299. On a *Latitat's* being sued out against the Commissioners of the Treasury, the Puisne Baron of the Exchequer came into the Court of *B. R.* and brought into Court the Red-Book of the Exchequer, which is deemed a Record in that Court; and thereby it appeared, that the Treasurer had Privilege of being sued only in that Court; and the Patent being produced in Court which constituted the Defendants, &c. and granted them the Office of Treasurer of *England*, their Privilege was allowed them without putting them to bring a Writ of Privilege, the Court grounding themselves on the (a) Record before them.

(a) Difference between Officers that are of Record and not. *Hard.* 164.

Hard. 316. *vid.* It hath been held, that the Treasurer of the Navy is *eo ipso* an Accountant; and that an Accountant's Privilege will hold against a special Privilege in another Court, as Officer of the Court or otherwise; tho' it be not alledged that such an Accountant is (b) entered upon his (b) But if an Accountant may be attached by the Court to make up his Accounts, and must attend for that Purpose *de die in diem.*

Moor 753.
2 *Inst.* 23, 551.
Bro. Privilege 16.
But if an Accountant has finished his Account and reduces it to a Debt, he shall have no Privilege but as a general Debtor. *Hard.* 365.

Raym. 34. In Debt in *B. R.* against *J. S.* he pleaded to the Jurisdiction, that none of the Privy Chamber ought to be sued in any other Court, without the special Licence of the Lord Chamberlain of the Household, and that he was one of the Privy Chamber; on Demurrer to this Plea, the Court over-ruled it with great Resentment, and awarded a *Respondeas Ouster.*

1 *Keb.* 137.
Barrington v. Venables.

(c) 2 *Lev.* 129. It was agreed in Serjeant (c) *Scrogg's Case*, that the Privilege of the Court of *C. B.* which Serjeants claimed, extended only to inferior Courts, not to the Courts in *Westminster Hall*; and that he may be sued in any of these, because he is not confined to that Court alone, but may practise in any other Court; but it is otherwise as to Attornies or Philazers, who cannot practise in their own Name in any other Court but such as they respectively belong to; and that therefore a Serjeant at Law is to be sued by Original, and not by Bill of Privilege.

3 *Keb.* 424.
2 *Mod.* 296.
S. C.—So of the Servant of a Serjeant at Law. *Cro. Car.* 84.

Trin. 7 *Geo.* 2. So in an Action by Bill brought in *C. B.* against a Serjeant at Law, for Work done, he pleaded that he ought to have been sued by Original, and not by Bill; and on Demurrer, the Court held, that the Case of a Serjeant and Prothonotary's Clerk were upon the same Foot, neither of them being bound to personal Attendance, as Prothonotaries and Attornies were; and that therefore he ought to have been sued by Original, and accordingly gave Judgment for the Defendant.

Trin. 7 *Geo.* 2.
Serjeant Girdler's Case.

2 *Show.* 287. *J. S.* being arrested by a Writ out of *C. B.* brought his Writ of Privilege as Clerk of the Crown-Office; but it appearing that he was only a Clerk to Mr. *Ward* (Clerk of that Office) and not an immediate Clerk of the Office, a *Supersedeas* to the Writ of Privilege was granted on Motion; the Court having agreed, that he had no more Privilege than an (d) Attorney's Clerk.

Ward v. Lawrence.

(d) That an Attorney's Clerk has no Privilege. *Comb.* 12. adjudged.—But the Clerk to the Clerk of the Pells in the Exchequer is intitled to the Privilege of that Court. *Comb.* 482.

Stil 460. A Serjeant at Law, (e) Barrister, Attorney or (f) other privileged Person, whose Attendance is necessary in *Westminster Hall*, may (g) lay his Action in *Middlesex*, tho' the Cause of Action accrued in another hath discontinued his Practice for some Time. 2 *Show.* 176. (f) This Privilege extends to Judges Clerks, and also to the Clerk of Assise. *Salk.* 670, 671. (g) It is the common Right of any Gentleman at the Bar to have a Trial at Bar; and it has never been denied in the Case of an Officer of the Court. 6 *Mod.* 123. *per cur.*

1 *Mod.* 64.
2 *Show.* 242.
(e) Tho' he

County; and the Court on the usual Affidavit will not change the Venue.

But it hath been held, that if a privileged Person be sued, and the Action brought against him in the right County, his Privilege will not intitle him to have it tried in *Middlesex*.

Carth. 126.
1 Show. 148.
Bisse v. Harcourt—But in
Salk. 668. in

Wilcocks's Case, Trin. 2 Ann. the Venue is said to have been changed where an Attorney was Defendant.

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.

2 Vent. 47.
Salk. 668.

On a Motion to discharge a Rule which had been obtained for changing the Venue, it appeared, that the Plaintiff was a Barrister and Master in Chancery; and the Court held, that he had a Privilege by Reason of his Attendance, to lay his Action in *Middlesex*, and therefore discharged the Rule.

2 Ld. Raym.
 1556
Fitzg. 40.S.C.
Burroughs v. Willis.

2. Of the Privilege and Protection allowed those whose Attendance is necessarily required.

The Law not only allows Privileges to the Officers of the Court, but also protects all those whose Attendance is necessary in Courts; so that if a Suitor is arrested either in the Face of the Court, or out of the Court, as he is going and coming to attend and follow his Suit, and it appears upon Complaint made thereof, that the Fact was so, the Court will not only discharge the Party from the Arrest, but will punish the Officers or Bailiffs, as also the (a) Plaintiff who procured the Arrest, as for a Contempt to the Court.

1 Brownl. 15.
Raym. 101.
2 Mod. 181.
2 Rol. Abr.
 272.
Goldf. 33.

(a) If he knew that the Party

was prosecuting or defending any Suit; because an Affront to the Court, as well as an Injury to the Party arrested. *2 Lill. Reg.* 369.

Serjeant *Scroggs* entering his Coach at the Door of *Westminster Hall*, was arrested upon a *Latitat* out of *B. R.* and Complaint being made thereof in *C. B.* it was agreed, that not only Serjeants at Law, but all other Persons whatsoever, are freed from Arrests so long as they are in View of any of the Courts at *Westminster*, or if near the Courts, though out of the View, that any Disturbance may be occasioned to the Courts or any Violence used, which in such Cases is very penal. In this Case the Serjeant was discharged of the Arrest by the Rule of Court, and the Judges said, that if the Plaintiff should bring an Action against the Sheriff for an Escape, they would commit him; the Bailiffs who made the Arrest were committed to the *Fleet*, but the next Day upon their Submission and Acknowledgment were discharged, paying their Fees.

Mich. 26.
Cur. 2. in
C. B.

So where one *Long* an Attorney of *C. B.* was arrested in *Palace Yard*, not far from the Hall Gate, sitting the Court, he together with the Officer was brought into Court, and the Officer committed to the *Fleet*; and because the Plaintiff was an Attorney of *B. R.* who informed the Court of *C. B.* that his Cause of Action was 200 *l.* the Court ordered that another of the Sheriff's Bailiffs should take Charge of the Prisoner, and that the Prothonotary should go with him to the Court of *B. R.* and that Court being informed how the Case was, discharged the Defendant on common Bail. The Writ upon which he was arrested was an Attachment of Privilege, which the Court supposed to be designed to oust him of his Privilege; for there was another Writ against him at the Sheriff's Office, at the Suit of another Person.

2 Mod. 181.
Long's Case.

- Dier* 377. a. If Proceſs hath iſſued againſt a Husband, and in coming to defend
pl. 30. it, he and his Wife are both arreſted, the Wife ſhall have Privilege as
Bro. Priv. 17. well as the Husband; for they are conſidered as one Perſon in Law,
et vi. Noy 68. and the Wife cannot answer without her Husband.
- 2 Rol. Abr.* If the Court gives either Plaintiff or Defendant Leave to inquire
 272. after Evidence in any Cauſe depending in that Court, and he be arreſted, he ſhall have Privilege; but it is otherwiſe if he goes without the Permiſſion of the Court. So if one on the Day he has been attending his Cauſe be arreſted at ten a Clock at Night, by one no way engaged in the Cauſe, he ſhall not have Privilege.
- Jenk.* 173. *A.* has a Suit againſt *B.* in *C. B.* and afterwards *B.* is arreſted in an inferior Court, when he was not coming to or returning from the Defence of his Suit, he ſhall not have Privilege.
- Comb.* 29 *The* A Perſon coming to give Security of the Peace, it was held he
King v. Eiel- was privileged; if he had come to have ſworn the Peace, the Arreſt
ding. would have been allowed.
- Salk.* 544. So where one came to confeſs an Indiſtment, the Court held he had no Privilege *cundo & redeundo*, becauſe there was no Proceſs againſt him.
- 1 Vent.* 11. The Courts not only protect the Parties themſelves, but all Wit-
 16 *Mod.* 66. neſſes are protected *cundo & redeundo*; for ſince they are obliged to appear by the Proceſs of the Court, they will not ſuffer any one to be moleſted whiſt he is paying Obedience to their Writ.
- 20 H. 6. 4.* Alſo the Courts not only protect the Perſons of their Attendants,
Bro. Priv. 55. but likewiſe all thoſe Things that are neceſſary for their Journey or
2 Rol. Abr. the Defence of their Suit; but not Merchandiſes or Goods for Sale
 273. or Traffick.

3. In what Caſes this Privilege is to be allowed.

- 1 Sand.* 67. The Privilege allowed Officers of the Court, is to be underſtood as extending only to ſuch Caſes where the Party who ſues them has ſufficient Remedy in their own Courts; therefore if a Writ of Entry or other real Action be brought againſt an Attorney of *B. R.* he cannot plead his Privilege; becauſe if this ſhould be allowed, the Plaintiff would have a Right without Remedy; for the King's Bench hath not Cognizance of real Actions.
- 1 Sand.* 67. So if an Attorney of *C. B.* be ſued in an Appeal, he ſhall not have his Privilege; for his own Court hath not Cognizance of this Action.
- 1 Sid.* 362. So if Money be attached in an Attorney's Hands by foreign Attach-
1 Sand. 67. ment in the Sheriff's Court in *London*, he ſhall not have his Privilege;
2 Keb. 346. becauſe in this Caſe the Plaintiff would be remedileſs; for the foreign
Turbill's Caſe, Attachment is by the particular Cuſtom of *London*, and does not lie
et vid. 2 *Leon.* at Common Law.
 156.
- 4 Leon.* 81. In Indiſtments, Informations or Suits in which the King alone is
2 Rol. Abr. concerned, the Officer ſhall not have Privilege; for it would be unrea-
 274. ſonable that the Courts ſhould allow Protection to thoſe who offend
Lit. Rep. 97. againſt the publick Peace of the Community and the King's Intereſt.
- 3 Lev.* 398. But it ſeems the better Opinion, that in an Action *qui tam*, as on
Comb. 319. the *Stat.* 23 *H. 6.* againſt an Attorney, for continuing Sheriff longer
1 Lutw. 193. than a Year, the Defendant ought to have his Privilege; for tho' it
Skin. 549. be brought in the King's Name, and the King is to have Part of the
Salk. 30. Money, yet it is to be conſidered as the meer Suit of the Party, in
1 Ld. Raym. which the Party may be Nonſuit; alſo the Party may have a *Tales*
 27. without the Warrant of the Attorney General.

Also the Privilege the Courts allow their Officers, 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 not intitled to Privilege.

Hob. 177.
Dier 24 pl.
150.
2 Sid. 157.
Latib 199.
Godb. 10.
Brown &
Goldsb. 47.
Sav. 39.

As where a Clerk of the King's Remembrancer in the Exchequer, married a Woman who was Executrix to J. S. and having brought an Action of Debt by Privilege, for a Debt due to the Testator, it was held that he was not intitled to Privilege.

So in an Action against an Attorney, who was Executor to J. S. who pleaded his Privilege, but was over-ruled, tho' it was urged, that there was a Difference where the Attorney was Plaintiff, and where Defendant; but the Court held it the same in both Cases.

Salk. 2.
1 Ld. Raym.
533. New-
ton v. Row-
land.

Also if a privileged Person brings a Joint Action, this destroys his Privilege; because those with whom he joins are not Officers of the Court, nor intitled to the Attachment which the Court grants to its own Officers.

2 Rol. Abr.
274.

So if an Action be brought against a privileged Person and others, he shall be ousted of his Privilege; for if otherwise, he would destroy the Plaintiff's Action, as he would be obliged to sue the others by original Writ, and him by Petition; but some Opinions are, that this must be understood where the Action is joint in its Nature, and cannot be severed; and that if the Action can be severed without doing any Injury to the Plaintiff, the Officer shall have his Privilege.

14 H. 4. 21.
20 H. 6. 32
Dier 377.
2 Rol. Abr.
274, 275.
Godb. 10.
Noy 68.
2 Sid. 157.
1 Vent. 298.
1 Vern. 246.

2 Lev. 129. 2 Mod. 296.

But this Matter came fully to be considered in a late Case where Trespass was brought in B. R. against an Attorney and another Person, the Attorney pleaded his Privilege as an Attorney of C. B. and concluded, *quod non intendit quod cur cognoscere velit, &c.* and on Demurrer, tho' it was admitted that the Nature of the Action was several, yet the Court on Consideration of the above-cited Cases held, that the Rule was general, and that the Plaintiff was not bound to bring separate Actions; and thereupon awarded a *Respondeas Ouster*.

Hill. 8 Geo. 2.
in B.R. Pratt
v. Salt.

4. Of claiming and allowing Privilege; and therein, that it must be set forth and pleaded.

Privileges are to be claimed and allowed of in Courts in such (a) Manner as the Law directs, and in most Cases is a Matter to be taken (b) strictly.

Dalf. 16.
Vaugh. 154.
2 Bulf. 36.
(a) Not to

be allowed on Motion. *Stil. 373. vid. 2 Cha. Ca. 69.*—An Attorney must plead his Privilege, and cannot be discharged on Motion. *Salk. 544.* (b) *2 Sid. 164.*—but *Q.* for it seems discretionary in the Court to relieve on Motion, or put the Party to his Writ of Privilege.

If an inferior Court will proceed after a Writ of Privilege is delivered, it is a Nullity; and the Courts at *Westminster* will discharge the Party.

3 Co. 141.
2 Brownl. 101.
— A Writ
of Privilege

disallowed by an inferior Court, held Error. *Cro. Eliz. 152.*

One *Fletcher* was sued in the Marshal's Court, and he procured a Writ of Privilege as Attorney of C. B. upon which the Plaintiff in the Marshal's Court surmised, that he was forejudged before, and produced the Record of his Forejudger; upon which the Marshal's Court proceeded

Hill. 26 C. 11. 2.
in C.B. Barns
v. Fletcher.

proceeded; and upon Complaint thereof in *C. B.* the Court held, that the Writ of Privilege ought not to have been questioned there, but ought to have been allowed; and that if it was not duly obtained, it was a Matter examinable here; therefore all the Proceedings in the Marshal's Court were set aside, and the Plaintiff ordered to pay all Costs of the Proceedings since the Writ of Privilege, otherwise an Attachment to issue.

6 Mod. 305.
Phips v. Jackson

A Clerk to one of the Barons of the Exchequer being sued in *B. R.* pleaded, that *tempore quo memoria non extat* all the Clerks of the King's Court of Exchequer were privileged from being sued elsewhere than in that Court; and that the Defendant was Clerk to *R. P. un' Baron' de Scaccario nostro prædict'*; upon Demurrer the Court said, there were two Ways of pleading Privilege; one was, to go to Issue, and at the Trial, if the Party be an Officer of Record, to shew it by producing the Record; if he be not an Officer of Record, but is Attendant on one of the Barons, that must be tried by a Jury; because the Court of Exchequer, as a Court, cannot take Notice of it no more than the Court of King's Bench; the other Way is, if he be an Officer on Record; to produce a Writ of Privilege at the Time of the Plea pleaded, and then no Issue can be joined upon it; and here the Custom is ill pleaded, for *tempore quo non extat memoria* is Nonsense, it should be *cujus cont' memoria, &c.* and because that he did not aver to one of the Barons of the King's Exchequer, but *de Scaccario nostro*, a *Respondeas Ouster* was awarded.

Cartb. 362.
Skin. 582.
Stephens v. Squire.

In an Action against *A.* he pleaded his Privilege thus: And the said *A.* in his proper Person, says, that he is, and at the Time of exhibiting the Bill was, one of the Clerks of *T. W.* one of the Prothonotaries of the Court of *C. B.* at *Westm.* in the County of *Middlesex*, and attending his Office every Day, and concluded with an Averment generally, without annexing any Writ of Privilege to his Plea; and this on Demurrer was held ill, because the Defendant did not say *venit* as well as *dicit*; and for that he did not lay any *Venue*, so as the Fact of his being a Prothonotary's Clerk might be tried; for it is a Matter issuable, for their Clerks are not (*a*) inrolled.

(a) *Hard.* 164.
Earell. 97.—

But the Privilege of an Attorney or Officer on Record is not traversable, nor triable *per Pais*.
Salk. 30, 543. 2 *Sid.* 164. 2 *Lutw.* 1466. 1 *Vent.* 264. 3 *Keb.* 352. *Skin.* 582.

Salk. 545.
2 *Ld. Raym.*
1172. *Scarven*
v. Garret.

To an Action brought in *B. R.* the Defendant pleaded his Privilege of an Attorney of *C. B.* without producing any Writ of Privilege, and without saying *prout patet per Recordum*; and two Exceptions taken: 1st, The Want of Averment, *prout, &c.* 2^{dly}, That there was no Place laid where the Defendant was an Attorney; and *per Holt Ch. J.* there are two Ways of pleading this Matter so as it cannot be denied, *viz.* with a *Profert* of a Writ of Privilege, or of an Exemplification of the Record of his Admission; or else it may be pleaded as it is here; and as to the Averment by the Record, it is never pleaded as a Matter of Record, which is always pleaded with Time, *viz.* of such Term, *&c.* but never any Plea was seen that the Defendant of such Term was admitted Attorney, *&c.* As to the second Exception he said, that it was not necessary to lay a *Venue*; for that this being a Matter concerning the Person of the Defendant should be tried where the Writ was brought.

Salk. 545. *Dillon v. Harper.*
2 *Ld. Raym.*
898. *S.C. vid.*
Earell. 106.
Clifton v. Swezeland,
like Case.

An Attorney of *C. B.* being sued in *B. R.* pleaded his Privilege; to which it was demurred specially, for not concluding his Plea with a *Profert* of a Writ of Privilege testifying his being an Attorney, *&c.* and *per Holt Ch. J.* the Difference is, if Privilege of an Attorney be pleaded with a Writ, the Defendant cannot be denied to be an Attorney;

torney; if without, he may; and then a *Certiorari* shall be awarded to certify whether he be or not.

An Attorney of C. B. pleaded to the Jurisdiction of the Court of B. R. & *per curiam*, he shall not be (a) sworn to his Plea, nor need the Writ of Privilege be set forth at large; and if Matter of Fact be pleaded in Abatement, and found against the Defendant, Judgment final shall be given.

of Privilege to his Plea, tested after the Action brought, but made no Affidavit of the Truth of his Plea; and on a Motion of Mr. Parker, the Plea was set aside for Want of the Oath; and because it did not appear by the Writ, that the Defendant was an Attorney at the Time of bringing the Action. *Mich. 6 Geo. 2. Wicks v. Dagley.*—The Defendant pleaded his Privilege that he was an acting Clerk to Sir George Coke, and annexed an Affidavit to his Plea, that he solicited Causes in the Court of C. B. but because he did not swear that he entred Causes in that Office, or that he did Business as an entring Clerk, the Plea was set aside. *Hill. 2 Geo. 2. in E. R. Edmund and Thomas.* (b) That it is peremptory. *Bro. Perempt. pl. 48.*

In *Assumpsit* by A. against B. for 1000 Yards of black Cloth, for which the Defendant promises to pay, &c. the Defendant pleaded his Privilege as an Auditor of the Exchequer, in these Words, That the Barons of the Exchequer, their Clerks, or other Officers of that Court, have not been impleaded elsewhere; to which Plea there was a Demurrer: 1st, Because it was pleaded in the (c) Negative. 2^{dly}, Because it was general, that the Barons and their Clerks; which doth not shew but that one of their Clerks might be sued elsewhere. 3^{dly}, That the Conclusion was, he hopeth, &c. and for these Reasons the Plea was thought ill; it was likewise said, that he ought to have concluded *hoc paratus est verificare*, unless the Puisse brings into Court the (d) Red Book of the Exchequer.

the Exchequer may be pleaded, or by shewing the Red Book of the Exchequer allowed. 1 *Keb. 256.* 2 *Keb. 103.* 2 *Lutw. 46.*—An Accountant of the King's Exchequer allowed his Privilege in B. R. on a Baron's coming into Court and shewing his Book of Accounts, and this without any Plea or Prayer of the Party. 2 *Bulf. 36.*—Where one intituled to the Privilege of the Court of Exchequer is sued in C. B. the Court sends a *Superfedeas*; but if it be in B. R. no *Superfedeas* is sent, for that would be to supersede the King; but the Practice is, to send up the Red Book by the Puisse Baron. *Salk. 546. per Walter Ch. Baron.*

In *Assumpsit*, the Defendant *Venit & dicit*, that he is an Officer of the Exchequer, and pleads Privilege; and on Demurrer two Exceptions were taken: 1st, Because he pleads his Privilege by Writ, but not under the Seal of the Court. 2^{dly}, That it is not said, that the Court ought not to have Conufance in the Beginning of the Plea; & *per Holt Ch. J.* If a Man pleads Privilege, and at the Time of pleading he produces a Writ testifying that he is an Officer, the Plaintiff cannot deny the Privilege; but if he pleads it without a Writ, the Plaintiff may deny it, but the Plea is good without shewing the Writ; as to the second Exception he held, that the Conclusion made the Plea; for if a Man begins in Bar and concludes in Abatement, it is a Plea in Abatement.

The Clerks of the Papers and Secondary of the King's Bench, when they claim Privilege, declare themselves to be Clerks to the Master.

Privilege in the Common Pleas must be certified by the Prothonotaries, and not by the Secondaries.

It hath been a Matter of great Doubt how far an Attorney of C. B. or other Person privileged, being *in Custodia Marefcalli*, shall be ousted of his Privilege; for as on the one Hand being in actual Custody, he is to answer to the Plaintiff's Demand lodged against him, and not to the Procefs that brought him in; and on the other hand, it being thought hard that his being there by Coertion and on a fictitious Trespafs should oust him of his real Privilege: The Determinations herein have been, 1st, That tho' A. be *in Custodia Marefcalli* at the Suit of B. yet when B. declares against him he may plead his Privilege, be-

cause he comes there by Coertion, and had no Opportunity before to take Advantage of it. 2dly, If *A.* files Bail at the Suit of *B.* and in the same Term a Declaration is delivered against *A.* at the Suit of *C.* *A.* may plead his Privilege against *C.* as well as against *B.* for it were absurd that *C.* who tops his Suit upon the Action of *B.* should have more Liberty or Advantage against *A.* than *B.* himself had. 3dly, But if it be in a subsequent Term, or if by any thing *A.* waives his Privilege in the first Action, he then becomes obnoxious to the Suits of every one; and as to *C.* he is truly *in Custodia Marefcalli*; for being once ousted of his Privilege, he can no longer attend as an Officer in the other Courts, but is fix'd in the King's Bench; and therefore cannot by the Supposition of the Necessity of his Attendance oust the Party of his Action.

Carth. 377.

So if an Attorney of *C. B.* is brought into the Court of *B. R.* at the Suit of an Attorney there, which is an Estoppel to the Defendant's Privilege, the Defendant shall be ousted of his Privilege in all other Actions commenced against him in *B. R.* in the same Term; because the Jurisdiction of this Court was attached upon him by the first Action.

22 H. 6. 7.
2 Rol. Abr.
275, 276.
Dier 33.
Godb. 286.
Stil. 295.
1 Lev. 54.
1 Keb. 195,
221, 256.
2 Show. 145.
Hard. 365.
1 Sid. 318.
2 Keb. 103,
121, 163.
1 Show. 49.
Lutw. 46.
Salk. 1.
Comb. 68.

As to the Time of pleading Privilege, it has been laid down in a Variety of Cases as a sure Rule, that after Imparance the Defendant cannot plead his Privilege, because by imparling he affirms the Jurisdiction of the Court, which by this Plea he would oust; but herein these Distinctions have been taken; and the Law herein by the modern Authorities seems now established, that after a general Imparance, the Defendant cannot plead Privilege, because he must then plead in Chief; so after a special Imparance in this Manner, *Salvis omnibus allegationibus & exceptionibus omnimodis tam ad breve quam ad narrationem*; for by this special Imparance he has confined himself to take Advantage of Defects in the Writ and Count only; but in Case of a general special Imparance obtained from the Court, *viz. Salvis sibi omnibus & omnimodis advantagiis & exceptionibus*, he may after plead his Privilege; for this is not to oust the Court of its Jurisdiction, but is a Privilege which each Court allows to the Officers of the other, to be sued in their own Court only.

Trin. 13 Ann.
in B. R.
Hatch v. Blifs.

A Witness was arrested in his Return from *Winchester Assises*, and in the Term following was discharged by Motion on common Bail by the Court from which the Record issued, and that without having the Privilege of the Court of *Nisi Prius* certified; had the Arrest been at the Assises, the Judges there might have discharged him; for Privileges given by Law are to be prosecuted in such a Manner as the Party may most easily get the Benefit of them.

5. How privileged Persons are to sue and be sued.

4 Inst. 71,
99, 112.
(a) In the
Exchequer,
where the
Plaintiff is
privileged,
Salk 546.

When an Attorney or other Officer intitled to Privilege, is Plaintiff, he regularly sues (*a*) by Writ of Privilege, and is sued by Bill; which Processess issue out of the Court in which the Action is commenced, and have no Foundation in Chancery.

where the Defendant is privileged, the Suit is by *Quo minus*; where the Defendant is privileged, the Suit is by Bill.

1 Vent. 199.
28 E. 3. 4.
Cro. Eliz. 731.

But an Attorney is not obliged to sue by Writ of Privilege, but may sue by Original; but if he elects the former, he must name himself Attorney, &c. for when any particular Character or Relation gives any Person Rights and Privileges, it must be set forth.

And therefore it hath been held, that if an Attorney sues by Original, he must declare as others do; and that if he does otherwise, it will be fatal on a special Demurrer, tho' aided after Verdict, and also good on a general Demurrer.

2 Lev. 40.
1 Vent 198.
2 Keb. 860,
879
5 Keb. 15.

Attornies are intituled to Procefs of Attachment, are not to be arrested nor held to special Bail, let the Cause of Action be what it will; for being Officers of the Court they are obliged to a constant Attendance, and are presumed to be always amenable.

1 Mod. 10.

A Philazer of B. R. was arrested by Writ, but discharged on common Bail; for he ought to be sued by Bill, as being present in Court.

Salk 544.
Brown's Case.

A Bill cannot be filed against a Person privileged, in Vacation; for then he is not present in Court, and as to the Vacation, it begins the last Day of the Term, as soon as the Court rises.

Salk. 544.

The Bill must be filed tho' the Attorney agrees to appear and dispense with it; but it may in such Case be filed afterwards.

Salk. 544.

In an Attachment of Privilege by the Marshal, he shall have no Attorney, because present in Court.

6 Mod. 16.

An Information was exhibited against the *Custos Brevium* of B. R. for Abuses and Misdemeanors in his Office, who refused to appear in (a) Person, but would have appeared by Attorney; and the Opinion of the Court was, that he could not appear by Attorney, being an Officer of the Court, and presumed to be always present; and therefore it was agreed, that no Procefs should be issued against him; but that upon reading the Information, if he did not appear, Judgment should be given against him.

1 Sid 134.
The King v. Paget.
(a) An Attorney may plead his Privilege by an Attorney, without an Inconvenience; for he
Stil. 413.

may be sick, or have Business in another Court, and the Precedents are both Ways.

In an Action brought by an Attorney by Bill of Privilege, the Judgment was, *Quod nil capiat per Breve*, instead of *Nil capiat per Billam*; which was held manifest Error, unless it could be amended as the Mistake of the Clerk.

Cro. Car 580.
Raymond v. Burbedge.

In a Bill of Privilege by or against an Attorney, no *Capias* lies, but an Attachment of Privilege; and consequently on such Proceeding there can be no Outlawry.

1 Leon. 329.
Crew v. Bailie, *vid. Tit. Outlawry.*

In an Attachment of Privilege by or against an Attorney, it hath been held, that Pledges to prosecute must be entred on the Imparlance Roll; and that this is not barely Form, but Matter of (b) Substance.

Dier 288. a. pl. 53.
Cro. Car. 91, 92.
3 Lev. 39.
4 & 5 Ann. cap. 16.

(b) Seems now aided by the 4 & 5 Ann. cap. 16.

The Judges, Prothonotaries, Attornies, &c. of the Court of C. B. whose Attendance is wholly required in Court, are not suable by Original, but by Bill only; but Serjeants at Law, Judges Servants and other Clerks, who tho' they may be intituled to the Privilege of being sued in that Court, yet must they be sued by Original and not by Bill.

2 Mod. 297.
3 Lev. 398.
3 Salk. 283.
1 Ld. Raym. 399.

In *Affumpfit* by Bill against the Defendant as *un' clericorum Domini Regis coram ipso Rege*, the Defendant pleaded that he was a Philazer, *absque hoc*, that he was a Clerk; and on Demurrer, the Plea was set aside as frivolous and impertinent, for that Philazers are Clerks.

Tvin. 5 Geo. 2. in B. R. Duret v. Hayward.

6. Whether there can be Privilege against Privilege.

It seems a general Rule, that there can be no Privilege against Privilege; so that if an Officer of one Court sues an Officer of another,

Bro. Privilege pl. 40.
Godb. 81.
the Jenk. 131.

2 *Brownl.* 267. the Defendant shall not plead his Privilege; for the Attendance of the
Moor 753. Plaintiff is as necessary in his Court as the Defendant's is in his; and
 2 *Rob. Abr.* 274. therefore the Cause is legally attached in the Court where the Plaintiff
Fenk 173. is an Officer.
 2 *Keb.* 346.

As where *J. S.* Attorney of *B. R.* brought Trespass against the
 2 *Leon.* 41. Warden of the *Fleet*, who came into the Court of *C. B.* and prayed
Povey's Case. the Advice of the Court, whether he being an Officer of the Court
 should be obliged to answer; and on Consideration of the Equality of
 Privilege, the Court determined, that he who commences his Suit first
 is intitled to Privilege; and therefore advised the Warden to answer.

So where one of the Clerks in Chancery was impleaded in *C. B.* by
 4 *Leon.* 193. Bill of Privilege by an Attorney of the said Court, and prayed his
Ben. Johnson's Privilege; but it was denied him, because the Plaintiff was privileged
Case. in that Court as well as the Defendant in Chancery, and was first in-
 terested in his Privilege by bringing his Writ.

So where the Plaintiff brought his Bill in the Exchequer, to be re-
Hard. 117. lieved against a Bond, put in Suit against the Defendant in the Petty-
Baker v. Lenthall. Bag Office, which is a Court of Common Law, to which the Defen-
 dant pleaded his Privilege as an Officer of the Court of Chancery;
 and herein the Court agreed, that when both Parties are privileged
 Persons, his Privilege shall take Place who first sues; so that here the
 Suit in Equity to be relieved against the Penalty of the Bond, being
 first attached here, gained a Preference in the Plaintiff in his Suit,
 which is a distinct Suit from that of the Defendant's at Common
 Law; and therefore the Plea was over-ruled, and an Injunction awar-
 ded 'till Answer. In this Case it was said, that if both are privileged,
 but the Attendance of the one is more requisite than that of the other,
 his Privilege shall be allowed who has most Cause of Privilege.

Where an Action is sued by the King, the Defendant shall not have
 1 *Ld. Raym.* Privilege; for Privilege is not good against Privilege.
 27.

An Attorney of *C. B.* sued a Member of the University of *Oxford*,
 1 *Ld. Raym.* who prayed his Privilege, which is not to be sued in another Place;
 342. *Jolliffe* and tho' it was insisted, that this Privilege was given them by Act of
v. Langston. Parliament, yet in regard the Words were general, the Court held,
 that there was no Necessity to construe them so as to extend to Privi-
 leges before *in esse*; and that therefore this special Privilege was not
 taken away by the Statute.

(C) Privilege of Peers and Members of Parliament: And herein,

1. Who such Persons are that are intitled to this Privilege.

4 *Inst.* 24. ALL Peers, without any Distinction as to Degree or Rank, are
Stil. 222, 253. intitled to Privilege; for they are equally obliged to (a) attend
Dier 314. the Service of the Publick, and are always supposed amenable, and
 1 *Mod.* 66. to have sufficient Property to answer in Suits and Actions brought
Bro Exig. 3. against them, and on these Grounds are not to be arrested or molested
Moor 767. in their Persons. This Privilege extended formerly to Abbats, as it
Scobel's Me-
morials 88,
 103. *Sir Simon Dew's Journals* 414. *Finch* 355. (a) *Dier* 60. a. in Margin. *Noy* 102. *Moor* 78.
Stamf. P. C. 38. That the King's Grant or Charter of Exemption cannot discharge a Noble-
 man from his Attendance in Parliament. 4 *Inst.* 49.

does to Bishops, Members of the Convocation, and Members of the House of Commons at this Day.

The Privilege of Parliament, according to the (a) Law of Parlia- (a) Ld. Coke
ment, is of a very extensive Nature; but all that is here intended to says of this
be treated of is only the taking Notice of and pointing out such Cafes Law, ab om-
and Resolutions relative hereto, as are to be found in the Books of nibus querenda
Law; not to determine concerning this Privilege as settled by the est, a multis
Rules and Orders of each House, of which they themselves are the ignorata, a
(b) sole Judges, tho' the King's Courts (c) incidently take Notice paucis cognita.
thereof, and are bound to determine in Matters of Privilege when fo 4 Inst. 15.
directed by Act of Parliament. (b) 13 Co. 65.
4 Inst. 23,
50, 363.
Prinn's Ani-

mad. on 4 Inst. 12. Cro. Car. 181, 604. 2 Ld. Raym. 1111. (c) Vid 1 Mod. 66. Have determi-
ned in relation to their Journals. Hob. 111. See the Arguments in the Case of *Asbby v. White*,
1 Salk. 19. 6 Mod 45. 2 Ld. Raym. 938. *Barnadiston v. Soame*. 2 Lev. 114. 3 Keb. 365, 369.
Onslow's Case. 2 Vent. 37. *The Queen v. Paty*. 2 Ld. Raym. 1105.

This Privilege extends only to the Peers of *Great Britain*; so that Co. Lit. 156.]
a Nobleman of any other Country, or a Lord of *Ireland*, hath not 2 Inst. 48.
any other Privileges in this Kingdom than a common Person; also 3 Inst. 30.
the Son and Heir Apparent of a Nobleman is not intitled to the Pri-
vilege of being tried by his Peers, which is confined to such Person
as is a Lord of Parliament at the Time; but it seems that an Infant
Peer is privileged from Arrests, his Person being held sacred.

The Peers of *Scotland* had no Privileges in this Kingdom (d) before (d) 9 Co. 117.
the Union, but now by the twenty-third Article of the Union, The
sixteen elected Peers shall have all the Privileges of the Peers of Parli-
ament of *Great Britain*; also all the Rest of the Peers of *Scotland* 1 P. Will.
shall have all the Privileges of the Peerage of *England*, excepting only 583.
that of Sitting and Voting in Parliament.

A Peeress by Birth is intitled to Privilege; so of a Peeress by Mar- 2 Inst. 50.
riage, and that as well during the Coverture as after; but as a Peeress Stil. 222.
by Marriage is said to (e) lose her Dignity by marrying a Commoner, 234, 252.
2 Cha. Ca. 224.
Q. if after such Marriage she is intitled to any Privilege. (e) Co. Lit. 16.
6 Co. 53.
Dier 79.

It was holden by my Ld. Ch. J. *Holt*, in the Case of (f) Ld. *Ban-*
bury, that where a Person is called by Writ to the House of Peers, he (f) Vid. this
is no Peer 'till he sits in Parliament, the Writ giving him no Nobility Case postea.
or Honour; but that it was the Sitting in the House of Lords, and
associating himself with them that ennobled his Blood; and that there-
fore, if the King or he dies before a Parliament meets, the Writ is de-
termined, and the Party remains a Commoner; but he held it other-
wise in a Creation by Letters Patents, by which the Party is imme-
diately noble without any other Act or Ceremony; and tho' the Parli-
ament never meets, or the King dies, the Nobility remains to him
and his Posterity, according to the Limitations in the Patent.

2. How far this Privilege extends to their Servants and Attendants.

A (g) Member of Parliament shall have Privilege of Parliament, not 4 Inst. 24.
only for his (b) Servants, but for his Horses, &c. or other Goods (g) Noble-
diffrainable. mens Ser-
vants are

privileged from Arrests in Time of Parliament. 2 Show. 84. (b) Said to extend only to Servants,
and not to their Tenants. 1 Mod. 13. And in *Marsh* 92. it is said to have been ordered by the
Lords in Parliament, 16 Car. 1. That only menial Servants, or one who attended on the Person
of a Knight or Burgefs of Parliament, should be free from Arrest.

Stil. 139. *Smith v. Hale*, & *v. d. Lat. h* 150. and the *S. C. Stil.* 167, 223. *J. S.* brought Debt for Rent against *H.* who pleaded that he was Tenant and Servant to Lord *Moon*, and prayed his Writ of Privilege might be allowed; the Plaintiff demurred; it was argued, that the Matter of the Plea was against the Common and Statute Law; but *per Roll Ch. J.* you ought not to argue generally against the Privilege of Parliament, every Court hath its Privilege; I conceive a Writ of Privilege belongs to a Parliament Man, so far as to protect his Lands and (a) Estate; and you have admitted his Privilege by your Demurrer.

(a) *1 Jon* 155. *2 Vent.* 154. The Warden of the *Fleet* insisted upon a Writ of Privilege, alledging that he was obliged to attend the House of Lords; but it appearing that he was sued upon an Escape, and the Court considering the great Inconvenience that would ensue, and being of Opinion that it was in their Discretion whether they would grant such Writ or no, upon a Motion they said he might plead it if he would, but they would not award such a Writ, or if his Privilege was infringed, he might complain to the House of Lords.

1 Mod. 146. cited to have been adjudged between *Rivers v. Coustn. Hill* 24 *E. 4. ret. 4, 7, 10. in fiacc.* In Debt, the Defendant pleads he was a Servant to a Member of Parliament, and *ideo capi seu arrestari non debet*; the Plaintiff prays Judgment, and *quia videtur quod tale habetur Privilegium quod Magnates, &c. & eorum familiares capi seu arrestari non debent; sed nullum habetur Privilegium quod non debent implacitari, ideo respondeat Ouster.*

Pl. b. 30 Car. 2. in C. B. Leav. v. Wheatley. Defendant after a general Impar lance pleaded, that he was a Servant to a Peer, *viz.* the Earl of *Pembroke*; and by *North Ch. J.* it is not receivable, for it is the Privilege of the Master and not the Servant's; but the Defendant ought to sue his Writ of Privilege, for perhaps his Master will not protect him; and if he will not, he is then left to answer; like to the Case of a Counsellor, where it is the Privilege of the Client that he shall not be compelled to discover the Secrets of the Client; but if the Client be willing, the Court will compel the Counsel to discover what he knows; which Serjeant *Maynard* said was his Father's Case before the Lord *Cecil*, in the Court of Wards. *North* said, as it was a Matter of great Consequence, he would advise with the Lord Chancellor and the rest of the Judges, what used to be done in such Cases; afterwards it was moved again, and *North* said it was moved in the House of Lords, and that they had left it to the Judges to do according to Law; and therefore the Plea was rejected.

By an Order 24 *Jan.* 1696. in the House of Lords, it was resolved, that no common Attorney or Solicitor, tho' employed by any Peer, should have the Privilege of this House.

By an Order 24 *May* 1724. this Privilege was restrained to menial Servants and others necessarily employed about the Estates of Peers.

By an Order 22 *Jan.* 1715. it was resolved, that every Peer should upon his Honour certify to the House, that the Persons protected were within the Privilege of the House; and should by Letter acquaint the Party, arresting such privileged Person, with the same.

Mich. 10 *Geo. 2. in B. R. Wickham v. Hobart.* An Attorney was taken in Execution upon a *Ca. Sa.* about two Years ago, but upon a Letter under the Hand and Seal of the Lord *Say and Seal*, the Sheriff discharged him as Steward to his Lordship; a Rule was obtained at the Side-Bar for the Return of the Writ; and now on Motion in Court to discharge this Rule, it was urged in Behalf of the Sheriff, that this Privilege belonged only to the Peer, and not to the Party, and was not returnable to the Process; and that therefore the Court ought not to insist upon a Return, as the Sheriff could not justify the Detention of the Defendant, but under Peril of bringing himself and the Plaintiff under the Censure of the House of Peers;

Peers; but on Consideration of the abovementioned Orders, and on considering the Nature of this Case, that the Plaintiff was within the ordinary Justice of the Court intitled to a Return of his Writ; that without such Return he might be debarred from any further Execution; but principally from the great Inconveniency that might arise by allowing Attornies, who are Officers to the Courts in which they respectively practise, and therefore amenable to those Courts, this Kind of Privilege; the Court gave the Plaintiff Liberty to proceed against the Sheriff, but gave him Time 'till next Term to make his Return.

3. In what Cases this Privilege is to be allowed.

In all Civil Causes this Privilege is regularly to be allowed; so that a Peer of the Realm, or a Member of the House of Commons, is not to be (a) arrested or molested in his Person or (b) Estate. Bro. Exigent. that a Capias does not lie against a
 Lord of Parliament, nor against an Abbot or Bishop; but if Rescous be returned upon a Lord of Parliament, a *Capias* lies for the Contempt. *Moor* 767. *Finch of Law* 355. (a) A Peer of Parliament nor to be arrested for Debt, Trespass, &c. for he is supposed to be assisting the King with his Countel for the Good of the Commonwealth, and to guard the Realm with his Power and Valour. *9 Co* 49. a. (b) The Goods of a privileged Person taken in Execution during the Privilege of Parliament ought to be redelivered and freed as well as the Person. *1 Jon.* 155.

But Privilege of Parliament doth not extend to (c) High Treason, Felony, Breach of the Peace, or Surety of the Peace. 4 Inst. 25. Prin's Survey of Parliament Writs. (c) In Treason or Felony, or Misprison of Treason or Felony, they can only be tried by their Peers; but for all other Offences, as *Præmunire*, Riot, Seducing a young Lady from her Parents in order to debauch her, &c. they are to be tried by the Country. *2 Hawk. P. C.* 424 That neither *Magna Charta*, nor any other Law privileges a Peer from being indicted by a Grand Jury of Commoners, either in the King's Bench, or before Commissioners of Oyer or the Coroner, &c. *2 Hawk. P. C.* 424.—But the Court of *B. R.* cannot receive the Plea of Not guilty, or the Confession of a Peer, but only the Lord High Steward; but may allow a Pardon pleaded by a Peer to an Indictment in that Court. *2 Hawk. P. C.* 424 —So if a Peer be attainted of Treason or Felony, he may be brought before the Court of *B. R.* and demanded what he has to say, why Execution should not be awarded against him; and if he plead any Matter to such Demand, his Plea shall be discussed, and Execution awarded by the said Court, upon its being adjudged against him. *2 Hawk. P. C.* 424.

And therefore in an Indictment for Treason or Felony, Trespass *vi armis*, Assault or Riot, Process of Outlawry shall issue against a Peer of the Realm; for the Suit is for the King, and the Offence is a Contempt against him; but in Civil Actions between Party and Party, regularly a *Capias* or *Exigent* lies not against a Lord of Parliament. 2 Hal. Hist. P. C. 199. 2 Hawk. P. C. 424.

If a Peer of Parliament be convicted of a Disseisin with Force, a *Capias pro fine* and *Exigent* shall issue; for the Fine is given by Statute in which no Person is (d) exempted. Cro. Eliz. 170. Ld. Stafford v. Thynne, vid. Dier 314.

(d) For Execution on a Statute Staple, Merchant, on the Statute of *Aston Burnel*, or on the Statute of *23 H. 8.* the Body of a Baron shall be taken in Execution; for by these Statutes, such Persons are not exempted. *2 Leon.* 173.—So a Custom to commit Persons who shall take an Orphan out of the Custody of a Guardian, is good without Exception of Peers; for a Peer is not privileged in this Case, and in a *Homine replegiando*, where he detains the Body, he shall be committed. *1 Lev.* 162-3.

So in Debt upon an Obligation against the Earl of *Lincoln*, who pleaded *Non est factum*, which being found against him, the Judgment was *Ideo capiatur*; which on a Writ of Error brought by him was objected to, in that a *Capias* does not lie against a Peer of the Realm; *sed non allocatur*; for by this Plea found against him, a Fine is due to the King, against whom none shall have any Privilege. Cro. Eliz. 503. Earl of Lincoln v. Flewce.

An Information was exhibited in *B. R.* against the Earl of *Devonshire*, for striking in the King's Palace; which being in Time of Parliament Comb. 49. The King v. Earl of Devonshire.

- liament, he insisted on his Privilege of a Peer, and refused to plead in Chief, but put in his Plea of Privilege; to which there was a Demurrer, and the Plea over-ruled, and he was fined 30000*l*.
- 3 *Mod.* 215. In the Case of the seven Bishops it was insisted, that Peers of the Realm could not be committed in the first Instance, for a Misdemeanor before Judgment; and that no Precedent could be shewed where a Peer had been brought in by a *Capias*, which is the first Process for a bare Misdemeanor, and they put in a Plea in Writing of their being Peers, &c. but the Plea was rejected.
- 2 *Hawk. P. C.* 152. Also Peers of the Realm are punishable by Attachment for Contempts in many Instances; as for rescuing a Person arrested by due Course of Law; for proceeding in a Cause against the King's Writ of Prohibition; for discharging other Writs wherein the King's Prerogative or the Liberty of the Subject are nearly concerned; and for other Contempts which are of an enormous Nature.
- Dier* 314.
Moore 767.
9 *Co.* 49.
Co. Lit. 157.
1 *Fon.* 153. If a Peer be returned on a Jury, on his bringing a Writ of Privilege he may be discharged; also it seems the better Opinion, that without such Writ he may either challenge himself or be challenged by the Party.
- Pasch.* 27
Car. 2. in
B. R. Also in the Case of Sir *Edward Bainton*, who being returned on a Jury, the Court would not force him to be sworn against his Will, he being a Parliament Man, and the Parliament then sitting.
- 9 *Co.* 49. a. A Day of Grace shall not be given against a Lord of Parliament; for he is presumed to be Attendant on the Service of the Publick.
- 9 *Co.* 49. a. So if a Peer be made Steward of a Base Court, or Ranger of a Forest, he may from the Dignity of his Person, and the Presumption that he is engaged in the more weighty Affairs of the Commonwealth, exercise these Offices by Deputy; tho' there are no Words for this Purpose in his Creation.
- 9 *Co.* 49. b. So if a Licence be granted to a Peer to hunt in a Chase or Forest, he may take such a Number of Attendants with him as are suitable to his State and Dignity.
- 3 *Inst.* 129. A Peer or Lord of Parliament cannot be an Approver; for it is against *Magna Charta* for him to pray a Coroner.
- 2 *Hawk.*
P. C. 427. If a Peer of the Realm bring (a) an Appeal, the Defendant shall not be admitted to wage Battle, by Reason of the Dignity of his Person.
- (a) In an Appeal brought against him he shall be tried by a Jury of Commoners, and not by his Peers; for the Words of *Mag. Char. nec super eum ibimus*, &c. are to be intended only of the Suit of the King. 3 *Inst.* 50. 2 *Inst.* 49.
- Fenk.* 107. In *Fenkins* the following Privileges are laid down as belonging to Peers: 1. They are intitled to a Letter Missive. 2. They have a Knight to try any Issue which concerns them. 3. They are not to be arrested for Debt, Trespas, or any personal Action. 4. They are exempted from serving on Juries. 5. To have no Day of Grace against them. 6. Upon the Trial of a Peer for Treason or Felony, they try him upon their Honour only, and not upon Oath. 7. When they pass through any of the King's Forests to attend upon the King, upon blowing a Horn they may have a Buck or Doe, as the Season of the Year is. 8. They have Power in their House to reverse Judgments given in the King's Bench. 9. They have the Benefit of Clergy tho' they cannot read. 10. They are not liable to find Carriages for the King when he removes from one Place to another.

4. Of the Commencement and Continuance of this Privilege.

The Privilege of the Lords commences from the Teste of the Writ of Summons, and the Privilege of a Burgeses at his (a) Election; but if he be arrested, or in Execution before his Election, he shall not have Privilege.

Moor 57, 340.
Fenk. 118.
Dalf. 58.
Dier 59, 60.
Latch 46, 150.
(a) Vid. 1 Sid.
42.

So Persons outlawed ought not to be Knights or Burgeses of Parliament, and such Persons outlawed may be arrested by *Cap. Utlag.* Privilege of Parliament notwithstanding.

1 And. 293.

As to the Time and exact Continuance of this Privilege, it seems in good Measure unsettled even at this Day. It is indeed agreed in most Books that Members of Parliament have Privilege *eundo, morando, (b) & redeundo*; and that they are intitled to Privilege as well after a Dissolution as a Prorogation of the Parliament.

Atkin's Power of Parl. 38.
4 Inst. 44.
Brownl. 91.
Stobell's Memorials 88,
103, 180.

Sir Simon Dewe's Journals 414. 4 Inst. 408. (b) By the 35 H. 8. cap. 11. Members of Parliament have their Wages so many Days after the Parliament as they may reasonably spend in their Return home. Vid. Raft. 664. Appendix to Reg. 1.

By two Orders of the House of Lords, one dated the 28 of May 1624. the other the 27 of January 1628. it is declared, that their Privilege commences from the Teste of their Writ of Summons to Parliament; and that upon every Session and Prorogation, their Privilege is for twenty Days before and twenty Days after each Session, which one of the Orders says is Time enough for them to come from all Parts of the Realm, and to return; but the Commons never assented to this, for they claim (c) forty Days before and after each Session.

2 Lev. 72.
1 Chan. Ca. 221.
1 Sid. 29.

(c) In Cotton Record. 704. they claim forty Days. So by Fenk. 118.

In the Case of Colonel *Pit*, the Parliament was prorogued 16 April 1734. dissolved the 17th, and the new Writs bore Teste the 18th following, and the Defendant *Pit*, who was a Member of that Parliament, was arrested on the 20th; one of the Questions in this Case was, Whether the Arrest was within Time of Privilege? And it was determined that it was, altho' the Defendant had lived for two Years before no farther distant from London than *Hammersmith*; but the Court did not think it necessary, in the Determination of this Cause, to ascertain the exact Time of Privilege that Members of the House of Commons were intitled to after a Dissolution of Parliament.

Trin. 8 Geo. 2. in B. B. Col. Pitt's Case.

5. How Privilege is to be claimed and taken Advantage of.

It seems that formerly the usual and indeed necessary Way of taking Advantage of Privilege, was to plead the same, or to bring a Writ of Privilege; and that Applications in other Manner, or even by Motion in Court, were held insufficient.

Dalf. 16.
Stil. 177, 186;
214, 222.

As where the Defendant being a Burgeses of Parliament brought a Letter from the Speaker to the King's Bench, to stay, &c. but it was disallowed by the Court; for, as the Book says, it ought to have been a Writ of Privilege; and in this Case it was said, that when *Thorpe* was Speaker, he had a general *Supersedeas* for all Actions against him; and it was held ill.

Noy 83.
Latch 48, 150;
Hodges v. Moor.

1 Sid. 42.

A Person chosen to serve in Parliament, shall not have Privilege before the Day of Session; for there is no Clerk of Parliament to certify, and the Court will not admit Affidavits in that Case; he ought to sue his Writ of Privilege in Chancery, on the Return of his Election.

Salk. 509.
Skin. 336.
Carth. 297.
Comb. 273.
1 Ld. Raym.
10. S. C. *The King and Queen v. Knowles*, al' *Ld. Banbury Trin 6 W. & M. in B. R.*

Lord *Banbury* was indicted of Murder by the Name of *Charles Knollys Esq;* and he pleaded in Abatement, that by Letters Patents *K. Car. 1.* created his Grandfather Earl of *Banbury*, and so shewed the Descent to him and prayed Judgment of the Indictment, because he was not named Earl. The Attorney General replied, that upon his Petition to the House of Lords to be tried by his Peers, the Lords dismissed his Petition, and disallowed his Peerage, &c. and upon Demurrer, the Replication was held to be naught, and the Plea good, and the Indictment abated; and in this Case the following Points were determined: 1st, That it was not necessary for the Defendant in his Plea to aver that *Banbury* was within any County in *England*; for that in Reality there is not any Necessity that he should be created of any Place. 2^{dly}, That it was not necessary for the Defendant to aver that he was *unus Parium regni Anglie*; for whatever is done under the Great Seal of *England*, ought to bear Relation to *England*; and to suppose him a Peer of *Ireland*, is a foreign Intendment, and ought to be rejected. 3^{dly}, That the Conclusion of his Plea, *Et hoc paratus est verificare unde ex quo*, without *prout patet per Recordum*, or producing

(a) 22 Aff. 24.
Bro. Aff. 240.
25 H. 5. 46.
6 Co. 53.
9 Co. 31.
F. N. B. 247.
Regist. 287.
Cro. Car. 205.

a Writ to certify that he was an Earl, was sufficient; (a) tho' Baron or not Baron is regularly to be tried by the Record of his having sat in Parliament; but herein the Court took a Difference between a Creation by Writ, and that by Patent; and held, that in the latter Case his sitting or not sitting in Parliament was not material, as his Creation was by Patent, which gave him all the Privileges of a Peer tho' he had never sat in Parliament; besides his Plea does not barely consist on Matter of Record, but the Descents are Matters of (b) Fact which might be traversed, and tried by a Jury. 4^{thly}, It was held, that the Replication did not avoid the Defendant's Plea, nor he concluded from his Peerage by the Order of the House of Lords: 1st, Because in an original Cause the Lords have no Jurisdiction, nor is there any Precedents of their having ever determined a Right of Peerage without a previous Petition to the King, who is the Fountain of Honour, and the King's Reference to them. 2^{dly}, That this Dismission can amount to no more than an Ordinance of one Part of the Legislature, and such Ordinance cannot devert the Party of that in which he hath a Freehold and Inheritance, and in whose Advice and Services the King and Commonwealth are interested. 3^{dly}, That this Dismission does not amount to a Judgment of Parliament, and therefore cannot be pleaded in Bar to the Defendant.

(b) A Trial of Peerage in some Cases shall be by the Country, as where a Duchefs is ennobled by Marriage. 6 Co. 55.

1 Vent. 298.
Countess of Huntingdon's Case.

A Bill of *Middlesex* was issued out of *B. R.* by an Attorney of the Court, against the Countess of *H.* which was discharged by *Supersedeas* without Pleading; because it appeared by the Record that she was a Peeress, and the Attorney committed for suing out the Process.

2 Ld. Raym. 1247.
Salk. 512.
S. C.

A Motion was made on Behalf of the Lord *Banbury* for a *Supersedeas* to a *Latitat* which was issued out of the Court of *B. R.* against him, and on which he had been taken; and to induce the Court to grant it, they offered to produce an Exemplification of the Judgment in the Indictment in this Court against my Lord, and the Letters Patent of Creation, and an Affidavit that my Lord was the same Person in the Record of the Judgment; and it was also pretended, that if my Lord should put in Bail he would be estopped to plead his Peerage; but the Court denied the Motion, and the Ch. J. said that they could not take Notice that this *Charles Kollys* is Earl of *Banbury*; that there

was a Difference between this Case and the Case of a Peer that had sat in the House of Lords. If my Lord had been ever summoned to Parliament and had a Writ to shew, and there were no Dispute about the Identity of the Person, it would have been reasonable to have granted a *Superfedeas*; but in this Case of a Lord who has never sat, they could not do it; for they could not try Peerage on a Motion, but his Lordship might plead it, and pray a *Superfedeas*.

Villars was arrested as *J. Villars armiger*, and pretended himself to be Earl of *Buckingham*; and upon a Motion, the Question was, how he should put in Bail so as not to estop himself; & *per cur.* he need not join in the Recognizance, and then there is nothing to estop him; for the Act of others cannot conclude him.

If a Bishop has Occasion to plead to the Jurisdiction of a Court, he must plead that he is *unus de paribus hujus regni Angliæ*; for he has no Patent to produce in Testimony of his Peerage, but is only a Peer *ratione Baronie*, which he holds in *Jure Ecclesiæ*; otherwise of a temporal Peer.

In the Case of Colonel *Pitt* who was arrested two Days after the Dissolution of that Parliament of which he was a Member, and which was held to be within Time of Privilege, the Question of the greatest Difficulty was, how he should be relieved, and whether he could not be discharged on Motion without bringing his Writ of Privilege; and it was held by ten Judges, that tho' a Writ of Privilege was heretofore held a sure and legal Remedy, that notwithstanding, and especially since the Statute 12 & 13 *W. 3. cap.* . which expressly provides, that no Person intitled, &c. shall be arrested during Time of Privilege, that he might be discharged on Motion; for the Judges are to take Notice of every Act of Parliament, and to take Care that they be duly executed; and this Method was since the making of the above-mentioned Statute thought more adviseable by the Judges than a Plea or Writ of Privilege, as the Act does not make the Process void, but only voidable; and as there could be no Plea to a Process for Irregularity which is aided by the Appearance of the Party; and this Case was compared to an Arrest of an Ambassador's Servant contrary to the 7 *Ann.* and to an Arrest on a Sunday against the Statute 29 *Car.* and to other Cases of Privilege, as when a Juror or Witness, or the Plaintiff himself, is arrested in going to or returning from the Court; which are all discharged upon Motion.

Salk. 3. Smith v. Villars. Stil. 454.

4 Inst. 15.

Mich. 7 Geo. 2. Col. Pitt's Case, at Serjeants Inn.

6. What shall be deemed a Breach of Privilege.

The Privilege, Order or Custom of Parliament, either of the Upper House or House of Commons, belongs to the Determination or Decision only of the Court of Parliament; so that they are the proper Judges of all Breaches of Privilege, and of which the Courts of *Westminster* only take Notice incidently.

And accordingly in the Case of *Paty* and others who were committed to *Newgate* for a Breach of Privilege in commencing and prosecuting Actions at Common Law against the late Constable of (a) *Aylesbury*, the Court of *K. B.* by the Opinions of three Judges against *Holt Ch. J.* refused to relieve or discharge them on a *Habeas Corpus*, this being a parliamentary Matter in which the House of Commons are the sole Judges.

So in the Case of one *Ferrers*, the Sheriff was committed for detaining a Member in Execution.

But

13 Co. 63, 64. Prim's 4 Inst. 16. Cro. Car. 151, 604.

2 Ld. Raym. 1105. The Queen v. Paty.

(a) See the Case of *Ashley v. White, 6 Mod.*

2 Ld. Raym. 938.

1 Salk. 19. Dier 61.

Sir George Binton v. Exelin.
 1 *Lev.* 111.
 1 *Mod.* 145.
Salk. 512.
 1 *Show.* 99.
Carth. 137.
 2 *Ld. Raym.*
 1113. S. C.

But where in *Affumpsit* the Defendant pleaded the Statute of Limitations, and the Plaintiff replied that the Defendant was a Parliament Man, &c. the Plea was over-ruled; because one may file an Original against a Parliament Man, and continue it down without any Breach of Privilege, here being no actual Molestation of his Person or Estate; and that this should be so is of absolute Necessity in order to save the Bar of the Statute, for such Case not being provided by an Exception, the Plaintiff would be barred of his Action, tho' he could not file an Original.

2 *Ld. Raym.*
 1113. per *Holt*
 Ch. J.

So a Man whilst Member of Parliament may alien his Estate by Fine with Proclamations; and a Person who has a Right may be necessitated to commence an Action to save the Bar that would incur against him by the Statute 4 H. 7.

2 *Ld. Raym.*
 1113. per
Holt.

So one may commence an Action against a Member of Parliament that is Executor.

7. Of the Proceedings in Courts by and against Persons intitled to Privilege of Parliament.

By the Statute 12 & 13 W. 3. cap. 13. sect. 1. it is enacted, ' That any Person may prosecute any Suit in any of his Majesty's Courts at *Westminster*, or Chancery or Exchequer, or the Dutchy Court or in the Court of Admiralty; and in all Causes matrimonial and testamentary in the Court of Arches, the Prerogative Courts of *Canterbury* and *Tork*, and the Delegates, and all Courts of Appeal against any Lord of Parliament, or any of the Knights, Citizens and Burgeses of the House of Commons, or their Servants or any other Person intitled to Privilege of Parliament, at any Time immediately after the Dissolution or Prorogation of Parliament until a new Parliament shall meet, or the same be re-assembled, and immediately after any Adjournment of both Houses for above fourteen Days until both Houses shall meet; and the said Courts may after such Dissolution, Prorogation or Adjournment, proceed to give Judgment and to make final Decrees and Sentences thereupon; any Privilege of Parliament notwithstanding.

Sect. 2. ' Provided that this Act shall not subject the Person of any of the Knights, Citizens and Burgeses, or any other Person intitled to Privilege of Parliament, to be arrested during the Time of Privilege; nevertheless if any Person having Cause of Action or Complaint against any Peer, such Person after such Dissolution, Prorogation or Adjournment as aforesaid, or before any Sessions of Parliament, may have such Process out of his Majesty's Courts of King's Bench, Common Pleas and Exchequer against such Peer as he might have had out of Time of Privilege; and if any Person have Cause of Action against any of the Knights, Citizens or Burgeses, or any other Person intitled to Privilege of Parliament, after any Dissolution, Prorogation or such Adjournment, &c. such Person may prosecute such Knight, Citizen or Burges, or other Person intitled to Privilege, in his Majesty's Courts of *K. B. C. P.* and Exchequer, by Summons and Distress Infinite, or by Original Bill and Summons, Attachment and Distress Infinite, which the said respective Courts are impowered to issue, until they enter a common Appearance, or file common Bail; and any Person having Cause of Suit or Complaint may in the Times aforesaid exhibit any Bill or Complaint against any Peer, or against any of the said Knights, Citizens or Burgeses, or other Person intitled to Privilege, in the
 Chancery,

Chancery, Exchequer or Dutchy Court, and proceed thereupon by Letter or *Subpoena* as usual; and upon leaving a Copy of the Bill with the Defendant, or at his last Place of Abode, may proceed thereon, and for Want of an Appearance or Answer, or for Non-Performance of any Order or Decree, may sequester the Estate of the Party, as is used where the Defendant is a Peer, but shall not arrest the Body of any of the said Knights, Citizens and Burgesses, or other privileged Person, during the Continuance of Privilege of Parliament.

And *sect. 3.* 'Where any Plaintiff shall by Reason of Privilege of Parliament be stayed from prosecuting any Suit commenced, such Plaintiff shall not be barred by any Statute of Limitation, or nonsuited, dismissed, or his Suit discontinued for Want of Prosecution, but shall upon the Rising of the Parliament be at Liberty to proceed.

And *sect. 4.* 'No Suit or Proceeding in Law or Equity against the King's original and immediate Debtor, for the Recovery of any Debt originally and immediately due to his Majesty, or against any Person liable to render an Account to his Majesty for any Part of his Revenues, or other original or immediate Duty, or the Execution of any such Procefs, shall be impeached or delayed by Privilege of Parliament; yet so that the Person of such Debtor or Accountant, being a Peer, shall not be liable to be arrested, or being a Member of the House of Commons, shall not, during the Continuance of Privilege, be arrested by any such Proceedings.'

See the Statutes 2 & 3 Ann. cap. 13. 11 Geo. 2. cap. 24.

Sect. 5. 'This Act shall not give any Jurisdiction to any Court to hold Plea of any real or mixed Action in other Manner than such Court might have done before.

It hath been always held, that a Peer is to put in his Answer to a Bill in Equity, on his (a) Honour only, and not on his Oath; but when he is (b) examined as a Witness, he must be sworn.

(a) The 6 May 1628. it was resolved by the House of Lords, that

the Nobility of this Kingdom are of ancient Right to answer in all Courts as Defendants, upon Protestation of Honour only, and not upon the common Oath. 1 Jon. 155. 1 Fern. 329. (b) *Dier* 314. 1 Jon. 153. 2 Mod. 99.

Also if a Peer is by Order of Court to be examined on Interrogatories, or to make an Affidavit, the same must be on Oath.

As where the Lord *Stourton* brought a Bill against Sir *Thomas Meers* to compel him to a specifick Performance of Articles for the purchasing of Lord *Stourton's* Estate, Sir *Thomas* in his Defence insisted, that there were Defects in Lord *Stourton's* Title to the Estate; and it being ordered that Lord *Stourton* should be examined on Interrogatories touching his said Title, it was objected, that Lord *Stourton* being a Peer of the Realm, ought to answer upon Honour only; but it was ruled by Lord *Harcourt*, that tho' Privilege of Peerage did allow a Peer to put in his Answer upon Honour only, yet this was restrained to an Answer; and that as to all Affidavits, or where a Peer is examined as a Witness, he must be upon his Oath; and that this Examination upon Interrogatories, being in a Cause wherein his Lordship was Plaintiff, to enforce the Execution of an Agreement, as his Lordship would have Equity, so he should do Equity, and allow the other Side the Benefit of a Discovery, and that in a legal Manner; and accordingly order'd Lord *Stourton* to put in his Examination on Oath.

Salk. 513. & *vid. Proced. Chan.* 92. 1 P. Will. 146. *Salk.* 513. S.C. Sir *Thomas Meers v. Ld. Stourton.*

It hath been held, that tho' a Court of Equity will not proceed against a Member that has Privilege of Parliament, yet if a Parliament Man sues at Law, and a Bill is brought here to be relieved against that Action, the Court will make an Order to stay Proceedings at Law 'till Answer or further Order.

1 Fern. 329.

Raym. 12. *R. T.* being chose a Burgeses for *Buckingham*, and having a Trial at
 1 *Sid.* 42. Bar to be had on *Tuesday* before the Sitting of the Parliament, moved
 S. C. to have his Privilege allowed him; but was denied in regard the Par-
 liament was not sitting nor to sit 'till after the Trial had.

Hill. 10 *Geo.* 1. It hath been held, that in an Action founded on the abovementioned
 in B. R. Statute 12 *W.* 3. the Defendant shall have an *Imparlance*; and it was
Wadsworth v. said in this Case, that the Practice is to file a Bill in Nature of a special
Handiside. *Capias* against the Defendant, and then to summon him; and if
 he appears upon such Summons, the Plaintiff may declare against him,
 as in *Custodia Marefcalli*.

Fenk. 107. Peers are intituled to a Letter Missive, which Method was introduced
 upon a Presumption that Peers would pay Obedience to the Chancellor's
 Letter; and is founded on that Respect that is due to the
 Peerage.

If the Lord doth not appear upon the Letter, a *Subpœna* on Mo-
 tion is awarded against him; because no subsequent Process can be
 awarded but upon a Contempt to the Great Seal; and the Chancel-
 lor's Letter is only *ex Gratia*.

2 *Vent.* 342. If on the Service of the *Subpœna*, the Peer doth not appear, or if
 he appears and does not put in his Answer, no Attachment can be
 awarded against him, because his Person cannot be imprisoned; but
 the Proceedings must be by Sequestration, unless Cause, &c. and this is
 regularly made out, upon Affidavit made of the Service of the Letter and
 the *Subpœna*, tho' sometimes it is moved for without, since the Peer
 may shew Want of Service at the Day assigned to shew Cause why the Se-
 questration should not issue; and this Order for a Sequestration is never
 made absolute without an Affidavit of the Service of the Order to
 shew Cause, and a Certificate of no Cause shewn.

A Bill being filed against a Peer or Peeres, the first Application is
 for my Lord Chancellor's Letter returnable in Term-Time; or it may
 be *immediate*, if the Peer or Peeres lives in Town; but in this Case
 there must be an Affidavit, that the original Letter is left with the
 Peer at his House, with a Copy of the Petition as answered; and
 therewith also is left an Office-Copy of the Bill signed by the Six Clerk;
 for if the Bill is not signed, the Service is irregular.

This Letter is only a Compliment, and no Process to found Pro-
 ceedings on; so that the Peer may appear or not, as he pleases; if he
 fails a *Subpœna* issues against him, and his Time for appearing and an-
 swering being out, an Attachment must be actually sealed and entred
 against him, tho' never executed, to ground a Sequestration upon. It
 is a Motion of Course for a Sequestration upon an Attachment for
 Want of an Answer.

The Peer must be personally served with this Order, and he hath
 eight Days to shew Cause after personal Service of the Order; if no
 Cause, the Order is absolute; but if the Sequestration is for Want of
 an Appearance, and he appears, the Plaintiff must run the same
 Race over again for Want of an Answer, and the Peer must pray
 Time to answer, as Suitors do.

The same Proceeding is against a Member of the House of Com-
 mons; there the Party proceeds by Way of Sequestration, only with
 this Difference, that instead of a Letter there is always a *Subpœna* sued
 out; and when a Cause either against a Peer or Commoner stands in
 the Paper, and is called, and cannot proceed (Privilege being in)
 the Court never strikes it out as they do in other Cases; where the
 Party is not ready, they let it stand over from one Term to another,
 'till Privilege is out, and never put the Party to sue out a new *Subpœna*
 to hear Judgment; and the Direction of the Court to the Register is
 to put all privileged Causes (which have been put off on that Account)

the very first Causes in the Paper when the Court sits after Privilege is out.

A Sequestration was granted, unless Cause, against the Lord *Clifford* ^{2 P. Will.} for Want of an Answer; he afterwards put in an Answer, which being reported insufficient, it was moved for a Sequestration absolutely, an insufficient Answer being as no Answer; but the Court thought it a Hardship in the Case of a Peer or Member of the House of Commons, that a Sequestration, which in some Respects is in Nature of an Execution, should be the first Process against them; and therefore allowed, that in Case of an Answer which is reported insufficient, the Plaintiff is to move again *de novo*, for a Sequestration *Nisi*.

It was moved for a Sequestration *Nisi*, for Want of an Answer, against a menial Servant of a Peer of the Realm, as the first Process for Contempt, in the same Manner as in the Case of the Peer himself; and tho' the Motion was granted by the Master of the Rolls, yet the Register refused to draw it up as thinking it against the Course of the Court; which being moved again before the Lord Chancellor, his Lordship, upon reading the Statute 12 W. 3. likewise granted the Motion, it appearing to be both within the Meaning and Words of the Statute; and if it were not so, as it was plain no Attachment would lie against their Persons, consequently there would be no Remedy against them, and they would have a greater Privilege than their Lord; if the Process against such menial Servant were to be a *Subpœna*.

Prohibition.

Prohibition.

2 *Inft.* 601.
F. N. B. 40.
 12 *Co.* 6.
 1 *And* 279.
 2 *Jon.* 213.
Skin. 628.

(a) And is of great Antiquity. 3 *E.* 1. An Attachment granted against the Bishop and Official, for holding Plea after a Prohibition. 2 *Rol. Abr.* 280.

(b) Ecclesiastical Courts holding Plea by Fraud of Matters of which they had not Cognizance, were punishable in the Star-Chamber. *Dav.* 52.

Show. Par. Ca. 63.

AS all external Jurisdiction, whether Ecclesiastical or Civil, is derived from the Crown, and the Administration of Justice is committed to great Variety of Courts, hence it hath been the Care of the Crown, that these Courts keep within the Limits and Bounds of their several Jurisdictions prescribed them by the Laws and Statutes of the Realm; and for this Purpose the Writ of Prohibition was (a) framed; which issues out of the Superior Courts of Common Law to restrain Inferior Courts; whether such Courts be Temporal, Ecclesiastical, Maritime, Military, &c. upon a Suggestion that the Cognizance of the Matter belongs not to such Courts; and in Case they exceed their Jurisdiction, the Officer who executes the Sentence, and in some Cases the Judges that give it, are in such Superior Courts (b) punishable, sometimes at the Suit of the King, sometimes at the Suit of the Party, sometimes at the Suit of both, according to the Variety of the Case.

The Reason of Prohibitions in general is, that they preserve the Right of the King's Crown and Courts, and the Ease and Quiet of the Subject; that it is the Wisdom and Policy of the Law, to suppose both best preserved when every Thing runs in its right Chanel, according to the original Jurisdiction of every Court; that by the same Reason that one Court might be allowed to incroach, another might; which could produce nothing but Confusion and Disorder in the Administration of Justice.

2 *Inft.* 602.
 1 *Rol. Rep.* 252.
 3 *Bulst.* 120.
Palm. 297.

So that Prohibitions do not import that the Ecclesiastical or other Inferior Temporal Courts are *alia* than the King's Courts, but signify that the Cause is drawn *ad aliud examen* than it ought to be; and therefore it is always said in all Prohibitions (be the Court Ecclesiastical or Temporal to which it is awarded) that the Cause is drawn *ad aliud examen contra Coronam & dignitatem Regiam*.

Under this Head we shall consider,

- (A) What Courts may grant a Prohibition.
- (B) Whether the granting a Prohibition be discretionary or *ex debito justitiæ*.
- (C) Who have a Right to such Writ, and may demand it.
- (D) Who may join in such Writ.
- (E) Of the Suggestion and Manner of obtaining a Prohibition.

- (F) When to be granted absolutely, or hoc usque only, and therein of directing the Party to declare on his Prohibition.
- (G) Whether more than one such Writ is to be awarded.
- (H) At what Time to be granted; and therein in what Cases it may be granted after Sentence.
- (I) To what Courts a Prohibition may be awarded; and herein, that the Superior Courts are to determine the Boundaries of all Inferior Jurisdictions.
- (K) Prohibitions to Inferior Temporal Courts in what Instances to be granted.
- (L) Prohibitions to the Spiritual Court in what Instances: And herein,
1. Where they meddle with a Matter purely Temporal.
 2. Where they determine on a Matter of Freehold.
 3. In what Cases a Prohibition lies when they determine on Criminal Offences.
 4. Where the Ecclesiastical Courts determine on Acts of Parliament.
 5. In what Cases they have a concurrent Jurisdiction, and may determine Incidents.
- (M) The Offence of paying Disobedience to a Prohibition.

(A) What Courts may grant a Prohibition:

THE Superior Courts of *Westminster*, having a Superintendency over all Inferior Courts, may in all Cases of Innovation, &c. award a Prohibition; in this the Power of the Court of *B. R.* has never been doubted, being the Superior Common Law Court in the Kingdom.

Also the Court of Chancery may award a Prohibition, which may issue (a) as well in Vacation as in Term-time, but such Writ is returnable into *B. R.* or *C. B.*

(a) If one be sued in an Inferior Court for a Matter out of the Jurisdiction, the Defendant may either have a Prohibition from one of the Common Law Courts of *Westminster-Hall*; or in Regard this may happen in a Vacation, when only the Chancery is open, he may move that Court for a Prohibition; but then it must appear by Oath made, that the Fact did arise out of the Jurisdiction, and that the Defendant tendered a foreign Plea, which was refused; and if a Prohibition has been granted out of Chancery *improvidē*, and without these Circumstances attending it, the Court will grant a *Supersedeas* thereto. 1 *Peer Will.* 476.

As the Jurisdiction of the Court of *C. B.* is founded on Original Writs issuing out of Chancery, it hath been heretofore (b) doubted, whether this Court could without Writ or Plea depending award a Prohibition; but this Point has been (c) determined by the unanimous Sense of all the Judges, *viz.* That this Court may upon a Suggestion grant Prohibitions, to keep as well Temporal as Ecclesiastical Courts

Vol. IV. Q 99 within C. B. as *B. F.*

4 *Inst.* 99. 2 *Brownl.* 17. — Prohibitions for incroaching Jurisdictions issue as well out of the *Vaugh.* 157. *per Vaugh.* Ch. J.

F. N. B. 53.
4 *Inst.* 71.

Bro. Prohibition, pl. 6.
4 *Inst.* 81.
1 *Peer Will.* 43.

(b) *Bro. Prohibition,* pl. 6.
Nov 153.
(c) 12 *Co.* 58,
108.
Bro. Consulta-
tion, pl. 3.
C. B. as *B. F.*

within their Bounds and Jurisdictions, and that without any original Writ or Plea depending; the Common Law being, in these Cases, a Prohibition of itself, and standing instead of an Original.

Moor 861.
2 *Rol. Abr.*
317. *Hutton's*
Cafe.
Hob. 15. S. C.
and there said
by *Hob.* that
the Party
might like-
wise have a
Prohibition out of the *Duchy* Court.

Accordingly it hath been adjudged, that a Prohibition ought to be granted by the Court of *C. B.* to the Court of Delegates, for suing there to avoid an Institution of a Clerk to a Church in *Lancaſſire*, after Induction made of him thereto, tho' the *Quare Impedit* for this Church could not be brought in *C. B.* but only in the County of *Lancaſter*; because the Title of the Advowſon was not questioned by this Prohibition, but the Intruſion upon the Common Law, of which this Court has ſpecial Care.

Noy 77. *Dixy*
v. Brown.
Palm. 422.
Latch 114.
S. C.
(a) That if it
be inſiſted on,
a Prohibition
cannot be
moved for till
the Suggestion be entered on the Roll. 1 *Salk.* 136. *per Holt* Ch. J.
issues upon ſuch Prohibition, or the Party puts in Bail, then it becomes a private Suit, not diſcontinued by the Demiſe of the King; and after ſuch Proceeding the Party may be nonſuited, tho' not before. *Palm.* 423. *Latch* 114. *per Dodderidge* and *Jones.*

But as to the Courts of *B. R.* and *C. B.* this Difference hath been made, that in the firſt of thoſe Courts a Prohibition may be awarded upon a (a) a bare Surmiſe, without any Suggestion on Record; and ſuch Writ is only in Nature of a Commiſſion prohibitory, which is (b) diſcontinued by the Demiſe of the King; but that as to a Prohibition iſſuing out of *C. B.* the Suggestion muſt be on Record, and therefore is conſidered as the Suit of the Party, and in which he may be nonſuited, and is not diſcontinued by the Demiſe of the King.

Palm. 525.
Lane 39.
1 *Rol. Abr.*
539.

If the King's Farmer, or a Copyholder of the King's Manor, be ſued in the Eccleſiaſtical Court for Tithes, upon a Suggestion in the Court of Exchequer that he preſcribes to pay a certain *Modus* in Lieu of Tithes, he ſhall have a Prohibition out of the ſaid Court, and ſuch *Modus* ſhall be tried there.

1 *Sid.* 92.
but for this
vide Cro. Car.
341. 1 *Jon.* 330. *Vaugb.* 411.

The Grand Sefſions of *North Wales* may ſend a Prohibition and write to the Spiritual Courts there, as well as the Courts here may.

(B) Whether the granting a Prohibition be discretionary or ex debito juſtitia.

Hob. 67. in
the Cafe of
Aſton Pariſh
v. Caſtle Bir-
midge Chapel.

IT is laid down in *Hob.* that tho' a Surmiſe be a Matter of Fact, and triable by a Jury, yet it is in the Diſcretion of the Court to deny a Prohibition, when it appears to them that the Surmiſe is not true.

Winch 78. it
is ſaid to be a
Matter diſcre-
tionary. —
But in *Raym.*
3, 4. 1 *Sid.*
65. Prohi-
bitions are
ſaid by the
Judges to be

This Authority has been often quoted in Queſtions of this Kind, and in ſome Cafes denied to be Law; but yet it ſeems the better Opinion, and to have been ſo holden by the greater Number of our Judges, that the Awarding a Prohibition is a Matter diſcretionary, that is, that from the Circumſtances of the Cafe the Superior Courts are at Liberty to exerciſe a legal Diſcretion herein, but not an arbitrary one, in reſuſing Prohibitions, where in ſuch like Cafes they have been granted,

ex debito juſtitia, and not *de gratia*. — In *Raym.* 92. *Hid* Ch. J. affirms, that a Prohibition is *ex gratia*; but *Keling* and *Twiſden* poſitively denied it. — *Salk.* 33. *Comb.* 148. they are held to be diſcretionary. — 1 *Ld. Raym.* 220, 578. it is ſaid by *Holt* Ch. J. that *Hale* and *Windham* held Prohibitions to be diſcretionary in all Cafes. — And of this Opinion is *Holt*; and ſo in 1 *Ld. Raym.* 586.

granted, or where by the Laws and Statutes of the Realm they ought to be granted.

It hath been determined in the House of Lords, that no Writ of Error will lie upon the Refusal of a Prohibition; but when a Consultation is awarded, it is with an *Ideo consideratum est*, and then a Writ of Error will lie.

If a Master of a Ship sues in the Admiralty for his Wages, and a Prohibition is moved for, upon a Suggestion that the Contract was made on Land, and the Court is of Opinion that a Prohibition ought by Law to be granted; in this Case they will not compel the Party to find (a) special Bail to the Action in the Court above.

(a) But *Holt Ch. J.* confessed that the Court had sometimes interposed, and procured Bail to that was by Consent. 1 *Ld. Raym.* 578.

If there is Judgment against a Simonist, who by the Assent of Parties is to continue for a certain Time on the Benefice, and who at the Expiration of the Time refuses to remove, but commits Waste on the House or Glebe, a Prohibition to stay his doing Waste may be had by the Patron, Incumbent, or any other Person, because that is the King's Writ; and any one may pray a Prohibition for the King, and it is grantable *ex debito justitiæ*, and not Honorary, and in the Discretion of the Court.

(C) Who have a Right to such Writ, and may demand it.

THE King may sue for a Prohibition, tho' the Plea in the Spiritual Court be between two common Persons, because the Suit is in Derogation of his Crown and Dignity.

So if the Ecclesiastical Court will hold Plea of any Matter which belongs not to their Jurisdiction, upon Information thereof to the King's Courts, either by the Plaintiff, Defendant, or by a meer Stranger, a Prohibition will issue.

As if a Man libels in the Spiritual Court for a Matter which does not appertain to that Court, but to the Common Law, as a Matter of Frank-tenement; yet he himself, against his own Suit, may pray a Prohibition, and shall have it.

So where the Plaintiff in the Spiritual Court brought a Prohibition to stay his own Suit there, for that he suing for Tithes by Virtue of a Lease made by the Vicar of *A.* for three Years, the Defendant claimed to be discharged of the Tithes by a former Lease and Composition by Deed; and in this Case it was held, that the Plaintiff himself may have a Prohibition to stay the Suit; for the Ecclesiastical Judges are not to meddle with the Trial of Leases or real Contracts, tho' they have Jurisdiction of the original Cause (*viz.* the Tithes); for the Lease is in the Realty, and is not merely accidental; and it makes no Difference, that the Plaintiff brings this Prohibition to stay his own Suit; for if the Temporal Court has Knowledge by any Means, that the Spiritual Court meddles with Temporal Trials, a Prohibition ought to be awarded.

If a Vicar sues a Parishioner for Tithes in the Spiritual Court, and the Parson appropriate appears there (b) *pro interesse suo*, and prays a Prohibition, it shall be granted.

1 *Ld. Raym.* 545. in the Bishop of St. David's Case

Salk. 33.
Carth. 518
Cum. 74.
1 *Ld. Raym.* 576. S. C.
Clay v. Snelgrave.

be given, but

Comp. Incumb. 43.
1 *Sid.* 65.
Hob. 247.

F. N. B. 40.

2 *Inst.* 607.

2 *Rol. Abr.*

312.
1 *Leon.* 130.
Gouldf. 149.
12 *Co.* 56.

Cro. Jac. 351.

2 *Bull.* 283.

Lit. Rep. 20.

Wort. v. Clifton.

flon.

2 *Rol. Abr.*

312. *Robert's Case.*

(b) *Cro. Eliz.*

257.

If *Kelov.* 112.

- Moor* 915. If Lessee for Years is sued in the Spiritual Court for Tithes, he in
Cro. Eliz. 55. Reversion may have a Prohibition.
- March* 22, 45. But no Man is intitled to a Prohibition unless he is in Danger of
 — A Prohibition *quia* being injured by some Suit actually depending; and therefore upon a
timet does not Petition to the Archbishop, or other Ecclesiastical Judge, no Prohibition lies.
Allen 56.

(D) Who may join in such Writ.

- Noy* 131. IF several Libels are exhibited against *A.* and *B.* in a Matter in
 1 *Leon.* 286. which the Court hath not Conusance, *A.* and *B.* cannot join in a
Cro. Car. 129. Prohibition; so if the Grievs be several, as some Books say.
- Yelw.* 128-9. But where the Vicar of *A.* libelled several Persons severally for
Burges and Tithes, who joined in a Prohibition, suggesting a *Modus*; and tho' the
Dixon v. Ashton. Court held in this Case, that the Prohibition was not regularly brought,
 being in all their Names, when there were several Libels; yet inas-
Owen 13. much as this was on a Custom, and Matter triable at Common Law,
Bartue's Case, in which the Ecclesiastical Court was properly prohibited, tho' not in
 L. P. ad- exact Form, they refused to award a Consultation, but directed that
 judged. the Parties should put in several Declarations, as if there had been several Prohibitions.
- 1 *Ld. Raym.* So if *A.* libels against *B.* and *C.* for Defamation, and they sue a Pro-
 127. *per Tre-* hibition, they shall join in Attachment upon it; and it is no Objection
by Ch. J. & to say, that the Defamation was several.
vide for this
 1 *Vent.* 266. *Raym.* 425. *Comb.* 448.

- Owen* 13. *per* Where two or more are allowed to join in a Prohibition, and one
Cur. of them dies, the Writ shall not abate; because nothing is by them
 to be recovered, but they are only to be discharged.

(E) Of the Suggestion and Manner of obtaining a Prohibition.

- 2 *Salk.* 549. WHERE the Matter suggested for a Prohibition appears upon the
per Holt Ch. J. Face of the Libel, an Affidavit is never insisted upon; but if
 1 *Peer Will.* it does not appear upon the Face of the Libel, or if a Prohibition is
 477, 65. S. P. moved for, for more than appears upon the Face of the Libel, to be out
 cited. of their Jurisdiction, there ought to be an Affidavit of the Truth of
 the Suggestion.

- 2 *Inst.* 611. The Suggestion in the Temporal Courts may be traversed.
 2 *Co.* 44.
Moor 525. — Prohibition not to be granted upon Process before Libel or Appearance. 1 *Salk.* 35. 6 *Mod.*
 111. — Where it is in Nature of a *Superfedas.* 1 *Lew.* 253. — That a Person may alter his Suggestion.
 1 *Show.* 179. — Where a Variance between the Libel and Suggestion is not material. *Yelw.* 79.

- 2 *Ld. Raym.* On a Rule to shew Cause why a Prohibition should not be granted
 1211. to stay a Suit against the Plaintiff in the Court of the Archdeacon of
Burdett v. *Litchfield*, for not going to his Parish-Church, nor any other Church,
Newell. on *Sundays* or Holidays, nor receiving the Sacrament thrice a Year,
 upon

upon Suggestion of the Statute *Eliz.* and Toleration Act, and then qualifying himself within the Act, and alledging that he pleaded it below, and they refused to receive his Plea; Cause was shewn, that this Fact was false, and that the Plaintiff was not a Dissenter, nor had qualified himself *ut supra*, and therefore hoped the Court would not suffer the Rule to stand unless there was an Affidavit of the Fact; for by that Means any Person might come and suggest a false Fact, and oust the Spiritual Court of their Jurisdiction; which the Court admitted; and therefore for want of such Affidavit the Rule was discharged.

If a Plea to an Inferior Jurisdiction be properly tendered, which they refuse, tho' this be a good Cause for a Prohibition, yet an Affidavit must be made of the Refusal. *Skin. 20. Hard. 406. 3 Keb. 217.*

A Motion was made for a Prohibition to the Ecclesiastical Court of *London*, for calling a Woman *Whore*, upon a Suggestion that the Words were actionable there by Custom of the Place; but the Court would not grant a Prohibition without Oath made, that if any such Words were spoken, it was in *London*, and not elsewhere. *4 Mod. 367.*

On a Libel for calling the Plaintiff *Old Thief and Old Whore*; the Defendant suggested for a Prohibition, that if any such Words were spoken, they were spoken at the same Time; but this Suggestion was held ill, because the Words ought to have been fully confessed. *1 Vent. 10. Day v. Pitts.*

By 2 & 3 *Ed. 6. chap. 13.* it is enacted, ' That if any Party at any Time hereafter, for any Matter or Cause before (a) rehearsed, limited or appointed by this Act, to be sued or determined in the King's Ecclesiastical Court, or before the Ecclesiastical Judge, do sue for any Prohibition to any of the King's Courts where Prohibitions before this Time have been used to be granted, that then in every such Case the same Party, before any Prohibition shall be granted to him or them, shall bring and deliver to the Hands of some of the Justices or Judges of the same Court, where such Party demanded Prohibition, the very true Copy of the Libel depending in the Ecclesiastical Court concerning the Matter where the Party demandeth Prohibition, subscribed or marked with the Hand of the same Party, and under the Copy of the said Libel shall be written the Suggestion, wherefore the Party so demandeth the said Prohibition; and in Case the said Suggestion, by two honest and sufficient Witnesses at the least, be not proved true in the Court where the said Prohibition shall be granted and awarded, that then the Party, that is letted or hindered of his or their Suit in the Ecclesiastical Court by such Prohibition, shall upon his or their Request and Suit, without Delay, have a Consultation granted in the same Case in the Court where the said Prohibition was granted, and shall recover double Costs and Damages against the Party that so pursued the said Prohibition; the said Costs and Damages to be assigned or assessed by the Court where the said Consultation shall be so granted; for which Costs and Damages the Party to whom they shall be awarded may have an Action of Debt by Bill, Plaint or Information, in any of the King's Courts of Record. *(a) Rehearsed in the Statutes 27 H. 8. cap. 20. and 32 H. 8. cap. 7. to which this Act refers.*

In the Construction of the above-mentioned Statute the following Opinions have been holden.

That this Statute referring to the Statutes 27 and 32 *H. 8.* which extend to Tithes and Offerings generally, all such Tithes and Church-Duties as are mentioned in those Statutes, are as much within this Act as if particularly enumerated. *2 Inst. 662. Comp. Incumb. 600. Dier 170. b.*

And therefore it extends to Prohibitions to Suits for final Tithes as well as great. *Yelv. 102. 2 Ld. Raym. 1172.*

- Noy* 148. So it hath been adjudged, that the Suggestion of a *Modus decimandi* ought to be proved within six Months, being within the Act.
Yelv. 104.
L. P.
- 1 Rol. Rep.* 55. So where one, that was sued for Tithe of Hay in the Spiritual Court, suggested for a Prohibition, that he was to pay so much upon an Arbitrament; and it was held, that this Suggestion ought to be proved, as well as one made of a *Modus decimandi*: So on a Suggestion upon the Statute 31 *H.* 8. that Lands are Tithe-free, because the Clause requiring the Proof of a Suggestion is general, and not limited to Real Composition.
Reynolds v. Hay.
- 1 Jon.* 231. So upon a Suggestion, that the Suit in the Spiritual Court was for Tithes of Heath and Barren Ground improved within seven Years after the Improvement, contrary to the Statute; in this Case Proof of the Suggestion within six Months was held necessary.
Strande v. Hoskins.
Cro. Car. 208.
- Cumb.* 147. But it hath been held, that there needs no Proof of the Suggestion where the Suit is for Tithes contrary to common Right, or where the (a) Contract of the Party is suggested.
(a) For this
vide Yelv.
104, 119. *2 Leon.* 29. *Brown. Goulf.* 99. *Hell.* 145. *1 Rol. Rep.* 15. *2 Keb.* 134. *Lit. Rep.* 297.
- Cro. Eliz.* 736. It hath been held, that the Suggestion need not be proved (b) strictly, nor with precise Certainty as to all its Circumstances; but that if it be proved in Substance, or in such a Manner as to (c) shew that the Ecclesiastical Court has not Jurisdiction, it is sufficient.
Moor 911.
(b) That Proof by Hearsay is sufficient.
Palm. 377.
— Or that it is so by common Fame. *Noy* 28. (c) As where a *Modus* was alledged to be, that one should pay 20s. in Satisfaction of Tithes, and the Proof was, that he should pay 40s. this was held sufficient Proof, because thereby the Court above had sufficient Jurisdiction. *Hell.* 100. — So where the Suggestion was to pay 2s. 6d. for Tithes, and the Witnesses proved the *Modus* to be to pay 3s. this was held good by two Judges against one; because it ousted the Ecclesiastical Court of Jurisdiction. *Noy* 44. *Hell.* 110. & *vide Yelv.* 55. *2 Keb.* 57, 407. — So if one surmise that the Inhabitants of B. (of which he is one) have paid a *Modus*, and the Proof be that he himself had paid it, this is sufficient; because it ousts the Ecclesiastical Court of its Jurisdiction. *Noy* 28.
- 2 Bull.* 154. The Suggestion must be proved by honest and sufficient Witness, which is required by the express Words of the Statute; and therefore the Testimony of one attainted of Felony, excommunicated or convicted of Recusancy, is, as in other Cases, to be rejected.
- Mich.* 27 *Car.* 2. in *C. B.* But it hath been held, that Persons, such as Parishioners of the Parish, &c. who may not be sufficient and able Witnesses at a Trial at Law, may notwithstanding be sufficient Witnesses to prove the Suggestion; the chief Intent of the Statute being to prevent frivolous and vexatious Suggestions; also it hath been held, that after the Admitting and Recording the Proof of the Suggestion, nothing is to be objected against the Persons of the Witnesses or their Evidence.
Sharp v. Hobart.
- 1 Vent.* 107. If a Suggestion consists of two Parts, it is said to be sufficient to produce one Witness to the one, and another to another.
- Hob.* 179. It hath been held, that the six Months for Proof of the Surmise shall be accounted according to the Kalendar; for that this being a Computation which concerns the Church, it is but reasonable that it should be done according to the Computation used in the Ecclesiastical Law.
Lit. Rep. 19.
2 Mod. 58.
- (d) *Moor* 573. It is said in (d) *Moor*, that the Time of six Months given by the Statute to prove the Suggestion ought to be intended six Months in Term-time, and that the Vacation should be no Part of the Time; but this hath been since (e) adjudged otherwise, and that the Time shall commence from the *Teste* of the Writ of Prohibition, and not from the Time of the Rule made for awarding it.
(e) *Noy* 30.
2 Ld. Raym. 1172.
2 Salk. 554.
- Noy* 30. If the (f) Surmise be proved before one of the Judges within the six Months, although it be not recorded till after the six Months by the Court, it is well enough.
(f) That it must be entered in the Office.
2 Show. 308.

It hath been held, that Proof which is not sufficient may be supplied by better Proof within the six Months, but not after. *Lit. Rep.* 155.

The Party, on Failure of Proof of the Suggestion, shall not only have double Costs and Damages, but also his (a) Costs and Damages in the Action he brings for the Recovery of them. *Bendl.* 143. *(a) Vide Stat.* 8 & 9 W. 3. *cap.* 11.

But if the Prohibition be grounded partly on a *Modus*, which needs Proof, and partly on the Contract of the Parties, which needs no Proof, there ought not to be double Costs; for the mixing the Contract with the Manner of tithing privileges the whole. *Brownl. Goult.* 99. *Yelv.* 119.

So where for a Variance between the Libel and Suggestion, a Consultation was awarded, and double Costs adjudged to the Defendant; and this was held to be Error by the very Letter of the Statute, which gives double Costs (b) only for want of proving the Suggestion, and for no other Cause. *Yelv.* 79, 80. *(b) Carth.* 463.

So where a Prohibition was obtained upon a Suggestion which was not proved within the six Months, in which the Defendant took Issue with the Plaintiff, which was found for the Plaintiff; and in this Case it was resolved, that the Defendant should not have double Costs for want of the Suggestion's being proved; for the Statute is, that he shall have a Consultation and double Costs; but in this Case he could not have a Consultation, the Matter and Issue being found against him; but ought to have prayed a Consultation upon the Suggestion's not being proved, and then should have had his double Costs. *Latch* 140. *Watkinson v.* *Sir G. Pacy.*

The Surmise or Suggestion may be brought in by Attorney, and need not be in proper Person. *1 Leon.* 286.

A Prohibition is not to be granted the last Day of Term, but on Motion a Rule may be obtained to stay Proceedings till the ensuing Term. *Latch* 7. *2 Rol. Rep.* 456.

(F) **When to be granted absolutely, or hoc usque only; and therein of directing the Party to declare on his Prohibition.**

Prohibitions are granted either absolutely, or *hoc usque* only till such an Act be done; the first of these is peremptory, and ties up the Inferior Jurisdiction till a Consultation be awarded; the second is *ipso facto* discharged upon complying with the Act, and that without any Writ of Consultation. *6 Mod.* 308.

When a Prohibition is moved for, because a Copy of the Libel is denied to be delivered, the Court requires that Oath should be made of the Denial, and the Prohibition is only *quousque* the Copy is delivered. *1 Vent.* 252. *2 Salk.* 553.

A Prohibition *quousque* they give Copy of the Libel, if it be granted before any Libel exhibited, does not bind them from exhibiting any Libel, and after they shall not proceed till they give a Copy of it. *6 Mod.* 308.

A Prohibition was denied to be granted to the Admiralty Court, upon a Suggestion that they refused to give the Party sued there a Copy of the Libel, because the (c) Statute extends only to the Ecclesiastical Courts. *1 Ld. Raym.* 442. *(c) 2 H.* 5. *cap.* 3.

It was formerly held by all the Judges of *England*, that when there was a Proceeding *ex officio* in the Ecclesiastical Court, they were not bound to give the Party a Copy of the Articles; but the Law is otherwise; for in such Cases, if they refuse to give a Copy of the Articles, a Prohibition shall go *quousque* they deliver it. *2 Ld. Raym.* 991. *per Holt* Ch. J. and so ruled by him in a like Case.

On

(a) *Cro. Eliz.* 16, 94. On (a) Motions for Prohibitions it is frequent in doubtful Cases to grant them *nisi*, or that the adverse Party should shew Cause why they should not be granted; also in (b) nice and difficult Cases it is usual to direct the Plaintiff to (c) declare on his Prohibition, and so proceed to (d) Issue, that the Merits of the Cause may be brought before the Court with the greater Exactness, and they thereby be the better enabled to judge of the Reasonableness of granting or refusing them.

5 *Mod.* 247. *Ld. Raym.* 236. (b) *Cro. Eliz.* 736. 4 *Mod.* 151-2. 1 *Lew.* 125. *Raym.* 88. (c) *Stile's Pract. Reg.* 43. *F. N. B.* 44. (d) If the Jury, upon an Issue joined in a Prohibition *de Modo decimandi*, find a different *Modus*, yet the Defendant shall not have a Consultation; for it appears that he ought not to sue for Tithes *in Specie*, there being a *Modus* found. 1 *Vent.* 32.

1 *Leon.* 181. The Court is not obliged to give Direction for such Declaration, but are absolute Judges of the Sufficiency or Insufficiency of the Suggestion.

Faref. 113-4. 1 *Leon.* 128. If the Declaration varies from the Suggestion, this is naught, and a Consultation will be awarded. for the Surmise is as the Writ.

(G) Whether more than one such Writ is to be awarded.

BY the 50 *E. 3. cap. 4.* it is enacted, ' That where a Consultation is once duly granted upon a Prohibition made to the Judge of (c) Holy Church, that the (f) same Judge may proceed in the Cause by Virtue of the same Consultation, notwithstanding any (g) other Prohibition (b) thereupon to be delivered; provided always, that the Matter in the Libel of the said Cause be not enlarged or otherwise (i) changed.

(e) Intended Spiritual Judge, and therefore this Statute extends not to the Court of Admiralty. 2 *Brownl.* 35. (f) Ecclesiastical Judge in general, or Person competent, and not the same individual Person. *Popb.* 159. *Palm.* 418. *Latch* 6, 75. (g) But if the first Prohibition was unduly obtained, as on Proceedings by *English* Bill in Chancery, &c. a second Prohibition may be awarded notwithstanding this Statute. *Cro. Eliz.* 736. (b) Whether proceeding out of the same Court or another, if for the same Cause. *Cro. Eliz.* 277. (i) 2 *Rel. Rep.* 207.

2 *Brownl.* 25, 247. This Statute hath been construed to extend to those Cases where a Consultation hath been lawfully granted; that is, upon the Right and Merits of the Thing in Question, and not to such Cases where for Defect of Form, Misprision of a Clerk, Mispleading an Act of Parliament, &c. Consultations have been awarded.

1 *Jones* 231. *Moor* 908. *Yelv.* 102. *Cro. Car.* 208. 2 *Keb.* 719. So if a Consultation be awarded for Default of Proof of the Suggestion pursuant to the Statute 2 & 3 *E. 6.* the Plaintiff is not precluded, but may bring (k) another Prohibition; for this Statute goes to the Suggestion made upon the (l) same Libel, and to a Consultation duly granted, and not to the Case of not having Witnesses ready to prove the Suggestion through Negligence.

463. (l) It is said by Justice *Holloway*, that after a Consultation awarded for not proving his Suggestion, &c. the Party shall be for ever barred from having another Prohibition on the same Libel. *Comb.* 63.

2 *Vent.* 47. A Motion was made for a Prohibition to a Suit for Tithe-Lamb, upon Suggestion of a *Modus* to pay 2d. a Lamb for Lambs falling in the Plaintiff's Farm in the Parish. It was objected, that a Prohibition was granted before to stop this Suit, upon a Suggestion, which was tried and found for the Plaintiff, and a Consultation granted. But it was answered, that that Suggestion was for every Lamb which fell in the

the Parish, whereas this only is for Lambs falling in a particular Farm, and so not within this Statute; but the Court inclined against the Prohibition, thinking it within the Statute.

¶ If upon the Trial of a Suggestion the Plaintiff be nonsuit, no new Prohibition shall be granted, altho' the Nonsuit was occasioned for want of some of the Plaintiff's Witnesses, who were to prove the Truth of the Suggestion, and who were necessarily obliged to be absent. *1 Keb. 286.*

If the Ecclesiastical Court refuse to grant a Copy of the Libel, for which a Prohibition is granted, and thereupon they grant the Copy, and afterwards proceed in the Cause, the Matter not being within their Jurisdiction, another Prohibition lies. *Moor 917.*

If the Defendant in a Prohibition die, his Executors may proceed in the Ecclesiastical Court, and the Judges of the Court, out of which the Prohibition was granted, will also in such Case make a Rule to the Spiritual Court to proceed; but the Plaintiff may, if he please, have a new Prohibition against the Executors. *Lit. Rep. 155.*

(H) At What Time to be granted; and therein in What Cases it may be granted after Sentence.

IT is clearly agreed, that in all Cases where it appears upon the Face of the Libel, that the Admiralty, Spiritual Court, &c. have not a Jurisdiction, a Prohibition may be awarded, and is grantable as well after as before Sentence; for the King's Superior Courts have a Superintendency over all Inferior Jurisdictions, and are to take Care that they keep within their due Bounds. *2 Inst. 662. 2 Rol. Abr. 318, 319. Noy 137. 1 Sid. 65. Cro. Eliz. 571. Moor 462, 907.*

Skin. 299. Carth. 463. March 153. 2 Rol. Rep. 24. Comb. 356.

But where the Court has a (a) natural Jurisdiction of the Thing, but is restrained by some Statute; as by 23 H. 8. for not citing out of the Diocese, there the Party must come before Sentence; for after pleading and admitting the Jurisdiction of the Court below, it would be hard and inconvenient to grant a Prohibition. *Vide the Authorities supra, and Cro. Car. 97. 2 Show. 145, 155. Vent. 61.*

6 Mod. 252. Farell. 137. Godb. 163, 243. 5 Mod. 341. Hettl. 19. 12 Co. 76. Like Point; because the Cause belongs to the Spiritual Court, and though not to that Spiritual Court, yet it belongs to some other, and not to the King's Temporal Courts; & vide Carth. 33, 34. where it appeared on the Face of the Libel, that the Party was cited out of his proper Diocese.—*Cro. Jac. 429. Cro. Car. 97. Comb. 448.* where the Party obtained a Prohibition before Sentence, but did not serve it till two Terms after, which was after Sentence definitive, and it was held to be too late. *(a) Salk. 543.*

Upon a Motion for a Prohibition the Case was, The Defendant libelled in the Spiritual Court for Tithes of Faggots made of Loppings of Trees; and the Suggestion for a Prohibition was, that these Loppings were cut from the Stumps of Timber-Trees above the Growth of twenty Years; and it was alledged, that Sentence was given in the Spiritual Court, and therefore the Plaintiff comes here too late to have a Prohibition: But per Holt Ch. J. the Sentence will not hinder the having a Prohibition in any Case, but in Case of Prohibitions grounded upon 23 H. 8. cap. 9. for citing out of the Diocese; but because the Plaintiff had not pleaded this Matter in the Spiritual Court, they denied the Prohibition, because the Spiritual Court has a general Jurisdiction. *2 Ld. Raym. 835. Dike v. Brown.*

diction of Tithes; and if any special Matter deprives them of their Jurisdiction, it must be pleaded there; and if it had been pleaded there, and Issue joined upon it, and upon the Trial it had been found not to be *Silva Cædua*, it had been well; but if they had refused to admit the Plea, a Prohibition should have been granted.

(I) **To What Courts a Prohibition may be awarded; and herein, that the Superior Courts are to determine the Boundaries of all Inferior Jurisdictions.**

THE King's Superior Courts of *Westminster* have a Superintendency over all Inferior Courts of what Nature so ever, and are by Law intrusted with the Exposition of such Laws and Acts of Parliament as prescribe the Extent and Boundaries of their Jurisdiction; so that if such Courts assume a greater or other Power than is allowed them by Law, or if they refuse to allow of Acts of Parliament, or expound them otherwise than according to the true and proper Exposition of them, the Superior Courts (a) will prohibit and controul them.

(a) The Honour of B. R. to keep Inferior Courts in Order. 2 *Rol. Rep.* 471.

Hence Prohibitions are grantable to almost all Sorts of Courts which differ from the Common Law in their Proceedings, to the Courts (b) Christian, to the Admiralty, nay to the (c) Delegates, and even to the Steward and Marshal, upon the Statute of *Articuli super Chartas*.

(b) That the Spiritual Jurisdiction exercised within this Realm is derived from the King. *Dav.* 97. (c) Where they exceed their Authority, or proceed in Matters not properly within their Cognizance, may be prohibited. *Moor* 460, 463. *Latch* 85, 86.

A Prohibition lies to the Convocation *Si concilium teneant de aliquibus que ad Coronam Regis pertinent, vel que personam Regis, vel Statum suum vel Statum Concilii sui contingunt.*

4 *Inst.* 322. Lay to the High Commission Court. 4 *Inst.* 333. *Lit. Rep.* 152, 189, 274.

Prohibitions have been granted to the Marches of *Wales*, of which there are many Instances;

4 *Inst.* 243. 2 *Rol. Abr.* 317. 1 *Rol. Rep.* 309, 311. *Winch* 78, 103. *Raym.* 191. 1 *Vent.* 300. *Comb.* 469. 1 *Jon.* 248.

As where a Bill of Foreclosure was brought against one in the Grand Sessions for the County of *Montgomery*, upon a Mortgage of Lands that lay there, but the Party himself was not an Inhabitant; and it was held in this Case, that a Prohibition ought to go; for that the Party living out of the Jurisdiction could not be served with Process, and consequently could not be guilty of a Contempt, on which a Sequestration on his Lands could be grounded.

2 *Ld. Raym.* 1408. *Vaughan v. Evans.*

So Prohibitions have been granted to the County Palatine of *Chester* in many Instances where they have exceeded their Jurisdiction.

Hutt. 59. 2 *Rol. Abr.* 318. *Stile* 285. 3 *Bulst.* 116. *Hob.* 15. 1 *Rol. Rep.* 246, 331. 1 *Sid.* 189.

So Prohibitions have been granted to the Duchy Court of *Lancaster*, (a) 2 *Rol. Abr.* 317-8. for holding Plea of Land, not Parcel, of the Duchy, (b) for determining on the Validity of Letters Patent granted of a Manor. *Hob.* 77. (b) 3 *Bull.* 119. 1 *Rol. Rep.* 252. *Skm.* 43.

So where a Suit was commenced in the Duchy Chancery Court, to discover Matters whereby the Defendant there would forfeit his Freehold; and a Prohibition was granted. *Salk.* 550.

A Prohibition was moved for to the Chancery Court of the Cinque Ports, in which a Bill was filed, setting forth a Custom, that every Ship that used the Pier of *Ramsgate* should pay 4 *d.* for all their Gettings in the Year, for the Maintenance of the Pier, and for a Discovery of the Defendant's Gettings; and such Prohibition was held to lie, as to the Custom, which is only triable by Law; but the Court held, that such Bill might be proper as to the Discovery. *Comb.* 261.

A Prohibition was prayed to the Court of the Chamberlain of *Cheshire*, where an *English* Bill was preferred, setting forth, that *J. S.* being indebted to the Plaintiff, the Defendant upon good Consideration promised, that if *J. S.* did not pay it, he would, and that he wanted such precise Proof as the Law required, and so prayed to be relieved by the Equity of the Court; the Defendant confessed the Promise in his Answer, and said that he had paid the Money; and a Prohibition was granted; for the Plaintiff had now obtained the End of his Suit, and might have Remedy at Law upon the Evidence of the Defendant's Answer. *1 Vent.* 212. *Mekins v. Minshaw.*

The Plaintiff in Prohibition suggests, that by the Laws of *England*, when Issue is joined between the Parties, that it ought to be tried by the Evidence *viva voce*, and not by Notes or Minutes of their Testimony; that an Information was exhibited against him before the Commissioners of Excise, pursuant to 12 *Car.* 2. *cap.* 23. & 15 *Car.* 2. *cap.* 11. setting forth, that he was a common Brewer, and did keep a common Store-house without acquainting the said Commissioners therewith; that he was found guilty; and that he appealed from their Sentence to the Commissioners of Appeals, before whom the Informer did produce as Evidence the Minutes taken before the Commissioners of Excise, and that the Witnesses who gave Evidence there were still alive; which Minutes were allowed as Evidence by the Commissioners of Appeals, &c. and after great Consideration a Prohibition was granted *quoad* the Admitting this Evidence. *2 Salk.* 555. *5 Mod.* 272. *278. S. C.* *Bredon v. Gill.*

If the Commissioners for determining Policies of Insurance grasp at more Power, or proceed otherwise than as they are enabled by the Acts of Parliament which create their Jurisdiction, they will be prohibited by the King's Superior Courts. *Vide 1 Show.* 396.

A Prohibition lies to the Vice-Chancellor's Court in *Oxford* and *Cambridge*, where they exceed their Jurisdiction. *Lit. Rep.* 10.

On a Motion for a Prohibition to the Court of the Vice-Chancellor of *Cambridge*, it was suggested, that one *Richardson* had a Libel preferred there against him, because he had preferred an Information in this Court against divers Persons for a Riot committed within the Jurisdiction of their Court, and the Libel was read in this Court; and upon that the Court declared, that their Jurisdiction was concurrent, but not exempt from this Court, and that they ought to plead their Privilege here, if they had any such Privilege, but they ought not to proceed against the Informer as a Criminal; and so the Court granted a Prohibition *nisi*, upon the Motion of Serjeant *Scroggs*. *Mich.* 26 *Car.* 2. in *B. R. Richardson's Case.*

If Justices of Peace take upon them more Jurisdiction than they are allowed by Law, as where they determined on the Statutes of Usury, a Prohibition lies. *Lit. Rep.* 163.

4 *Inft.* 229. So a Prohibition lies to the Court of *Stannaries*, which is confined
Cro. Car. 333. to Tin Matters only, and where the Parties who sue, or one of them,
 is a Tinner, if they exceed their Jurisdiction.

1 *Bulst.* 110. A Prohibition was granted to the Council of *Tork*, for holding Pleas
 in Replevin and Avowries; the Court being clear of Opinion that these
 are Matters determinable at Common Law.

1 *Bulst.* 20. So a Prohibition hath been granted to the Court of Requests, for
 injoining a Creditor to give Time to his Debtor to pay his Debt, upon
 Security given.

Show. P. C. 58. It hath been resolved, that a Prohibition lies to the Court of the
 in the Case of Earl Marshal, for proceeding against a Person for painting Arms and
Dr. Oldis and marshalling Funerals.

Donmille,
 where there is good Learning on this Subject. 4 *Mod.* 128. S. C.

2 *Salk.* 553. So a Prohibition was held to lie to the Court of Honour, to prohibit
Farell. 125. a Suit there for these Words, *you a Knight, you are a pitiful Fellow*; and
Chambers v. in this Case *Holt* Ch. J. at first doubted whether there was, or could be
Sir John Jennings. any such Court; but said, a Prohibition would lie to a pretended
 Court.

3 *Bulst.* 120. It is said by my Lord *Coke* in 3 *Bulst.* that the Court of King's Bench
 (a) If the may prohibit (a) any Court in *Westminster-Hall*, if they exceed their
 Judges of Jurisdiction; but this Notion of Lord *Coke*, and of which he was very
C. B. hold fond, especially as to Proceedings in Courts of Equity, hath been so
 Plea of an shaken and contradicted of late Years, that his Authority herein seems
 Appeal, a to be but of very little Weight; but for this we must refer to Title
 Prohibition is *Courts and their Jurisdiction.*
 to be granted by B. R.

3 *Bulst.* 120.— So if the Court of Exchequer hold Common Pleas without a Writ of Privilege. 3 *Bulst.* 120.
Et vide 2 *Salk.* 550.— So an *English* Court, or Court of Equity, holding Plea of a Thing whereof Judg-
 ment was given at Common Law, hath been prohibited. *Moor* 836. *Cro. Jac.* 335.— But for this *vide*
Jurisdiction of the Court of Chancery, and 1 *Ld. Raym.* 531.

Lit. Rep. 42. The Superior Courts of *Westminster* not only grant Prohibitions where
 2 *Rol. Rep.* Inferior Courts assume a Jurisdiction, which properly belongs to such
 471. Superior Courts, but also in Cases where one Inferior Court inroads upon
 another, and that even in Matters in which such Superior Courts
 have not a Jurisdiction.

5 *Co.* 73. As if the Ecclesiastical Court grant the Probate of a Will made with-
Show. P. C. in a Manor, when by Custom or of Right such Probate belongs to the
 63. Lord of the Manor.

2 *Rol. Abr.* So where the Marches of *Wales* held Plea of a Matter that belonged
 313. to the Court Christian, it was held that a Prohibition lay.
Winch 78.

4 *Inft.* 249. So in *London*, where the Lord Mayor and Court of Aldermen have
Hob. 257. the Government of City-Orphans, if any Orphan sue in the Eccle-
 siastical Court or elsewhere, for a Legacy or Duty due to them by
 Custom, a Prohibition lies.

Hob. 178. If a Bishoprick be void, and the Jurisdiction devolved on the Metro-
 politan, he must hold the Courts within the Inferior Diocesefes, other-
 wise he will be prohibited.

1 *Mod.* 211. If there be a Controversy, whether such a Will ought to be proved
per North before a Peculiar or before the Ordinary; whether by the Archbishop
 Ch. J. of one Province or another, or both; and what shall be (b) *Bona nota-*
 (b) But in *Lucas's Rep.* *abilia*: In these and the like Cases the Common Law retains the Juris-
 272. this diction of determining.

Point is taken
 Notice of and denied to be Law, for that the Spiritual and Common Law are the same as to *Bona notabilia*;
 and there said, that if a Prohibition lay, there must be frequent Instances of it

(K) Prohibitions to Inferior Temporal Courts in What Instances to be granted.

IT is clearly agreed, that a Prohibition doth lie as well to a Temporal Court as to the Spiritual, Court of Admiralty, or other Court, whose Proceedings are different from the Common Law, if such Temporal Court exceed the Bounds of its Jurisdiction, or take Cognizance of (a) Matters not arising within its Jurisdiction.

F. N. B. 45.
2 Inst. 229,
243, 601.
2 Rol. Rep.
379.
1 Rol. Rep.
252.

(a) Or if but Part only, cannot have Jurisdiction. 1 Ld. Raym. 692.

As if Trespass *Vi & Armis* be brought in the County-Court, a Prohibition lies to the Plaintiff or Sheriff.

F. N. B. 47.

So if one sueth another in a Court-Baron or other Court, which is not a Court of Record, for Charters concerning Inheritance or Freehold, he shall have a Prohibition.

F. N. B. 47.

A Person having obtained Judgment in B. R. for his Debt and Damages, brought his Action for the Recovery of them against the Bail in the Court of the Tower of London, in which Action the Party was taken on a *Capias*, and was (b) rescued; after which the Plaintiff brought his Action on the Case in the same Court for the Rescue; and all this appearing to the Court of B. R. they granted a Prohibition.

1 Rol. Rep.
54.
(b) If an Officer let a Man at Liberty who is

in Execution upon a Bond sued in an Inferior Court, the Bond not being made within the Jurisdiction thereof; this is no Escape. 2 Mod. 29. *Squibb v. Hole*.— So where the Plaintiff, in an Action brought against an Officer, declared in *Hull* upon a Bond made at *Hallifax*, and had Judgment and Execution, and the Defendant escaped; and in an Action brought for this Escape the Declaration was held ill, because it did not alledge the Bond to be made *Infra Jurisdictionem Curiae*. 1 Rol. Abr. 809. *Richardson v. Bernard*.

So where an Action of Debt was brought in the *Marshalsea*, on a Judgment in B. R. and a Prohibition was granted.

2 Salk. 439.

A Suit was surmised to be before the Lord President of the Marches, for an Office, between the Grantee of the Lord President and a Stranger, wherein the only Question would be, whether the Grant of that Office belonged to the Lord President; and because in this Case he would be as it were (c) both Judge and Party, a Prohibition was granted.

1 Keb. 648.
(c) 1 Salk.
396. That

where a Judge has an Interest, neither he nor his Deputy can determine a Cause or sit in Court, and in so doing a Prohibition lies. *Hard. 503*.

If there be one intire Contract above 40 s. and a Man sues for it in a Court-Baron, severing it into divers small Sums under 40 s. a Prohibition shall be granted, because this is done to defraud the Court of the King.

19 H. 6. 54.
2 Rol. Abr.
280.
F. N. B. 46.

An Action was brought in the Hundred-Court for 40 s. in which Action the Plaintiff confessed that he was satisfied one Shilling, which being done with an Intent to give that Court Jurisdiction, and to defraud the Superior Courts, a Prohibition was granted.

Palm. 564.
Clarke v. Corke.

If there be several Contracts between A. and B. at several Times for divers Sums, each under 40 s. but amounting in the whole to a Sum sufficient to intitle the Superior Court to a Jurisdiction, they shall be sued for in such Superior Court, and not in an inferior one, which is not of Record.

1 Vent. 65.
said to have been adjudged in the Case of the *Savoy Court* and *Standford*.

So in a Prohibition to the Court of the Honor of *Eye*, where the Case was: One contracted with another for divers Parcels of Malt, the

1 Vent. 73.
Girling v. Alders.
Money
2 Keb. 617

Money to be paid for each Parcel being under 40 s. and he levied divers Plaints thereupon in the said Court; wherefore the Court here granted a Prohibition; because though there be several Contracts, yet inasmuch as the Plaintiff might have joined them all in one Action, he ought to have so done, and sued here, and not put the Defendant to unnecessary Vexation, any more than he can split an intire Debt into divers, to give the Inferior Court Jurisdiction *in fraudem Legis*.

2 *Inst.* 231.

1 *Sand.* 74.

2 *Jon.* 230.

1 *Show.* 10. &

vide Tit. Courts

and their Ju-

risdiction.

1 *Rol. Abr.*

545.

1 *Ld. Raym.*

211.

6 *Mod.* 146.

Carth. 402.

1 *Salk.* 201.

1 *Peer Will.*

476.

(a) 2 *Mod.*

271. 2.

* *Vide Impar-*

lance under

Tit. Plead-

ings.

2 *Mod.* 273.

1 *Ld. Raym.*

346. *Coke v.*

Licence.

It is laid down by my Lord *Coke*, and admitted in a great Variety of Cases, that no Inferior Court can hold Plea of an Obligation, Contract, Battery, or other transitory Action, if not made within the Jurisdiction, and that the Cause of Action must be alledged to arise within such Jurisdiction.

And therefore, in an Action on a Promise in an Inferior Court, not only the Promise, but the Consideration must be alledged to arise within the Inferior Jurisdiction, and must be so proved on the Trial.

But if the Plaintiff had shewn that the Money had been lent *infra Jurisdictionem Curiae*, or if it had been for Goods there sold, the Plaintiff would have had no need to say that the Defendant assumed to pay *infra Jurisdictionem Curiae*; because the Law creates the Promise upon the Creation of the Debt, which Debt being within the Jurisdiction, the Promise shall be intended there also.

In all Cases where Inferior Courts assume a Jurisdiction, or hold Plea of a Matter not arising within their Limits, the Party hath his Remedy, and may stay their Proceedings by Prohibition; but such Prohibition can only regularly be obtained by its appearing on Oath made, that the Fact did arise out of the Jurisdiction, and that the Defendant tendered a foreign Plea, which was refused.

In the Case of (a) *Mendyke v. Stint* it was greatly insisted upon, that though the Party neglected to plead to the Jurisdiction, that yet the Matter arising out of the Inferior Jurisdiction, the Superior Courts ought to grant a Prohibition; for that otherwise the Parties, their Counsel and Attornies, would give a Jurisdiction to Inferior Courts which they were not intitled to by Law; but it was otherwise adjudged in this Case; and it seems to be now agreed, that after admitting the Jurisdiction, or after * *Impar lance*, the Party cannot apply for a Prohibition.

But in the above-mentioned Case these Things were agreed by the Court. 1. That if any Matter appears in the Declaration, which sheweth that the Cause of Action did not arise *infra Jurisdictionem*, there a Prohibition may be granted at any Time. 2. If the Subject Matter in the Declaration be not proper for the Judgment and Determination of such Court, there also a Prohibition may be granted at any Time. 3. 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 likewise will lie at any Time.

A Motion was made for a Prohibition to be directed to the Sheriff's Court in *Bristol*, upon Suggestion that Causes of Action arising out of the Jurisdiction of the Sheriff's Court ought not to be sued there; and this Motion was made in Behalf of the Defendant in the Action, before he had appeared to stay the Proceedings of the Court, who proceeded to attach his Goods in the Hands of a Garnishee. And Sir *B. Shower* opposed the Motion; because the Defendant could not pray a Prohibition upon Suggestion of a Matter which he could not plead; and as here he could not plead this before Appearance, so he ought not to make such a Motion before Appearance. And *per Holt C. J.*

A Man shall not plead to the Jurisdiction until he appear; but if the original Cause of Action arose out of the Jurisdiction of the Court, the Garnishee may plead it; and of that Opinion he said was *Hale C. J.* but if it was Debt upon a Simple Contract, it is attachable where the Person of the Debtor is.

So in the Case of *Clerk v. Andrews*, where *Showers* moved for a Prohibition to the Court of the Sheriffs of *London* to stay Proceedings, where they attached the Debt of the Garnishee, because it arose out of the Jurisdiction; but it was denied, because the Debt was upon Simple Contract, which follows the Person of the Debtor. 1 *Showers Rep.* 9 cited.
1 *Ld. Raym.* 347.

(L) Prohibitions to the Spiritual Court in what Instances: And herein,

1. Where they meddle with a Matter purely Temporal.

IF one sues another in the Spiritual Court for a Chattle or Debt, the Defendant shall have a Prohibition. So if he sues for a Trespass. F. N. B. 40.

If the Spiritual Courts take upon them to try the Boundaries of Parishes, a Prohibition lies. 2 *Rol. Abr.* 291.
7 *Co.* 44.

1 *Rol. Rep.* 332. *Cro. Eliz.* 228. 3 *Leon.* 129. 3 *Keb.* 286. S. P. per *Hale* Ch. J. because the Prescription is the Ground thereof.

As if a Suit be by a Parson for Tithes, and the Defendant plead, that the Place where is in another Parish, a Prohibition lies; because they meddle with that which is out of their Jurisdiction, though the original Thing be of their Cognizance, and this comes in (a) obliquely. 2 *Rol. Abr.* 282.
1 *Showers* 10. cited.
Noy 147. S. P. but that it

must so appear by the Pleadings in the Spiritual Court. *Vent.* 335. S. P. and that a Plea thereof must be tendered in the Ecclesiastical Court. (a) So where the Defendant pleaded that he resorted to and received the Sacrament in a different Parish from that in which he inhabited. *Vide* 1 *Bullst.* 159. *Hard.* 406. 1 *Salk.* 166. 6 *Mod.* 188.

So if a Vicar of a Parish libels against another to avoid his Institution to the Church of *D.* which he supposes to be a Chapel of Ease appertaining to his Vicarage, and the Defendant suggests, that *D.* is a Parish of itself, and not a Chapel of Ease; a Prohibition will be granted, for they shall not try the Bounds of the Parish. 2 *Rol. Abr.* 291.

So if the Question be in the Court Christian, whether a Church be a Parochial Church, or but a Chapel of Ease; a Prohibition lies. 2 *Rol. Abr.* 291. several Cases to this Purpose.

But if the Bounds of two Villis lying in the same Parish come in Question in the Spiritual Court, no Prohibition lies; for that such Bounds are triable in the Ecclesiastical Court, though those of Parishes are not. 1 *Lev.* 78. *Pettler v. Yalman.*

The Ecclesiastical Courts have Cognizance of a Way to a Church, and for not repairing such Way the Parties may be proceeded against in the Spiritual Court. *March* 45.

So if a Parson is prevented from carrying away his Tithe by the Stopping up the usual Way, he may have his Remedy in the Ecclesiastical Court, grounded on the Statute 2 *E.* 6. 1 *Bullst.* 67.
1 *Jon.* 230.

But

March 45. But if the Question be, whether he is to have one Way or another, or whether such a Way be a (b) Highway or not; this cannot be tried in the Spiritual Court.
1 Bullst. 67.
(b) 2 Rol. Abr. 287. S.P. adjudged.

2 Rol. Rep. 287. So if the Church-wardens of a Church sue for a Way to the Church, which they claim to appertain to all the Parishioners by Prescription, a Prohibition shall be granted; for this Right being grounded on the Prescription, is to be tried in the Temporal Courts.
2 Rol. Rep. 41.

Hob. 15. If a Man be admitted, instituted and inducted, and a Suit is commenced in the Ecclesiastical Court for to avoid the Institution, supposing it not valid; though the Thing be of their Cognizance, yet because the Induction, which is Temporal, and gives a Lay Right, may depend upon it, a Prohibition lies.
Latch 205.
1 Bullst. 179.
Lit. Rep. 165.
Poph. 133.
1 Rol. Abr. 282. *1 Show. Rep.* 10.

Cro Eliz. 228. If there be a Suit for Tithes in the Ecclesiastical Court, and the Tenant pleads, that the Party who sues is not Incumbent, but that *f. s.* is; and this Plea, because it goes to the Right of the Incumbency, is rejected, a Prohibition lies; for by denying the Tenant this Liberty he might be twice charged for his Tithes.
3 Leon. 265.
Green v. Pennilden.

2 Rol. Rep. 59. There are frequent Instances of Prohibitions being granted to the Ecclesiastical Courts to stay Suits for Fees by Chancellors, Registers and Proctors in those Courts, on this Foundation, that Demands *pro Opere & Labore* are properly determinable at Common Law, and that Fees cannot be settled by the Canon Law; and that the Spiritual Court can only give Costs and Expences of Suit, but that no Action of Debt will lie for such Costs at Common Law; and that the Profits of an Office being Temporal, the Remedy for them ought to be by *Quantum meruit*; or in Case it be an Office of Freehold, by Assise; the Denial of just Fees being a Disseisin; and therefore it seems to be now settled, that neither a Proctor nor Register can sue for Fees in the Spiritual Court, but that the proper Remedy is, in Case of a Fee certain, by an *Indebitatus assumpsit*, or in Case of an uncertain Fee, by *Quantum meruit*; and in such Suits it is said not to be necessary to prove a Retainer, that being implied by Law.
3 Leon. 268.
1 Mod. 167.
2 Keb. 615.
3 Keb. 303, 441, 516.
1 Salk. 333.
 and *4 Mod.* 254. where *per Holt*, if a Proctor might sue in the Spiritual Court for his Fees, he would avoid the Statute of Limitations; & *vide 1 Ld.*

Rayn. 703. *Cum.* 18. and *1 Vent.* 165. where notwithstanding it is said, that for such Fees as are due by Provincial Constitutions they may sue in the Spiritual Court. *Lucas's Rep.* 262.

Yelv. 38. If a Legatee takes a Bond from the Executor for Payment of the Legacy, and afterwards sues him in the Spiritual Court for the Legacy, a Prohibition will be granted; for by the taking the Obligation the Nature of the Demand is changed, and it becomes a Debt or Duty recoverable in the Temporal Courts.
2 Vern. 31.
 but *2 Rol. Rep.* 160.
S. P. cont.

2. Where they determine on a Batter of Freehold.

F. N. B. 40. Matters of Freehold, and the Rights of Inheritances, are only determinable in the Temporal Courts; so that if the Ecclesiastical Courts intermeddle with those, a Prohibition lies.
2 Rol. Abr. 286.
Lit. Rep. 164.

Cro. Jac. 270. As in a Feoffment of Tithes and Lands, where there is no Livery, if they do adjudge the Tithes to pass, notwithstanding there is no Livery, a Prohibition will lie.
1 Vent. 41.
 cited.

Dier 151, 264. So if a Man devises, that his Lands shall be sold for the Payment of his Debts, and that the Overplus shall be paid to such and such Persons
Hob. 265.
2 Rol. Abr. 284-5. 4 in
2 Show. 50. *Cro. Car.* 16.

in certain Shares; the Legatees in this Case cannot sue in the Ecclesiastical Court; for the Provisions intended them arise originally out of Lands, and their proper Remedy in this Case is in a Court of Equity.

But if a Rent be devised out of a Farm for Years, the Ecclesiastical Courts may hold Plea thereof; for the Term for Years being only a (a) Chattel is Testamentary, and consequently the Rent devised thereout.

1 Sid. 279.
2 Keb. 5.
1 Lev. 179.
(a) Where the Legacy was to arise

as well out of a Term for Years, as out of Lands of Inheritance, and the Executor received it; but being dead without Payment, so that no Action of Account could be brought at Common Law against his Executor, it was held that the Ecclesiastical Court should have Cognizance thereof. Cro. Jac. 279.

The Rights of Offices for Life in the Ecclesiastical or Courts of Admiralty are determinable at Common Law; as in the Question concerning the Validity of two Patents, by which the Office of Register to a Bishop was granted; it was held, that this should not be tried in the Spiritual Court, though the Subject Matter be Spiritual; because the Office itself being Matter of Freehold is for that Reason of Temporal Cognizance.

2 Rol. Abr. 285-6.
Noy 91.
Litch 228.
Palm. 450.
Godb. 390.
Cro. Car 65.
2 Rol. Rep. 306.

Raym. 88. 1 Lev. 125. 4 Mod. 27. Comb. 306.

Trespas on a Glebe being Freehold cannot be determined in the Ecclesiastical Court.

Bro. Jurisdiction, pl. 41.

A Parson libelled against the Defendant in the Spiritual Court of York for having cut Elms in the Church-yard; and a Prohibition was granted, upon Suggestion that they grew on his Freehold.

1 Ld. Raym. 212.
Hilliard v. Jeffreson.

3. In what Cases a Prohibition lies when they determine on Criminal Offences.

It is clearly agreed, that the Spiritual Courts have no Jurisdiction as to Crimes and Capital Offences; so as to punish Persons guilty of Treason, Felony or other Offences, which are cognizable in the King's Temporal Courts; but it is held, that a Spiritual Person may, especially after a Conviction for a Criminal Offence at Common Law, be proceeded against *pro salute animæ*, and in Order to a Deprivation; and this Jurisdiction they are indulged in from a Necessity of purging their Body of all scandalous Members; but they are not to inflict a collateral Punishment for such Matters as are only indictable at Common Law; and if they take upon them to do so, a Prohibition lies.

Kelw. 181.
Dir 293.
Cro. Jac. 430.
March 174.
Hob. 288.
2 Ld. Raym. 1507.

And therefore if a Clerk be convicted of Homicide or Manslaughter, and afterwards libelled against, the Libel ought not to charge that he is an Homicide, or that he is guilty of Manslaughter, &c. and if it doth, a Prohibition lies; but the regular Way is only to charge that he was convicted of Homicide, &c. and so the Sentence of Deprivation ought to be grounded on the Conviction in the Temporal Court, without any further Examination of the Matter, by which the Verdict there given is not to be impeached, but affirmed; and though the Person convicted doth desire that he may be admitted to his Defence in the Spiritual Court, to prove his Innocency against the Verdict, yet this is not to be allowed him; because this would be to impeach in a Court improper a Sentence given in a proper Court.

Hob. 121, 288.
Cro. Jac. 430.
Searl's Case.
Comp. Incumb. 53-4.

So where a Libel was exhibited in the Ecclesiastical Court against a Woman *Causa Facilitationis Maritajii*, and she suggested, that the Person libelling was indicted at the Sessions in the Old Bailey for marrying her, he then having a Wife living, *contra formam statuti*, and that he was thereupon convicted, and had Judgment to be burnt in the Hand;

3 Mod. 164.
Boyle v. Boyle.

so that being tried by a Jury, and a Court which had a Jurisdiction of the Cause, and the Marriage found, a Prohibition was prayed, and granted.

1 Jon. 320.

If a Matter of Ecclesiastical Cognizance be made Felony or Treason by Act of Parliament, the Spiritual Courts (unless there be a Saving of their Jurisdiction in such Statute) cannot take Cognizance thereof, nor of any Defamation in Relation thereto.

1 Lew. 138.

1 Sid. 217.

1 Keb. 721,

762. Slader

v. Smallbroke.

A Layman forges Orders, and obtains a Benefice, for which he is prosecuted in the Ecclesiastical Court in order to Deprivation; and he prays a Prohibition, because Forgery is triable at Common Law; but the Prohibition was denied, for the Forgery is touching an Ecclesiastical Matter, and he is suable there for it in Order to his Deprivation only.

Comb. 71.

If the Spiritual Court proceeds against a Man for Writing a Libel, a Prohibition lies; for this is an Offence indictable at Common Law.

F. N. B. 42.

2 Rol. Abr.

304.

The Ecclesiastical Courts cannot punish or hold Plea *pro reformatione morum* in Case of legal Perjury, or *pro lesione fidei* in a Temporal Matter; as that the Party will pay a Debt, make a Feoffment, &c. So if a Jury give a false Verdict, they cannot be punished for this in the Ecclesiastical Courts.

Jenk. 184.

Kelw. 39.

pl. 5.

But for Perjury in their own Courts, and in Matters in which they have Cognizance, as Matrimony, Tithes, Testaments, &c. they may punish, and no Prohibition lies.

2 Rol. Abr.

286.

Hob. 246.

Hell. 132.

If a Presentment be made by the Church-wardens of a Parish in the Ecclesiastical Court, that *J. S.* a Parishioner, is a Railor and Sower of Discord among the Neighbours, a Prohibition lies; for this belongs to the Leet, and not to this Court, unless it was in the Church, or such like.

4. Where the Ecclesiastical Courts determine on Acts of Parliament.

4 Leon. 16.

Vaugh. 206.

2 Injl. 614,

618.

2 Lew. 64.

The Construction of Acts of Parliament is of Temporal Cognizance; so that if the Spiritual Courts expound them in a different Sense than they ought to do, a Prohibition lies; as if upon the Statute 32 H. 8. cap. 38. which only prohibits Marriages within the *Levitical* Degrees, the Ecclesiastical Courts should molest or call in Question Marriages without those Degrees, a Prohibition lies; because they act contrary to that which is declared to be lawful by the Statutes of the Realm; but where they are not bounded by any Law, their Jurisdiction still continues, and therefore within the *Levitical* Degrees they are still Judges of Incest.

1 Jon. 259,

260.

So if it be made a Question in the Ecclesiastical Court, whether the Words of the Statute 25 H. 8. have given sufficient Power to the Archbishop to grant Marriage Licences, and they determine against the Power, a Prohibition lies; for by this they determine against an Act of Parliament, which is a Temporal Affair; but if they allow the Power, they may determine as to the Form of the Licence, the Notice, and other Circumstances requisite, &c. for in these they have a Jurisdiction, as such Licences have been, and still are, notwithstanding this Statute of Ecclesiastical Cognizance.

2 Rol. Abr.

303.

If an Administration is granted to the next of Blood, and upon this an Appeal is sued to the Delegates, and there they intend to revoke the said Sentence, and to grant it to another, who is not nearer of Blood by our Law, but is by the Ecclesiastical Law; a Prohibition lies; because this being ordained by Statute ought to be interpreted according to our Law.

If there be a Controversy, whether a Person hath disposed of the Guardianship of his Child pursuant to the Statute 12 Car. 2. cap. 24. or whether he hath revoked such Disposition; this cannot be determined in the Ecclesiastical Courts

1 Vent. 207.
Lady Chesler's
Case.
3 Keb. 30.

On a Motion for a Prohibition to the Ecclesiastical Court, to stay a Suit there against a Person for Brawling in the Belfry, and Striking a Man there, the Statute of 5 & 6 E. 6. cap. 4. was suggested; and it was alledged, that all Statutes are construable by the Common Law, and that the Person striking was Mayor of the Town, and that he came there to suppress a Riot; but (*absente Holt*) the Prohibition was denied; because this Offence was consuable in the Ecclesiastical Court before this Statute *ratione Loci*; and that the Statute, though it provides a Penalty, does not alter the Jurisdiction.

2 Ld. Raym.
850. *Wen-*
mouth v. Col-
lins.

The Defendant was presented in the Ecclesiastical Court for working upon Holidays, viz. carrying Hay on St. *John Baptist's* Day in Church-time; but a Prohibition was granted, because this was out of the Statute by the very Words of the Act 5 & 6 E. 6. it being a Work of Necessity; and this being an Holiday by Act of Parliament, it belongs to the Judges of the Common Law to determine whether it was broken or not.

Godb. 218.
Wheeler's
Case.

5. In what Cases they have a concurrent Jurisdiction, and may determine Incidents.

The Ecclesiastical Courts have in some Instances a concurrent Jurisdiction with the Temporal Courts; as in laying violent Hands on a Clerk, (a) a Pension by Prescription, &c. So that if a Clergyman be beaten, an Action at Law lies for the Battery; as also a Suit in the Spiritual Court for Irreverence to his Character; but such Proceedings in the Ecclesiastical Court must be *pro Salute Animæ*, and to punish the Sin, but not to recover Damages.

2 Inst. 492.
9 E. 2. *Arti-*
culi Cleri.
Cro. Eliz. 655.
6 Mod. 156.
vide 4 Co.
20. a. in the
Abbot of *St.*
Albans Case.

(a) Vent. 3, 120, 265. 1 Ld. Raym. 578. 2 Salk. 550. 6 Mod. 252.

But if a Clerk be arrested by (b) Process of Law, he cannot for this sue in the Ecclesiastical Court.

Bro. Prohibi-
tion, pl. 21.
2 Inst. 492.

(b) If a Person be proceeded against for Defamation in the Spiritual Court, for giving Evidence in a Court of Justice, he may have a Prohibition. *Bro. Prohibition, 21.* 2 Bull. 296. 1 Rol. Rep. 61.—Cook sued *Webb* in the Spiritual Court for saying that he had a Bastard; *Webb* the Defendant alledged in the Spiritual Court, that the Plaintiff was adjudged the reputed Father of a Bastard by two Justices of Peace, according to the Statute, whereupon he spoke these Words, and they of the Spiritual Court accepted his Confession, but would not allow his Justification, wherefore he prayed a Prohibition; which was granted him. *Cro. Jac. 535. Webb v. Cook.*

So 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.
Pryn's Case.

So if one be sued in the Ecclesiastical Courts for laying violent Hands on a Clergyman; the Party being an Officer or Constable may (c) suggest, that the Plaintiff made an Affray upon another, and that he, to preserve the Peace, laid Hands on him, and so have a Prohibition.

2 Inst. 608.
(c) On the
Statute 5 &
6 E. 6. cap. 4.
against braw-
ling, &c. in

a Church or Church-yard, it hath been held, that he who strikes another cannot justify or excuse himself by shewing that the other assaulted him. *Cro. Jac. 367.*—But in laying Hands on a Clerk may justify. *Moor 915. Cro. Eliz. 655.*

Also it is said, that though the Crime of laying violent Hands on a Clergyman be within the express Words of the Statute of *Circumspecte Agatis*, that yet the Party is not punishable in the Spiritual Court before he is found guilty in a Temporal Court; and that if he be proceeded against sooner, a Prohibition lies.

Farefl. 80.

In

Cro. Car. 89. In Case of Criminal Conversation with a Man's Wife, an Action
Cro Jac. 538. lies at Common Law, in which the Husband recovers Damages, and
 1 *Fon.* 440. the Offender is likewise punishable in the Ecclesiastical Court for
 Adultery.

Farest. 80. So in Case of a lewd Woman who hath a Bastard chargeable on
 the Parish, though by the Statute 7 *Jac.* 1. *cap.* 4. she is to be sent to
 the House of Correction; yet she may be proceeded against for Incon-
 tinency in the Spiritual Court.

Salk. 552. The Defendant libelled against Plaintiff in the Ecclesiastical Court,
Farest. 79. for having solicited the Chastity of his Wife, after the Plaintiff had
Galizard and been indicted for an Assault upon the same Woman, with an Intent to
Rigault; and ravish her, and convicted and fined upon it; and after an Action of
 2 *Ld. Raym.* Assault and Battery against him for the same Offence, which Action
 809. S. C. was depending at the same Time that the Prosecution was in the Spi-
 where it is ritual Court; and all this Matter appearing on the Pleadings, the Que-
 said, that the stion was, whether a Prohibition should go to stay the Proceedings in
 Court was of the Ecclesiastical Court, or a Consultation should be awarded; and it
 this Opinion; was held in this Case that a Prohibition should be granted; for that
 but at the this being an Attempt and Solicitation to Incontinence, coupled with
 Prayer of the Force and Violence, it did by Reason of the Force, which is Tem-
 Defendant's poral, become a Temporal Crime *in toto*.
 Counsel they ordered that
 it should be argued by Ci-
 vilians; but afterwards, an apparent Fault being in the Pleadings, they refused to hear the Civilians, and
 gave Judgment that the Prohibition should stand.

2 *Rol. Abr.* 295. So if *A.* calls *B.* *Whore* and *Thief*, the Action shall be sued at Com-
 2 *Ld. Raym.* 809. — the Word *Whore*, and have an Action at Law for the Word *Thief*.

So if *A.* says of *B.* *you are a Bawd, and thou keepest a Bawdy-house*; the keeping a Bawdy-house, being a
 Matter indictable at Common Law, makes the whole of Temporal Cognizance; but calling *Whore* or *Bawd*
 only are punishable in the Ecclesiastical Courts, 2 *Salk.* 552. & *vide* 2 *Inst.* 488. where Lord Coke, *Mere*
Spiritualia sunt quae non habent mixturam temporalium.

3 *Lev.* 17. But on a Motion for a Prohibition for saying of a Parson that *He*
Crandon v. *Walden.* *preaches nothing but Lies and Malice in the Pulpit*, on Suggestion that
 these Words are actionable at Common Law, the Court refused to
 grant it; for that these Words concerning and relating to an Eccle-
 siastical Person and an Ecclesiastical Matter, it was fit to be tried
 there.

2 *Ld. Raym.* 1101. So where the Words were, *You are known by the Name of Bawdy Nell,*
Ewans v. Brown. *and do live with another Woman's Husband*; and an Action being brought
 at Law for these Words, grounded on a special Damage sustained by
 the Defendant's speaking them, and also a Suit in the Ecclesiastical
 Court, it was moved for a Prohibition; for being actionable at Law by
 Reason of the special Damage, the Party ought not to be twice punished
 for the same Offence; but the Court refused to grant a Prohibition.

1 *Salk.* 24, 120. If there be a mutual Contract of Marriage between a Man and a
 6 *Mod.* 155, 172. Woman *per verba de futuro*, and either of them refuses; for this Breach
 of Contract an Action lies at Common Law for the Temporal Loss to
 the Party, although there might have been a Remedy in the Ecclesiasti-
 cal Courts of enforcing such Contract.

1 *Sid.* 281. If the Church-wardens take away the Bells of a Church, they may
Welcome v. *Lake.* be proceeded against in the Ecclesiastical Courts for such sacrilegious
 (a) It is said Taking; and the rather, as (a) they are Church-wardens, altho' an
 in 2 *Salk.* 547. that a Action lies against them at Common Law by their Successors; and the
 Prohibition Remedy in this Case is said to be most proper in the Spiritual Court,
 was granted because

4

to stay a Suit in the Ecclesiastical Court for taking away two Bells out of the Steeple, for these Reasons, that
 the Church-warden is a Corporation, and the Property is in him, and he may bring Trover at Common
 Law; & *vide* 2 *Inst.* 492. 1 *Rol. Rep.* 255.

because at Common Law Damages only are recovered, but in the Ecclesiastical Court they decree a Restitution of the Thing in *Specie*.

J. S. sued his Brother, whom his Father made Executor, for his reasonable Part of the Goods of the Father, in the Spiritual Court, according to the Custom of the Province of *Tork*; upon which a Prohibition was moved for, and insisted, that this was a Temporal Cause founded upon a Custom, and that there was an original Form in the Register, by which it appeared that it was a Matter confutable at Common Law; but it was holden by three Judges, in the Absence of *Hale*, that in this Case both Courts had a (b) concurrent Jurisdiction.

(a) Where in Matters of

Legacies the Courts of Equity and Ecclesiastical Courts have a concurrent Jurisdiction, vide 2 *Vern.* 47. 2 *Vent.* 362. *Preced. Chan.* 546.

If a Parish-Clerk be guilty of several scandalous Offences, and which are punishable at Common Law, yet he may be proceeded against in the Spiritual Court in Order to a Deprivation, tho' his Office be for Life.

2 *Ld. Raym.* 1506. *Fitzg.* 189.

It is laid down as a Rule in a great Variety of Cases, that the Ecclesiastical Courts having Cognizance of the principal Thing, they shall have it of Incidents and Accessaries; but this hath been understood in this Manner, that if such incident Matter be merely Temporal, or if a Temporal Matter be pleaded in Bar to an Ecclesiastical Demand, they must proceed in the Ecclesiastical Court, according to the Temporal Law, otherwise they will be prohibited.

2 *Inst.* 493. 613. 12 *Co.* 65. 2 *Bulst.* 227. *Cro. Eliz.* 66. *Hob.* 12. *Heil.* 87. 2 *Rel. Abr.* 298.

1 *Sid.* 89, 161. *Cro. Jac.* 269. 1 *Ld. Raym.* 73

As if a Release be pleaded to a Demand of Tithes, or Payment in Bar of a Legacy, which can only be proved by one Witness, and for this Reason is rejected by the Ecclesiastical Courts, because their Law requires two Witnesses; there a Prohibition will be granted.

2 *Rol. Rep.* 42. *Godb.* 272. *Cro. Eliz.* 666. *Hob.* 188, 247. *Latch* 217.

Noy 12. *Moor* 413. *Vent.* 291. 1 *Sid.* 161. 1 *Sharv.* 158. *Carth.* 142. 2 *Salk.* 547. 1 *Ld. Raym.* 220.

So altho' Tithes, Oblations, Mortuaries and Pensions, are of Ecclesiastical Confuance, yet if to a Demand of these a (b) *Modus* or Custom is pleaded, such Custom, like all others, must be determined in the Temporal Courts; and (c) if the Ecclesiastical Courts take upon them to determine it, a Prohibition will lie.

2 *Inst.* 653. *Latch* 48. 2 *Lev.* 163. 3 *Bulst.* 231. 1 *Rol. Rep.* 419. 2 *Co.* 45.

(b) But if a *Modus* be there pleaded and admitted, no Prohibition shall go; *secus* if the Question be, *Modus* or no *Modus*. 2 *Salk.* 551. *Per Holt* Ch. J. If they agree in the *Modus*, and only vary in the Manner of Payment, no Cause for a Prohibition. *Winch* 33. (c) The Reason why the Spiritual Court ought not to try Customs is, because they have different Notions of Customs, as to the Time which creates them, from those that the Common Law hath; for in some Cases the Usage of ten Years, in some twenty, in some thirty Years, make a Custom in the Spiritual Court, whereas by the Common Law it must be Time whereof, &c. *Noy* 28. 1 *Ld. Raym.* 436.

But if there be but one Witness to prove a Nuncupative Will, and the Ecclesiastical Court refuse the Probate thereof, because to every such Will the Law requires two Witnesses, no Prohibition lies; because there is no other Way of authenticating such Will but in the Spiritual Court.

Carth. 143.

So where the Church-wardens libelled for a Church-Rate, which was sentenced against them, and then they appealed to the Metropolitan, but pending the Appeal one of the Appellants released to the Appellee all Actions, Suits and Demands, but the other Appellant proceeded in his and his Partner's Name to reverse the Sentence; whereupon the Appellee prayed a Prohibition; but it was adjudged, that no Prohibition lay, the principal Matter being of Ecclesiastical Cogni-

Telv. 172. *Noy* 129. *Cro. Jac.* 234. *Starkey* v. *Barton* and *Gore*.

zance, Things dependant thereon will be so too; and whether this Release will bar both the Church-wardens is what they are to determine, and not the Court of *B. R.*

Hard. 510.
Goddin v.
Wainwright.

A Libel was exhibited on a Custom, that the Constable of the Town should collect the Rates assessed for repairing the Parish-Church; which he refused to do; and on a Motion for a Prohibition it was suggested, that it was not triable there, whether the Party was Constable and duly elected or not; but the Court denied to grant one, because this Matter is pleadable there, and Prohibitions ought not to go unless upon a Trial of the Matter their Law and Proceedings cross the Common Law, and in that Case a Prohibition lies only till Trial here, and after that a Consultation shall be granted.

5 Mod. 69.
1 Salk. 115.
1 Ld. Raym.
73. Chamberlain v. Hewitson.

But it hath been resolved, that if a Feme Covert sue another in the Spiritual Court for Incontinence with her Husband, and recover Costs, if the Husband release them the Wife is barred; for since the Husband is liable to the Charges of the Suit expended by the Wife, he shall have the Costs in Recompence; besides, the Wife cannot have a Chat-tel Interest exclusive of her Husband.

1 Ld. Raym.
74. per Curiam.

But if the Husband and Wife are divorced *a Mensa & Thoro*, and the Wife has Alimony allowed her, and she sues for Defamation, or other Injury, and recovers Costs, the Husband releases them, yet the Wife shall recover them; because they come instead of that she has expended out of her Alimony, which was a separate Maintenance, and not in the Power of the Husband.

(M) The Offence of paying Disobedience to a Prohibition.

F. N. B. 40.
Bro. Att. Pro.
pl. 5. pl. 9.
pl. 11.
1 And. 279.

(a) Though the Discretion of the Superior Court. *the Writ of Prohibition was not directed to the Party. 19 H. 6. 54. — And such Attachment may be awarded against a Peer of the Realm. 21 E. 3. 3. pl. 7.*

2 Jon. 47.
Dr. Wainwright's Case.

An Attachment was granted, upon Affidavit that the Party proceeded after a Prohibition delivered to him, in a Suit for a Seat in a Church which the Plaintiff claimed by Prescription; and upon his Appearance and Examination upon Interrogatories he confessed the Matter, and was fined five Marks.

Moor 599.
1 Leon. 111.

And not only an Attachment lies for proceeding in the same Cause pending a Prohibition, but also for instituting a new Suit for the same Thing; as if a Parson libels for Tithes, and a Prohibition is brought, and he libels for Tithes of another Year, the first not being determined, an Attachment shall be awarded.

Cro. Car. 559.
2 Jon. 128.
1 Vent. 348.
3 Lev. 360.

In an Attachment upon a Prohibition the Plaintiff shall recover Damages and Costs against the Party for proceeding after the Writ of Prohibition awarded.

Release.

Release.

A Release is the giving or discharging of a Right of Action which a Man hath or may claim against another, or that which is his; or it is the Conveyance of a Man's Interest or Right which he hath to a Thing to another who (a) hath Possession thereof, or (b) some Estate therein.

(a) But it is contrary to the Nature of

a Release to give Possession. 4 Co. 25. Hutt. 65.—And therefore one Tenant in Common cannot release to his Companion, because they have distinct Freeholds. Co. Lit. 200. (b) A Release cannot operate but upon an Estate, Interest or Right. 1 Rol. Rep. 197.

Releases are distinguished into express Releases, or Releases in Deed, and those arising by Operation of Law; and are made of Lands and Tenements, Goods and Chattels, or of Actions Real, Personal and Mixt. *Co. Lit. 264. a.*

These are to be adapted to the Nature of the Case, and the Purposes for which the Release is intended; so that if a Man be disseised of Lands, or dispossessed of Goods, and release all Actions, he may notwithstanding enter into his Lands, or retake his Goods, the Right and Property being still in him tho' he has devested himself of his Remedy. *Hob. 163. 4 Co. 63.*

So where a Man has divers Means to come to his Right, he may release one, and yet take Advantage of the other; but if a Man has not any Means to come to his Right but by way of Action, there by a Release of all Actions his Right by Judgment of Law is gone, because by his own Act he has barred himself of all Means to come at it. *8 Co. 152. Co. Lit. 286.*

Heretofore Releases were construed with much Nicety and great Strictness, and being considered as the Deed or Grant of the Party, were according to the Rule of Law taken strongest against the Releasor; they now receive such Interpretation as other Grants and Agreements do, and are favoured by the Judges as tending to Repose and Quietness. *Dyer 56-7. a. Plow. 289. Hutt. 15. 8 Co. 148. 1 Shaw. 154.*

Hence it hath been established as a general Rule in the Construction of Releases, that where there are general Words only in a Release they shall be taken most strongly against the Releasor; but where there is a particular Recital in a Deed, and then general Words follow, the general Words shall be qualified by the special Words. *1 Mod. 99. 1 Ld. Raym. 235.*

For the better Understanding hereof we shall consider,

(A) Releases that are express and by Deed: And herein,

1. Of the Words and Ceremony requisite in an express Release.
2. How far a Covenant or Agreement may operate as a Defeasance or Release.
3. How far a Disposition by Will may operate as a Release.

(B) Release by Operation of Law, how created, and the Effect thereof.

(C) Re-

(C) Releases of Lands and Hereditaments, how they enure :
And herein,

1. Of Releases that enure by way of *Mitter le Estate*.
2. Releases by way of *Mitter le Droit*.
3. Releases that enure by way of Extinguishment.
4. Releases that enure by way of Enlargement : And therein of the modern Manner of Conveyancing by Lease and Release.
5. What Estate or Interest passes by the Release : And therein of the Words requisite to an Enlargement.

(D) Who in Respect of their Right and Interest are capable of releasing.

(E) Of Releases by Executors and Administrators.

(F) How far the Husband's Release shall bind the Wife.

(G) To whose Benefit a Release shall enure ; and who shall be bound thereby tho' not a Party to the Release.

(H) How far a Possibility or Contingent Interest may be released.

(I) How the operative Words in a Release have been construed : And therein of the Words,

1. Claims and Demands, what are released thereby.
2. By a Release of all Actions and Suits.

(K) Release, in what Cases restrained to the special Purpose for which it was given.

(L) What Right and Interest shall be said to be released : And therein of Discretals and Exceptions in Releases.

(A) Releases that are express and by Deed :
And herein,

1. Of the Words and Ceremony required in an express Release.

Lit. §. 445.
Co. Lit. 264.
(a) *Plow.*
140.

Littleton tells us, that the proper Words of a Release are *Remiffisse, relaxasse & quietum clamasse*, which have all the same Signification. Lord Coke adds, (a) *Renunciare, acquietare* ; and says, that there are other Words which will amount to a Release ; as if the Lessor grants to the Lessee for Life, that he shall be discharged of the Rent ; this is a good Release.

So it hath been held, that a Pardon by Act of Parliament of all Debts and Judgments amounts to a Release of the Debt, the Word *Pardon* including a Release.

1 Sid. 265.—
So the Words
ei Reddidit
enure as a Re-
leased or dis-
charged. 9 Co. 52. 1 Sbarv. 331.

leaf. *Cro. Jac.* 696. — So an Obligee's acknowledging himself on good Consideration of all Bonds, Debts and Demands, is in Judgment of Law a good Release.

An exprefs Release must regularly be in Writing and by Deed, according to the common Rule, *Eodem modo quo oritur eodem modo diffoluitur*; so that a Duty arising by Record must be discharged by Matter of as high a Nature; so of a Bond or other Deed.

Co. Lit. 264. b.
1 Rol. Rep. 43.
2 Leon. 76,
213.
2 Rol. Abr.
408.

2 Saund. 48. Moor 573. pl. 787.

But a Promise by Words may before Breach be discharged or released by Words only.

1 Sid. 177.
2 Sid. 78.
Cro Jac. 483;
620.

As where in *Assumpsit* the Plaintiff declared that the Defendant for valuable Consideration assumed to go a certain Voyage in such a Ship before *August* following, and alledged a Breach in the Non-performance; to which the Defendant pleaded, that before any Breach, the Plaintiff the fourth of *April* at such a Place *exoneravit eum* of the said Promise; and on Demurrer the Plea was held sufficient, without shewing how he discharged him, or that such Discharge was in Writing.

Cro. Car. 383.
Langden v.
Stokes.

But where in *Assumpsit* for 5*l.* upon Exchange of a Horse to be paid upon Request, the Defendant pleaded that before the Action brought the Plaintiff did exonerate him of this Agreement; and this Plea was resolved to be ill, for tho' a Parol Agreement may be discharged by Parol before Cause of Action accrued, yet after that it cannot be discharged but by Deed; and here the Cause of Action did accrue at least upon Request, and therefore he should have pleaded the Exoneration before the Request.

1 Mod. 262.
2 Mod. 259.
S. C. Edward
v. Weeks.

In Trespafs for riding the Plaintiff's Horse, the Defendant pleaded that such a Day the Plaintiff *exoneravit* him of the Trespafs; and this was held an ill Plea, in not shewing that the Discharge was in Writing.

1 Sid. 293.
Westlake v.
Perse.

A Release of a Right in Chattels cannot be without Deed.

1 Leon. 285.
per Anderson
Ch. J.

2. How far a Covenant or Agreement may operate as a Defeasance or Release.

A Covenant perpetual, as that the Covenantor will not sue without any Limitation of Time, is a (a) Defeasance or absolute Release; and this Construction has been made to avoid Circuity of Action; for if in such Case the Party should contrary to his Covenant sue, the other Party would recover precisely the same Damages which he sustained by the other's suing; but if the Covenant be, that he will not sue till such a Time, this does not amount to a Release, nor is it pleadable in Bar as such, but the Party hath Remedy only on his Covenant.

Moor 23. pl.
80, 811.
1 Rol. Abr.
939.
Bridg. 118.
2 Bull. 95,
290.
Hard. 113.
3 Lev. 41.
2 Salk. 573-5.
Carth 210.
1 Ld. Raym.

419, 691. (a) A Defeasance is only a conditional Release, and may be executed as well after as at the Time of the original Contract. 2 Saund. 48. *Cro. Eliz.* 623.

As in Debt upon an Obligation, the Defendant pleaded that the Plaintiff by Indenture, &c. did covenant that he would not sue the Bond before *Michaelmas*, intending thereby that this was a Suspension of the Action, and consequently a Release; but upon Demurrer the

Cro. Eliz. 352.
1 Ard. 307.
1 Rol. Abr.
939. *Deux v.*
Jefferies.

Court adjudged that it only amounted to a Covenant, and that for Breach thereof an Action of Covenant would lie.

Carth. 63. So if the Obligee covenants and grants to and with the Obligor, that
Salk. 573. Ail- during ninety-nine Years he will not put the Bond in Suit; this is only
loffe v. Serim- a Covenant on which an Action will lie, but it cannot be pleaded in
shire, & vide Bar of the Bond.
1 Show. 46.
S. C.

Crö. Car. 551. If two are jointly and severally bound in an Obligation, and the
March 95. Obligee by Deed (*a*) covenants and agrees not to sue one of them;
2 Salk. 575. this is no Release, and he may notwithstanding sue the other.
(a) But if
 two are jointly and severally bound in a Bond, a Release to the one discharges the other. *1 Ld. Raym. 420.*

2 Vent. 217. *A.* covenants with *B.* to pay him 300 *l.* for the Use of the Wife of
Garwden v. *A.* only for her Life; in Covenant brought on this, and Breach assigned
Draper. that there was so much of the 300 *l.* arrear, Defendant pleads that
1 Ld. Raym. there was another Indenture between him and the Plaintiff since the
691. S. C. Date or Delivery of the Deed of Covenant declared on, reciting the
cited per said Covenant and Agreement for the Payment of the 300 *l.* wherein it
Holt, and ad- was covenanted and agreed, that so long as *A.* and his Wife did co-
 mitted to be habit, the Payment of the 300 *l.* should cease; and avers, that they
 good Law; but he said, did cohabit for the Time the said Arrear became due, and pleads this
 that if the 300 *l.* had in Bar of the first Agreement; and tho' in this Case there could not
 been a Rent, he should have been any great Mischief in construing the Deed pleaded a Defea-
 have been of fance or Release, there being no other Parties to the Deed; yet as this
 Opinion that was a Sum in Gross, and the Covenant temporary and not perpetual, it
 the second was adjudged no Bar.
 Deed would
 have amounted to a Grant of the Rent for the said Time; & vide *1 Lev. 152.*

43 Aff. pl. 44. If the Collateral Ancestor of the Disseisee release to the Disseisor
Co. Lit. 265. with Warranty, and the Disseisor makes a Deed reciting the Release
1 Ld. Raym. with Warranty, and covenants tho' he be impleaded or ousted yet he
690. cited. will not take Advantage of the Deed or Warranty, that is a Defea-
 fance; and if the Disseisor pleads the Release with Warranty in Bar of
 an Action brought by the Disseisee, he shall be rebutted from the
 Warranty by his own Deed; but in this Case if the Disseisor had cove-
 nanted only not to bring a *Warrantia Chartæ*, or not to vouch, there it
 would only have been a Covenant, because there would have remained
 a Remedy upon the Warranty.

Noy 5. *A.* having a Rent-charge issuing out of three Acres, *B.* purchased
1 Show. 321. two Acres thereof, and *A.* covenanted and granted to and with *B.* not
S. C. cited. to distrain in those two Acres for the Rent. By *Glanvil* it was held a
 Release; but *Anderson contra*; but *per Cur'*, If it be a Release, the
 Tenant of the other Acre may plead it, for thereby the Rent was
 extinct.

Bro. Estranger If *A.* be bound to *B.* in a certain Sum, and *B.* covenants and grants
al Fait, pl. 21. with *C.* a Stranger to the Bond, that if *A.* did such a Thing, the
 Obligation should be void; this does not amount to a Release.

Carth. 64, If a Letter of Licence contains the following Words, *viz.* that if the
210. Creditor sues within such a Time his Debts shall be forfeited; such
1 Show. 46, Licence is pleadable in Bar as a Release, for the Words, *shall be for-*
337, 350. *feited,* make an absolute Defeasance upon a Suit commenced.
2 Show. 446.

2 Salk. 573. Obligee reciting the Bond covenants to save the Obligor harmless,
 it is an absolute Release; and if upon a Contingency, it is a conditional
 Release, because it has an express Relation to the Bond.

2 Mod. 228. An Award that all Suits shall cease hath the Effect of a Release, and
Strangford v. the Submission and Award may be pleaded in Discharge as well as a
Green. Release.

3. How far a Disposition by Will may operate as a Release.

It seems agreed, that a Will, tho' sealed and delivered, cannot amount to a Release, because it is ambulatory and revokable during the Testator's Life; also by reason of the Executors Consent requisite to every Disposition of a personal Thing by Will, and the Injury that might accrue to the Testator's Creditors, were a Will allowed to operate as a Release.

And therefore where in Debt upon an Obligation, by the Representative of a Testator, the Defendant pleaded that the Testator by his last Will in Writing released to the Defendant; this was adjudged ill, and that no Advantage could be taken hereof by Plea.

But it hath been held in Equity, that tho' a Will cannot enure as a Release, yet provided it were expressed to be the Intention of the Testator that the Debt should be discharged, the Will would operate accordingly; and Lord Cowper said, that in such Case it would be plainly an absolute Discharge of the Debt tho' the Testator had survived the Legatee.

So in another Case it was held by Lord King, that a Release by Will can only operate as a Legacy, and must be Assets to pay the Testator's Debts; and if a Debt so released by Will be afterwards received by the Testator himself in his Life-time, the Legacy is extinct, and such Release by Will intimates no more than that the Executors should not after the Testator's Death trouble or molest the Debtor.

A. devised to his Servant *B.* a Legacy of 50*l.* and 20*l.* per Ann. for his Life; and by his Will acquits, exonerates and discharges *B.* of all Debts, Accounts, Reckonings and Demands whatsoever at the Death of the Testator; *B.* had a Trunk of his in which were Medals, Jewels, &c. and it was made a Doubt, and directed to be tried at Law, whether by these Words the Trunk, &c. passed or not.

A. devises 100*l.* to *B.* and by his Will releases to *B.* all Debts and Demands, and afterwards *A.* lends *B.* 100*l.* and the Question was, whether the Will should discharge the 100*l.* lent without any new Publication, in which the Court doubted, however decreed Payment of the 100*l.* Legacy, and left the Executor to recover the 100*l.* lent, if he could, at Law.

If a Debt is mentioned to be devised to the Debtor without Words of Release or Discharge of the Debt, and the Debtor die before the Testator; this will be a lapsed Legacy, and the Debt will subsist.

(B) Release by Operation of Law, how created, and the Effect thereof.

Releases by Operation of Law are created sometimes by Deed, or may be without; as if the Lord disseise the Tenant, and make a Feoffment in Fee; or if the Disseisee disseise the Disseisor's Heir, and make a Feoffment in Fee; this is a Release in Law of the Seignory in the first Case, and both of the Right and Action of the Disseisee in the second.

If a Disseisee release to his Disseisor's Lessee for Life, his Right is gone for ever; but if he disseise his Disseisor's Heir, and make a Lease

for

for Life, his Right is released but during the Lessee's Life, for a Release in Law is more favourably taken according to the Party's Intent than an express Release in Deed.

Co. Lit. 264. *Plow.* 184-5. *Hutt.* 128. If the Obligor makes the Obligee his Executor, and he accepts of the Executorship, this in Law is a Release of the Action, but still the Debt or Duty remains, for which the Executor may retain, but such Retainer can only be against Creditors who are in an equal Degree with himself.

8 *Co.* 136. *Off. of Ex.* 31. *Salk.* 300. So if the Obligee makes the Obligor his Executor, who administers several Goods, but dies before Probate, this in Law is a Release; so an Administrator of a Creditor may (a) retain so much of the Intestate's Assets as will satisfy himself; but an Executor *de son tort* who is a Creditor cannot retain, because this would be allowing him to take Advantage of his own Wrong.

(a) But if there are not Assets, the Action is not suspended, and the Executor may sue the Heir of the Obligor where the Heir is bound. 1 *Rol. Abr.* 940. 1 *Salk.* 304. — So if a Creditor is made Executor with others, he may sue the others, especially if he hath not administered. *Cro. Car.* 372. 1 *Jon.* 345. *Off. of Ex.* 32.

Cro. Car. 372. *1 Jon.* 345. *1 Rol. Abr.* 934. *Dorchester v. Webb.* *A.* and *B.* are bound in an Obligation jointly and severally to *C.* and after *A.* makes *D.* his Executor, and dies, and *D.* takes upon him the Execution of the Will, and fully administers all the Goods of *A.* and after the Obligee makes the same *D.* his Executor, and dies; and the Question was, whether this was a Release or Extinguishment of the Obligation as to *B.* and adjudged to be no Release, because he had it in another's Right.

1 *Ld. Raym.* 605. *Carveth v. Philips.* Debt upon Bond by the Plaintiff as Executor of the Obligee; the Defendant pleaded that the Obligee made the Defendant Executor during the Minority of the Plaintiff, and that the Plaintiff became Executor at his Age of seventeen; the Plaintiff demurred; and *per Cur'*, This cannot be a Suspension of the Action, because the Defendant was only Executor in Trust for the Plaintiff during his Minority.

2 *Lew.* 73. *Cock v. Crofs.* If *A.* and *B.* be jointly and severally bound to *C.* and *A.* makes *C.* his Executor, (or as the Case was) makes *D.* his Executor, who makes *C.* his Executor; in this Case if *C.* has not received Satisfaction of the Assets of *A.* he may sue *B.* for being jointly and severally bound, he may sue which of them he pleases.

1 *Sid.* 79. If an Obligor administers to the Obligee, and makes his Executor, and dies, the Creditor of the Obligee may well bring an Action against him.

8 *Co.* 136. *1 Salk.* 306. If the Obligee makes the Obligor his Executor, this is a Release in Law, in Regard it is the proper Act of the Obligee, who thereby makes the Executor the only Person capable to receive and pay, &c.

8 *Co.* 136. *1 Leon.* 90. *2 Mod.* 315. But if the Obligee dies Intestate, and Administration of the Goods of the Obligee is by the Ordinary granted to the Obligor, this does not (b) extinguish the Debt, for he comes into the Administration by the Act of Law, whereas the other is the Act of the Party.

(b) But if an Administrator having no Assets pays a Debt of the Intestate to the Value of the Bond out of his own Money, this will amount to a Release. *Salk.* 306.

Plow. 264. *1 Leon.* 320. If the Debtee makes the Debtor and another Co-Executors, and one of them makes his Executor, and dies, the surviving Co-Executor shall not have an Action to recover the Debt against the Executor of the Debtor, because the Debt was once extinct; for it could not be brought but in the Names of both the Co-Executors, notwithstanding one alone administered; and it could not be brought in both their Names, because the Debtor could not sue himself.

If the Obligee makes the Obligor and others his Executors, and the Obligor refuses, but the others administer, and the Obligor dies first, yet the Debt is released, for the Obligor notwithstanding the Refusal might have come in and administered, and the Probate by the others was for his Benefit.

1 Salk. 338.
per Holt.

It is said by Ch. Just. Holt, that a Creditor making his Debtor Executor does not operate as a Legacy, or amount to a Bequest to him of the Sum due, but to a Payment and Release, the Meaning whereof is, that such Executor having Assets sufficient to pay the Debts and Legacies of the Testator, is discharged of the Debt due from himself, as he by Law is intitled to all the Residue of the Testator's Personal Estate after Payment of Debts and Legacies; but it hath been adjudged, that in Case of a Deficiency of Assets either for the Payment of Debts or Legacies, such Debt is to be deemed Assets, and the Executor accountable therewith as so much of the Testator's Personal Estate.

1 Salk. 304,
306.
Cro. Car. 373.
Off. of Ex. 30.
Yelv. 160.
1 Chan. Ca.
292. and the
Case of Sel-
win v.
Browne,
which vide
'Tit. Execu-
tors.

If an Infant at the Age of seventeen make his Debtor Executor, this in Law is a Release; for as the Law gives him Power to make an Executor, it gives his Executor the same Advantages with others.

Co. Lit. 264.

If a Feme Obligee marries the Obligor, or one of the Obligors; or if there be two Feme Obligees, and one of them marries the Obligor; these are Releases in Law.

8 Co. 136.
Co. Lit. 264.

But if a Woman, Executrix of the Obligee, takes the Debtor to Husband, this is no Release in Law, because she hath the Debt in another Right; and if this amounted to a Release in Law, it would be a *Devastavit*, which is a Wrong the Law will not suffer.

8 Co. 136.
Co. Lit. 264.
Cro. Eliz. 114.
S. P. adjudged
that it was
suspended but
Moor 236.

not extinguished, for that after the Husband's Death an Action would lie against his Executor.

If *A.* and *B.* are bound in an Obligation jointly and severally to *C.* and *C.* makes *D.* the Wife of *A.* his Executrix, and dies, and *D.* administers, and after *A.* the Husband of *D.* makes *D.* his Executrix, and dies, leaving sufficient Assets to pay the Debt, and after *D.* dies, and *E.* takes Administration of the Goods of *C.* the Obligee not administered, yet he can have no Action upon the Obligation against *B.* the other Obligor, because that when the Obligor made the Executrix of the Obligee his Executrix, and left Assets, the Debt was presently satisfied by way of Retainer, and then by Consequence no new Action could be had for the Debt.

2 Rol. Abr.
935.
Hob. 10.
Moor 855.
Frier v. Gild-
ridge.

By an Intermarriage all Contracts between the Husband and Wife for Debts due *in presenti* or *in futuro*, or upon a Contingency which may become due during the Coverture, are released and extinct, because the Husband and Wife make but one Person in Law; and it is holden by Just. Gould, that if there was an express Agreement that they should not be released by the Intermarriage, it would be void, as inconsistent with the State of Matrimony.

Co. Lit. 264.
8 Co. 136.
Dyer 140

But it is the better Opinion, and founded on great Variety of Cases, that Promises, Covenants and Agreements for the Performance of a Thing which is not to happen during the Coverture, as Payment of Money after the Husband's Decease, are not released by the Marriage.

Hob. 216, 227.
Hutt. 17.
Noy 26.
Cro. Jac. 571.
Palm. 99.
1 Rol. Rep.

343. 2 Rol. Abr. 407. Godb. 271. 2 Rol. Rep. 162. Lit. Rep. 32. Hestl. 122. 2 Sid. 58.

Also it hath been adjudged by two Judges against Holt Ch. Just. that where *A.* entred into a Bond to his intended Wife, conditioned to leave her at his Death 1000*l.* if she survived him, that such Bond was not released by the Marriage, as nothing would be due during the Coverture, and as it would be contrary to the express Agreement of

1 Ld. Raym.
515.
Carth. 511.
Comb. 242.
Lill. Ent. 214.
1 Salk. 235.
the Case v. Astin.

the Parties. But the Ch. J. insisted strenuously, that a Bond differed from a Promise or Covenant, being *debitum in presenti*, tho' *solvendum in futuro*; and that the Rule of Law could not be controuled by the Intention of the Parties.

2 Vern. 290.
480.
Preced. Chan.
237.

Also where a Man entered into a Bond to his intended Wife, conditioned to leave her 1000*l.* and the Husband mortgaged his Estate and died, not leaving Personal Assets to discharge the Bond; and it was decreed in Equity, that admitting the Bond void at Law, yet it ought to be made good in Equity, and that she ought to redeem and hold the Land till she was satisfied her Debt.

(C) Releases of Lands and Hereditaments how they enure: And herein,

1. Of Releases that enure by way of Mitter le Estate.

Releases, says my Lord Coke, may enure four Manner of Ways: 1. By way of *Mitter le Estate*. 2. By way of Enlargement or Creation of Estate; upon both which a Rent may be reserved. 3. By way of *Mitter le droit*. 4. By way of Extinguishment; upon which two last no Rent can be reserved.

When two or more become seised of the same Estate by a joint Title, as by a Contract, or Descent as Jointenants or Coparceners, and one of them releases to the other his or her Claim, Right and Pretensions, such Release is said to enure by way of *Mitter le Estate*.

For if there be two Jointenants, and one of them releases to the other, the Releasee is in by the original Conveyance; and such Release is no Alienation, nor doth it make (a) a Degree; (b) nor can this be any Injury to a Stranger's *Præcipe*, for he may bring it against them all, and if any of them disclaim, the Rest must defend for the Whole, or lose their Interest.

(a) But if there are three Jointenants, and one releases to another of them,

such Release makes a Degree. *Co. Lit. 273. b. Winch 3.*—So does the Release of one Coparcener to another. *Co. Lit. 273. b. (b) Booth 33.*

Vide Tit. Jointenants.

And herein it is to be observed, that Jointenants can only regularly pass their Estates by Release; and that by reason of the Privity which must necessarily be in Releases which enure by way of *Mitter le Estate*, a Fee-simple passes without the Word *Heirs*.

Vide Tit. Jointenants and Tenants in Common.

But if there be two Tenants in Common, they cannot release to each other, but they must pass their Estate by Feoffment, &c. because this Estate being established by different Notories, each having passed by distinct Liveries, they must pass to each other by a distinguishing Livery, or else it cannot be known in whom such Parts are which formerly had passed by a distinct Livery.

Vide Tit. Coparceners.

As to Coparceners, they having in respect of the descending Line distinct Estates, they may pass the same by Feoffment, &c. or may release to each other, and shall join in an Assise, as each is seised *per my & per tout*.

21 E 3. 27.
Bro. Releases
16.
2 *Rel. Abr.*
403.

If there are two Coparceners, and the one enters in the Name of both, and the other releases to him, this countervails Entry and Feoffment, and is good Cause of Voucher; but where one enters in his own Name only, and claims to him alone, and the other releases to him, this

this is only an Extinguishment of the Right, and no making of the Estate.

If there be two Parceners of a Rent, and one of them marry the Tertenant, and the other release to her, this shall enure by way of *Mitter le Estate*, and yet the Rent was suspended at the Time of the Release; but if she had released to the Husband, it would have enured by way of Extinguishment. Co. Lit. 272 b.
Raym. 413.
cited.

One Jointenant of a Reversion depending on a Lease for Life may release to the other; but if the Rent be arrear, the one cannot release his Interest in the Arrearage to the other. 2 Rol. Abr.
403.
Ley 167.

If *A.* Feme Sole and *B.* Jointenants for Life are, and *A.* takes *C.* to Husband, and after *A.* and *C.* levy a Fine to *B.* by which they grant the Land to *B.* *Et quicquid habent, &c.* and his Assigns, with Warranty, and after *B.* dies, living *A.* yet the Lessor may enter into the Whole, and there shall not be any Occupant of any Part, because this Fine enures as a Release, not by *Mitter le Estate*, but by way of Extinguishment. 2 Rol. Abr.
409.
2 Rol. Rep.
398, 485.
Euface v.
Scarven.

If one joint Copyholder release to his Companion; this is good without Surrender or Admittance, for the first Admittance was of them and every of them, and the Ability to release was from the first Conveyance and Admittance. Winch 3.
Wase v.
Pretty.

If Land be given to two upon Condition that they shall not alien, and one of them releases to the other, this is no Breach of the Condition. Winch 3.

If two Jointenants in Fee let the Land for Life, reserving a Rent to them and their Heirs; if one release to the other and his Heirs, this Release is good, and he to whom it was made shall have the Rent of Tenant for Life only, and a Writ of Waste without Attornment to such Release, for the Privy which was once between the Tenant for Life and them in the Reversion. Vaugh. 45.

A. and *B.* Jointenants for their Lives, Remainder to the first Son of *A.* in Tail, and so to the second, *&c.* Remainder to the right Heirs of *B.* before any Issue had *A.* releases to *B.* and his Heirs, and after hath Issue a Son; and the Question was, if by this Release before the Birth of a Son the contingent Remainders were destroyed; and tho' it was urged that this uniting of the Estate for Life with the Remainder in Fee, being by Conveyance and Act subsequent to the Limitation of the contingent Remainders, and before they came in Being had destroyed them; yet it was adjudged by three Judges against *Dolben*, that these contingent Remainders were not destroyed, for that to some Purposes the whole Fee was executed in *B.* immediately upon the first Conveyance, and this Release of *A.* gave him no greater Estate nor in any other Degree than he had before, for after such Release he is in of the whole Estate by the Lessor, as he was before, and as he would have been had it come to him by Survivorship. 2 Jon. 136.
Raym. 413.
Harrison v.
Belley.
1 Vent. 345.
S. C. but says,
it was ad-
judged that
the contingent
Remainders
were destroy-
ed.

2. Releases by way of *Mitter le Droit* how they enure.

Releases are said to enure by way of *Mitter le Droit* where a Person is disseised, and he releases to the Disseisee, his Heir or Feoffee, who being in Possession are therefore capable of taking a Release of the Right. Co. Lit. 274,
276.

If there be two Disseisors and the Disseisee release to one of them, he shall hold out his Companion, because the Disseisor comes in by no lawful or established Act of Notoriety, which ought to be defeated before the Manner of possessing can be altered; and therefore tho' he possessed Lit. §. 4-2.

possessed as a Jointenant before the Release, yet after the Release he shall oust his Companion, because he was possessed of the Whole before by Wrong, and now being possessed by Right, it follows that the Possession of the other Wrong-doer is no Possession at all.

Co. Lit. 276. a.
(a) That the Feoffees are in by Title, and are presumed to have a Warranty, which is much favoured in Law. *Co. Lit. 276.*

But if a Disseisor had infeoffed two, the Release of the Disseisee to one should enure to both, (a) because coming in by the legal Notoriety of a Feoffment, that must be defeated by an Act of equal Notoriety before the Title can be altered, because the Feoffment must stand good as an Act that gives Warning to all Persons in whom the Freehold subsists, till by some Act of equal Solemnity it appears that the Freehold is in another.

Co. Lit. 274. 5. So where a Disseisor makes a Lease for Life, the Remainder in Fee, and the Disseisee releases to the Tenant for Life, or to the Remainder-Man; this enures to them both, because coming in by a known Conveyance, it cannot be altered unless it were defeated by an Act of equal Notoriety.

Co. Lit. 276. If a Disseisor makes a Lease for Life, and the Disseisee releases to Tenant for Life, this shall enure to him in Reversion, because the Release cannot alter the Estate that passed by the Feoffment without some Act that destroys the Feoffment.

Co. Lit. 276. So if there be two Disseisors, and they make a Lease for Life, and the Disseisee releases to Tenant for Life, this shall enure to them all.

Co. Lit. 276. If there be Tenant for Life, the Remainder in Fee, and Tenant for Life is disseised by two, and he releases to one of them, he shall not hold out his Companion; so if the Remainder-Man had released to one of the Disseisors, he should not hold out his Companion.

Co. Lit. 276. But if Tenant for Life and he in Remainder join in a Release to one Disseisor, he shall hold out his Companion, because when the Possession is notoriously in them both, each of them are capable of a Release, and when one has obtained a Release, it makes his Possession rightful, and his holding out his Companion makes it immediately notorious that the Estate is in him alone.

Co. Lit. 276. So also if the Disseisors make a Lease for Years, and the Disseisee releases to one of them, this shall enure to them both, because he cannot make it notorious that the Estate is in him alone, because he cannot hold out his Companion during the Continuance of the Lease for Years.

Co. Lit. 276. So if two Jointenants are disseised by two, and one releases to one of them, he shall not hold out his Companion, because he cannot hold him out of the Whole, because he has not the whole Right, and so there can be no Act of Notoriety whereby the Estate may appear to be in one Disseisor.

Co. Lit. 277. If the King's Tenant for Life be disseised by two, and he releases to one of them, this enures to both, because he can only be disseised of an Estate for Life since the Reversion in the King cannot be devested.

Co. Lit. 276. If there be Tenant for Life, Remainder in Fee, and they are disseised, Tenant for Life cannot release to him in Remainder, because the naked Right cannot be transferred.

Co. Lit. 276.
8 Co. 152. If the Heir of the Disseisor be disseised, and the Disseisee releases to such Disseisor, and after the Heir recovers against such Disseisor, the Right of Propriety goes along with it, because when the Heir recovers, he defeats the Possession of the Disseisor as if it had never been, so that the Disseisor can never recover in any Action, for in the Writ of Right he must lay the Possession in himself or some of his Ancestors; and this he cannot do in this Case, for here there never was any Possession in him but what was totally defeated and destroyed; and he cannot recover by the old Possession of the Disseisee, for that

was turned into a naked Right, which could not be transferred but to a true and real Possession; and here being no Possession but such as stands defeated, it is the Conveyance of a naked Right, which the Law will not allow.

If the Heir of the Disseisor be disseised, and the Disseisee releases to the Disseisor upon Condition, and the Condition be broken, this reverts the naked Right in the Disseisee, because when the Condition is broken the Release is as if it had never been, and therefore the Disseisee may recover by Virtue of his antient Seisin. *Co. Lit. 277.*

If two Men gain an Advowson by Usurpation, and the right Patron releases to one of them, he shall not hold out his Companion, but it shall enure to them, for their Clerk came in by Admission and Institution, which are judicial and notorious Acts. *Co. Lit. 276.*

3. Releases that enure by way of Extinguishment.

In some Cases where the Releasee cannot have the Thing released by way of *Mitter le Droit*, &c. yet the Release shall enure by way of Extinguishment against all Manner of Persons; as when the Lord releases his Seignory to his Tenant of the Land, or when the Grantee of a Rent-Charge or Common releases to the Tenant, and such Releases absolutely extinguish the Rent, &c. tho' the Releasee be only Tenant for Life. *Co. Lit. 279. b. 280.*

If a Lease be made to one for Life, reserving Rent to the Lessor and his Heirs; if the Lessee be disseised, and after the Lessor releases to the Lessee and his Heirs all his Right in the Land, and after the Lessee enters; in this Case the Rent is extinct, but the Right of the Reversion doth not pass. *Lit. §. 456.*

If there be Lord and Tenant, and the Tenant be disseised, and the Lord releases to the Disseisee all the Right which he has to the Seignory or in the Land, this Release is good, and the Seignory extinct. *Lit. §. 459.*

But yet if the Tenant, notwithstanding he is disseised, puts his Beasts on the Land, and the Lord takes them for Rent arrear, the Disseisee shall compel him to avow on him; and if the Lord avows upon the Disseisor as his Tenant, the Disseisee shall reply and shew the special Matter how he was Tenant and was disseised, and shall abate the Lord's Avowry. *Co. Lit. 268.*

But if the Tenant be disseised, and the Lord accept Rent from the Disseisor, and then the Lord distrains his Beasts for Rent in arrear, he may compel the Lord to avow on him, and the Lord cannot traverse the Disseisor's Title, having once admitted it by Acceptance of the Rent from him. *Co. Lit. 268.*

And according to my Lord Coke, if after such Acceptance the Disseisee should put in his Beasts, and the Lord should distrain them, the Disseisee cannot compel the Lord to avow on him, because it was his own Laches to let the Disseisor continue till Rent was due and accepted. *Co. Lit. 268. 48 E. 3. 9. 2.*

So if the Disseisor dies seised, the Heir of the Disseisor comes in by Title, and then the Disseisee cannot compel him to avow upon him, for he has lost the Right of Possession; and the Disseisee cannot put his Beasts on the Ground, and therefore cannot compel the Lord to avow on him, and therefore the Lord must take the Heir who has such Right of Possession to be his rightful Tenant; but because the Disseisee may enter and occupy the Land before the Descent cast, therefore the Lord may release to him and discharge the Contract, which is to his Benefit, and is still so far subsisting that he may take Advantage of it. *Co. Lit. 268.*

- Co. Lit.* 280. So where Donee in Tail releases to the Disseisor all his Right, yet if he in the Reversion releases to him afterwards, it shall extinguish the Rent.
- Co. Lit.* 268. There is a Diversity between a Seignory and a bare Right to Land, for a Release of a bare Right to Land to one who has but a bare Right, is void; but a Release of a Seignory to him who has but a Right, is good to extinguish the Seignory.
- Co. Lit.* 269.
Lit. §. 457. But if there be Lord and Tenant, and the Tenant makes a Feoffment in Fee, and afterwards the Lord releases to the Feoffor; this extinguishes nothing, for by the Feoffment the Relationship between the Lord and Tenant is destroyed, and the Feoffor only of Necessity becomes Tenant in the Avowry till the Lord procures his Arrears.
- Co. Lit.* 280. If a Feme Mefne marry her Tenant, and the Lord releases to the Feme, the Seignory is extinct; but if he release to the Husband, both the Seignory and Mefnalty are extinct.
- Co. Lit.* 280. If the Tenancy be given to the Lord and a Stranger, and the Heirs of the Stranger, the Lord releases all his Right to his Companion; this not only passes his Estate in the Tenancy, but also extinguishes his Right in the Seignory.
- Co. Lit.* 275. If Lessee for Years be ousted, and he in the Reversion disseised, and the Lessee releases to the Disseisor, the Disseisee may enter, for the Term for Years is extinct and determined; but were it in the Case of a Lessee for Life, it would be otherwise, because the Disseisor has a Freehold whereupon the Release of Tenant for Life may enure.
- 1 Jen.* 389.
Johnson v. Trumper. Lessee for Years devised the Term to his Wife for Life, the Remainder of the Years to *J. S.* who by Deed released all his Right, Interest, Term for Years, Possession and Demand in the said Land to him who had the Reversion in Fee; and by this it was held, that the Possession was extinguished in the Reversion, and that the Reversioner may after the Death of the Wife well enter.
- Moor* 56. *pl.* 161. *per Cur.*
Dalf. 60. *§*
v. 1 And. 235. If the Lord releases his Right in one Acre, this extinguishes the whole Seignory.
- Bro. Releases,*
pl. 18. So if a Man has a Rent-charge out of twenty Acres, and he releases all his Right in one Acre, this extinguishes all the Rent.
- Co. Lit.* 148.
§ wide Cro.
Eliz. 742. But it hath been held, that if the Grantee of a Rent-charge releases Part of his Rent, such Release does not extinguish the whole Rent.
- Dyer* 157. *b.*
pl. 29. If the Lord releases to his Tenant all his Right to the Land and Seignory, *Salvo sibi dominio suo*; this does not extinguish the Tenure, but only the annual Services.

4. Releases that enure by way of Enlargement: And therein of the modern Manner of Conveyancing by Lease and Release.

- Co. Lit.* 273.
Finch 44.
5 Co. 124.
Dyer 302. Releases enure by way of Enlargement when the Possession and Inheritance are separated for a particular Time, and he who hath the Reversion or Inheritance releaseth to the Tenant in Possession all his Right or Interest in the Land; such Release is said to enlarge his Estate, and to be equal to an Entry and Feoffment, and to amount to a Grant and Attornment; and herein the Law requires Privity of Estate, that the Releasor have a Right, and the Releasee such a (a) Possession as will make him capable of taking an Estate.
- (a) Possession counter-vails, and is equal to Livery. *Dyer* 269. *pl.* 20. Margin.

And therefore, if there be Lessee for Life or Years in Possession, the Lessor may enlarge their Estates by Release; so if they assign or grant over, the Estate or Interest of Grantee or Assignee may be enlarged by the Release of him in Reversion. Co. Lit. 273.
2 Rol. Abr.
401.

So if there be Lessee for Life, Remainder in Tail, the Remainder in Fee; he in Remainder in Fee may enlarge the Estate of the Lessee by Release notwithstanding the mesne Remainder. 44 Aff. 35.
but vide
1 Brownl. 207.

But if *A.* makes a Lease for Life, and Lessee for Life makes a Lease for Years, and *A.* releases to the Lessee for Years and his Heirs; this is void, because there is not the Consent of the Tenant for Life, who is immediate Tenant to the Reversioner, and ought to attorn to his Grants. Co. Lit. 272.

So if a Man leases for twenty Years, and the Lessee assigns for ten Years, a Release by the Reversioner to the Assignee is void for want of Privity; but a Release to the Lessee is good, for he hath the Possession notwithstanding the Assignment; the Possession of the Lessee being always considered the Possession of the Lessor, and that he holds as his Bailiff. Co. Lit. 270.
Dyer 4. pl. 2.
Carter 62.

If a Man makes a Lease for Years, the Remainder for Life, and afterwards releases to the Tenant for Years; this is good, because the Tenant for Years holds of the Reversioner, and pays him the Services, and ought to attorn to his Grants, and not he in the Remainder for Life; and therefore where Tenant for Years accepts a Release of the Reversion, it must in Consequence be good; and in this Case a Release to him in the Remainder for Life would be good likewise, because the Lessee in the original Creation took the Estate for Years, subject to such Remainder for Life, and therefore there needs no Consent from the Lessee for Years to enlarge the Estate. Co. Lit. 273.

If Tenant by the Curtesy grants over his Estate, he is not afterwards capable of taking a Release, for his Estate is created merely by Law, and he remains Tenant to the Heir, and subject to Waste, and is compellable to attorn to the Grants of the Reversioner; yet is he not capable of a Release, because he has no notorious Possession *in pais*, which may be enlarged into a Fee. Co. Lit. 273. a.

But the Grantee of Tenant in Dower, or by the Curtesy, is capable of taking a Release, because of the Privity and Notoriety of Possession. 2 Rol. Abr.
400-1.

If a Feme Covert be Tenant for Life, a Release to the Husband and his Heirs is good, for there is both Privity and an Estate in the Husband, whereupon the Release may sufficiently enure by way of Enlargement, for by the Intermarriage he gains a Freehold in Right of his Wife. Co. Lit. 273. b.
Keilw. 129.
pl. 97.

If an Infant makes a Lease for Life, and the Lessee assigns it over to another with Warranty, the Infant at full Age brings a *Dum fuit infra etatem* against the Assignee, and he vouches the Assignor, who enters into the Warranty, the Demandant cannot release in Fee so as to enlarge the Estate, because the Vouchee has no Possession. Co. Lit. 273. a.

But he who aliens hanging the Writ may, as long as that Writ hangs, accept a Release from the Demandant; so may a Vouchee after he hath entered into the Warranty, for tho' they be not Tenants, yet the Laws and the Parties have allowed them as Tenants *inter se* for that Suit. Lit. §. 490.
Co. Lit. 266.
284. b.
Hob. 338.

If a Man makes a Lease for Life, the Remainder for Life, and the first Lessee dies, a Release to him in the Remainder, and to his Heirs, is good before he enters to enlarge his Estate, because he hath an Estate of a Freehold in Law in him, which may be enlarged by Release before Entry. Co. Lit. 270. b.

But

Co. Lit. 270. But at Common Law, a Release to a Lessee for Years before Entry is void; yet it is said by my Lord *Coke*, that if a Man makes a Lease for Years, the Remainder for Years, the first Lessee enters, a Release to him in the Remainder for Years is good to enlarge his Estate.

Co. Lit. 270. *b.* And if a Lease for Years be made to two, albeit the Lessor before they enter cannot release to them to enlarge their Estate, yet one of them may before Entry release to the other.

1 *Jon.* 19. If an (*a*) Advowson be granted for Years, the Patronage for Years is in the Grantee, and he may accept a Release in Fee of the Patron; but if one, two or three Avoidances are granted, the Patronage is not separated, nor can such Grantee accept of a Release in Fee of the Patron in Fee who hath the Inheritance.

enlarge it by Release. 43 *Aff.* 8. 2 *Roll. Abr.* 400.

8 *H.* 6. 1. If *A.* a Member of a Corporation, disseise *B.* to his own Use, or if *Bro. Releases*, a Mayor and Commonalty disseise *B.* and *B.* in the first Case releases to the Mayor and Commonalty, or in the second to a particular Member of the Corporation; nothing passes by these Releases, for they are distinct Persons, and claim in different Rights, consequently there is no Privity.

Co. Lit. 273. If a Feme Covert be Tenant for Life, a Release to the Husband and his Heirs is good, for there is both Privity and an Estate in the Husband, whereupon the Release may sufficiently enure by way of Enlargement, for by the Intermarriage he gains a Freehold in his Wife's Right.

31 *Aff.* 13. If a Man sues Execution upon an (*b*) *Elegit* of the Lands of his Debtor, and the Debtor who hath the Inheritance confirms his Estate, he may afterwards enlarge it by a Release, for the Confirmation hath created a Privity between them.

2 *Roll. Abr.* 401. (*b*) So of a Tenant by Statute Merchant or Staple. *Co. Lit.* 270. *b.*

Co. Lit. 270. A Release by a Lessor to his Lessee at Will, having entered by Force of such Lease, is good in Respect of the Privity between them, and as it would be a vain Thing for the Lessor to make Livery and Seisin to one already in Possession of the Land by his own Agreement.

Lit. §. 460. *Dyer* 269. *b.* *pl.* 20. *Owen* 28, 29. S. P. and that such Lessee shall have Aid.

Cro. Eliz. 830. But if Tenant at Will makes a Lease for Years, and the Lessee enters, he only is the Disseisor, and a Release or Confirmation to the Tenant at Will afterwards is void, because the Privity is determined.

Co. Lit. 270. *b.* A Release to a Tenant at Sufferance, as where Lessee for Years holds over, is void, for tho' there be a Possession, yet there is no Privity, which is equally requisite.

Cro. Eliz. 268. *3 Leon.* 152. *Brownl.* 207. *Cro. Jac.* 170.

Co. Lit. 270. *b.* If one enter of his own Wrong and take the Profits, his Words, To hold at the Owner's Will, cannot qualify the Wrong, for he is a Disseisor, and in such Case the Owner's Release to him is good; or if the Owner consented, he is Tenant at Will, and in such Case the Release is likewise good.

The antient Manner of Conveyancing was by Feoffment, but the Manner of making Livery and Seisin begetting many nice Questions, grew troublesome, which put Lawyers upon new Devices, and introduced the modern Manner of Conveyancing by Lease and Release; this Method is said to have been first (*c*) invented in King *Charles* the First's Reign, and has its Validity from the Reasons drawn from the Statute of Uses; for by the Bargain and Sale for a Year, the Bargainee

(*c*) By Sir *Francis Moor*, 2 *Mod.* 252.

by Force of the Statute is in Possession without Entry, and when the Bargainor releases to him in Possession, the Lease is a down, and the Bargainee hath the Inheritance; for as at Common Law if a Man granted a Lease, and the Lessee entered, this divided the Estate, and left a Reversion in him, and the Possession in the Lessee; but still by the Common Law, the Lessee (a) before Entry could not accept of a Release, having only an *Interesse Termini*; and now tho' the Lessee does not enter, yet the Statute vesting the Estate or Use in him for a Year, he is deemed to be in the actual Possession, and so capable of a Release as much as a Lessee in Possession was at Common Law; but yet this Lessee cannot have Trespass till an actual Entry.

2 Salk. 678.
 & vide Faref.
 74.

(a) Lit. §.
 459.
 5 Co. 124.
 Plow. 423.

Lessee for Years cannot make a Lease for Years within the Statute of Uses, so as by this Means to give the Possession, and make his Lessee capable of a Release of the Reversion.

Lutw. 570.
 Faref. 73.

In Ejectment upon a special Verdict the only Question was, whether a Lease for a Year upon no other Consideration than reserving a Pepper-Corn, if it be demanded, could operate as a Bargain and Sale, and so make the Lessee capable of a Release; and resolved that it should, the Reservation making a sufficient Consideration to raise an Use in the same Manner as a Bargain and Sale does.

1 Mod. 262.
 2 Mod. 249.
 2 Vent. 35.
 Barker v.
 Keate.

A Release to *Cestuy que Use* is good; so to a *Cestuy que Trust*, who being in Possession, may at least be considered as Tenant at Will.

Godb. 299.
 Hurd. 491.
 Carter 162.

5. What Estate or Interest passes by the Release: And therein of the Words requisite to an Enlargement.

Releases, like other Conveyances, regularly require Words of Inheritance; so that if the Lessor release to his Lessee for Years, without saying to him and his Heirs, such Lessee hath only an Estate for his Life.

Lit. §. 465.
 Co. Lit. 273 b.
 Jenk. 200.
 1 Jon. 328.
 Cro. Car. 335.

So if a Release be made to Tenant by Statute Staple or Merchant or *Elegit*, by him in the Reversion of all his Right in the Land; by this a Freehold passes for the Life of the Releasee, it being the greatest Estate that can pass without apt Words of Inheritance.

Co. Lit. 273. b.
 2 Vent. 328.

If a Lessor release to his Lessee *pur autre vie*, he gives him an Estate for his own Life.

Co. Lit. 273. b.

A Chantry Priest incorporate took a Lease to him and his Successors for 100 Years, and afterwards took a Release from the Lessor to him and his Successors; and it was adjudged, that by the Release he had but an Estate for Life, for he had the Lease at first in his natural Capacity, for that it could not go in Succession; and the Words *bis Successors* could not give him an Estate of Inheritance in the same Capacity he had the Lease, for want of the Words *bis Heirs*.

Comp. Incumb. 373.

But if the Lord releases all his Right to the Tenant, the Seignory is extinct without the Word *Heirs*; for this Instrument is to discharge the Estate of the Tenant, and therefore has a necessary Relation to the Estate which the Lord at first created, and consequently it refers to those Words that in the Original of the Estate gave him a Fee-simple.

Co. Lit. 9.
 Coke R. on
 Fines 7.

So in Releases that enure by way of *Mitter le Estate*, the Word *Heirs* is not requisite; as where there are two Coparceners, and one of them releases to the other, this gives a Fee without the Word *Heirs*, because it hath a necessary Relation to the Estate whereof the other was seized.

Co. Lit. 9.
 292.

So if there be two Jointenants, and one release to the other, this passeth a Fee without the Word *Heirs*, because it refers to the whole

Co. Lit. 9.
 200.

Fee, which they jointly took and are possessed of by Force of the first Conveyance; but Tenants in Common have distinct Estates, and cannot enlarge the Estates of each other without proper Words of Inheritance.

¹ *And.* 45. If Lands be given to Baron and Feme, and a Stranger in Fee, and (a) Secus, had the Stranger releases to the (a) Baron; this gives him the Fee without the Release other Words of Inheritance.
been made to the Wife. *Dyer* 265. a. pl. 34.

Co. Lit. 274. A Release of a bare Right for a Day or an Hour is as good as if it was made to the other and his Heirs; for the Disseisee cannot release Part of his Estate in the Right, because he has no Right to any Estate but that whereof he was seised, therefore he must release his Right to that, or none at all.

(D) Who in Respect of their Right or Interest are capable of releasing.

Co. Lit. 265. b. ¹ *Rol. Rep.* 197. ³ *Bulf.* 31. (b) So if *Cestuy que Use* had devised that his Feoffees should sell the Land, and they had made a Feoffment over, yet might they have sold the Use. *Co. Lit.* 265. b.

A Bare Authority cannot be released; as where a Man by Will directs that his Executors shall sell his Lands; this being a Power only, and no Matter of Interest in the Executor, he cannot (b) release it to the Heir.

Co. Lit. 237, 265. ¹ *Co.* 110. ⁴ *Leon.* 133. But tho' these Powers in Strangers cannot be released, yet a Power of Revocation in the Feoffor or Party from whom the Estate moved may be released by Deed, or by levying a Fine, which is a Release in Law, for it is in Nature of a Condition, whereby he may restore himself to his former Estate whenever he pleases, and consequently such Power, like other Reservations, may be released.

²¹ *E.* 4. 40. ² *Rol. Abr.* 401. After one hath found Surety of the Peace, all the King's Subjects have an Interest in it, and neither the King nor Party against whom it is found can release it.

¹⁸ *H.* 6. 23. ² *Rol. Abr.* 402. In Trespafs or *Detinue* by the Villain the Release of the Lord is a good Bar.

¹⁹ *H.* 6. 64. ² *Rol. Abr.* 402. If a Commonalty be disseised, and after every one releases for himself, it is not good, because it ought to be by their common Seal.

Noy 5. *Albany v. Manry.* A Person who procures an Outlawry in Debt may release the Party, for the Release is a Satisfaction to him; and the Outlawry in this Case being pardoned by Act of Parliament, the Party is absolutely discharged.

³ *Bulf.* 29. ¹ *Rol. Rep.* 196. ² *Rol. Abr.* 402. *Quick v. Ludburrow.* If A. covenants with B. that C. shall pay to D. 8l. yearly, and D. takes J. S. to Husband, who releases the Payment to A. this Release does not discharge him, for J. S. is a Stranger to the Covenant, and hath no Right in him.

² *Rol. Abr.* 402. ¹ *Jou.* 238. *Cro. Car.* 214. *Flower v. Elgar.* If A. has Judgment against B. for Debt or Damages, and after extends the Land of B. for this Debt, and then assigns over the Land extended to C. for all his Estate therein, and after A. releases to B. the Judgment; this shall avoid the Extent, so that B. may have an *Audita*

Audita Querela against *C.* the Assignee, and therein shall (a) avoid the Extent, because *B.* notwithstanding the Assignment, continues privy to the Judgment, and might after the Assignment have acknowledged Satisfaction of the Judgment, and so defeat the Estate of the Assignee; and this Release is all one as if he had acknowledged Satisfaction of the Judgment.

(a) 2. If there may not be Relief in Equity. *Vide Vern.* 50.

If one Jointenant of a Rent in Fee releases all his Right, yet this does not pass the Moiety of his Companion; (b) but in Personal Actions one Jointenant may release the Whole, but if the Personalty be mixed with the Realty, it is otherwise.

21 E. 3. 58.
2 Rol. Abr. 411.
(b) 2 Co. 68.

A Release by the Common Vouchee is no Bar, for he renders nothing, and can be at no Loss.

Cro. Eliz. 2-3.

So if the Plaintiff in Ejectment, who is a meer nominal Person and Trustee for the Lessor, release the Action; or if an Action be brought in his Name for the mesne Profits, and he release it, this in either Case is no Bar; but from the Power the Courts now exercise of regulating all Proceedings in these Actions, is such a Contempt for which the Party may be committed.

Raym. 93.
Skin. 247.
Comb. 8.
Salk. 260.

If a Lessor after Assignment of the Reversion release to the Lessee all Covenants and Demands, yet the Assignee may have an Action of Covenant for Rent due after the Assignment, for it runs with the Reversion at Common Law, before the *Stat. 32 H. 8.* and passes by the Grant of the Reversion, and therefore the Lessor could not release it after the Assignment.

2 Jon. 102.
2 Lev. 206.
Harper v. Bird.
Cro. Car. 503.
L. P.— that a Creditor after an Assign-

ment of his Debt cannot release the Debtor. 2 *Chan. Ca.* 169.

If by Prescription the Inhabitants of antient Messuages in a certain Vill are intitled to have Common within the Vill by reason of their Commorancy, such Common cannot be released, for tho' one Inhabitant should release it, a succeeding one might claim it.

Cro. Jac. 152.
Smith v. Gatewood.

If by the Custom of a Manor the Tenants thereof are to chuse among themselves one to collect the Lord's Rents for a Year, and so on annually; the Lord may discharge or release a Tenant of this Burthen, but then the others shall not be further charged than before, for when it comes to his Course who is discharged, the Lord himself must collect it.

21 E. 4. 45.
47.
2 Rol. Abr. 401-2.

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.

March 73.
Jenk. 305.
Cro. Jac. 235.
Yelv. 173.
2 *Brownl.* 215.

A Servant who (c) distrains in Right of his Master, or one who is (d) robbed of his Master's Money, cannot, on an Action brought by him on the Statute of *Hue and Cry*, release to the Prejudice of his Master; nor can the (e) Ordinary release an Administration-Bond.

(c) 3 *Bulf.* 110.
1 *Rol. Rep.* 246.
(d) 4 *Mod.* 305.

Comb. 263. (e) *Holl's Rep.* 660.

But a Sheriff may release an Obligation taken by him for the Appearance of a Person whom he arrests.

Cro. Eliz. 808.

In Debt on a single Bill made to *A.* to the Use of him and *B.* the Defendant pleads a Release made to him by *B.* on which the Plaintiff demurs; and without Difficulty it was adjudged for the Plaintiff; for *B.* is no Party to the Deed, and therefore can neither sue nor release it; but it is an equitable Trust for him, and suable in Chancery if *A.* will not let him have Part of the Money; and the Book of *E.* 4. cited to prove that he might release in such a Case, was denied to be Law.

1 *Lev.* 235.
Offley v. Ward.
Lit. Rep. 149.
L. P.

(E) Of

(E) Of Releases by Executors and Administrators.

5 Co. 28.
Off. Exec. 33.
Plow. 281. AN Executor may before Probate of the Will release a Debt due to the Testator, for he derives his Authority from the Testator, and not from Act of the Ordinary; in like Manner may he pay Debts, and take Releases, &c.

39 E. 3. 26. And it hath been held, that if an Executor releases all Actions, this will extend as well to Actions which he hath in his own Right, as to those which he hath as Executor; * but yet in some Cases such general Words may according to the Intention of the Parties be restrained.

* *Vide infra.*

Vide Tit. Executors and Administrators. If there be two Executors, and one of them releases a Debt due to the Testator, this shall bind both, for each hath an intire Authority and Interest different from other Jointenants; and hence it is held, that if one Executor releases to his Companion, nothing passes thereby, because each was possessed of the Whole before.

Dyer 319. pl. 15.
Cro. Car. 420. But if there be two Executors, and one of them refuses to join in Action, upon which he is severed, after such Severance he cannot release the Action.

Paf. 11 Geo. 2.
In B. R. Williams v. Pen. In the Case of *Hudson v. Hudson*, Mich. 1737. In the Case of *Williams v. Pen*, it was adjudged in B. R. that if there be two Administrators, and one of them releases a Bond due to the Intestate, that this shall bind his Companion, and be a good Discharge to the Obligor; as the Statute 31 E. 3. cap. 11. gives an Administrator the same Power over Debts due to an Intestate as an Executor had, and as an Administrator by releasing without Consideration is equally liable to a *Devastavit* with an Executor.

Hardwicke was of a contrary Opinion, on the Difference the Law makes between an Executor and an Administrator, the former coming in not by the Act of the Ordinary, but by the Will of the Testator, consequently his Authority and Interest in the Assets greater, &c.

5 Co. 27.
Co. Lit. 172.
1 And. 177.
Moor 146. An Infant Executor, upon an actual Payment and full Satisfaction made to him, may release a Debt due to his Testator, but cannot without, for that this would be a *Devastavit* in him.

Cro. Car. 490.
Kniveton v. Latham. As if a Bond be forfeited, and the Infant Executor only receives the principal Sum without the Penalty, and gives a general Release of all the Debt; this Release at Law is no Bar of the Penalty.

Hob. 66.
Cro. Eliz. 43.
1 And. 138. If an Executor releases a Debt due to the Testator, this shall charge him to the Value of the Debt, tho' perhaps he did not receive near so much as was due; but if he releases an Account, this resting in Uncertainty, he cannot be charged with more than he actually receives.

1 Vern. 455. If an Executor voluntarily release a Debt, he shall not be relieved against it in Equity, altho' a Creditor may.

1 Salk. 318.
per Lord Harcourt. It hath been held in Chancery, that if there are two Executors, and they join in a Receipt, and one only receives the Money, that as to Creditors, who are to have the utmost Benefit of the Law, each is liable for the Whole tho' one Executor alone might release, and the joining the other was unnecessary; but as to Legatees, and those claiming Distribution who have no Remedy but in Equity, the Receipt of one Executor shall not charge the other, for the joining in the Receipt is only Matter of Form; the substantial Part is the actual Receiving, and this only is regarded in Conscience.

(F) How far the Husband's Release shall bind the Wife.

BY the Intermarriage the Husband acquires such an Interest in all Debts due to the Wife, that he may release them, and such Release shall bind the Wife. 17 E. 3. 66.
2 Rol. Abr. 410.

Baron alone may release Waste done by Lessee for Life before Coverture, upon a Lease made by the Feme. 42 E. 3. 18.
2 Rol. Abr. 402.

So all Rights accruing to the Wife during Coverture may be released by the Husband. Salk. 115.

The Husband may release the Wife's Right under the Statute of Distributions. Lucas 63.

If a Husband and Wife are divorced *a Mensa & Thoro*, and a Legacy is left to her, the Husband may release it. Moor 665:
Cro. Eliz. 908.
Noy 45.

So where a Legacy was given to a Feme Covert who lived 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. 1 Vern. 261.

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 those Costs, for the Marriage continues, and whatever accrues to the Wife during Coverture belongs to the Husband. 1 Salk. 115.
per Holt C. J.

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 Rol. Rep. 426.
1 Rol. Abr. 343.
3 Bulf. 264.

(G) To Whose Benefit a Release shall enure; and Who shall be bound thereby tho' not a Party to the Release.

IF two or more are jointly and severally bound in a Bond, a Release to one discharges the others; and in such Case the Joint Remedy being gone, the Several is so likewise. Co. Lit. 232.
Moor 856.
2 Rol. Abr. 410.

Hob. 10. 2 Sid. 41. Salk. 574.

So if there are two Conusees of a Statute, and one of them releases to the Conusor; this shall extinguish the Statute as to the other also. 2 Rol. Abr. 411.

So if two Executors sell the Goods of the Testator for a certain Sum of Money, and take an Obligation for the Money, the Release of one of them shall bar both. 17 E. 3. 66.
2 Rol. Abr. 411.

So where there are two Executors, and one only has the Possession of the Goods which are taken away by a Stranger; tho' he only in whose Possession the Goods were may bring an Action, yet the Release of his Companion shall bar him. Bro. Release 26.

- Lit. Rep.* 190. Also if two are bound in an Obligation, and the Obligee releases to one of them, Proviso that the other shall not take Advantage of it; this Proviso is void.
- Moor* 64. But if *A.* be bound to *B.* and *C.* *solvend.* the one Moiety to *B.* and the other to *C.* this is a several Obligation, and the Release of one shall not prejudice the other.
- Cro. Eliz.* 408, 470.
Salk. 574.
5 Co. 56. So where several enter into several Covenants in the same Deed, a Release to one of the Covenantors will not discharge the others.
- 2 Rol. Abr.* 412. *Cro. Eliz.* 161. So if two are bound to the King, and he releases to one of them; this will not discharge the other.
- 2 Rol. Abr.* 412. *Cro. Eliz.* 161. If *A.* and *B.* are named Obligors jointly and severally, and *A.* only seals the Bond, and then the Obligee releases to *A.* and after *B.* seals the Deed; this Release shall enure to the Benefit of *B.* tho' it was not his Deed at the Time of the Release, for the Release does not defeat the Deed, but is only a Bar by Plea, and both were bound for one and the same Debt, the which is satisfied by the Release.
- Co. Lit.* 232. *Hob.* 65. *Noy* 62. *5 Co.* 97. *Brownl.* 189. *Cro. Jac.* 444. If divers commit a Trespass, tho' this be joint or several at the Election of him to whom the Wrong is done, yet if he releases to one of them, all are discharged, because his own Deed shall be taken most strongly against himself; also such Release is a Satisfaction in Law, which is equal to a Satisfaction in Fact; but he who would take Advantage of such Release must have the same to produce.
- Hob.* 70. *Parker v. Laurence.* If Trespass be brought against three, and Judgment is given against one, and the Plaintiff enters a *Noli prosequi* against the other two, if the *Noli prosequi* had been before Judgment, it had discharged the whole Action. So if Judgment had been against all three, and the Plaintiff had entered a *Noli prosequi* against the two, for Nonfuit or Release, or other Discharge of one, discharges the Rest.
- 4 Mod.* 379. *Kiffin v. Willis.* In Trover against two, one pleaded Not guilty, and a Verdict against him; the other pleaded a Release, and Verdict for him: On Motion for Judgment against him who was found guilty it was denied, because the Trover being joint, a Release of all Actions discharged both.
- 2 Rol. Abr.* 412. *Sibley v. Rawlins.* *2 Lutw. S. C.* cited, and said, that if *C.* had been Party to the original Suit, it would have been otherwise. In Replevin by *A.* against *B.* *B.* makes Conufance in Right of *C.* for *Damage-feasant* to the Freehold of *C.* which is adjudged against *A.* and Judgment that *B.* shall have Return irreplegiabie with Costs and Damages; in a *Scire facias* brought by *B.* to have Execution of the Costs and Damages, if *A.* pleads the Release of *C.* in whose Right Conufance was made of all Demands, this is no Bar; in as much as *C.* was not Party to the Suit, nor liable to any Costs or Damages, had the Matter been adjudged against *B.* and therefore *B.* intitled to the Costs and Damages, which *C.* could not release.
- 1 Vent.* 35. *1 Lev.* 272. *2 Keb.* 530. *Stokes v. Stokes.* *3 Mod.* 279. *S. C.* cited. *A.* and *B.* took an Obligation from *J. S.* for the Payment to them of a Sum of Money, and this was done by them as Trustees, and for securing the Payment of Legacies to younger Children; *A.* brought an Action on this Bond, to which *J. S.* pleaded a Release from *B.* but upon *Oyer* it appeared that the Release was of all Actions which *B.* had on his own Account; and in Truth *B.* did not know of the taking the Bond, nor was he privy to the Suit; and tho' it was objected that the Release of one Obligee discharged the Bond, and that it must be on his own Account, yet it was adjudged that the Release did not bar, for that the Words, *on his own Account*, must have been put in for some Purpose, and could not in this Case be for any other, but to distinguish Demands which *B.* had in his own Right from those he had in Right of or in Trust for others.

Where divers are to recover in the Personalty, the Release of one is a Bar to all; but it is not so in Point of Discharge.

6 Co. 25. a.
Ruddock's
Case.

Cro. Eliz. 648. *Jenk.* 263. *Palm.* 319. *Owen* 22. *Hutton* 40.

As if there are two Plaintiffs who are barred by an erroneous Judgment, and they afterwards bring a Writ of Error, the Release of one shall bar the other, because they are both Actors in a Personal Thing to charge another, and it shall be presumed a Folly in him to join with another who might release all.

3 *Mod.* 135.

But if an Action be brought against four, and Judgment against them, on which they bring a Writ of Error, and the Defendant in Error pleads the Release of one of them; this is no Bar, for it being brought to discharge themselves of a Judgment, the Release of one cannot bar the other, because they have not a joint Interest but a joint Burthen, and by Law are compelled to join in a Writ of Error.

3 *Mod.* 109.

(H) How far a Possibility or Contingent Interest may be released.

IT is a general Rule in our Books that a meer Possibility cannot be released, and the Reason hereof is, that a Release supposeth a Right in Being, and it was thought to countenance Maintenance to transfer Choses in Action, Possibilities and Contingent Interests.

10 Co. 48. a.
Cro. Eliz. 552.

Hence it is held, that an Heir at Law cannot release to his Father's Diffeisor in the Life-time of the Father, for the Heirship of the Heir is a Contingent Thing, for he may die in the Life-time of the Father, or the Father may alien the Lands.

Lit. §. 446.
Co. Lit. 265. a.
10 Co. 51.
Bridgm. 76.
S. P. tho' the
Words *Quæ*

quovismodo in futuro habere potero are inserted in the Release.—But if the Heir releases with Warranty, it bars him when the Right descends. 2 *Leon.* 20. *Hob.* 130.

So if the Conusee of a Statute releases to the Conusor all his Right to the Land, yet he may afterwards sue Execution, for he has no Right to the Land but only a Possibility.

1 *And.* 133.
Co. Lit. 265.
Cro. Eliz. 552.
2 *Roll. Abr.*
405.

So if a Creditor releases to his Debtor all the Right and Title which he hath to his Lands, and afterwards gets Judgment against him, he may extend a Moiety of the same Land, for he had no Right to the Land at the Time of the Release, and the Land is not bound but in Respect to the Person.

2 *Mod.* 281.
2 *Lev.* 215.

So if the Plaintiff releases all Demands to the Bail in the King's Bench, and afterwards Judgment be given against the Principal, Execution may be sued against the Bail, for that at the Time of the Release there was only a Possibility of the Bail becoming chargeable.

5 Co. 70.
Hoe's Case.
Co. Lit. 265.
Moor 469.
Cro. Eliz. 579.
Moor 469.

Hutt. 17. & vide the Case of *Harrison v. Huxley*, *Moor* 852.

So if *A.* recovers in Trespass against *B.* in *B. R.* and *B.* brings a Writ of Error, pending which *A.* releases to *B.* all Executions, and after the Judgment is affirmed and new Damages given to *A.* for the Delay upon the Statute of 3 *H.* 7. this Release shall not bar *A.* to have Execution of those Damages, because he had not any Right to have Execution, nor to any Duty at the Time the Release was made.

2 *Roll. Abr.*
404.
Cro. Jac. 337.
1 *Roll. Rep.*
11. *Child. v.*
Durant.

Poph. 5. A Lease to the Husband and Wife for Life, the Remainder to the
 10 *Co.* 51. Survivor of them for twenty-one Years; the Husband grants it over,
Hutt. 17. and tho' he survived, yet the Grant was held void because it was con-
Raym. 146. tingent.

Cro. Eliz. 173, If the next Presentation to a Church be granted to *A.* and *B.* and
 600. living the Incumbent, *A.* releases all his Estate, Title and Interest to
Owen 85. *B.* this Release is void, it being of a Chose in Action; *secus* had the
 1 *Leon.* 167. Release been made after the Avoidance, at which Time the Interest
 3 *Leon.* 256. would have been vested in *A.*
 and *Dyer* 244.
 10 *Co.* 48.
 like Point.

From the Reasons herein it was held, that if at Common Law a
 4 *Co.* 1. *Vernon's* Case. — Woman before Marriage had accepted of a Jointure in Bar and Satis-
 factation of Dower, that this would not have bound her, because at the
 Time she had no Right to Dower.
 If a Husband makes a Lease for Life and dies, the Wife may release her Right of Dower to him in Reversion, tho' she has no present Cause of Action against him. *Co. Lit.* 265.

1 *Peer Will.* A City Orphan cannot at Law release her Orphanage Part to her
 638. Father, for she hath no Right in her during the Life-time of her
 2 *Peer Will.* Father; but it hath been held in Equity, that such Release being for a
 527. valuable Consideration, as upon the Marriage of a Daughter, and a
Preced. Chan. Portion given her by the Father, such Release may operate as an
 545. Agreement to waive the Orphanage, and hath accordingly been so decreed in Equity.

10 *Co.* 47. If there be a Devise of a Term for Years to *A.* for Life, Remainder
Lampet's Case. to *B.* *B.* may release his Right to *A.* and such Release shall extinguish
 his Interest tho' it was objected that *B.* had only a Possibility at the
 Time of the Release made.

10 *Co.* 47. But it was held in the above mentioned Case of *Lampet*, and hath in
 4 *Co.* 66. like Manner been held in other Cases, that *B.* could not assign over
 1 *Sid.* 188. his Interest to a Stranger in the Life-time of *A.* the same being only a
Raym. 146. Chose in Action, and a meer Possibility, in as much as an Estate for
 Life is in Supposition of Law a larger Estate than for any Number of
 Years.

2 *Vern.* 563. But later Resolutions, especially those which have been in Courts of
 Equity, have made a great Alteration in this Doctrine.

Moor 806. As in the Case of *Cole v. Moore*, where one possessed of a Term de-
 vised it to *A.* for Life, Remainder to *B.* and made *A.* Executor; *B.*
 devised this Remainder to *C.* and died in the Life-time of *A.* and in
 order to defeat *C.* of his Interest, *A.* assigned his Term to a third Per-
 son: And it was decreed by Lord Chancellor *Ellesmere*, that *A.* the
 Executor and Devisee, for Life was a Trustee for *B.* and should not be
 at Liberty to destroy this Remainder, but that the Executor should
 preserve the Lease, so as it might go according to the Will with the
 Performance whereof the Executor was intrusted.

1 *Chan. Ca.* 4. So in the Case of *Goring v. Bickerstaff*, where the Trust of a Term
 was devised to *A.* for Life, Remainder to *B.* It was agreed by all
 that *B.* might assign over this Trust, which shews that a Trust of a
 Term in Remainder may be transferred over by Deed.

1 *Peer Will.* One possessed of a Term for Years devised it to *A.* for Life, Re-
 572. *Wind v.* mainder to *B.* *B.* in the Life-time of *A.* devised his Remainder to *J. S.*
Jekyl. who devised it over; and the Question was, whether *A.* (the Devisee
 for Life) being dead, the Devisee of *J. S.* should have the Term, or
 whether it should go to the Administrator *De bonis non*; and it was
 decreed for the Devisee of *J. S.* and the Administrator *De bonis non* of
B. was directed to assign over the Term to him.

And in the Case of *Theobald v. Duffay* in the House of Lords *March* 1729-30. it was (*inter alia*) determined, that a Possibility of a Term is assignable for a good Consideration.

It is laid down in *Hoe's Case*, that a Duty uncertain at first, which upon a Condition precedent is to be made certain afterwards, is but a Possibility, which cannot be released. 5 Co. 70.
2 Mod. 281.

As a *Nomine pænæ* waiting on a Rent which cannot be released till the Rent is behind, as the Non-payment of the Rent makes the *Nomine pænæ* a Duty. Yelv. 215.
Brownl. 116.
Bridges v.
Enion.

So if a Man covenants to pay 10*l.* on the Birth of a Child, the Covenantor cannot be released of the 10*l.* it resting merely in Contingency whether such Child will ever be born or not. Yelv. 192.
Neale v. Sheff-
field.

So if an Award be, that upon the Plaintiff's delivering the Defendant by a certain Day a Load of Hay, the Defendant shall pay him 10*l.* in this Case the 10*l.* cannot be released before the Day, for it rests merely in Possibility and Contingency whether the Money shall ever be paid, for it becomes a Duty on the Delivery of the Hay only, and not before. Yelv. 215.

In Debt upon a Bond against the Defendant as Administrator, &c. the Defendant pleaded a Release, whereby the Plaintiff, reciting there were several Controversies between the Defendant and him about a Legacy and the Right of Administration, releases to the Defendant all his Right, Title, Interest and Demand of, in and to the Personal Estate of the Intestate; and on Demurrer this was held to be no Plea; and a Difference was taken by Ch. Just. *Holt* between a Release of all Demands to the Person of the Obligor or Administrator, and a Release of all Demands to the Personal Estate of the Obligor or Administrator, that the last will not discharge the Bond as the other may, because the Bond does not give any Right or Demand upon the Personal Estate, &c. until Judgment and Execution sued. Salk. 575.
2 Ld. Raym.
786. *Topham*
v. *Tallier*.

If *A.* promises *B.* in Consideration that he will sell to his Son certain Merchandize at such a Price, that if his Son does not pay it at the Feast of *St. Michael* next ensuing, he himself will pay it; and before *Michaelmas* *A.* releases all Actions and Demands to him who made the Promise; this shall not release the *Assumpsit*, for till *Michaelmas* it cannot be known whether his Son will have paid it or not, and till Default of Payment by him, the other is not bound to pay it, and so it is a meer Contingency till *Michaelmas*, which cannot be released. 2 Rol. Abr.
407-8. *Briscoe*
v. *Aier*.

(1) How the operative Words in a Release have been construed: And therein of the Words,

1. Claims and Demands, what are released thereby.

Littleton says, that a Release of all Demands is the best Release to him to whom it is made; and Lord *Coke* says, that the Word *Demand* is the largest Word in Law except *Claim*; and that a Release of Demands discharges all Sorts of Actions, Rights and Titles, Conditions before or after Breach, Executions, Appeals, Rents of all Kinds, Covenants, Annuities, Contracts, Recognisances, Statutes, Commons, &c. Lit. §. 508.
Co. Lit. 291.

But notwithstanding the large Import of the Word *Demands*, yet there are several Instances (which *vide infra*) where the Generality of the Words hath been restrained to the particular Occasion for which the Release was made.

Lit. §. 509. By a Release of all Demands, all Actions Real, Personal and Mixed, and all Actions of Appeal, are extinct.
8 Co. 154.

Co. Lit. 291. So a Release of all Demands extends to (a) Inheritances, and takes away Rights of Entry, Seisures, &c.
(a) But if the King releaseth all Demands, yet as to him the Inheritance shall not be included. *Bro. Prerogative, pl. 62. Bridgm. 124.*

Co. Lit. 291. By a Release of all Demands made to the Tenant of the Land, a Common of Pasture shall be extinct.

Cro. Jac. 170. A Release of all Demands will bar a Demand of a Relief, because the Relief is by Reason of the Seigniorship to which it belongs.

2 Rol. Abr. 407. Jordan v. Saunders. If *A.* being possessed of Goods loses them, and they come to the Hands of *B.* who being in Possession, *A.* by Deed releases to *B.* all Actions and Demands Personal which at any Time before *Habit et habere potuit* against *B.* for any Cause, Matter or Thing whatsoever; this shall bar *A.* of the Property of the Goods, so that *B.* has the absolute Right in him by this Release.

Lit. §. 508. By a Release of all Demands, all Manner of Executions are gone, for the Recoveror cannot sue out a *Fieri Facias*, *Capias* or *Elegit*, without a Demand.
2 Rol. Abr. 407.

Co. Lit. 291. Bridgm. 124. By a Release of all Demands to the Conusor of a Statute Merchant before the Day of Payment, the Conusee shall be barred of his Action, because that the Duty is always in Demand; yet if he releases all his Right in the Land, it is no Bar.

Cro. Jac. 300. So a Bond conditioned to pay Money at a Day to come, is a Debt and Duty presently, and may be discharged by a Release of all Actions and Demands before the Day of Payment.

Yelv. 214. Cro. Jac. 300. But in an Action of Debt for Non-performance of an Award made for the Payment of Money at a Day to come; there is no present Debt nor any Duty before the Day of Payment is come, and therefore it cannot be discharged before the Day by a Release of all Actions and Demands.

10 Co. 51. in Lampet's Case. So if a Man devises a Legacy of 20 *l.* to *J. S.* at the Age of twenty-three, tho' the Legatee, after he attains the Age of twenty-one, and before the Day of Payment, may release it, yet by the Word *Demands* it is not released, but there must be special Words for the Purpose.

Hancock v. Field, Cro. Jac. 170. 2 Rol. Abr. 407. Noy 123. A Release of all Demands does not discharge a Covenant not (b) broken at the Time; as where a Lessor, on Payment of 60 *l.* to him by the Lessee due on a Judgment, released to him all Demands; and it was adjudged that this did not release a Covenant for Repairs not then broken; but it was held, that a Release of all Covenants would have released the Covenant.
(b) For the Difference

when broken or not, *vide Dyer 217. Lit. Rep. 86. Moor 34. 3 Leon. 69. 10 Co. 51. 5 Co. 71. Hoe's Case. Co. Lit. 292. 8 Co. 153. 1 And. 8, 64.*

Witton v. Bie, 2 Rol. Abr. 408. Cro. Jac. 486. Bridgm. 123. 2 Rol. Rep. 20. Popb. 136. If Lessee for Life grants over his Estate by Indenture reserving Rent during the Continuance of the Estate, and afterwards releases to the Assignee all Demands; this shall discharge the Rent, for he had the Freehold of the Rent in him at the Time.

2 Rol. Abr. 408. in the Case of Witton v. Bie. So if Lessee for Years grants over by Indenture all his Estate, reserving a Rent during the Term, and after releases to the Assignee all Demands; this shall release the Rent, for tho' he cannot have an Action to demand all the Estate, yet this is an Estate in him of the Rent, and

and assignable over; and in an Action of Debt for any Arrearages after he shall claim it as a Duty accrued from the said Estate; and it shall not be said that the Duty arises annually upon the taking of the Profits, but this had its Commencement and Creation by the Reservation and Contract, which was before.

If there be Lessee for Years rendering Rent, and the Lessor grants over the Reversion, and the Lessee attorns, and after Lessee assigns over his Estate, and after the Assignee of the Reversion releases all Demands to the first Lessee, yet this shall not release the Rent, for that there is neither Privity of Estate or Contract between them after the Assignment; but if the Release had been made to the Assignee, it had extinguished the Rent.

If he who has a Rent-Charge in Fee releases to the Tenant of the Land all Demands from the Beginning of the World till the Making of the Deed of Release; this shall discharge all the Rent, as well that to come as what is past.

It is said by *Littleton* and Lord *Coke*, that by a Release of all Demands a Rent-Service shall be released; but this it is said is to be intended of a Rent-Service in Gross as a Seignior; and therefore in the Case of

Hen v. Hanson, where in Covenant brought on a Covenant in a Lease for Years to pay the Rent reserved, the Defendant pleaded a Release by the Plaintiff of all Demands at a Day before the Rent in Question became due; the Plaintiff replied, that the Release was in Performance of an Award of all Matters in Controversy between the Plaintiff and Defendant; and upon Demurrer it was adjudged by *Foster, Mallet and Windham*, that the Rent was not discharged by this Release, as it became due by the Perception of the Profits, and was not like to a Rent-Charge, or a Rent Parcel of a Seignior; and they held, that this Rent being incident to the Reversion, and Part thereof, was no more released hereby than the Reversion itself was; and that this Construction should the rather prevail, as it was not the Intention of the Party to release this Rent: But *Twisden contra*, he said, that in Releases and Deeds when Words are heaped up, the Party that is to take the Advantage may take the strongest Word and in the strongest Sense, and that is the Reason they are put in; and as to the Intent, that must be gathered from the Words; and Men must take Care what Words they Use, *Oportet politiam obedire legibus non leges politie*; and he said, he could see no Difference between this Rent and a Rent in Fee, both are Rent-Services, and neither demandable before they become due, otherwise than as in *40 E. 3. 47.* it is said, there is a continual Demand betwixt Lord and Tenant; and in this Case there is a Tenure between the Lessee and him in Reversion; and the Reason why the Reversion is not touched by this Release is, because it can work only by way of Extinguishment, and not by way of passing an Interest; but it was adjudged *ut supra.*

The Plaintiff declared upon a Lease for Years, *Reddendum 30 s. at Lady-day and Michaelmas*, and assigns for Breach Non-payment of a Year's Rent due and ending at *Lady-day 1689.* the Defendant pleaded a Release dated the 18th Day of *November 1688.* of all Demands; and upon Demurrer Judgment was given for the Plaintiff; for the growing Rent not due, which is incident to the Reversion, is not discharged, tho' the first Half Year's Rent, which was a Duty demandable, was released; but here the Release being pleaded as a Bar to all, which it is not, the Plea is naught, and Judgment must be given for the Plaintiff.

Collins v.

Harding,

2 Rol. Abr.

408.

Moor 544.

Cro. Eliz. 606.

20 Aff. pl. 5.

2 Rol. Abr.

408.

Lit. §. 510.

Co. Lit. 291.

1 Lev. 99,

100.

1 Sid. 141.

1 Keb. 499,

510. Hen v.

Hanson.

2 Salk. 578.

Stephens v.

Stow.

2. By a Release of all Actions and Suits.

- Co. Lit.* 292. A Release of all Actions discharges a Bond to pay Money on a Day to come; for it is *Debitum in presenti, quamvis sit solvendum in futuro*; and it is a Thing merely in Action, and the Right of Action is in him that releases, tho' no Action will lie when the Release is made.
- Co. Lit.* 292. But a Release of Actions does not discharge a Rent before the Day of Payment, for it is neither *Debitum* nor *Solvendum* at the Time of the Release; nor is it merely a Thing in Action, for it is grantable over.
- Co. Lit.* 292. So if a Man has an Annuity for Term of Years, for Life or in Fee, and he before it be (a) behind releases all Actions; this shall not release the Annuity, for it is not merely in Action, because it may be granted over.
- 1 Bulf.* 178.
Cvo. Eliz. 897.
Moor 133.
(a) But such Release shall release the Arrearages incurred before. *39 H. 6.* 43. *2 Rol. Abr.* 404.
- Co. Lit.* 292. If one releases *Omnes querelas aut loquelas*; this is as large as a Release of all Actions, and releases all Causes of Action, tho' no Action be then depending.
- Co. Lit.* 287. By a Release of all Manner of Actions, all Actions as well Criminal as Real, Personal and Mixed, are released.
- Co. Lit.* 284. A Release of Actions Real is a good Bar in Actions mixed; as (b) Affise of *Novel Disseisin*, Waste, *Quare Impedit*, (b) Annuity; and so is a Release of Actions Personal.
- (b) But not after the Grantee has made his Election. *1 Jones* 215.
- Co. Lit.* 287. In an Appeal of Robbery or Felony, a Release of all Actions Personal will not bar, because an Appeal, in which the Appellee is to have Judgment of Death, is higher than a Personal Action; but a Release of all Manner of Actions, or of all Actions Criminal, or of all Actions Mortal, or of all Actions concerning Pleas of the Crown, or of all Appeals, or of all Demands, will be a good Bar of any such Appeal.
- 2 Hawk. P. C.* 196.
- Co. Lit.* 288. And in an Appeal of *Maibem* a Release of Actions Personal may be pleaded, because Damages only recovered.
- Co. Lit.* 289. A Release of all Actions is regularly no Bar of an Execution, for Execution is no Action, but begins when the Action ends.
- 8 Co.* 153. Also a Release of all Actions does not regularly release a Writ of Error, for it is no Action, but a Commission to the Justices to examine the Record; but if therein the Plaintiff may recover, or be restored to any Thing, it may be released by the Name of Action.
- 2 Inst.* 40.
Yelv. 209.
Co. Lit. 288. But a Release of all Actions is a good Bar to a *Scire Facias*, tho' it be a judicial Writ, for the Defendant may plead to it, and it is in Nature of a new Original given by the Statute.
- Co. Lit.* 290. So in Replevin a Release of all Actions is a good Bar, for the Avowant is Defendant, tho' in some Respects he is Plaintiff.
- Comb.* 455.
2 Rol. Rep. 75.
- Latch* 110. By a Release of all Suits a Man is barred of a Writ of Error.
- Co. Lit.* 291. So by a Release of all Suits a Man is barred of Execution, because it cannot be had without Application to the Court, and Prayer of the Party, which is his Suit.
- 8 Co.* 153.
- Co. Lit.* 28.b. If a Disseisee releases to the Disseisor all Actions; this is no Release of his Right of Entry, for when a Man has several Means to come at his Right, he may release one of them, and yet take Benefit of the other.
- 8 Co.* 151.
- Co. Lit.* 286. So if a Man by Wrong takes away my Goods; if I release to him all Actions Personal, yet by Law I may take the Goods out of his Possession.
- Skin.* 57.

If a Man releases all Actions, by this he shall release as well Actions which he has as Executor, as those in his own Right.

39 E. 3. 26.

2 Roll. Abr.

404.

2 Ld. Raym. 1307. S. C. cited by *Porvel*, and said by him to be clearly so, unless there was an Action of his own for the Release to work upon.

If a Man releases all Quarrels; a Man's Deed being taken most strongly against himself, it is as beneficial as all Actions, for by it all Actions Real, Personal and Mixed, are released.

Co. Lit. 292.

So if a Man releases *Omnes loquelas*, it is as large as *Omnes actiones*, and extends as well to Actions in Courts of Record as base Courts.

Co. Lit. 292.

So a Release of *Omnes exactiones*, is equal to a Release of all Actions.

Co. Lit. 292.

(K) Release, in What Cases restrained to the special Purpose for which it was given.

ON the Rule of Law, that every Man's Deed shall be taken strongest against himself, and on what is laid down in (*a*) *Altham's Case*, *Generalis Clausula*, &c. it hath been insisted, that general Words in a Release are to be taken strongest against the Releasor, and are not to be qualified or restrained by any special Recital.

Plow 289.

19 H. 5. 42.

(a) 8 Co. 148.

But herein the sure Rule and Distinction seems to be, that where there are general Words all alone in a Deed of Release, they shall be taken most strongly against the Releasor; but where there is a particular Recital in a Deed, and then general Words follow, the general Words shall be qualified by the particular Recital.

1 And. 64.

Hob. 74.

Dyer 240.

1 Mod. 99.

3 Mod. 277.

1 Ld. Raym.

663.

Indeed in the Case of *Rotherham v. Crawley*, where upon a Reference to Arbitration of some Controversies relating to Relief and Heriot claimed by the Lord of his Tenant, a Release was awarded, which was drawn up of *all Reliefs, Duties and Amercements*, and this Release being pleaded to an Action of Debt on an Obligation, it was insisted, tho' the Word *Duty* might in Strictness extend to a Bond Debt, that yet it ought not to have this Construction in the present Case, it being placed between the Words *Relief* and *Amercements*, which shewed that the Parties intended Duties of the same Nature; but it was adjudged otherwise; and that the Word *Duty* working an Extinguishment of the Bond at Law, the Force of the Word was not to be controuled by the Intention of the Party.

Cro. Eliz. 379.

Ow. 71. S. C.

Raym. 309.

S. C. cited.

But in the following Cases the Intention of the Party has been principally regarded:

As where in Debt upon an Obligation the Defendant pleaded a Release of all Errors, and all Actions, Suits and Writs of Error whatsoever; and it was adjudged that the Release extended only to Writs of Error, and did not release the Obligation, tho' the Word *Actions*, had it stood singly, would have done it.

Hell. 9, 15.

Abree v. Page.

If a Man receives 10*l.* of another, and by his Deed acknowledges the Receipt thereof, and thereof releases, acquits and discharges him, and of all Actions, Suits, Debts, Duties and Demands; by this Release nothing is discharged but the 10*l.* and the Action and Demands thereof, for the last Words have Reference to the first, and so limited by them.

2 Roll. Abr.

409. cited by

Tanfield, to

have been ad-

judged *Trin.*

5 Jac. 1. in

B. R.

3 Mod. 277.

Carth. 119. 1 *Skow.* 155. S. C. cited, and doubted of by *Holt* Ch. J. who said, that no such Case was to be found.

¹ *Lew.* 99. In the Case of *Hen v. Hanson* it was held, that a Release made in
¹ *Sid.* 141. Performance of an Award did not discharge a growing Rent, tho' the
 Release contained general Words, for this Reason (*inter alia*) that it
 was not the Intention of the Parties.

² *Jon.* 104. So in the Case of *Morris v. Wilford*, a Release of the Wife's Custo-
² *Lew.* 214. mary Part, with general Words, was held only to extend to the spe-
² *Shorw.* 46. cial Matter recited.

³ *Keb.* 814, So where the Plaintiff released all Demands on his own proper Ac-
 840. count; and it was adjudged by the whole Court, that an Obligation
² *Lew.* 272. taken by the Plaintiff in his own Name in Trust for the Children of
² *Stokes v. Stokes.* *J. S.* was not discharged thereby.
¹ *Vent.* 35. S. C. by the
 Name of
² *Nokes v. Stokes.*

² *Mod.* 281. So where in Covenant to pay an Heriot *post mortem J. S.* or 40 s.
² *Lew.* 210. at the Election of the Plaintiff, and sets forth the Death of *J. S.* and
¹ *Vent.* 314. that afterwards he chose to have the 40 s. for which he brought his
Trewil v. In- Action, and assigns the Breach in the Non-payment; the Defendant
gram. pleaded, that the Plaintiff released to him all Actions and Demands,
 &c. but this Release was made in the Life-time of *J. S.* and there was
 an Exception in it of Heriots; and upon Demurrer it appearing that
 neither the Heriot nor 40 s. were in Demand at the Time of the Re-
 lease given, and it appearing plainly by the Exception in the Release
 not to be the Intention of the Parties to release the Heriots, Judgment
 was given for the Plaintiff.

³ *Mod.* 277. *A.* recovered against *B.* a Judgment for 600 l. and made *J. S.* and
³ *Lew.* 269. *J. D.* his Executors, and died; *B.* made *C.* his Executor, and devised
¹ *Shorw.* 150. a Legacy of 5 l. to *J. D.* and died; *J. D.* by Deed acknowledged the
Carth. 119. Receipt of the 5 l. of *C.* and thereby released the said Legacy, and
Cole v. Knight. all Actions, Suits and Demands which he had against *C.* as Executor
 to *B.* and after Argument in *R. R.* it was adjudged, that nothing was
 released but the 5 l.

¹ *Ld. Raym.* In *Assumpsit* against the Defendant for 7 l. the Plaintiff declares,
 235. *Thorpe* that whereas he had mortgaged to the Defendant certain Copyhold
v. Thorpe. Lands redeemable upon Payment of such a Sum of Money, the De-
 fendant, in Consideration that the Plaintiff would release to the De-
 fendant his Equity of Redemption, assumed to pay to the Plaintiff
 7 l. The Plaintiff avers, that he did release his Equity of Redemption,
 but that the Defendant has not paid the 7 l. The Defendant pleads
 this Release in Bar of the Action, because after the Words *Equity of*
Redemption, the Scrivener had added, *And all Actions, Duties and De-*
mands: And on Demurrer the Question in * *C. B.* was, whether this
 7 l. was released by those general Words; and adjudged that it was
 not.

* *Vide* the Ar-
 guments in
 this Case in
B R. as re-
 ported ¹ *Salk.* 171. ¹ *Lutw.* 245. ¹ *Ld. Raym.* 664.

² *Rol. Abr.* If an Obligation be dated and delivered the 23d of *January 5 Jac.*
 410. but for and Obligee make a Release, which is dated 22d of *January 5 Jac.*
 this *vide Dyer* but it is delivered after 23d of *January*, and by this Deed he releases
 56, 307. to the Obligor all Actions *usque diem hujus presentis temporis*; this Re-
² *Rol. Rep.* 255. lease shall not discharge the Obligation, for (*hujus presentis temporis*)
² *Palm.* 218. shall be taken the present Time when the Deed was dated.
² *Brownl.*
³ 00. *Cro. Eliz.* 14. ² *Mod.* 280.

³ *Mod.* 182. In Trespass, Assault and Battery, the Defendant pleaded a general
Dixon v. Ter- Release of all Actions, &c. from the Beginning of the World *usque ad*
 17. *diem datus* of the said Release; and it happened that the Battery was
 done

done upon that very Day in which the Release is dated, so that it was held that this Action was not discharged, for the Release did not include that Day, and the Defendant should have traversed all, &c. after the Date of the Day of the Release.

(L) **What Right or Interest shall be said to be released; and therein of Disrecitals and Exceptions in Releases.**

A Release of a bare Right for a Day or an Hour, &c. is as good as *Co. Lit.* 274. if it was made to the other and his Heirs.

A Release may be on Condition, but a Condition cannot be released *Co. Lit.* 274. on Condition.

But a Release on Condition that Releasee shall pay Releasor so much Money, is not good; but if the Release be worded in this Manner, That if the Releasee pay so much at a Day to come, then he releases, &c. this is a good Release. ^{1 Lutw. 638. per Treby Cin. Just.}

If one Man finds the Goods of another, and the Owner releases to him who is in Possession; this vests the Property in him, (a) but such Release must be by Deed. ^{2 Rol. Abr. 407. (a) 1 Leon. 283.}

If one makes a Lease for ten Years, Remainder for twenty Years, and he in the Remainder releases to the first Lessee, the Releasee shall have thirty Years for his Term, for ten Years shall not be drowned, because a Chattel cannot be drowned in a Chattel. *Co. Lit.* 273.

The Lord *Paramount* cannot release to the Tenant *Paravaile*, saving to him Part of the Services, but the Saving in that Case is void; but if there be Lord and Tenant by Fealty, and 20 s. Rent, the Lord may release all his Right in the Seignior, saving Fealty and 10 s. Rent; but the Lord upon his Release to the Tenant cannot reserve a new Kind of Service. *Co. Lit.* 305. b.

A Release of Common in one Acre is an Extinguishment of the whole Common. ^{1 And. 235. 1 Show. 350.}

An (b) intire Thing cannot be released as to Part; but if a Man be bound to perform two Things, the Obligee may discharge the Party of one of them. ^{3 Bull. 232. (b) What shall be said an intire}

Thing, *vide Palm.* 247. *Owen* 21. *Meor* 413.

A Release of Covenants shall release the Bond for Performance of Covenants. So in the Case of (c) *Hen v. Hanson* it was agreed, that if the Rent was released, the Covenant for Payment of it was released likewise. ^{(c) 1 Lev. 99. 1 Sid. 141.}

If a Man brings an Appeal of *Maibem*, and after releases the Action, the Release shall bar him to have an Action of Battery of the same Battery. ^{43 Aff. 39. 2 Rol. Abr. 413.}

If a Rent-Charge issues out of three Acres of Land, and he who has the Rent releases all his Right in one Acre, the Rent is all extinct, because all issues out of every Part, and it cannot be apportioned. ^{2 Rol. Abr. 414.}

When Execution is had of twenty Acres, by a Release of one Acre, the Execution is gone, and is a Discharge of Land and Body. ^{1 And. 266. Owen 21. Hct. 79.}

- 8 Co. 152. A Release of all Advantages of Account, a good Bar to an Action of Debt upon that Account.
- Dyer 56. pl. 21. If I release to *A.* all Actions which *J. S.* has against him, the Release to *A.* is good, and the last Words shall be (*a*) rejected; for a Deed may be qualified and abridged by latter Words, but not totally destroyed.
- (*a*) If a Release be limited as to one Obligee, Provifo that the other shall not take Advantage of it, the Provifo is void. *Lit. Rep.* 191.
- 1 *Ld. Raym.* 235. A Release to *A.* and *B.* of all Actions, is a Release of all such several Actions which the Releasor has against them, as well as all joint Actions.
- Cro. Eliz.* 726. A Release excepting one Bond, excepts Suits and Actions for that Bond.
- Dyer 50, 87. If *A.* reciting that he had recovered Judgment against *B.* before the *Justice in Derby*, whereas in Truth the Judgment was had in *B. R.* this Misrecital it is said will make the Release void.
- 191, 395.

Remainder and Reversion.

- Co. Lit.* 49, 143. **A** Remainder is described to be a Remnant of an Estate in Lands or Tenements, expectant on a particular Estate created together with the same and at the same Time, and is so expectant on the particular Estate, that unless it can take Effect when the particular Estate determines, it is void.
- 2 *Co.* 51. *Moor* 344. *Vaugh.* 269.
- Co. Lit.* 22. *Plow.* 160. A Reversion is where the Residue of the Estate always doth continue in him who made the particular Estate, or where the particular Estate is derived out of the Estate which was granted.
- 2 *Inst.* 501. *Vaugh.* 269. Every Remainder must depend upon a particular and less Interest than the Fee-simple, for the Statute *Quia emptores, &c.* having enacted, that the Fee in all Cases is to be holden of the Chief Lord, the Tenant after his Alienation has nothing further to expect in the Estate either as a Seignory, Reversion or Escheat.
- 2 *Inst.* 335. *Co.* 51. *a.* But upon an Estate-tail a Remainder may be limited; for when a Man creates an Estate-tail, the Tenant in Tail holds of him in the Reversion, who holdeth of the Lord Paramount; and this Diversity depends on the Construction first made on the Statute *De Donis*; the Judges holding the Fee conditional in the Donee to be an Estate-tail, and the antient Seignory in the Donor to be a Reversion; and had they not made this Construction, the Statute *Quia emptores, &c.* had shut out the Donor for ever.
- 1 *Ld. Raym.* 523. *Salk.* 232. *Cum.* 62. *Badger v. Loyd.* Hence it is held, that if there be Tenant in Tail, Remainder in Tail, and he in the Remainder grants his Estate during the Life of the Tenant in Tail, the Grant is void, for his Grantee cannot have any Benefit by it; but if there be Tenant in Tail, Reversion in Fee, and he in the Reversion grants his Estate during the Life of Tenant

in Tail, this is good, for the Grantee shall have the Services which the Tenant in Tail ought to perform.

If Lands are given to J. S. and his Heirs whilst such a Tree stands, ^{1 Ld. Raym.} there can be no Remainder limited after, yet there is a Possibility of ^{326. vide} Reverter left in the Donor. ^{postea.}

When a Statute is extended, it turns the Estate of the Conuzor into ^{2 Vent. 327.} a Reversion.

Reversions and Remainders are Things incorporeal, and can only ^{Co. Lit. 47.} pass by Grant; yet a Rent reserved on a Grant of them is good, as ^{1 Co. 62.} they relate to Land, though the Grantor has no Remedy for it during the Continuance of the particular Estate.

By the Name of Reversion a Remainder will pass.

Cro. Eliz.

594.

Plow. 154.

J. S. having a Remainder in Fee, devises all his Remainder to J. N. and it was adjudged that the Fee passed to J. N. ^{1 Ld. Raym. 187.}

187.

But for the better understanding this Head, we shall consider

- (A) Of what Things a Remainder may be made.
- (B) What Words are sufficient to create a Remainder.
- (C) What shall be a Reversion, and not a Remainder; And herein,

1. Where a Limitation to the Heirs of the Donee, or Heirs of his Body, shall vest in such Heirs by Descent or Purchase.
2. Where a Limitation to the Heirs, or Heirs of the Body of a Stranger shall vest in such Heirs as a Remainder and by Purchase, or by Way of Limitation and Descent.
3. Where by a special Description the Remainder shall vest by Purchase.

(D) Of the several Kinds of Remainders as distinguished into Remainders vested, or in Contingency and Abeyance,

(E) What Estate is sufficient to support a Remainder.

(F) Of the Continuance of the particular Estate, and when the Remainder is to commence.

(G) Contingent Remainders, how prevented from rising or coming in Esse.

(H) Of Remainders that arise on Conditions Precedent or Subsequent.

1. Of the Difference between a Condition and a Limitation, and in Case of the Condition when it precedes the Vesting of the Remainder as the Cause thereof, and is annexed to the first Estate, and when it is annexed absolutely without any Regard to the Remainder.
2. Between a Deed and a Will, when in both the same Words of Condition are made use of for vesting the Remainder.
3. Between a Limitation over in Case of a Will, and where no Limitation is made over.
4. Between Remainders that are to arise upon Conditions agreeable to the Rules of Law, and such as are to arise upon Conditions repugnant and against the Rules of the Law.

5. Between such Words as actually make a Condition, and such as are only descriptive of the Manner when and how the Remainders are to arise.

(I) In what Cases a Remainder or Reversion shall be subject to the Acts or Charges of the particular Tenant.

(K) To what Purposes the Remainder is accounted but as one with the particular Estate, and where they are regarded as several Estates.

(L) Of Cross Remainders, or those arising by Implication and Construction of Law.

(A) Of what Things a Remainder may be made.

AS to Estates of Inheritance, there can be no Doubt but that the Grantor, having a perpetual and durable Interest in the Estate, may share and divide it, or grant as many Remainders over as he thinks proper.

Bro. Devise
13.
Plow. 521.
Dyer 74.
8 *Co.* 94.

But as to Personal Goods and Chattels, it was formerly held, that they in their own Nature were incapable of any Limitation over, being Things transitory, and by many Accidents subject to be lost, destroyed or otherwise impaired, and the Exigencies of Trade requiring a frequent Circulation thereof, in which they differ from Lands and Tenements which are permanent, and therefore what is called an *Estate* in Lands is termed *Property* in Personal Chattels; and hence it was held, that a Grant or Devise of a Personal Thing to one, though but for an Hour or Minute, was a Gift for ever, and an absolute Disposition of the intire Property.

Vide Tit. Devise
under Limitations of
Terms for
Years.

Hence it came to pass, that it was a long Time ere the Courts of Justice could be prevailed on to have any Regard for a Devise over even of a Chattel Real, or a Term for Years after an Estate for Life limited thereon, because the Estate for Life being in the Eye of the Law of greater Regard and Consideration than an Estate for Years, they thought he, who had it devised to him for Life, had therein included all that the Devisor had a Power to dispose of; but now such Remainders over are allowed under the Name of Executory Devises, and are established both in Courts of Law and Equity, provided they tend not to a Perpetuity, so as to make Estates unalienable.

Plow. 521.
Cro. Car.
346.
1 *Rel. Abr.*
610.
March 106.
Owen 33.
1 *Ch. Ca.* 129.
2 *Vern.* 245.
1 *P. Wil.* 1.
502, 651.
1 *P. Wil.* 666.
Vide Executory
Devises,
under Title
Devise.

Also a Distinction was formerly taken between a Devise of a Personal Chattel to one for Life, with a Remainder over, and of the Use only, that in the first Case the Devisee for Life had the absolute Property, but not so in the second, for that the first Devisee had not the Property of the Goods, but only a special Interest in them, so that there still remained a Property which might be limited over; but this Distinction is now exploded in Conformity to the Civil Law, and the Devisee in Remainder is allowed in Equity the like Remedy in both Cases.

But a Devise of a Term for Years or Personal Chattel to one for a Day or an Hour, is a Devise of the whole Term or Interest, if the Limitation over is void, and it appears at the same Time that the whole was intended to be disposed of from the Executors.

A. being possessed of a Term for ninety-nine Years, devised it to *B.* for Life, and after to six others successively, for their Lives, if the said Term should so long continue; and all the seven Persons being dead, and the Term continuing, it was adjudged that it should revert to the Executors of the Testator, and that it did not vest in the Survivor of the Devisees so as to transmit it to his Representatives.

1 Salk. 231.
1 Ld. Raym.
325. *Ayres v. Falkland.*

A Farmer devised his Stock (which consisted of Corn, Hay, Cattle, &c.) to his Wife for Life, and after her Death to the Plaintiff. It was objected, that no Remainder can be limited over of such Chattels as these, because the Use of them is to spend and consume them; but the Master of the Rolls said the Devise over was good, but said if any of the Cattle were worn out in using, the Defendant was not to be answerable for them; and if any were sold as useless, the Defendant was only to answer the Value of them at the time of the Sale; and an Account was decreed to be taken accordingly.

Abr. Eq. 361.
Hayle v. Burrodale.

A. Gives his Sister, by Will, 10*l.* and directs that such Part of his Personal Estate, as his Wife should leave of her Subsistence, should go to the Sister; whatever the Wife has not employed in that Way, shall go over and be accounted for.

1 *P. Will.* 651.
Uperwel v. Halley.

But if a Chattel Real, Money, Goods or other Personal Things, are devised to one and the Heirs of his Body, or to one and if he dies without Heirs of his Body, Remainder over, this Remainder is totally void, and the Courts of Equity will not allow of a Bill by the Remainder-Man to compel Security, &c. or to have the Money, &c. after the Death of the first Devisee, but it shall go to his Executors, or Administrators; for the first Devisee gives the absolute Property of a Personal Estate, as the like Devise of a Real Estate before the Statute *de donis* gave the absolute Fee, upon which no Limitation could be made further, and as the Heirs are the Representatives to take the Real Estate, so are the Executors to take the Personal Estate; and this is not within the Statute *de donis*, but remains as at Common Law.

2 *Vent.* 349.
2 *Vern.* 600.
1 *Salk.* 156.
Abr. Eq. Tit. Devise.

If *A.* devise that his Goods and Furniture shall remain in his House to be enjoyed according to the Limitations of his Will, by those intitled to the House, the first that would be Tenant in Tail of the House becomes absolute Owner of the Goods.

Saunders v. Saunders,
Admitted.

Not only Lands and Tenements, but also Rents, Commons, Estovers, or any other Interest or Profits *in effc.*, wherein the Grantor hath the absolute Property to him and his Heir, may be granted with Remainder over.

Plow. 379.
9 *Co.* 48, 97.

So if one hath the Office of Park-keeper, Forester, Gaoler, Sheriff, &c. to him and his Heirs, he may grant these Offices to one for Life, Remainder to another for Life, &c. for *Omne Majus continet in se Minus*, and as they are grantable over in Fee, so may they be granted in Succession to one for Life, with Remainders over, &c.

9 *Co.* 48.
1 *And pl.* 201.

It was formerly doubted, whether there could be a Remainder of a Rent created *de novo*, that is, whether a Man seised of Lands in Fee, could thereout grant a Rent-Charge to one for Life, or Years, Remainder to another in Fee, or in Tail; and this Doubt arose from the Rent's not having any Existence before it was created, and consequently no Reversion could be left in the Grantor, out of which the Remainder was to arise; but it hath been (a) adjudged, and is now settled, that such Grant in Remainder is good, the Grantor having the absolute Interest in the Estate out of which it is to arise, and his Intention gives it Being for the whole, out of which the lesser Estates are carved. But (b) if he grant such Rent for Life, or Years, to one without going further, he cannot after grant the Reversion thereof to another, because he has no Reversion in him.

2 *Rel. Abr.*
415.
2 *Co.* 70, 76.
2 *Vent.* 240.

(a) 1 *Lev.*
144.
1 *Sid.* 285.
2 *Salk.* 577.
2 *Lutw.* 1225.
(b) *Moor pl.*
100.

In the Case of *The King v. Kemp*, it was held, that the King may grant an Estate in an Office to commence *in futuro*, or upon a Contingency,

4 *Mod.* 275.
1 *Ld. Raym.*
52.

Carth. 350. gency, for he hath no Inheritance in the Office, or to the Execution of
Salk. 465. it, but in point of Interest only to grant. And it was said there was
Comb. 334. a Diversity between Offices in Fee existing, and such as were granted
Rex v. Kemp. only for Life, which being as a new thing created, might, as a Rent
de novo, be granted to commence *in futuro*.

Show. Par. If one be created Baron, Viscount, Earl, &c. by Patent, and after,
Ca. 5, 11. in the same Patent, the same Honour is granted to another in Remain-
 der, yet this operates as a new Grant, and not as a Remainder, for
 the King had no Reversion of that Honour in him tho' he had still the
 same Power of appointing one in Succession to take it, as he had of
 granting it to the first.

¹ *Lev.* 220. A Licence to sell Wine may be granted to one for Life, Remainder
Bridg. Rep. to another for Life; because by such Licence not only an Authority
 113. passeth, but an Interest, by way of Restitution to that which was the
 Subject's Right before it was prohibited by Statute.

(B) What Words are sufficient to create a Remainder.

¹ *Rel. Abr.* THE Word *Remainder* is no Term of Art, nor is it necessary to
 416. create a Remainder. So that any other Words, sufficient to shew
Plow 29. the Intent of the Party's Will, create a Remainder; because such E-
¹ *Rel. Rep.* states take their Denomination of Remainders more from the Nature
 319. and Manner of their Existence, after they are limited, than from any
Dyer 125. previous Quality inherent in the Word *Remainder*. To make them
 such therefore, if a Man gives Lands to *A.* for Life, and that after his
 Death the Land shall revert, or descend, to *B.* for Life, &c. This is
 a good Remainder, and may be pleaded as such.

Co. Lit. So if Lands are given to one and the Heirs Male of his Body, and
 377. a. to him and the Heirs Female of his Body, this Limitation to the Heirs
 Female is a Remainder; because it is not to take place till the Estate
 to the Heirs Male is spent.

Co. Lit. 26. So if Lands are given to a Widow, and to the Heirs of the Body
 200. of her late Husband, on her begotten, this is a Remainder to the Heirs
² *Mod.* 210. of the Body of the Husband; because it cannot take Effect till after
 the Widow's Death, who hath an Estate for Life.

Plow. 159. So an Estate limited to *A.* for Life, or in Tail, & *post decessum ejus*,
Moor pl. 54. or *pro defectu talis Exitus*, to *B.* and the Heirs of his Body, is good,
Dyer 125. though there be not the Word *Remainder*. So if a Lease be made to
¹ *Rel. Rep.* *A.* for Life, and that after his Death *B.* shall have the Profit, this is a
 319. good Remainder to *B.*
Cro. Eliz. 10.
 742.

⁶ *Co.* 17 b. So a Lease to *A.* for Life, and that after his Death his Children
Raym. 83. shall have it, is a good Remainder.

Cro. Eliz. Nay though an Estate be limited expressly as a Remainder, yet if
 727, 768, it be not so in Construction of Law, the Word *Remainder* will have
 792. no Force to make it such. As if *A.* seized of Lands in Fee, he and
Moor, pl. 795. *B.* levy a Fine to *C.* in Fee, who grants and renders to *B.* in Tail,
Co. Lit. 299. rendring Rent, and if *B.* died without Issue, *Tenementa præd' integre re-*
Raym. 142. *manebunt* to *A.* and his Heirs; *B.* suffers a Common Recovery; *A.*
 distrains for his Rent; and this was adjudged a Reversion, and as such
 the Rent passed with it to *A.* and was chargeable upon the Land in
 whose Hands soever it came, by Virtue of the Contract which cannot
 be destroyed by the Recovery, though the Reversion is thereby barred.

But

But here it may be proper to take Notice of a Set of Words sometimes used in Leases for Years, which are so far a Part of the Limitation and Description of the first Interest, that they cannot again be made use of to pass any further Interest in the same Land. As if one make a Lease to *A.* for eighty Years, if he so long live, and if he happen to die within the said Term, then the Lands for the Residue of the said Term, or for so many Years as shall be then remaining of the said Term, to go over to another, this Limitation over is void; because the Time, or Term, of eighty Years was not absolute to *A.* but was determinable upon his Death, and by his Death the whole Term is at an End; as if a Lease had been made to him barely for his Life, and then to limit the Residue of a Term, when nothing thereof remains, is repugnant and void; but some Opinions incline, that a Devise in such a manner would be good, by reason of the Intent of the Party and the equivocal Signification of the Word *Terminus*, which may, though not strictly, signify also the Time or Space of eighty Years, as well as the Estate or Interest for eighty Years determinable as aforesaid. But now if a Lease be made to *A.* for eighty Years, if he so long live, and if he die within the said Term, then the Land to go over to another for the Residue of the eighty Years, this is a good Remainder; because though the Term or Interest be determined, yet the Land, and Part of the Years, still remain; those Years may be made the Measure of the succeeding Interest, as any other Number of Years may be.

Cro. Eliz.
216.
1 *Leon.* 218.
1 *Co.* 153.
3 *Leon.* 195.
2 *Rol. Abr.*
415.
Plow. 198.
Moor 247,
520. *pl.* 441.
1 *An.* 259.

J. S. seized of Lands in Fee by Indenture demises them to *A.* for Life, *Habendum* to the said *A. B. C.* and *D.* his three Sons for their Lives and the Life of the Survivor of them successively; after the Death of the latter it was adjudged in this Case, first, that if the Sons could take, it must be by way of Remainder, they not being Parties to the Deed, and then it must be as Jointenants, which could not be by reason of the Word *Successive*. Secondly, that they could not take in Succession, for the (a) Uncertainty whose Estate or Interest was to commence first.

Hob. 313.
Hutt. 87.
Windsore v.
Hobart.

(a) But had it been ascertained by 2

Clause *successive sicut nominantur in Charta*, it had been good. 1 *Leon.* 246. *Godb.* 220.

A. by Indenture makes a Lease to *B.* for forty Years, if *A.* so long live, and after his Death to *C.* (who was no Party to the Deed) for one thousand Years, and then *A.* levies a Fine and dies, and five Years pass after his Death, and then the Plaintiff claiming under *C.* enters, &c. and by the Arguments and Reasons of the Case, it seems clear that this is no Remainder at all to *C.* for first, presently it cannot vest by reason of the Lessor's Life interposing, and therefore is no Remainder vested. Secondly, as a Contingent Remainder it cannot be good; because then it ought to have a particular Estate to support it, and ought to be in Abeyance, or Contingency, to vest or not vest when that determines; but here the first Lease is no such particular Estate; because that reaches not to the Commencement of the Remainder, nor is the Remainder limited with any Regard to the particular Estate; because it is not to commence upon the Determination of that, but at a future time, *viz.* upon the Death of the Lessor, and there is no Contingency at all in the Case, for it is to take Effect at all Events, upon the Death of the Lessor, be it before or after the End of the Term, and therefore it can be no other than a future *Interesse Termini* to begin after the Death of the Party that grants it, which being but for Years it may well do; because it enures by way of Contract, and though the Grantee there was no Party to the Deed, and therefore, as objected, could take nothing, yet it appears that Judgment was given for the Plaintiff; which proves, first, that the Grantee had an Interest; secondly, that

Raym. 140.
Corbett v.
Stone.

this Interest was not barred by the Fine and five Years Nonclaim after the Death of the Grantor, not being touched, devested or turned to a Right; thirdly, That though the Grantee was no Party to the Indenture, yet he might well take by Virtue thereof, if he gets the Indenture to make out his Title, for the Grantor can't derogate from his own Grant, or avoid his own Acts.

(C) What shall be a Reversion, and not a Remainder: And herein,

1. Where a Limitation to the Heirs of the Donor, or Heirs of his Body, shall vest in such Heirs by Descent or Purchase.

Co. Lit. 22.
1 Co. 127.
1 Rol. Abr. 827.
1 Mod. 98, 237.
1 And. 3.

IT is laid down as a general Rule in our Books, that none can make his own right Heir a Purchaser either of a Fee-Simple or Fee-Tail, without departing with the whole Estate; and the true Reason hereof seems to be from the Prejudice which otherwise might arise to the Lord in respect of his Seignory, and his being defeated of the Advantages of Wardship, Relief, &c. were the Heirs of the Donee permitted to come into the Engagement of the Estate in other Manner than was originally intended.

1 Leon. 182.
Moor 284.
1 And 288.
Fenwick v. Mitford.

So that if one levies a Fine to the Use of his Wife for Life, the Remainder to the Use of his eldest Son and the Heir Male of his Body, and for want of such Issue, to the Use of his own right Heir, this Limitation to the Use of his right Heir is meerly void, and he hath a Reversion and not a Remainder in him.

Dyer 9. pl. 20.
Moor 720.

In like Manner, if a Man makes a Lease for Life, or a Gift in Tail by Deed, Remainder to another for Life or in Tail, Remainder to himself and his Heirs, or to his own right Heirs only, this Remainder to himself or to his Heirs is void, because the Fee continued still in him, and then he can't give himself what he had before, and he can't give to his Heirs as such what the Law gives them by a prior Right, to vest at the same Time with his Disposition to them.

Co. Lit. 22.
Bendl. 49.
Hob. 30.

But if a Man makes a Feoffment in Fee to the Use of himself for Life, Remainder to the Heirs Male of his own Body, this is a good Estate-Tail executed in himself, for the Law conjoins his Estate for Life and the Remainder to the Heirs Male of his Body, to prevent that Remainder's being lost by Forfeiture or Determination of the particular Estate before it can vest, and the Limitation is good by way of Use, because it is (a) raised out of the Estate of the Feoffees, as if they had given it to him in such Manner.

(a) So if one covenants to stand seised to the Use of his Heirs Male on the Body of his second Wife, he takes an Estate for Life by Implication, and so it is an Estate-Tail executed in himself. *Pybus v. Mitford*, 1 Vent. 372. 2 Lev. 75. *Raym* 228. 1 Mod. 98, 122, 159. 3 Keb. 229. S. C. adjudged, *et vide* 2 Salk. 679. *Adams v. Savage*. 2 Ld. Raym. 854. 6 Mod. 134.

1 Co. 137.
Dyer 362.
Co. Lit. 22.
2 Saund. 383, 387.

If one makes a Feoffment in Fee to the Use of himself for Life, or in Tail, Remainder to the Use of the Feoffee in Fee, yet the Feoffee hath no Reversion, but 'tis in Nature of a Remainder, although the Estate of the Feoffor is executed by the Statute, and the Feoffee is in by the Common Law, which concurring with the Common Law shall be preferred, since that can give him no more than what he has already by the Common Law.

If a Man makes a Feoffment in Fee to the Use of *A.* for Life, or in Tail, Remainder to the Use of *B.* for Life, or in Tail, Remainder to the Use of himself and his Heirs, or to the Use of his own right Heirs, yet the Use being of the same Nature with the Land, comes back to him in the same Manner as that would have done, and then having only disposed of Part of the Estate, the Use returns and brings with it the Land for the Residue of the Estate undisposed of, as if it had never been out of him, and consequently such Residue shall go to the Heirs by Descent, and not vest in them by Purchase.

So where one made a Feoffment in Fee to the Use of himself for Years, Remainder to the Use of *A.* his Son and Heir apparent, and the Heirs Male of his Body begotten, Remainder to the Use of the right Heirs of the Feoffor for ever, and after *A.* died, leaving two Daughters only, and then the Feoffor conveyed the same Lands to another of his Sons in Fee; and 'twas adjudged a good Conveyance, and that the Daughters of the eldest Son, though they were Heirs at Law, took nothing by Purchase, for the eldest Son dying without Issue Male in the Life-time of the Feoffor, if the last Remainder could have taken Effect at all, it ought then to have so done, because the Lease for Years was not sufficient to support it till it came *in Esse* afterwards, for then there would have wanted a Tenant of the Freehold in the mean Time, and upon the Death of *A.* it could not take Effect, because his Father was then living, and could have no Heir during his Life, and therefore the Remainder was void, and the whole Estate reverted in himself, by the resulting of the Use in the same Manner as if the Limitation had been at Common Law without any such Use.

So where the Husband was sole seised in Fee, and a Stranger levied a Fine to the Husband and Wife, and the Heirs of the Husband, and they rendered to the Conuzor for Life of the Husband, Remainder to *D.* for Life, Remainder to the right Heirs of the Husband, the Husband died, and then *D.* died; and by the Opinion of the Court of Wards and the three Chiefs, 'twas held to be no Remainder to the Husband, but his antient Reversion, because the Husband can't limit a Remainder to his right Heirs where the Fee was never out of him, and therefore the Interest of the Wife was not gone by her joining in the Grant and Render, but that she should have it during her Life against the Heir of the Husband.

If a Copyholder surrenders to the Use of his last Will, and devises to *A.* for Life, Remainder to *B.* in Tail, or surrenders to the Use of himself for Life, Remainder to the Use of *A.* for Life, Remainder to the Use of his Will, in these Cases the Reversion is so in the Copyholder, that he may in his Life surrender to the Use of any other; so that all who come in upon such Surrenders are in by the Copyholder, not by the Lord, for that nothing remains in the Lord, but so much as is not disposed of remains in the Copyholder as strongly as if it had been limited to him.

If a Man seised of Lands in Fee by his Will in Writing devises them to one for Life or in Tail, Remainder to his own right Heirs, this is void as a Remainder, and the Heir shall be in of the old Reversion by Descent, because immediately upon the Death of the Ancestor the Estate descends to the right Heirs, and so prevents his taking by the Disposition of the Will.

So if a Man devises Land to his Heir at Law, paying a Sum of Money or an annual Rent, yet the Heir, notwithstanding such Incumbrance or Charge, takes by Descent and not by Purchase.

But

Cro. Eliz.
 321.
Dyer 133.
 1 *Leon.* 182.
 2 *Co.* 91.
Moor 284.
 744.
 1 *Co.* 130.
 2 *Rot. Abr.*
 418.
Popb. 3.
Moor 720.
Cro. Eliz.
 334.
Dyer 237. pl.
 31, 199 a.
 2 *Rot. Abr.*
 414.
 1 *Leon.* 102.
Cro. Jac.
 376.
Cro. Eliz.
 148, 441.
 1 *Leon.* 102.
 4 *Co.* 23.
Hob. 30.
 10 *Co.* 41.
 1 *Vent.* 372.
Salk. 241.
Cum. 72.
Clark v.
Smith, et vide
Tit. Descent.

Salk. 242.
2 Ld. Raym.
829.
Cum. 123.
Reading v.
Royston.

4 Mod. 300.
Carth. 272.
1 Ld. Raym.
33. *Tipping*
v. *Coffins*, et
vide *Preced.*
Chan. 435.
S. C. cited.

But where the Estate devised is altered in Quantity or Quality, there the Devisee, though Heir at Law, takes by Purchase; as where a Man having two Daughters devises his Estate to the Son of one of them and his Heirs, it was adjudged that the Devisee took the whole as a Purchaser, and was not in by Descent as to any Part.

A. in Consideration of a Marriage intended between him and *B.* and of a Marriage Portion, made a Feoffment in Fee to the Use of himself and his Heirs till the Marriage, and after to *B.* for Life, then to Trustees and their Heirs during the Life of *A.* to support contingent Remainders, then to the first, second and other Sons of his Body in Tail Male, then to the Heirs Male he should have by any other Wife, and for want of such Issue, to the Heirs of the Body of *A.* with Remainder to his own right Heirs; the Marriage takes Effect, and they have Issue only a Daughter, then *A.* levies a Fine to the Use of himself for Life, Remainder to his Wife for Life, Remainder to *C.* in Fee with Warranty; and the Question was, What Estate was vested in *A.* by the first Deed, viz. Whether the Heirs of the Body should take by Purchase or Descent? For if by Purchase, then the Fine levied afterwards was no Bar to them; and the Court was of Opinion, that they must take by Purchase, because where the Ancestor has no Estate for Life, as in this Case he has not, they can't be Words of Limitation; and here the Estate is expressly limited to Trustees and their Heirs during his Life; and though a Man can't make his own right Heirs Purchasers by the Name of Heirs, either in a Conveyance by Way of Use, or by his last Will, yet he may make them so of an Estate-Tail, which is a new created Estate, different from what the Law makes.

Eq. Rep. 20.
Preced. Chan.
338. *Eure*
v. *Howard.*

A Settlement was made by *A.* to the Use of himself for fifty-nine Years, if he should so long live, Remainder to Trustees and their Heirs during his Life to support contingent Remainders, Remainder to *B.* his Son for ninety-nine Years, if he should so long live, Remainder to Trustees and their Heirs during his Life to support contingent Remainders, Remainder to the first and other Sons of *B.* in Tail Male successively, with other Remainders over, Remainder to the right Heirs of *A.* then *A.* by Will devises all his Lands in Possession, Reversion or Remainder to Trustees and their Heirs, in Trust by Sale or Mortgage to raise Money for Payment of his Debts and Legacies; and if this Limitation to his own right Heirs vested the Reversion in Fee in himself, so as to be subject to his Disposition, or if the Heirs were to take by Purchase was the Question; all the intermediate Remainders being determined. And it was argued upon the Reason of the above Case of *Tipping* and *Coffins*, that the Heirs must take by Purchase, because he had only an Estate for Years, and the Freehold during his Life was expressly limited to Trustees and their Heirs, and therefore against his own express Limitation he should have no resulting Use or Estate for Life; but on the other Side it was argued, that the Reason of the resulting Estate for Life was, because it might possibly happen that all the intermediate Estates might determine before the Death of *A.* as by his and the Trustees joining in a Feoffment, &c. which would be a Forfeiture of their Estates, &c. and therefore of Necessity he must have a resulting Use for his Life: And my Lord Chancellor was clear of this Opinion, and said it was his old Reversion in him and deviseable by Will: But Note, this was a Remainder limited to his own right Heirs.

2. Where a Limitation to the Heirs, or Heirs of the Body of a Stranger shall vest in such Heirs as a Remainder and by Purchase, or by Way of Limitation and Descent.

Here likewise the general Rule laid down is, That wherever the Ancestor takes an Estate for Life, and after in the same Conveyance a Remainder is limited mediately or immediately to his right Heirs, or to the Heirs Male or Heirs Female of his Body, that in such Case the right Heirs or Heirs Male or Female, &c. shall not be Purchasers, but shall take by Descent; and the Reason hereof also arises from the Prejudice that might ensue to the Lord or to the Donor by the Loss of Wardship, Marriage, &c. if such Heirs should be adjudged Purchasers, because they then claiming nothing from their Ancestor by hereditary Succession, would not be liable to the Terms and Conditions annexed to the hereditary Succession only.

Therefore if a Lease be made to *A.* for Life, Remainder to the Heirs Male or Heirs Female of his Body, or to his right Heirs, in this Case the Remainder is executed presently in *A.* and he is seised in Fee or in Tail, according to the respective Limitation.

So if one make a Lease to *A.* for Life, or a Feoffment in Fee to the Use of *A.* for Life, Remainder to *B.* for Life or in Tail, Remainder to the right Heirs of *A.* or to the Heirs Male or Female of the Body of *A.* in this Case the Heirs or Heirs Male or Female of *A.* shall not be Purchasers, but shall take the Remainder by Descent from *A.* for it was so executed as a Remainder in *A.* that he might give or forfeit it as such in his Life-time.

Tenant for Life, Remainder in Tail, Remainder to the right Heirs of Tenant for Life; the Tenant for Life acknowledges a Statute and dies, he in Remainder dies without Issue; and the Question was, If the right Heir of the Tenant for Life should be charged by this Statute, and the Lands in his Hand liable thereto; and adjudged that they should, for that they came to him by Descent from the Tenant for Life, who had them as a Remainder vested in him, and might either grant or charge.

In Dower it was found by special Verdict, that the Husband of the Demandant was seised of the Lands, &c. for his Life, Remainder to *A.* and *B.* Trustees for ninety-nine Years, Remainder to the Heirs of the Body of the Husband; and the Question was, Whether this was such an Estate-Tail executed in the Husband, whereof his Wife should be endowed; and adjudged that it was, and that the intervening Estate to the Trustees being only for Years ought not to be regarded.

A Lease is made to *A.* for Life, Remainder to the right Heirs of *B.* and after *B.* purchases the Estate of *A.* yet the Fee is not executed in *B.* but the Remainder to his right Heirs continues distinct; for if *A.* dies first, the Remainder will be void, and if *B.* dies first, yet there will be an Occupancy during the Life of *A.* and the Remainder immediately upon *B.*'s Death vests as a Remainder in his right Heirs.

A. in Consideration of a Marriage intended between him and *B.* covenants to stand seised to the Use of himself for Life, Remainder to the Heirs Male of their Bodies, Remainder to *C.* in Tail, the Marriage takes Effect, the Husband and Wife join in levying a Fine; and 'twas adjudged, that the Estates for Life to the Husband and Wife stood so distinct, that they were not merged or confounded in the Estate-Tail, being limited all in one and the same Conveyance, and that the Fine levied by them was not any Discontinuance either of the Estate-Tail or Remainders; for if the Estate-Tail should be executed in the Husband and Wife, then the Wife would have an Estate in Possession

1 Co. 93.
Shelly's Case.
Moor 136.
1 And. 69.
and the S. P.
cited in num-
berless Cases.

2 Rol. Abr.
417.
1 Rol. Rep.
317.
Raym. 163.

Lit. §. 578.
1 Co. 104.
2 Rol. Abr.
415.

Cro. Eliz.
355. Pet-
house v. Crane.

1 Ld. Raym.
326.
1 Salk. 254.
Lutw. 719.
Bates v. Bates.

2 Leon. 7.

1 Lev. 36.
Raym. 36.
1 Sid. 83.
1 Keb. 76.
Stephens v.
Brittridge.

feffion, whereas by the Conveyance ſhe was only to have a Remainder; alſo the Husband would have only a Moiety, whereas he was to have the whole during his Life; but yet the Remainder in Tail veſts in the Husband and Wife as a Remainder; ſo that the Heirs of their Bodies ſhall take it by Deſcent, and not by Purchaſe.

2 Jon. 114.
2 Lev. 223.
Raym. 302.
Liſle v. Gray.

A. ſeiſed of Lands in Fee by Indenture covenants to ſtand ſeiſed to the Uſe of himſelf for Life, Remainder to *Edward* his eldeſt Son for Life, Remainder to the firſt Son of *Edward* in Tail Male, Remainder to the ſecond, third and fourth Sons of *Edward* in Tail Male, and ſo to all and every other the Heirs Male of the Body of *Edward* reſpectively and ſucceſſively, and to the Heirs Male of their Bodies according to their Seniority of Birth; Remainder to the Lefſor of the Plaintiff for Life, and a Proviſo, that if *Edward* dies without Iſſue Male, that he ſhall have Power to charge the Lands with Daughters Portions not exceeding 100 *l.* a-piece; the Covenantor dies, and *Edward* ſuffers a Common Recovery, and dies without Iſſue Male; and the only Queſtion was, If *Edward* took an Eſtate-Tail ſubſequent to the Limitation to his four Sons in Tail, or if he took only an Eſtate for Life, with a like Remainder to all his other Sons in Tail Male ſucceſſively, as was limited to the four firſt; and it was adjudged, that he took but an Eſtate for Life, and that all his other Sons ſhould take by Purchaſe; firſt, Becauſe otherwiſe the Words, *and to the Heirs Male of their Bodies*, would be uſeleſs; ſecondly, The Words, *and ſo, &c.* prove the ſame Intent, which being turned into *Latin* are *eodem modo*; thirdly, *Severally and ſucceſſively, according to their Seniority*, are alſo a further Proof of ſuch Intent; fourthly, The Power to provide Portions for Daughters would be unneceſſary if *Edward* took an Eſtate-Tail, becauſe then by a Common Recovery he might bar it, and charge the Lands as he thought fit.

1 Co. 66.
2 And. 37.
Cro. Eliz. 453.
Archer's Caſe
cited. 1 Vent.
216.
3 Lev. 433.
and in ſeveral
other Caſes, which *vide* under Tit. *Devife*.

A. deviſes Lands to *B.* for Life, and after his Death to the next Heir Male of *B.* and the Heirs of the Body of ſuch next Heir Male; and it was adjudged a good Remainder in Contingency to the next Heir Male of *B.* being in the ſingular Number, and ſo was only a Deſcription or Deſignation of the Perſon who ſhould take the Remainder after the Death of *B.* and not any Limitation of his Eſtate.

6 Co. 17.
Wild's Caſe.

If one deviſes to *A.* for Life, Remainder to *B.* and the Heirs of his Body, Remainder to *C.* and his Wife for their Lives, and after their Death to their Children, they then having Children, *C.* and his Wife take only an Eſtate for Life, with Remainders to their Children for Life, and no Eſtate-Tail; but had there been no Children, the De- viſe being immediate, the Children could not take in Remainder, and therefore it muſt be an Intail in the Husband and Wife.

2 Rol. Abr.
416.
6 Co. 17.

If Lands are given to a Woman and the Heirs of the Body of her Husband who is then dead, it is ſaid that the Wife and the Iſſue of the Husband are Jointenants for Life, with Remainder to the Iſſue in Tail; for ſince they are named to take in Poſſeſſion as the Wife, and if they ſhould only take an Eſtate for Life, the Donor would have again the Land, though there were ſtill Heirs of the Body of the Husband in Being, which by the Words and Intent of the Gift he ought not to have, ſince he has given it to the Heirs of the Body of the Husband; and whoever answers that Deſcription is comprized within the Words of the Gift.

1 Sid. 247.
Raym. 126.
1 Keb. 888.
Meyrell v.

Rumſey, et *vide* Perk. §. 337. 5 Co. 9. 2 Rol. Abr. 418.

Lands were ſettled to the Uſe of the Husband and Wife for their joint Lives, and after the Death of either of them, to the Heirs of the Body of the Wife by the Husband to be begotten, and for Default of

such Issue, the Wife surviving the Husband, to the Use of the Wife for Life, and after her Death to the Heirs of her Body begotten; the Husband dies leaving Issue by the Wife, and she marries again and suffers a common Recovery; and the principal Question was, Whether this was an Estate-Tail executed in the Wife, or that the Remainder was contingent; and it was argued, that the Remainder depending on their joint Lives, and being limited to the Heirs of the Body of one of them, so that it may be frustrate, if the Wife survives, must needs be contingent, because by the Death of the Husband the joint Estate for Life is determined, and yet the Remainder to the Heirs of the Body of the Wife by the Husband can't take Effect, for *non est heres viventis*. But *per Cur.* clearly, and with some Displeasure at the Argument, the Words *Heirs, &c.* are not Words of Purchase, but of Limitation to the Wife, and the Estate vests in her presently, and is not in Contingency; as if an Estate be limited to a Woman *durante viduitate*, Remainder to her Heirs or the Heirs of her Body, this is a Fee-Simple or Fee-Tail executed in her presently; and though she afterwards marries, yet that shall not destroy the Estate that was well vested and settled in her before, and here the Remainder closes with the particular Estate to all Purposes but dividing the Jointenancy, and is no more than an Estate to the Husband and Wife, and the Heirs of the Body of the Wife.

A. devised Lands to *B.* for Life, Remainder to Trustees to preserve contingent Remainders during the Life of *B.* and *Verney* doubting whether this was an Estate for Life in *B.* or Tail, sent it as a Case to *B. R.* and notwithstanding the Testator's plain Intention to pass an Estate for Life, yet the Court held, that where the Ancestor takes an Estate for Life, and in the same Instrument a Limitation is made to his Heirs, or to the Heirs of his Body, the Heir can't be a Purchaser, and that therefore this was a plain Estate-Tail.

Hil. 13 Geo. 2. in B. R. Colson v. Colson.

See more hereof under Title *Devise.*

3. Where by a special Description the Remainder shall vest by Purchase.

If a Lease be made to *A.* for Life or in Tail, Remainder to the Heirs Male of the Body of *B.* if *B.* hath Issue two Sons, and the eldest dies leaving a Daughter, and then *B.* dies, living *A.* yet the youngest Son shall not take this Remainder, for he who takes by Purchase and original Vesting, must answer the Description exactly, which here the youngest Son does not, for he ought to be Heir as well as Male, and this he is not, for the Daughter of the eldest Son is Heir, and she can't take because she wants Part of the Description too, not being Male, and therefore neither of them can take, but the Remainder shall be void; so if such Lease or Gift in Tail be made to *A.* Remainder to the Heirs Female of the Body of *B.* and he hath Issue a Son and a Daughter, and dies, living *A.* yet the Remainder shall be void for the Reason before mentioned; otherwise it is if a Gift be made to one and the Heirs Male or Heirs Female of his Body, &c. for there *per formam doni* they shall take by Descent though another be Heir, for there the whole Estate-Tail is in the Ancestor, but in the other Cases the Ancestor takes nothing.

Co. Lit. 24, 25. Hob. 31. 1 Co. 102. Dyer 374. 2 Rol. Abr. 416.

A. having Issue two Sons and two Daughters, by Will devises Land to his younger Son in Tail, and for want of such Issue, to the Heirs of the Body of his eldest Son, and if he die without Issue, then to his Daughters in Fee, and dies; the younger Son dies without Issue, living the

2 Leon. 70. Challmer v. Bowier.

the eldest who has Issue; and if this Issue should take the Remainder was the Question; and adjudged that he should not, though it was urged that this being in the Case of a Will, the Intent of the Testator should prevail.

¹ *Vent.* 334.

² *Vent.* 311.

Raym. 330.

² *Jon.* 99.

² *Lev.* 232.

James v.

Richardson, or

Burbett v.

Durdant, Pol

lex. 457.

But where one devised Lands to *A.* and his Heirs, during the Life of *B.* and after the Death of *B.* to the Heirs Male of the Body of the said *B.* now living; and it was adjudged in *B. R.* and affirmed in Parliament against a Judgment in the Exchequer Chamber, that *C.* who was the Son and Heir apparent of *B.* at the time of the Devise, should take this Remainder by Purchase, as sufficiently described and intended by the Will, and that it was not a Contingent Remainder to be void on the Determination of the particular Estate before the Death of *B.* and it was held that the Words *now living* should refer to the Heirs Male, and not to *B.* himself, though that was the next Antecedent; because the Devisor took Notice before that he was living, and then to refer those Words to him would be a vain Tautology, and *C.* was then Heir apparent, and Heir in common Parlance.

Mich. 1713.

in Domo

Procerum,

Beaumont v.

Long, 1 P.

Wms. 229.

S. C.

A. by his Will in Writing devises all his Lands to *B.* and *C.* and the Survivor of them, for the Term of twenty-one Years, for the Payment of his Debts and Legacies, and after Payment the Term to cease, and after the End or sooner Determination of that Estate, he devises the Premises to the first Son of his Body, and to the Heirs Male of the Body of such first Son lawfully issuing, and for Default of such Issue, to *B.* for ninety-nine Years, if he so long live, without Impeachment of Waste, Remainder to the first and other Sons of *B.* and the Heirs male of their Bodies successively, Remainder to *C.* for ninety-nine Years, if he so long live, Remainder to his first and other Sons in Tail Male successively, Remainder to the Heirs Male of my Aunt Mrs. *Elizabeth Long*, Wife of *Richard Long* Clerk, lawfully begotten, with Remainder to his own right Heirs, and by his Will gave 150*l.* Annuity to *Dorothy Beaumont* his Sister, the Plaintiff in Error, for Life, and 500*l.* to her Children, and to his Aunt *Elizabeth Long* 100*l.* and to her Children 500*l.* and dies without Issue. *B.* and *C.* entered by Virtue of the Devise for twenty-one Years, and afterwards both died without Issue; and *John Beaumont* and *Dorothy* his Wife entered in Right of *Dorothy* as Heir at Law to the Testator, the Term for twenty-one Years being determined, and the Debts and Legacies paid; and *Thomas Long*, eldest Son of *Elizabeth* (she having, at the Time of making the said Will, three Sons, *viz.* the said *Thomas*, and two others) entered and brought an Ejectment; and in the Exchequer Judgment was given by Chief Baron *Ward, Price* and *Lovell*, against Baron *Bury*, for the Plaintiff *Thomas Long*; but in *Trinity Term* 1713. this Judgment was reversed in Error in the Exchequer Chamber; and now upon Error brought in the House of Lords it was argued, that this Reversal should be affirmed. First, because *Dorothy* being Heir at Law to the Testator, her Right, as such, was to be favoured; and all Devises to disinherit an Heir at Law were to be taken strictly. Secondly, that to make this Devise good to *Thomas Long* it must be construed either a Contingent Remainder, or the Words *Heirs Male* be taken as a *descriptio Personæ* to vest in him. As a contingent Remainder it cannot be good for want of a Freehold to support it; all the preceding Estates being only for Years; besides if it were good as a contingent Remainder in its Creation, yet *Elizabeth Long*, the Mother, being living when the particular Estates determined, it cannot vest, because *non est Hæres viventis*; as *descriptio Personæ* it cannot vest, for that ought to be such a Description as is *Vice Nominis*, which the Word *Heir Male* (being a legal Term, and not accompanied with any other Words to determine the Sense otherwise, as Heir apparent, or Heir now living, &c.) cannot amount to, and the Word *begotten* doth not determine the Sense otherwise; nor does any
Intent

Intent appear to confine the Devise to the Issue Male of *Elizabeth Long*, then much less to *Thomas Long* only as the Person described in this Devise; but notwithstanding these Reasons it was adjudged, that the first Judgment should stand, and the Judgment of Reversal be reversed, though ten of the Judges were of Opinion that the Devise was void, and only the three Judges (*Lovel* being dead) beforementioned held it good.

J. S. having Issue two Sons *A.* and *B.* devises in the Words following; 'I give to my eldest Son *A.* all that my Farm called *Dumfey*, to him and his Heirs Males for ever, if a Female, my next Heir shall allow and pay to her 200*l.* in Money, or twelve Pounds a Year out of the Rents and Profits of *Dumfey*, and shall have all the rest to himself; I mean my next Heir, to him and his Heirs Males for ever.' Upon the Death of the Testator *A.* entered and died, leaving Issue a Daughter; and it was adjudged, that the Lands should go to the second Son *B.* and not to the Daughter of the eldest, though she was Heir General.

I. S. devised to Trustees in Trust, after Debts and Legacies paid, to convey to *A.* his Cousin and the Heirs Male of his Body; and for want of such Heirs Male, then to the Heirs Male of the Body of *B.* his great Grandfather; and for want of such Heirs Male, to his own right Heirs for ever, and gave to his Sister 2000*l.* to be put out at Interest during her Life, she to receive the Interest, and after her Death to her Children, and died, and soon after *A.* died without Issue; and *C.* being Heir Male of *B.* the Testator's Grandfather, but not Heir General, there being a Daughter of an elder Brother, the Question was between him and the Testator's Sister and Heir at Law, who had the 2000*l.* devised to her, whether the Devise was void or not; and my Lord Chancellor held the Devise good, and that *C.* should take as a Person sufficiently described and intended by the Testator.

But when one seised in Fee devised his Lands to his Grandaughter (being his Heir at Law) for her Life, Remainder to his own right Heirs Male for ever, and died, leaving his Grandaughter his Heir at Law, and also leaving a deceased Brother's Son, who was the next of kin in the Male Line; and it was held by Lord *Macclesfield*, that the Nephew could not take, that the Words *Heirs Male* must be intended Heirs Male of the Body, and could never extend to an Heir Male of any collateral Line; and it not being said in the Will Heir Male of his Body or of his Name, the Grandaughter, who was his Heir at Law, might have an Heir Male, though not of his Name; and he said that this Case differed from that of *Brown* and *Barkham*, that being merely a Trust; also that in that Case the Remainder was limited to the Heirs Male of the Body of Sir *Robert Barkham* the Grandfather; whereas here the Devise was to the Heirs Male, without saying of any Body.

1 *Ld. Raym.*
185.
Preced. Ch.
468. *Baker*
v. Wall.

2 *Fern.* 729.
Newcomen
v. Barkham.
Preced. Ch.
461. S. C.

2 *P. Wms.*
1. 2.
Darves v.
Ferrers.

(D) Of the several Kinds of Remainders, as distinguished into Remainders vested, or in Contingency and Abeyance.

2 Rol. Abr. 415.
1 Co. 95. 103.
Plow. 56.
(a) But Contingent Remainders are of three Sorts; First, when it is a Limitation to one not *in esse*, for in that Case, if the Remainder-Man never does come *in esse*, it is a void Remainder. Secondly, when the particular Estate may determine before the Remainder can commence; as an Estate to *A.* for Life, and from and after the Determination of his Estate, then to *C.* during the Life of *A.* this is good by Contingency, that is, if *A.* forfeit his Estate by Alienation, or otherwise, in his Life time. Thirdly, when there is a Limitation precedent, or something to happen before the Remainder can take Effect, which may never happen; as a Remainder to commence when *J. S.* shall return to *England* from *Rome*. In the Case of *Dormer* and *Fortescue*, *Mich. 14 Geo. 2. per Lee* Chief Justice.

1 Co. 135.
Co. Lit. 378. a.
2 Co. 51.
2 Rol. Abr. 415.
Plow. 28, 556.
Popb. 74.
Moor 720.
3 Co. 20.
10 Co. 50.
Raym. 145.
Pollex. 56.

But if *J. S.* be living at the Time of the Remainder limited to his right Heirs, this puts such Remainder in Abeyance or Contingency, that is, no Person but *in Nubibus* till the Contingency happens, for in the Feoffor or Donor it is not, because he has limited it out of him, and all Remainders must pass out of him at the time of the Limitation, though they do not presently vest in the Person intended; and in the Right Heirs of *J. S.* it cannot be, because he cannot have Heirs during his Life; so there is no Person *in Rerum natura* within the Description, to take it; therefore it is in the mean time in Abeyance or Expectancy, to vest or not vest, as the Case happens; for if *J. S.* dies during the particular Estate, then the Remainder presently takes place in his Heirs; but if the particular Estate determines by Death or otherwise in the Life of *J. S.* then such Remainder is become totally void, and can never vest, but the Estate settles again in the Feoffor or Donor, as if no such Limitation in Remainder had been; and he becomes Tenant to the *Præcipe* and is obliged to do the Services; and tho' *J. S.* die soon after, yet his Heir can have no Benefit by it, not being capable of taking the Remainder when it fell.

Co. Lit. 3.
1 Co. 66.
2 Co. 51.
Hob. 33.
Moor 104.
Dyer 337.
2 Leon. 218.
1 Rol. Rep. 254.

But if there be no such *J. S.* at the Time of the Limitation, though he be after born, and dies during the particular Estate; yet his Heirs shall never have the Remainder. So if a Remainder be limited to *A.* Son of *B.* in Tail, &c. or to *E.* Wife of *D.* where in Truth there is no such *A.* or *E.* though *B.* has a Son after called *A.* or *D.* marries one *E.* yet they can never take the Remainder; because if there be such Persons as the Words of the Gift import, there the Remainder ought to vest in them presently, and they will never after be made capable of taking it; but if there be no such Persons then *in esse*, none who come within that Description after can lay Claim to it, because the Limitation was present to such Persons; but a Remainder limited *Primogenito Filio*, or *Proximo hæredi Masculo* of *A.* or *Propinquioribus Hæredibus de sanguine Puerorum*, or *Seniori Puero* of *A.* or to the right Heirs of *A.* there being then such *A.* *in Esse*, or to the Wife that *A.* shall marry; these are good Remainders, and shall vest when such Persons come *in esse* as are within the Description; because here appears no present Regard for any Person in Particular, and therefore if they answer the Description

scription at any time before the particular Estate determines, it is time enough; and so there is a Diversity between a Remainder limited to one by Name in particular, and such Remainder limited by Description, or Circumlocution, or between a general Name and a special Name.

A. makes a Lease to *B.* for Life of *B.* and after the Death of *A.* to remain to *B.* and his Heirs; this Remainder is Contingent, and cannot vest presently, for if *A.* survives *B.* it is void; because otherwise the Operation of Livery would be interrupted during the Life of *A.* for he can't give himself any Estate, his Livery operating to pass Estates from him, not to give any to him who had the whole before; and therefore during his Life the Operation of the Livery must cease, and by Consequence no Remainder can take Effect in Virtue of that Livery, which *pro tempore* being at an End, all that depended thereon ceases too, and can never after be revived; for the Livery must carry out all the Estates at once from the Feoffor, and if he comes again into the Possession before they can all take Effect, this breaks the Force of the Livery, and brings back again to him all that such Livery had taken out from him, and then they can never take Effect but by a new Livery; and this is the Reason of the common Case, that one can't give Lands to another to begin after his Death, because being to make Livery presently, if that can't operate presently, it can never operate at all, for it is a Contradiction to give Lands to one by a solemn Livery, which is an Act executed and works presently, and yet by Words to restrain that Operation to a future Time; but in the principal Case, where *A.* dies first, there no Interruption is of the Livery, for *B.* had an Estate for Life by Virtue thereof, and before that determines, the same Livery, which carried the Remainder in Abeyance, for the Uncertainty of its taking Effect, does upon *A.*'s Death direct and settle, or bring down the Remainder to *B.* and his Heirs.

If a Lease be made to *A. B.* and *C.* for their Lives, and if *B.* survives *C.* then to remain to *B.* and his Heirs, this Remainder is in Abeyance, because though the Person be certain, yet since it depends on *C.*'s dying before him, till that be known the Remainder can't vest. So if a Lease be made to *A.* for Life, and after the Death of *B.* who is a Stranger, to remain to *C.* in Fee, or to *A.* in Fee, these Remainders are in Abeyance or Contingency, and depend on *B.*'s dying before *C.* or *A.* for if he survives them, the Remainder can't take Effect.

If a Lease be made to *A.* for Life, Remainder to the Abbot of *D.* and his Successors, though the Abbot be then dead, so as there is then no Abbot at all, yet the Remainder shall be good if an Abbot be made before the Death of *A.* So of a Remainder to a Mayor and Commonalty, Dean and Chapter, Prior and Convent, &c. though there be then no Mayor, or Dean, or Prior. So of a Remainder to the Bishop of *D.* Parson of *D.* or other sole Corporation and his Successors; these Remainders not being limited to them by Name specially, but to them generally, and so whoever comes within the Description before the Determination of the particular Estate, is capable of taking by Virtue thereof, are good Remainders in Abeyance, &c. but if there be no such Corporations at the Time of the Limitation, then the Remainders are totally void; and none created after, though by the same Name, can take these Remainders, though a Patent be then passing to make such Corporation.

If a Man makes a Lease to *A.* for Life, and that after the Death of *A.* and one Day after, the Land shall remain to *B.* for Life, &c. this is a void Remainder, because not to take Effect immediately upon the Determination of the first Estate, and so during that Time there would be an Interruption of the Livery, and no Tenant of the Freehold, either to do the Services, or answer to Strangers Precipes.

If

1 *Rol. Rep.*
238, 317,
438.
2 *Rol. Abr.*
416.
Dyer 99.
1 *Leon.* 102.

If a Man surrenders Copyhold, or makes a Feoffment in Fee of Freehold Lands to the Use of his Wife for Life, Remainder to the Heirs of the Body of the Surrenderor and his Wife, this is a contingent Remainder not executed in the Wife, because he who will take by it must make himself Heir of both their Bodies, which can't be before the Death of both; and then if the Wife who has the particular Estate dies first, the Remainder is become void, because it can't vest when the particular Estate determines. So if such Feoffment or Surrender had been to the Use of the Wife and a Stranger for Life, Remainder to the Heirs of the Husband and Wife, this Remainder also is contingent; for though the Wife dies, yet it shall not vest till the Death of the Husband, and if he survives his Wife and the Stranger, the Remainder is become void.

Popb. 5,
Moor 104.
Perk. §. 56.
Dav. 35.

If one makes a Lease to *A.* for Life, Remainder to him who first comes to *St. Paul's Church, &c.* this is a good Remainder in Abeyance or Contingency, but can vest in none till he qualifies himself to take it by coming to *St. Paul's Church*; nor can any one grant it away, though he should happen after to come there first.

Cro. Eliz.
269.
1 *Leon.* 243.
Co. Lit. 225.

One levies a Fine to the Use of himself for Life, and after his Death to the Use of his two Daughters till his Son *B.* should return from beyond Sea, and should come to the Age of twenty-one Years or die, and after such Return and Age of twenty-one Years, or Death, which should first happen, to the Use of the said *B.* and the Heirs of his Body begotten; *B.* returns from beyond Sea; and it was adjudged, that this was a good Remainder, and should vest in him immediately upon his Return, though he was not then twenty-one; for the last Disjunctive *Or* is to be applied to the whole Sentence, and makes it disjunctive in all, and though his coming from beyond Sea, or to twenty-one Years, are uncertain, yet his Death is certain; and therefore this Remainder does not depend altogether upon Uncertainties; and in this Case it seems the Heirs of his Body shall not take by Purchase, though his Death had happened first, and so the Remainder could not vest in himself, for the Limitation being to him and the Heirs of his Body, whoever takes by Virtue thereof, must take as from him, and consequently will be in by (*a*) Descent, and not by Purchase.

(*a*) 1 *Co.* 99.
Shelly's Case.
2 *Leon.* 82.
3 *Leon.* 182.
3 *Co.* 20.
Dyer 142.

So if one devises Lands to *A.* for Life, *si tam diu sola vixerit*, and after her Death or Marriage, Remainder over to another, this is a good Remainder, because it is certain one of the two Contingencies will happen; but if one gives Lands to *A.* till *B.* comes to twenty-one Years of Age, and when *B.* comes to such Age, then to remain over, this Remainder is contingent, and uncertain whether it will ever vest, for if *B.* dies before such Age, the Remainder is become void. So where Land is given to a Woman so long as she shall remain sole, or to *A.* till *B.* comes from *Rome* to *England*, and after her Marriage, or *B.*'s coming to *England*, then to remain to *C.* in Fee, these Remainders are contingent, and uncertain whether they shall ever vest or not, for if the Woman never marries, nor *B.* comes to *England*, these Remainders will not vest, but are become void. So if Lands are devised to one for Life, and if the Devisee be disturbed, that then the Land shall remain over to another in Fee, this creates no Remainder till such Disturbance, and if that never happens, the Remainder fails likewise; for these Remainders are not to arise but upon such Acts done, and therefore if they fail, so does the Remainder.

Popb. 97.
10 *Co.* 85.

One levies a Fine to the Use of *A.* and the Heirs Male of his Body, till he or the Heirs Male of his Body attempt to alien or sell, and then to the Use of *B.* &c. *A.* dies without Issue, and without any Attempt, &c. *B.* will have no Estate, for his Remainder was not to begin but upon such Attempt precedent, and that not happening, the Remainder never takes Place.

A Lease is made to *A.* for Life, Remainder to *B.* for Life, and if *B.* dies before *A.* that then the Land shall remain to *C.* for Life, this is a good Remainder, if the Contingency happens, otherwise not; and in the mean Time the Estate continues in the Lessor, and is not in Abeyance, being expressly limited to go over, if such Contingency happens, therefore till it does happen nothing is devested out of the Lessor.

One devises Lands to his Wife during her natural Life, if she do not marry, but if she marries, then presently after my Son *A.* to enter and enjoy, to him and the Heirs Male of his Body; and 'twas adjudged, first, That by this Will the Wife had an Estate for her Widowhood only; secondly, That this was a Remainder vested in *A.* presently to take Effect in Possession upon the Death or Marriage of the Wife, which should first happen, and not a contingent Remainder to take Effect only in Case the Wife married.

One devises Lands in this Manner; My Will is to intail all my Lands to my Nephew *A.* and the Heirs Male of his Body, and for Default of such Issue, to his Brother and the Heirs Male of his Body, &c. *Habendum* to them severally, and to the Heirs Male of their Bodies, to the only Intent and true Meaning of this my Will, and so long as they and every of them do perform and keep the true Meaning thereof, touching the intailing all my said Lands in Manner following; and therefore I give all my said Lands to *A.* and the Heirs Male of his Body begotten, until he or they make any Acts to alter or discontinue the Estate-Tail, and then to *B.* and the Heirs Male of his Body, with other Remainders over, and dies. *A.* enters; *B.* dies leaving Issue *C.* and then *A.* levies a Fine; and it was objected that *C.* could not enter, because the Remainder devised to his Father was contingent, and not to arise but upon *A.*'s Alteration of the Estate, and not before or otherwise, and then *B.* dying before that Contingency happened, the Remainder could not vest; but it was adjudged that the Remainder to *B.* was not contingent, but an immediate Devise, and that otherwise the Intent of the Devisor, which was to give to every one in Remainder successively, would be destroyed, though they held the Limitation over upon his Alienation did not so defeat the Operation of the Fine, as to prevent the Discontinuance wrought thereby, and give him in Remainder immediate Title of Entry thereby, for that such Clause tended to a Perpetuity, and was condemned in Law upon the Reason of other Cases there cited.

A Limitation to *A.* for Life, and from and after the Determination of his Estate, then to Trustees for the Life of *A.* or to *A.* for ninety-nine Years, if he live so long, and from and after the End of that Term, then to Trustees during the Life of *A.* is a good Remainder in the Trustees, because by Possibility the Remainder may take Effect by the Tenant for Life's Alienation, or Committing a Forfeiture.

(E) What Estate is sufficient to support a Remainder.

AS every Remainder must depend upon a particular Estate, such particular Estate must be sufficient to support the Remainder, and can't by the general Rule of Law be less than an Estate for Life; so; that if one makes a Lease for (*a*) Years, either at Common Law or by Way of Use to *A.* Remainder to the right Heirs of *J. S.* who is living,

VOL. IV. 4 K
 1 Co. 134.
 Chudleigh's Case.
 3 Co. 20.
 4 Leon. 21.
 4 Mod. 256.
 Popb. 4, 82.
 Co. Lit. 217.
 4 Mod. 256. 1 Salk. 226. (*a*) Leases for Years were antiently of so little Value, that no Lease could be made for more than forty Years. Co. Lit. 45. b. 1 P. Wil. 574.

living, this Remainder is void, because till the Death of *J. S.* there is no Power to take the Freehold, and that can't be in Abeyance.

Moor 488. *pl.* So if one makes a Lease to *A.* for twenty-one Years, if he or if *B.* 685.
3 Co. 20. shall so long live, and after the Death of *B.* or after the Death of *A.*
Raym. 144. to the first Son of the Body of *B.* in Tail, and so to the second, &c.
 in Tail, Remainder to *C.* in Fee; all these Remainders are void, be-
 cause the first Estate being but for Years, and the Remainder not to
 take Effect immediately after those Years, but at a future Time, after
 the Death of *A.* or *B.* which may be long after, and so during that
 Time there would be an Interruption of the Livery, and no Tenant
 of the Freehold, therefore these Remainders are void; and though it
 happen that *A.* or *B.* die within the Term, yet till their Death the
 Freehold would be carried into Abeyance, and could not vest in those
 in Remainder for the Incertainty of the Death of *A.* or *B.* within the
 Term; and therefore the happening of that after, can't save the Re-
 mainder which was void before; but if such Lease had been made, and
 then it had been limited, that after the Determination of that Estate,
 or after the Expiration of the said Term, to *C.* for Life, or in Tail,
 &c. this had been a good Remainder executed presently, as if a Lease
 for Years had been absolutely to one, Remainder to another for Life,
 &c. for here was no Interruption of the Livery, or Want of a Tenant
 of the Freehold.

Plow. 83.
Vaugh. 46.

8 Co. 75.—
 (a) But an
 Estate at Will
 may be limited
 to commence
 after the
 Death of an-
 other. *1 Sid.*
 347.

Co. Lit. 54.
Dyer 310.
Cro. Eliz.
 491.
3 Leon. 22.

Co. Lit. 21. *b.*
Godb. 19, 20.

2 Lev. 52, 54.
3 Keb. 110.

Co. Lit. 298. *a.*
 (a) If Rent
 be granted to
A. for the Life
 of *B.* Remain-
 der over, if *A.*
 dies, he in
 Remainder

shall have the Rent presently, because the Estate for Life in the Rent determined by the Death of *A.* and there can be no Occupant of a Rent. *Moor* 664. *Yelv.* 9. *Vau.* 200.

2 Rol. Abr.
 415.
Moor 519.
1 Rol. Rep.

138. *1 Leon.* 195. *Dyer* 122. *Plow.* 344. *Raym.* 163.

A Remainder can't depend on an Estate at (a) Will, so that if such Estate be made with Remainder, the Remainder is void; the Reason whereof seems to be, because by the Limitation over the Will is instantly determined, and then the Remainder can't be good for want of a particular Estate whereon to depend; and in Possession it can't be good, because it was limited as a Remainder.

If one make a Lease to *A.* for Life, Remainder to him for Years, or to *A.* for his own Life, Remainder to him for the Life of *B.* these are good Remainders, and both Estates are vested in *A.* for though he can have no Benefit of the Remainders in his own Person, yet he may give, grant, devise or assign either Estate, and a greater Estate may support a less, as in these Cases, but not *e converso*; therefore if one make a Lease to *A.* for Years, Remainder to him for Life, the Lease for Years is drowned.

A Remainder may be limited, upon a Gift in Frank-Marriage, either to the Donees themselves or to a Stranger.

If *A.* on the Marriage of his Son, &c. covenants to stand seised to the Use of the Son for Life, or for ninety-nine Years, if he so long live, Remainder to two Strangers during the Life of the Son, upon Trust to support contingent Remainders, with Remainder to the first and other Sons in Tail, &c. this Remainder to the two Strangers is void, because there is no Consideration, and then by Consequence there is no Estate to support the contingent Remainders to the Sons.

If one makes a Lease to *A.* for the Life of *B.* Remainder to *C.* in Fee, *A.* dies; now till an (a) Occupant enters, there is no particular Estate, and yet the Remainder to *C.* continues good, because it vested in *C.* presently by the first Limitation, and the Want of a Tenant to the first Estate shall not vitiate the Estate to the second, which was well vested.

If one grant a Rent to the right Heirs of *J. S.* who is then living, Remainder over, this whole Grant is void, for *J. S.* can't have Heirs during

during his Life, and so there is no Person to take the particular Estate, and without that there can be no Remainder, and therefore that is likewise void. So if a Lease be made to *J. S.* for Life, where there is no such Person, Remainder over, the whole is void for the same Reason. So if a Lease be made to a Monk or other Person, who has no Capacity by Law to take, for Life or Years, Remainder over, both are void ; but in all these Cases, if such Estates were devised by Will, he in the Remainder should take presently. So if the first Devisee refuses, or dies in the Life-time of the Devisor, the Remainder shall vest in Possession presently, because that in a Will the Intent of the Devisor is principally to be regarded ; so that if the particular Estate fails, the Devise over shall be construed as a new original Devise to support the Intent of the Testator.

If one gives Lands to *A.* in Tail, Remainder to himself for Life or Years, Remainder to *B.* in Fee, this Remainder to himself is void, because none can give Lands to himself, and yet the Remainder to *B.* is good, because there is a particular Estate to support it. So if the first Remainder were to a Monk or other incapable Person, Remainder over, this last Remainder is good, and shall take Effect in Possession upon the Determination of the particular Estate, without any Regard to the mesne Remainder, which was void.

If by Lease and Release Lands are limited to the Use of a Protestant for Life, Remainder to *B.* a Papist for Life, Remainder to *C.* a Protestant, and *A.* dies, in such Case the Remainder to *B.* the Papist being void, the next Remainder to *C.* shall take Effect presently in the same Manner as if a Remainder were limited to a Monk for Life, or to one who refuses to take, or if such Remainder-Man were dead, and there never had been such a Limitation.

A Right of Action can't support a contingent Remainder, but there must be a particular Estate actually in Being, or a present Right of Entry ; but a future Right of Entry is not sufficient.

Perk. §. 566.

1 Leon. 197.

Dyer 309.

2 Mod. 210.

2 P. Wil. 362.

in the Case of

Carrick v.

Errington,

per Lord

Chancellor.

1 Vent. 189.

2 Lev. 35.

1 Ld. Raym.

314.

(F) Of the Continuance of the particular Estate, and When the Remainder is to commence.

IF a Man makes a Lease to *A.* for Life, and that after the Death of *A.* and one *(a)* Day after, the Land shall remain to *B.* for Life, &c. this is a void Remainder, because not to take Effect *(b)* immediately upon the Determination of the first Estate, and so during that Time there would be an Interruption of the Livery, and no Tenant of the Freehold, either to do the Services or answer to Strangers Precipies.

Plow. 25.

Raym. 144.

(a) That the

Law is nice to

an Infant,

1 Ld. Raym.

316.

(b) That if

the contingent

Remainder can't take Effect when the particular Estate determines, be it by Surrender, Merger, Feoffment, or otherwise, it can never after arise. *2 Saund. 380. in the Case of Purfoy v. Rogers.*

A. seized in Fee devises his Lands to *B.* eldest Son of his Brother *C.* for Life, Remainder to the first Son of *B.* in Tail, and so to all his other Sons in the same Manner successively, Remainder to *D.* second Son of *C.* for Life, Remainder to his first and other Sons in Tail successively, and dies ; *B.* enters and dies, leaving his Wife *ensient* with a Son, then *D.* enters as in his Remainder, and six Months after the Son is born ; and all this Matter being found specially, 'twas adjudged in *C. B.* for *D.* against the Son ; first, Because this being a contingent

4 Mod. 259.

3 Lev. 408.

1 Salk. 227.

Carth. 309.

Reve v. Long.

Re-

Remainder to the Son, and he not being born at the Time when the particular Estate determined, this became void; secondly, *D.* being the next in Remainder, and having entered before the Birth of the Son, was in by Purchase, and therefore shall not lose his Estate by a Son born after; and this Judgment was affirmed in *B. R.* for they held it plainly to be a contingent Remainder, and not an executory Devise or a springing Remainder, for that would introduce a Perpetuity not to be barred by a common Recovery, because 'twould be the same to all the other Sons; but here it being a contingent Remainder, and not happening in Time, 'tis gone for ever; and they relied on *Archer's Case*; but upon a Writ of Error brought into Parliament, the Judgment was reversed by almost all the Lords, because being in a Will, they thought that by the Meaning and Equity thereof they ought not to disinherit the Heir for such a Nicety, and that a Will was otherwise to be expounded than a Deed; and therefore they construed it an executory Devise or springing Remainder to the first and other Sons, and that the Freehold should vest in *D.* till the Son was born; but all the Judges were much dissatisfied with it, and did not change their Opinions, but blamed the Judge who permitted it to be found specially where the Law was so certain and clear.

Note, That now by the 10 & 11 W. 3. cap. 16. Provision is made, that after-born Sons and Daughters, to whom Remainders are limited in Contingency, shall take in the same Manner as if they had been born in the Father's Life-time, though no Estate be limited to Trustees to preserve and support such contingent Remainders, which Act was made by Reason of this Case, and of the Strictness of the Law herein.

(G) Contingent Remainders, how prevented from rising or coming in Esse.

1 Co. 134,
138.
Popb. 82.

HEREIN, as has been before observed, the general Rule is, that if the contingent Remainder can't vest either during the particular Estate, or at the Instant of the Determination thereof, such Remainder is for ever destroyed; the Reason whereof seems to be, to prevent the Inconvenience and Danger that might otherwise ensue to Purchasers by allowing such Remainder to take Place wherever they happened; for if but the Latitude of a Day were given to their vesting after the particular Estate ended, they might as well arise one hundred Years after; the Reason of such Allowance being the same; and since by the Limitation they ought to vest when the particular Estate determines, if they can't so do, they shall never after take Effect, be they limited either at Common Law or by way of Use.

1 Co. 66.
Cro. Eliz. 453.
Hob. 338. et
vide 2 Leon.
219.
Moor 104.
2 Sid. 67.

As in *Archer's Case*, a Devise of Lands to *A.* for Life, and after to the next Heir Male of *A.* and the Heirs Male of the Body of such next Heir; *A.* having Issue *B.* his Son, makes a Feoffment in Fee to *C.* upon whom *B.* enters; and it was adjudged, first, That this was good as a contingent Remainder; secondly, That by this Feoffment of *A.* who was but Tenant for Life, the contingent Remainder was destroyed, for every Remainder ought to vest either during the particular Estate, or at least *eo instanti* that the particular Estate determines; and here by the Feoffment the Estate for Life of *A.* was determined by Forfeiture; and since the Remainder could not then take Effect, for *non est hæres viventis*, it can never after arise.

So where one made a Feoffment in Fee to the Use of himself for Life, and after to the use of his first Son and his Heirs; the Father and Feoffees, before any Issue, infeoff J. S. and his Heirs for a valuable Consideration without Notice, and then the Father dies leaving Issue a Son who enters; and by the better Opinion the contingent Use to the Son was destroyed; because by the Feoffment the Particular Estate was determined, and the Son not being *in Esse* to take Advantage of the Forfeiture and Wrong done to his Remainder, shall never after set it up against the Purchaser; and the Feoffees, by their joining in the Feoffment, have excluded themselves of any Entry to revive the Remainder, if that were necessary, as (a) a Release by them after the Feoffment of the Father would likewise have done.

2 Leon. 178.
(a) 2 Rot. Abr. 797.

A. had Issue B. and C. his Sons, and makes a Feoffment in Fee to the Use of himself for Life, and after to the Use of the Feoffees and their Heirs during the Life of B. Remainder to the Use of the first, second, and other Sons of B. in Tail Male, Remainder to the Use of C. and the Heirs of his Body, Remainder to his own right Heirs, and dies; the Feoffees infeoff B. in Fee, without Consideration, and with Notice of the first Uses, and after B. hath Issue a Son, and if he was barred by the Feoffment of the Feoffees, was the Question; and adjudged, upon Solemn Argument in the Exchequer Chamber, that he was barred; for the Feoffment of the Feoffees devested all the Estates and future Uses, and tho' B. had Notice, this was not material, the Estate out of which the Uses were to arise being devested and gone; and the new Estate given by the second Feoffment shall not be subject to the Uses limited by the first Feoffment; and there being no Son of B. to enter when the particular Estate determined, as in this Case it did by the Feoffment, which was a Forfeiture thereof, he shall never enter after; for the Statute 27 H. 8. executes no uses but when the Estate continues in the Feoffees to serve them, and not when that is devested, and the Use itself turned to a Right. Also it was held in the same Case, that if there had been no Alteration of the Possession, but that B. had died before the Birth of his Son, he should never after have the Estate, the Remainder to C. being then executed, and the Son of B. born out of due time; and they agreed that the Preserving such contingent Uses would create Perpetuities, and tend to the Destruction of Families, who, upon no Occasion whatever, could dispose of their Estates.

1 Co. 120. Popb. 70. Chudleigh's Case.

A. Tenant for Life, Remainder to his first, second, and other Sons in Tail Male successively, Remainder to B. for Life, and so to his first, second and other Sons in Tail Male, then B. having Issue a Son, and A. no Son, A. cuts Timber Trees; the Son of B. who is then Tenant in Tail shall have them, for the Property thereof is in him by Reason of his Inheritance, and the Remainder to the first and other Sons of A. is no Impediment, being but a Possibility, which may never happen, and is of no Regard till it does happen, but may be destroyed by Feoffment, &c.

1 Rot. Abr. 119. Uvedal v. Uvedal.

One made a Feoffment in Fee to the Use of himself and his Wife, and to the Heirs of the Survivor of them, and after the Husband makes a Feoffment in Fee, and dies; the Wife enters, and infeoffs a Stranger, and dies; and the Question was, Whether by the Wife's Entry the Fee should vest in her, being the Survivor, so as her Issue might enjoy it; and it was adjudged, that the Husband's Feoffment had destroyed this future contingent Use of the Fee; for whatever cannot accrue at the Time of the Death of the Party who first dies, cannot afterwards, by any Act, be revived; and though in this Case the Wife had a joint Estate for Life, with her Husband, yet, during the Coverture, she was bound by his Feoffment, and so could not prevent the Destruction of the contingent Fee, which was not to take Effect till the Death of one of them.

Cro. Car. 152. Biggot v. Smith. 3 Mod. 309. S. C. cited. 1 Ld. Raym. 316. S. C. cited.

1 Vent. 189.

Cro. Cor. 364.
Boreton v. Nicholls.

So where one hath Issue two Sons *B.* and *C.* and makes a Feoffment in Fee to the Use of himself for Life, Remainder to the Use of *C.* for Life, Remainder to the first Son of *C.* who should have Issue of his Body, and to his Heirs for ever; and for Default of such Issue, to the Use of the first Daughter of *C.* who should have Issue of her Body, and to her Heirs for ever; and so to the second, &c. Remainder to the right Heirs of *C.* for ever, and dies; *C.* enters, and hath Issue a Son, who dies without Issue; then after *C.* levies a Fine with Proclamation, and *B.* enters as for a Forfeiture of his Estate for Life; but it was adjudged against *B.* for the Fee vested presently in *C.* and the other Limitations were but contingent, and so barred and destroyed by the Fine, there being then none *in Esse* to take them, and then the Fee was immediate to his Estate for Life, and so the Fine good, and no Forfeiture.

Cro. Jac. 168.
Bell's Case
cited.

If one makes a Feoffment in Fee, or Covenant to stand seised to the Use of himself for Life, and after to the Use of his first Son in Tail Male, &c. and, before the Birth of any Son, makes a Feoffment in Fee, this destroys the contingent Remainder to the Son, so that it can never after arise.

Cro. Eliz.
630.
Moor pl. 726.
*Smith v. Be-
lay.*
Lit. Rep. 291.
Like Case.

One made a Feoffment in Fee to the Use of himself for Life, Remainder to the Use of his Wife for Life, Remainder to *A.* his eldest Son for Life, Remainder to the eldest Issue of *A.* which should be at the Time of his Death, Remainder to *C.* in Fee; *A.* hath Issue *B.* his eldest Son; the Feoffor dies; his Wife leases to *A.* for Years, and he makes a Feoffment in Fee to *D.* to whom *C.* levies a Fine; the Wife dies, then *A.* dies, and it was adjudged, that by this Feoffment, the Remainder to the eldest Son of *A.* which should be at the time of his Death, was destroyed, though he had then a Son actually born; because it was contingent and uncertain whether that Son would continue to be his eldest at the time of his Death; for he might die, and another be his eldest; and therefore the Remainder could not vest in him in his Father's Life, and by Consequence being in Contingency was destroyed by the Feoffment, which determined the particular Estate before the Remainder could take place; but note, if the Wife had entered, this had revived the contingent Remainder, for her Right of Entry was sufficient for that Purpose; or if she had survived *A.* then, though she had died before Entry, yet might the Feoffees, after her Death, enter and revive the contingent Remainder.

2 *Roll. Abr.*
794.

Moor pl. 750.
Porole v. Veer.

A. makes a Lease for Life by Indenture, with Livery, to *B.* and if it fortune *B.* to marry any Wife, who shall survive him, then the Land shall remain to such Wife for her Life; *Proviso* if *B.* does not in Writing, or last Will, declare his Mind that she shall have it, then it shall not remain to her; *B.* before marriage makes a Feoffment to *C.* to whom *A.* levies a Fine, and suffers a Recovery, and after *B.* marries, and makes a Declaration, that his Wife shall have the Remainder, &c. then he and his Wife levy a Fine to *C.* and after he makes another like Declaration and dies; and his Wife enters, and by Certificate of two Judges to the Chancellor, her Remainder was destroyed by the Feoffment, because the Freehold was thereby determined before the Remainder could take Effect; also the Possibility of the Wife was inclusively given away in the Fine, and then the Declaration was to no Purpose; and so it seems it would have been if he had made such Declaration, and after had made the Feoffment, for that Declaration had only made the Remainder absolute to the Wife who should survive him, which being contingent, and uncertain who that would be, would be barred and destroyed by the Feoffment.

1 *Co.* 135.
3 *vid.*
2 *Roll. Abr.*
796
2 *Sid.* 64,
129.
1 *Vent.* 188.

If one makes a Gift in Tail to *A.* Remainder to the right Heirs of *J. S.* and *A.* makes a Feoffment in Fee, and then *J. S.* dies, and after *A.* dies without Issue, yet the right Heirs of *J. S.* shall never have the Remainder, for by the Feoffment of *A.* the Estate-Tail, and all Remainders, were discontinued and vested in the Feoffee, and there was

not

not any particular Estate in Fact, or in Right, to support the Remainder when it should happen; and upon the Death of *J. S.* this Remainder was as capable of vesting as a Remainder, as ever it could be after, his right Heir being then certainly known; but since, by the Feoffment of *A.* the whole Estate-Tail, and the Right of it, as to himself, was determined, and yet the Remainder could not then take Effect, it shall never afterwards; otherwise it would be, if *A.* had only been disfeised, for then the Right of the Estate-Tail had preserved the Right of the Remainder; and so it seems the Law is upon a Feoffment to the Use of Tenant in Tail, Remainder to the right Heirs of *J. S.*

A. Tenant for Life, Remainder to her first and other Sons in Tail Male successively; *A.* takes a Husband, and, before the Birth of any Son, the Reversioner in Fee grants and conveys his Reversion to the Husband and Wife by Fine, and then *A.* hath Issue a Son, and dies; and *per Cur.* though if *A.* had survived her Husband, she might have avoided and waved the Estate taken by the Fine, yet the contingent Remainder to the Son is utterly destroyed, there being then none *in Esse* when the particular Estate determined, for the Husband and Wife take by Entireties, and therefore the Estate for Life of the Wife was merged before the Contingency happened, and the Possibility which the Wife had, of avoiding the Inheritance, given by the Fine, and thereby reviving her Estate for Life, will not preserve it; for if the contingent Remainder cannot take Effect when the particular Estate determines, be it by Surrender, Merger, Feoffment, or otherwise, it can never after arise.

If Tenant for Life, with contingent Remainders to his first and other Sons, before the Birth of any Son, make a Feoffment in Fee, with condition of Re-entry, the contingent Remainders shall never arise, tho' the Condition be broken, and a Re-entry made before the Birth of any Son; because the Feoffment, though upon Condition, was a Forfeiture and Determination of the particular Estate, and the Remainder not being capable of taking place is gone for ever, for the Recovery does not purge the Forfeiture.

A. Tenant for Life, Remainder to his first and other Sons in Tail Male successively, Remainder to *B.* in Tail, Remainder over; *A.* before the Birth of any Son surrenders to *B.* and then a Son was born; and in this Case it was held that by the Surrender the contingent Remainder was gone and destroyed; but the principal Question in this Case was, if the Surrender was effectual, because *B.* knew nothing of it till five Years after the Birth of the Son, and then he agreed to it; and this in *C. B.* and *B. R.* was adjudged to be no such Surrender as should destroy the contingent Remainder; but the Judgment, as to this Point, was reversed in the House, against the Sense of all the Judges except two; but in this Case it afterwards appearing, that at the Time of the Surrender *A.* was *non compos*, this was held a void Surrender, and not only voidable, and therefore no Estate passed by it, and then by Consequence the contingent Remainders were not touched.

A. Tenant for Life, Remainder to his first Son in Tail, Remainder to *B.* for Life, Remainder to his first Son in Tail; *A.* having a Son accepts a Fine from *B.* and then makes a Feoffment in Fee, and then *B.* has Issue a Son born, the Remainder to him is not destroyed; for the Acceptance of the Fine displaced nothing; and though the Feoffment displaced all the Estates, yet the Right left in the first Son of *A.* shall support the Right of the contingent Remainders; for though the Feoffment of *A.* was a Forfeiture of his Estate for Life, yet his Son, who was next in Remainder, and had a Right thereto, was not bound to take Advantage thereof, but might stay till the Death of *A.* and as he might then have entered, so, if he dies, whereby the Remainder and Right of Entry goes over to another, they may likewise enter, after the Death of *A.* or before, as they think fit; and it is there said, the

2 Saund. 380.
2 Lev. 39.
3 Keb. 11.
Purifoy v. Rogers.
4 Mod. 284.
3 Mod. 310.
S. C. cited and in several other Books.

Show. Par. C.
151.

1 *Ld. Raym.*
313. *Carth.*
211.
Show. Par. C.
150.
3 *Lev.* 284.
2 *Salk.* 427.
618.
2 *Vent.* 198.
3 *Mod.* 301.
Comb. 438.
Thompson v. Leech.

1 *Vent.* 183.
2 *Lev.* 35.
2 *Keb.* 872.
Lloyd v. Braking.

Way

Way to preserve such contingent Remainders is to limit the Use to the Husband for Life, or more modernly, to him for Years, then to the Use of the Feoffees for the Life of the Husband, and then to limit the contingent Remainders; or if it were to the Husband for Life, Remainder to Trustees and their Heirs during the Life of the Husband, Remainder to the Heirs or Heirs Male of the Body of the Husband, yet is not the Fee or Fee-Tail executed in the Husband otherwise than as a Remainder (a), by Reason of the interposing Limitation to the Trustees, and therefore in such Case the Wife of the Husband shall not be endowed.

(a) 3 Lev. 437. *Duncombe v. Duncombe*, S. P. and 2 Vern. 755. *Erve v. Osborne*. 2 P. Wil. 610. *Manfel v. Manfel*.

1 Vent. 306.
2 Jon. 76.
3 Keb. 731,
820. *Hartpool v. Kent*.

Father and Son are, the Father conveys Land to the Use of himself for Life, Remainder to the Use of the Son for Life, Remainder to the first and other Sons of the Son in Tail Male successively, Remainder to the Heirs of the Body of the Father, or to his right Heirs, and dies before the Birth of any Son of his Son; and if by the Descent of the Fee or Tail upon the Son, the contingent Remainders were destroyed, was the Question; and argued that they were not, because the Inheritance came to the Son by Descent, which was an Act in Law, and not by his own Act; and therefore the Law which does no wrong shall not destroy these contingent Remainders, but that upon the Birth of the Sons the Estate shall open again to let in the Remainders; but 'twas adjudged that the contingent Remainders were destroyed by the (a) Descent of the Inheritance upon the Son; and they relied on the Case of (b) *Wood v. Ingerfoles*, and held that this Case differed from the Cases cited, where the Estates were united at first upon making the Conveyance, which if they should not afterwards open, so as to let in the Remainders, the Conveyance would destroy itself; but here this Descent was an Act subsequent to the Conveyance, and made an Alteration in the Estates limited thereby, and therefore had destroyed the contingent Remainders.

(a) For this wide Co. Lit. 28. a.
11 Co. 80.
1 Lev. 11.
Raym. 28.
1 Sid. 47.
Plunkett v. Holmes.
2 Lev. 202.
2 Jon. 79.
Fortescue v. Abbot. (b) *Cro. Jac.* 60.

1 Vent. 345.
2 Jon. 136.
Raym. 413.
Harrison v. Belsey.

A. and *B.* Jointenants for their Lives, Remainder to the first Son of *A.* in Tail, and so to the second, &c. Remainder to the right Heirs of *B.* before any Issue *A.* releases to *B.* and his Heirs, and after hath Issue a Son; and if by this Release, before the Birth of a Son, the contingent Remainders were destroyed, was the Question; and argued, upon the Diversity in the above Case, that this Uniting of the Estate for Life with the Remainder in Fee, being by Conveyance and Act subsequent to the Limitation of the contingent Remainders, and before they came in Being, had destroyed them; for now the Estate for Life upon which they depended is gone, and the whole Fee executed in *B.* and therefore they can never after arise; but by three Justices, *dissentiente Dolben*, 'twas adjudged that these contingent Remainders were not destroyed; for to some Purposes the whole Fee was executed in *B.* immediately upon the first Conveyance, and this Release of *A.* gave him no greater Estate, nor in any other Degree than he had before; for after such Release he is in of the whole Estate by the Lessor, as he was before, and as he would have been if it had come to him by Survivorship; and his Estate being at first given, subject to these contingent Remainders, must open to let them in when they happen, as it would have done, had no such Release been made; and though they were limited immediately after the Estate for Life to *A.* and *B.* yet till they came in *Esse* they did not prevent the Closing of the Fee in *B.* and therefore did not depend absolutely upon the Estate for

for Life, and have now no other Impediment to hinder their Rising than they had at first.

A Copyholder in Fee surrenders to the Use of his Wife and of *B.* ^{1 Rol. Rep. 238, 317,} for their Lives, Remainder to the Use of the Heirs of the Body of the Surrendoror and his Wife; *B.* and the Wife are admitted accordingly, after *B.* surrenders his Part to the Use of the Husband, and then the Husband surrenders the whole to the Use of *C.* and his Heirs, who is admitted accordingly; then the Wife dies, leaving Issue, who brings Trespass for the Moiety of the Wife; and adjudged not maintainable; for when *B.* surrenders his Moiety to the Use of the Husband, this makes a Severance of the Jointure; and when the Husband after surrenders the whole to *C.* he by this hath an Estate for the Life of *B.* in the one Moiety, and for the Life of the Wife in the other Moiety; and though if she had survived her Husband she might have defeated the Surrender of her own Moiety, yet now she dying first, the Estate of *C.* as to that Moiety is determined; and since he who would claim it must make himself Heir of both their Bodies, which during the Life of the Husband he can't do, and yet the particular Estate as to that Moiety is determined; therefore the Remainder as to that Moiety which was contingent is destroyed, and the Husband's Death can never set it up again; but for the other Moiety, if the Husband dies, living *B.* it will take place, else not, being contingent, and not capable of vesting during the Life of the Husband; and as to the Husband's Surrender to the Use of *C.* and his Heirs, this was no such Forfeiture or Determination of the Estate for Life as to give an Entry to those in Remainder, for then that had destroyed the contingent Remainder of the whole; and though the Wife had survived and defeated such Surrender as to her own Moiety, yet it appears before that that would not have revived the contingent Remainder, being not capable of vesting when the particular Estate ended; but such Surrender of the Husband works only by Way of Grant for what he might lawfully pass, and not so strongly as Livery of Seisin.

(H) Of Remainders that arise on Conditions precedent or subsequent.

IT is laid down as a Rule of Law in Variety of Books, That a Remainder can't be limited to begin upon a Condition annexed to the first Estate, but that for Breach of the Condition the Feoffor or Lessor must enter, and by that Entry, the first Estate being determined, the Remainder is destroyed, because it can't take Effect at the Instant of the Determination of the particular Estate; for the Remainder passing out of the Feoffor or Lessor at the same Time that the particular Estate is created, and being to take Effect in Virtue of the first Livery, when the Feoffor or Lessor re-enters for the Condition broken, that destroys the Force of the first Livery, being an Act of equal Notoriety therewith, and then the Remainder which was to take Effect thereby can never arise, because there wants the Solemnity required by Law for that Purpose.

If there be Tenant for Life with a contingent Remainder, Tenant for Life makes a Feoffment in Fee, upon Condition, if the Contingency happens before the Condition is broken, the Contingency is destroyed; but if the Tenant for Life enters for the Condition broken before the Contingency happens, the contingent Remainder shall be revived,

Co. Lit. 378.

1 Co. 86.

Plow. 25, 29.

1 Rol. Abr.

474.

Perk. §. 831.

1 Ld. Raym.

314. *per Holt*

Ch. J.

and the Contingency, if it happens, may vest ; but if before the Contingency happens the Reversioner enters upon the Tenant for Life for the Forfeiture, the contingent Remainder is destroyed.

But for the better Explanation hereof it may be necessary to consider the following Distinctions.

1. Between a Condition and a Limitation, and in Case of the Condition when it precedes the Vesting of the Remainder as the Cause thereof, and is annexed to the first Estate ; and when 'tis annexed absolutely without any Regard to the Remainder.

Co. Lit. 201,
214.
10 Co. 42.
Plov. 27.

(a) Moor 292.
Co. Lit. 214.
Popb. 99.
Plov. 413.
Cro. Eliz. 414.
10 Co. 41.

A Condition is properly such as goes in Abridgment and Restraint of the Estate first given upon something to be done or not done by the Person who takes the Estate, or by him who makes the Estate, or to happen during the Continuance of the Estate. (a) A Limitation is such as limits and circumscribes the Estate to continue so long only, and no longer, than till such a Thing happens, or till such a Thing done or not done by the Person who takes the Estate, or any other ; so that upon the Happening, Performance or Non-performance thereof, the Estate *ipso facto* determines and expires as certainly as if it had been made for Life or Years ; and upon such an Estate a Remainder may be limited, as well as after an Estate for Life or Years.

Perrk §. 830.
Co. Lit. 214.

If a Man makes a Lease for Life or Years of Lands, or grants an Advowson, Common, Rent *in Effie*, &c. to one for Life or Years, upon Condition that if the Lessee or Grantee do not pay such a Sum of Money, that then his Estate shall cease, and that it shall remain to B. for Life, Years, or in Fee, this Remainder is void for these Reasons ; first, Because it does not vest as a Remainder presently, but is to arise upon Breach of the Condition only ; secondly, Upon Breach of the Condition it can't vest, because none can take Advantage of the Breach thereof, but only the Party from whom the Condition moves and his Heirs ; thirdly, When they have taken Advantage thereof by Entry or Claim, the particular Estate is thereby determined, and the Lessor or Grantor in of his first Estate, as it were *ab initio*, by Title paramount the Estate given or granted ; and then if the Remainder can't vest at the Instant of the Determination of the particular Estate, it can never after take Effect, and by Consequence is defeated and gone.

Cro. Eliz. 360.
Cogan v. Cogan.

As where A. seised of Lands in Fee, let them to B. for Life, Remainder to C. for Life, provided that if A. hath Issue a Son during his Life, who should live to the Age of five Years, that then the Estate limited to C. should cease, and that it should remain to such Son in Tail ; A. hath Issue a Son, who lives to the said Age, and if the Remainder limited to C. should cease, and the Remainder to the Son be good, was the Question ; and *per totam curiam* it was adjudged, that the Remainder to the Son was void ; wherein it appears first, That this was properly a Condition, because upon the happening thereof it was to shorten and abridge the Estate before given ; secondly, This Case proves the Law to be the same in Case of Things which lie in Grant, as of those which lie in Livery ; for here it was not the particular Estate that was to cease upon the Condition, but the Remainder, and that lies in Grant ; thirdly, Though the Condition here was not annexed to the first Estate, yet it was annexed to the Estate immediately preceding the Remainder to the Son ; and so to this Purpose is the same as if it had been for Life, upon such Condition to cease and remain over ; fourthly, It appears that the Remainder was not to begin but upon the Condition performed, and so the Condition preceded the

Vesting

Vesting the Remainder; fifthly, This Case proves that none shall take Advantage of a Condition but the Lessor and his Heirs, and therefore the Remainder to the Son who was a Stranger could not arise thereby; sixthly, That this Remainder being limited to begin upon a Condition precedent, whereof none can take Advantage but the Lessor and his Heirs, is for ever defeated and destroyed, because it can't take Effect according to the Terms limited for vesting thereof.

But now if one makes a Lease for Life or Years, upon Condition to pay so much a Day certain, or reserving Rent, and for Default of Payment a Re-entry, Remainder after the Death of the Lessee, or after the Years, to *B.* for Life or in Fee; or if one makes a Lease to *A.* for Life, Remainder to *B.* in Fee, rendering Rent, with Clause of Re-entry for Default of Payment by the Tenant for Life, and to retain during his Life; in these Cases the Remainder vests presently in *B.* and has no Dependence on the Condition for its taking Effect; but if the Condition should be broken, or the Rent arrear, *B.* can't enter, being a Stranger; and if the Lessor should enter, he would be in of his first Estate by Title Paramount the Remainder, and then the particular Estate being determined before the Remainder could take Effect, the Remainder would thereby be destroyed; but this would be unreasonable that he should destroy the Remainder which was well vested by his own Grant; and since every Man's Grant shall be construed strongest against himself, and this must be to support and make good the Estate he has departed with; therefore by such Remainder over the Condition is destroyed, and the Power of Re-entry gone, and then the first Estate is absolute, with the Remainder over; and the Lessor has no Remedy for the Money or the Rent, but in a Court of Equity.

Perk. §. 831.
Co. Lit. 214,
 338.
1 Co. 40.
1 Rol. Abr.
 472.
Cro. Eliz. 7-7,
 792.
Dyer 127.
Doct. & Stud.
lib. 2. cap. 21.

2. Between a Deed and a Will, when in both the same Words of Condition are made use of for vesting the Remainder.

Here we must observe, that though in Case of a Deed either the Condition destroys the Remainder, or the Remainder the Condition, as appears before, yet in a Will it is otherwise.

As where one seised of Lands in Fee, deviseable by Custom, by Will devised them to *J. S.* a Clerk, upon Condition that he should be a Chaplain, and sing for the Soul of the Devisor all his Life, and that after his Death the Land should remain to *J. D.* Mayor of *S.* and his Successors, to find a Chaplain perpetually to sing for the Soul of the Devisor, and dies. *J. S.* being of the Age of twenty-four Years enters, and holds the Land for six Years, and is not a Chaplain; the Heir of the Devisor ousts him; then *J. S.* brings an Assise, and upon the pleading thereto by the Heir, and all this Matter found, the Assise went for the Plaintiff; whence my Lord *Coke* infers, that this was no Limitation, because then the Estate of *J. S.* would have been *ipso facto* determined, and the Estate cast upon *J. D.* and then *J. S.* could not have recovered; secondly, That this being a Condition, *J. D.* in Remainder could not enter for Breach thereof; and thirdly, Since it was adjudged likewise against the Heir that he could not enter for the Condition broken, therefore the Condition by the Limitation of the Remainder over must be destroyed. But *Perkins* in citing of this Case holds, that for Breach of the Condition the Heir might enter, and yet that the Remainder should not be defeated thereby, but that after the Death of *J. S.* it should well take Effect; and with him agrees *Dyer* in a like Case, and takes the Diversity between a Remainder by Deed with Li-

29 Aff. pl. 17.
Perk. §. 563.
Plow. 412.
Dyer 127.
10 Co. 40.
1 Rol. Abr.
 407, 474.

very,

very, and a Remainder by Will; for in Case of the Deed, the Entry for the Condition broken defeats the Livery, and by Consequence the Remainder which depends thereon; but in Case of a Will the Remainder is good, though the particular Estate never was good, or be defeated before the Remainder can take Effect, which must be as an executory Devise, not as a Remainder; for then it ought to vest when the particular Estate ends, and without Question as an executory Devise such Limitation over is good; and therefore, where *Plowden* in citing this Case holds it to be a Limitation, and not a Condition, because then by the Entry of the Heir the Remainder over would be defeated, this Reason holds not, when by construing it an executory Devise it may be made good, and yet the Condition be preserved.

10 Co. 41.
Dyer 127.
 1 *Rol. Abr.*
 472.

So where *A.* seized of Lands in Fee, having Issue three Sons, *B. C.* and *D.* devises the Lands to his Wife for Life, *sub conditione quod ipsa educabit pueros testatoris in eruditione et bonis moribus*, the Remainder to *D.* his Son in Tail, and dies; the Wife enters and breaks the Condition, and if *B.* as Heir should enter for the Condition broken, or if *D.* should enter as by Limitation, or if the Condition was destroyed by the Limitation over, were the Questions; *et per totam Curiam*, as my Lord *Coke* cites it, 'twas held to be no Limitation, because there are express Words of Condition; and if it be a Condition, then the Heir by his Entry for Breach thereof would defeat the Remainder likewise, which is not reasonable; therefore it was held, that by the Limitation over the Condition was destroyed; but in *Dyer*, which seems to be the same Case, 'twas held the Condition was not destroyed, but that for Breach thereof the Heir should enter, and hold during the Life of the Wife, and yet that after her Death *D.* should have the Land, which must be by Way of executory Devise.

Vide Title
Conditions,
 Letter (H)
 2 *Mod.* 26.

But however the Law might have stood when Devises of Lands were not very frequent, it is now settled, that in Case of a Will the Devisee in Remainder shall enter for Breach of the Condition annexed to the first Estate, be it devised to a Stranger, or to the Heir himself; and this Construction was introduced to support the Intent of the Testator, which otherwise in many Cases would be totally frustrated, and his Will set aside; and to make Way for such Construction they held, that by Non-payment of the Sum, or Non-performance of the Thing directed to be done, the Estate of the first Devisee determined immediately without Entry or Claim, and then the Remainder succeeded as if there had been no Condition at all; and so they changed the Condition into a Limitation, which determines the Estate to the first, and casts the Possession on the second by Way of immediate Remainder. Another Reason of this Construction might be, that seeing by the Limitation over the Land was given from the Heir at Law, and a new Heir made, it was now more reasonable that this *Heres factus* should take Advantage of the Condition, who was to have the Benefit of the Land, than the *Heres natus*, who by such Limitation over was excluded and shut out from inheriting the Land; and since none can enter for Breach of the Condition but the Heir, and now by giving him the Land the Devisee is become Heir thereof, therefore they construed such *Heres factus* to be the Heir who should enter for Breach of the Condition; and this was still more reasonable, when the first Devisee was himself Heir at Law, and was to perform the Condition; for otherwise, whether he performed it or not, the Remainder could never take place, since none could take Advantage of the Breach thereof but he himself who was to perform it; and by Consequence the Remainder, which was to arise upon the Breach of such Condition, would be prevented and destroyed, and the Intent of the Testator eluded.

Therefore where a Copyholder in Fee of Lands, descensible in *Borough English*, having three Sons and a Daughter, surrendered his Land to the Use of his Will; and after by Will devised his Land to his eldest Son in Fee, (for so it was construed) paying to each of his Brothers and his Sister 40*l.* within two Years after his Death, and dies; the eldest Son is admitted, and does not pay the Money within the two Years; the youngest Son enters; and it was adjudged, that his Entry was lawful, for though in a Will the Word *Paying* amounts to a Condition, yet if it should be construed a Condition, in this Case it would descend on the eldest Son himself, who was to perform it, and also take Advantage of the Breach thereof; and then whether he performed it or not, would be all one, since either way he was to have the Land; and so the youngest Children would be not only without Remedy for their Portions, but there would likewise be no Penalty upon the eldest to enforce the Payment thereof; which would frustrate the Intent of the Testator; therefore they construed the Devise to the eldest Son paying, &c. to be a Limitation to him till he made Default of Payment only, and no longer; and then by such Default, his Estate ceasing, the Nature of the Land revives and lets in the youngest Son, who was Heir by the Custom, since there was no Limitation over.

Wellock v. Hamond,
3 Co. 20.
Cro. Eliz.
204.
2 Leon. 114.
cited.
Cro. Jac. 592.
1 Rol. Rep.
219.
and in several
modern Books:

So where one seised of Lands in Fee, having Issue two Sons and a Daughter, devised to his youngest Son and Daughter 20*l.* apiece, to be paid by his eldest Son; and devised his Lands to his eldest Son and his Heirs, upon Condition, that if he did not pay the said Sums, that then the Land should remain to his youngest Son and Daughter, and their Heirs, and dies; the eldest Son enters, and does not pay the Money; and it was adjudged that the youngest Son and Daughter should have the Land; for first, This Devise to the eldest Son and Heir, being no more than what the Law gave him, without such Devise, was void; secondly, If this should be a Condition, it would be defeated by the Descent on the eldest Son, who was to perform it; therefore, thirdly, It was held to be a Devise to the eldest Son only, or no longer than, till he failed to pay the said Sums; and then to the youngest Son and Daughter; which gives them the Land by Way of Limitation, upon his failing to pay the said Sums; but *Vaugh.* in citing this Case holds, the Devise to the eldest Son being void, that then it was no more than if he had devised, that if his eldest Son did not pay such Sums, that then the Land should be to the Legatees; which makes a good future executory Devise, and the Land in the mean Time descends to the Heir at Law, as if no Devise had been made thereof. This Construction is well warranted by the Case, and answers the Purpose for which it was cited by *Vaugh.* but the other Construction, in making it an actual Limitation, is more natural and agreeable to the Words and Intent of the Will.

Hainsworth v. Pretty,
Cro. Eliz.
833, 319.
Moor 11. 891.
1 Rol. Abr.
411.
Vaugh. 271.
2 Mod. 26.

One devises Lands to *A.* his Wife, upon Condition that she does not marry; and if she marry or die, that then the Land shall remain to *B.* in Tail; and if *B.* died without Issue in the Life of *A.* that then the Land should remain to *A.* to dispose thereof at her Pleasure; and if *B.* survive *A.* and after dies without Issue, that then the Land should be divided betwixt the Sisters of the Devisor, and dies; *B.* dies without Issue, in the Life of *A.* and it was adjudged, that *A.* had a Fee by the Words *to dispose thereof at her Pleasure*; and that the Remainder to the Sisters was upon a Contingent, which never happened, *viz.* *B.*'s surviving *A.* but *B.* dying before *A.* the Devise of the Fee to *A.* was absolute; and though it was doubted if a Remainder might be limited to begin upon a Condition precedent, annexed to the first Estate, as in this Case it was, yet, being in a Will, it was held to be a new executory Devise of the Reversion, if the Estate had been defeated by the precedent Condition, and not as a Remainder; or at least the Condition should be construed to amount to a Limitation till she married;

1 Leon. 283.
Jennor v. Hardie.

and so the Remainder would be made good thereby upon such determinable particular Estate.

Plow. 27,
414.

One devises Lands deviseable to *A.* for Life, upon Condition that if his Heir, to whom the Reversion descends, disturb *A.* or the Executors of the Devisor of their Administration, that then the Land should remain to the Daughter of the Devisor and her Heirs, and dies; *A.* dies; the Daughter brings a Formedon in Remainder against the Son and Heir of the Devisor, and alleges, that he disturbed *A.* and the Executors also; and Issue was joined upon it; which proves that the Limitation to the Daughter was good as an Executory Devise, to take Effect upon such Disturbance; and the Fee in the mean Time descended to the Heir; and the Book adds, that this could not be a Condition, because then by the Descent to the eldest Son, who was to perform it, it would be destroyed.

Fry v. Porter,
or *Williams v.*
Fry, 1 *Vent.*
199.
2 *Lev.* 21.
1 *Mod.* 86,
300.
2 *Keb.* 756,
787.

A. having Issue three Sons and two Daughters, and the eldest Daughter having Issue *B.* and the youngest Issue *C.* *A.* by his Will devises Lands to his Wife for Life; and after her Death to my Grandchild *B.* and the Heirs of her Body; provided always, and upon Condition, that she marry with the Consent of *D. E.* and *F.* or the major part of them; and in case she marries without such Consent, or dies without Issue, then I bequeath the said Premises to *C.* and dies; *B.* marries *G.* without Consent of any of the Persons named for that purpose, and thereupon *C.* enters upon her; and it was held clearly to be a Limitation to her till she married without such Consent, and not a Condition; for then it would descend to the Heir at Law, and he for Breach thereof might enter and defeat the Limitation over; therefore it was construed to be a Limitation, and that the Marriage, without such Consent, determined her Estate-Tail and cast the Possession upon *C.* by way of immediate Remainder.

2 *Mod.* 7.
Shuttleworth
v. Barber.

One devises 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.* and dies; *A.* enters into the Lands devised to *B.* and claims them; and it was held first, That this was a sufficient Breach to give Title to *B.* secondly, That if this should be a Condition, it would, by the Descent thereof to *A.* who was to perform it, and also to enter for the Breach thereof, be merged and defeated; therefore it was held to be a Limitation which determined the Estate of *A.* and cast the Possession upon *B.* without Entry.

Dyer 314. *pl.*
96.

This Construction hath likewise prevailed in Conveyances to Uses.

As where one levied a Fine to the Use of *A.* and *B.* his Wife for their Lives, and the Life of the longer Liver of them; Remainder after their Deaths for six Months, to the Use of the Executors of *A.* and after the six Months ended, then to the Use of *C.* and *D.* his Wife, and the Heirs of their two Bodies; and for Default of such Issue, to the Use of *A.* and his Heirs; provided that if it happen the said *A.* at any Time after have Issue of his Body, or any Wife of the said *A.* at the Time of his Decease, to be *ensient* with any Issue begotten by the said *A.* that then after such Issue had, and after 500 Marks paid, or tender'd to *G.* and refused, within six Months next after the Birth of such Issue, that then the Use of the said Lands, immediately after the Decease of the said *A.* and *B.* and the said six Months, shall be to the said *A.* and the Heirs of his Body; and for Default of such Issue, to the right Heirs of *A.* then *B.* dies, and *A.* takes another Wife; and by *Plow.* and *Dyer,* till Issue and the six Months past, *A.* hath not any longer Estate than he had before; but *Quere* if by the first Limitation *A.* hath not the Fee till Issue; and then upon Payment, or Tender and Refusal of the 500 Marks, and the six Months past, the Use limited to *C.* and *D.* in Tail, with Remainders to *A.* in Fee, does not cease, and settle in *A.* in Tail with Remainder to him in Fee as by Limitation? For

where *A.* and *B.* joined in a Fine to the Use of *A.* in Fee, if *B.* did not pay to *A.* 10*l.* before such a Day, and if he did, then to the Use of *A.* for Life, Remainder to *B.* in Fee; in this Case it was held, that if *B.* did not pay the 10*l.* before the Day, that *A.* should have the Fee absolutely; which proves that he had it before *sub modo*, or subject to be determined upon such Payment, and a Use may well be limited to cease in one, and to go over to another; and the Statute of 27 *H.* 8. carries the Possession after it; and in the first Case the Use being expressly limited to *A.* in Fee, must, as it seems, vest in him till the Contingency happens, which determines that Use, and gives him another instead of it, to which the Statute carries the Possession accordingly; but *Quere.*

One levies a Fine, the Conufee grants and renders the Lands to the Conufor in Tail, upon Condition that he and the Heirs of his Body should bear the Standard of the Conufee when he went to Battle, and if they failed, that it should remain to a Stranger in Fee; this was held a good Remainder, to begin upon such Condition; but *Quere* of this Case, unless it be intended by Way of Limitation of Use, which may cease in one, and be limited to another.

Upon a Writ of Error out of *Ireland* the Case was this; *A.* seised of Lands in Fee, and having Issue only one Daughter, named *B.* by Lease and Release conveys his Lands to the Use of himself for Life, and after his Death to the Use of *B.* in Tail, provided that she married with the Consent of the Trustees, or the major Part of them, some Person of the Family and Name of *Fitzgerald*, or who should take upon him that Name immediately after the Marriage; but if not, then the Trustees to raise a Portion out of the said Lands for *B.* and the Lands to remain to *C.* *A.* dies and *B.* marries one who neither was nor took upon him the Name of *Fitzgerald*; and the only Point on which Judgment was there given, was the Want of Notice in *B.* of the Settlement, without which, being Heir at Law, and so having a Title by Descent, she was not bound *ex officio* to take Notice of the Condition; but this fully proves the Point in Question, that if she had had sufficient Notice of the Condition, her breaking of it had determined her Estate, and cast the Possession upon *C.* who was next in Remainder.

3. Between a Limitation over in Case of a Will, and where no Limitation is made over.

A. seised of Lands, and having Issue two Daughters only, devised Lands to the eldest and her Heirs, and that she pay to her youngest Sister yearly 30*l.* and *per Cur.* this was a Condition, for otherwise the youngest Sister would have no Remedy for the Rent; and being a Condition, it descended upon both the Daughters as Heirs, and for Breach thereof the youngest might enter into a Moiety of the Land with her Sister; for there being no Limitation over to the youngest for Default of Payment, if she had not been equally Heir with her Sister, she would have been without Remedy.

So where a Copyholder in Fee of Lands in *Borough English*, having Issue three Sons, *A.* *B.* and *C.* surrendered his Land to the Use of his Will, and after devised them to *B.* in Fee, upon Condition that he should pay to his four Sisters 20*l.* a-piece at their full Age, and dies; *A.* the eldest Son hath Issue two Daughters, and dies, *B.* is admitted, and does not pay the 20*l.* a-piece; *C.* the youngest Son enters; and it was objected that this was a Limitation to *B.* till he failed to pay, &c. and so should go to the youngest Son, who was inheritable by the Custom; but it was adjudged to be a Condition, and that for Breach thereof the Daughters of *A.* the eldest Son should enter; but it seems that

that after such Entry the Heir by Custom shall enter upon them; but *Quære* if the Devise had been to the eldest Son upon such Condition, this had been a Limitation, which upon Non-payment would have carried the Land to the youngest Son who was Heir by Custom; for otherwise, if it should be a Condition by the Descent to the eldest Son, 'twould be merged and defeated; but *Quære* if the Land had been descendible to the eldest Son as other Inheritances at Common Law are, and such conditional Devise had been made thereof to the eldest Son without any Limitation over for Default of Payment, *Quære* if in such Case the Legatees had any other Remedy than by Bill in Equity for their Legacies, for the Land not being given to them, it will be hard to maintain, that for Breach of the Condition the Land should go over to them; therefore in such Case it should seem they have no Remedy but in Chancery, where the eldest Son will be looked upon as a Trustee for the Payment of so much Money to them.

4. Between Remainders that are to arise upon Conditions agreeable to the Rules of Law, and such as are to arise upon Conditions repugnant and against the Rules of the Law.

1 Co. 83.
Mo. pl. 831,
859.
6 Co. 40.
9 Co. 127.
Cro. Eliz. 378.
Cro. Jac. 698.
10 Co. 36.

If one by his Will, by Covenant to stand seised, Feoffment to Uses or other Conveyance whatsoever, gives or conveys Lands to or to the Use of *A.* his eldest Son and the Heirs Male of his Body, Remainder to or to the Use of *B.* his second Son and the Heirs Male of his Body, and so to the third and other Sons in like Manner; and after adds a Proviso, that if *A.* or his Issue, or any other of his Sons in Remainder, shall attempt to alien, &c. or shall alien, &c. by which any Estate shall be barred, &c. that then immediately after such Attempt, and before any Act executed, or immediately after such Alienation, the Use and Estate of him so attempting or aliening, &c. shall cease as if he were naturally dead, and that then it shall remain immediately to such Persons to whom it ought to come by the Intent of the Indenture or Will, or to him in the next Remainder, &c. in this Case the Remainders are actually vested as Remainders in all the Sons; but as to their taking Effect in Possession upon Breach of the Condition, or sooner, or otherwise than they would have done if there had been no Condition at all, the Proviso or Condition is totally repugnant and against Law; for be it either a Condition or a Limitation, it can't carry over the Estate to him in Remainder upon Breach thereof; for if it be a Condition, then the Donor and his Heirs only can take Advantage of the Breach thereof, not those in Remainder who are Strangers; and if the Donor or his Heirs enter for Breach of the Condition, they thereby defeat not only the present Estate, but all Remainders dependant thereupon; if it be a Limitation till they alien only, yet it is repugnant, that when by the Alienation the Estate is actually settled and vested in the Alienee, that the same Alienation should at the same Time vest and settle the Estate in another; and for the Words *attempting, endeavouring, or going about to alien*, they are of too uncertain a Signification to receive any Countenance, and what shall be said a sufficient Attempt, and what not, is hard to determine; besides that, all such Clauses tend to Perpetuities, to fix Estates in Families unalienable, that they can upon no Exigencies nor Emergences whatsoever dispose thereof, to provide for Payment of their Debts, their Wives or younger Children; and also they destroy and enervate the Force of Fines and common Recoveries, the great and common Assurances, whereby Men hold their Estates, and therefore with just Reason all such Clauses are exploded and disallowed.

One devises Lands to his Son *A.* and the Heirs Male of his Body, provided that if *A.* or any Issue Male of his Body, alien, give or grant the Premises to any Person for above twenty Years, &c. that then the said Premises, for Default of such Issue Male of the Body of *A.* immediately upon every such Alienation, Gift or Grant, shall remain and come to my Son *B.* and the Heirs Male of his Body, &c. and dies; *A.* enters and makes a Lease for a thousand Years, and dies without Issue Male, leaving *C.* his Daughter and Heir; *B.* enters upon her, *C.* re-enters; and 'twas held first, That the Remainder to *B.* was not to take Effect but upon Alienation and Death without Issue Male, and not upon the Death of *A.* without Issue Male only; secondly, That the Remainder being limited to take Effect upon such Alienation should never arise, because by the Alienation the Land is given to another, and then it is repugnant to make the Alienation to one sufficient to carry the Land to another.

Cro. Jac. 61.
10 Co. 86.
Moor 772.
Loveit v. Goddard.

One devises Lands to *A.* in Tail, upon Condition that he shall not alien, and that if he dies without Issue it shall remain to *B.* in Fee; after *A.* aliens, yet *B.* can't enter for the Condition broken, but the Heir at Common Law, because this is not a Limitation, but a Condition, by *Coke* and *Warburton*; but *Quere* if *A.* after dies without Issue, if *B.* may not enter; for though the Heir enter for the Condition broken, and hold till the Estate-Tail determined, yet the Remainder to *B.* seems good by Way of executory Devise, to arise out of the Reversion vested in the Heir by his Entry for Breach of the Condition, and not as an immediate Remainder, because it is not to take Effect till the Death of *A.* without Issue, and yet the Estate-Tail of *A.* by Breach of the Condition may determine long before.

1 Rol. Abr.
412. Skin v. Lady Bond.

One devises Lands to *A.* and the Heirs Male of his Body, provided that if he does attempt to alien, that then immediately his Estate shall cease, and *B.* shall enter; after *A.* makes a Feoffment in Fee, and thereupon *B.* enters; and it was adjudged in the Grand Sessions against *B.* whereupon he brought a Writ of Error; and first it was agreed, That Tenant in Tail could not be restrained from Alienation by Fine or Recovery; secondly, That a bare Attempt would be no Breach; but then it was argued, that he might be restrained from aliening by Feoffment, or other Act which would amount to a Tort, and make a Discontinuance, and that this Proviso imports as much; and therefore the Feoffment was a Breach, for that was an Attempt, and more; and that therefore it should determine the Estate-Tail *quasi* by Limitation, which would give an immediate Title of Entry to *B.* by executory Devise, and that the Current of Authorities, since *10 Co.* 40. are, that a Condition in a Will shall be taken as a Limitation; but the whole Court held the Condition void, because *non constat* what shall be adjudged an Attempt, and how it should be tried; and so the Judgment was affirmed.

1 Vent. 321.
3 Keb. 787.
Piers v. Wynn, et vide Plew.
408.
Moor 543.

But where one having two Sons, devised *Blackacre* to his eldest in Tail, and *Whiteacre* to his youngest Son in Tail, *proviso semper* that if any of his Children alien or demise any of his Lands to them devised before they come to the Age of thirty Years, then the next Brother shall enter; the eldest enters, and lets *Blackacre* before his Age of thirty Years; and this was held a good Limitation till they aliened, and that upon Alienation it should go to the other; but this Case differs from the preceding Cases, for here was no total Restraint of Alienation, but only till they arrived to such an Age as they might be presumed to have full Discretion, and to know well what they did, which was but a reasonable Restraint; but in that Case where the younger Brother entered into *Blackacre* by Virtue of the Limitation, and aliened it before his Age of thirty, it was held that the eldest Brother

2 Leon. 38.
Mo. 271.
Spittle v. Davis.

ther could not enter into it again, because by the Entry of the younger Brother that Part was of the Limitation for ever.

1. *P. Wil.*
104.
2 *Vern.* 635.
Collins v.
Plummer.

Upon a Marriage-Settlement *A.* is made Tenant for Life, Remainder to the Heirs of his Body by his Wife *Jane*; and in the same Deed *A.* covenants not to suffer a Recovery, but that the Lands shall be enjoyed according to these Limitations; *A.* notwithstanding his Covenant suffers a Recovery, and devises the Lands; and it was held in Chancery, that *A.* being Tenant in Tail, and as such having Power to suffer a Recovery, the Lands devised shall not be affected, but that the Covenant was good, and should therefore bind his Assets.

5. Between such Words as actually make a Condition, and such as are only descriptive of the Time and Manner when and how the Remainders are to arise.

Plow. 23 to
29.
Co. Lit. 378.

As where one made a Lease to *A.* for Life, Remainder to *B.* for Life; and if it happen *B.* dies before *A.* then the Lands to remain to *C.* for Life; *B.* dies in the Life of *A.* and then *A.* dies, and if the Remainder to *C.* was good, was the Question; and 'twas argued that it was not, because it was appointed to begin during the particular Estate, where it ought to be limited to take Effect after the particular Estate ended; and therefore a Lease for Life to *A.* Remainder to *B.* for Life, and if *A.* dies, that then it shall remain to *C.* in Fee, this Remainder is void, because then it would subvert the Remainder to *B.* and therefore is repugnant to the Estate first limited to *B.* So a Lease to two for their Lives, Remainder after the Death of the first of them to *C.* in Fee, is void, because it would defeat the Survivorship given by the first Words; so here, secondly, it was argued, That this Remainder was void, being to begin upon a Condition, whereof none should take Advantage but the Lessor and his Heirs; thirdly, That this Remainder being to begin upon a Condition precedent, did not pass out of the Lessor at the Time of the Livery, as all Remainders ought, and therefore also was void. But on the other Side it was argued and adjudged, that first, Here was no Repugnancy, for it was not intended that if *B.* died, living *A.* that then *C.* should have the Land immediately, but that then it should remain to *C.* as a Remainder, *viz.* after the Death of *A.* and as *B.* would have had it if he had lived; secondly, That this was not a Condition, but a Limitation when the Remainder should begin; for if it were a Condition, it would go in Restraint of the Thing given upon something to be done or not done by the particular Tenant, which here it does not; therefore if one makes a Lease to *A.* for Life, upon Condition that if *B.* marries the Daughter of the Lessor during the Estate for Life, that then it shall remain to *B.* this is no Condition to defeat or abridge the Estate of *A.* but is only a Limitation when and how the Remainder to *B.* is to take Effect. So if a Lease were made to *A.* for Life, upon Condition that if *B.* pay to the Lessor 20*l.* that then after the Death of *A.* the Land should remain to *B.* this is good, because it does not go in Abridgment of the first Estate; but if it was, that then immediately upon such Payment the Land should remain to *B.* this would be void, because this would go in Destruction of the first Estate, without any Thing to be done or not done by him, and of such Condition the Lessor and his Heirs only can take Advantage, not a Stranger, and therefore the Remainder to arise thereby is void. So if a Lease be made to two for their Lives, upon Condition that if one of them died within seven Years, that then after the Death of the other the Land should remain to a Stranger in Fee, this is a good Remainder, being not to begin upon a Condition, but upon a Limitation or *Modus* appointed by the

Lessor; and they all agreed, that a Remainder to begin upon an impossible or illegal Limitation or Condition would be void; as upon a Condition that if *A.* the first Lessee alien, or if *B.* kills a Man, that then it should remain to him, these Remainders shall never arise. So the Case of *Plesington*, who made a Lease for Years upon Condition that if he aliened the Reversion, that then the Lessee should have it to him and his Heirs; this Limitation was void, because repugnant, that when he aliened the Reversion to one, the same Alienation should carry the Land to another; also the better Opinion seems that the Remainder passed out of the Lessor presently, and is carried into Abeyance, to be executed when the Contingency happens.

A. had Issue two Sons *B.* and *C.* and *B.* had Issue a Son *D.* and *C.* had Issue a Daughter *E.* then *A.* by Will devises Lands to his Son *B.* for Life, and after his Death to his Grandson *D.* and the Heirs Male of his Body; and if he die without Issue Male, then to his Granddaughter *E.* in Tail, and charged it with some Payments; then comes this *Proviso*, Provided that if my Son *C.* should have a Son by his now Wife, then all my Lands shall go to such Son and his Heirs, he paying as *E.* should have done; afterwards a Son was born; and the Question was, Whether the Estate limited to *B.* the eldest Son, was thereby defeated? But *per Cur.* this *Proviso* did only extend to the Case of *E.*'s being intitled, and had no Influence on the first Estate limited to the eldest Son.

A. by his Will devised Lands to *B.* his second Son, and if he depart this World, not having Issue, then I Will that my Land shall remain over to another, and died; *B.* had Issue *C.* and died; then *C.* died without Issue; it was urged, that the Remainder could not take Effect, because it was limited to take place on a Condition Precedent, which in this Case had not happened; for *B.* left Issue, and so did not depart the World not having Issue, as the Words of the Will are; yet, *per Cur.* it was adjudged, That though literally he could not be said to depart the World not having Issue; yet, since that Issue died without Issue, by the Intent of the Will, and the Construction of Law, he was dead without Issue whenever the Issue failed; as in a Formedon in Remainder or Reverter, though the Donee hath Issue, yet, if after the Estate-Tail determines for want of Issue, the Writ supposes that the Donee died without Issue; *a fortiori* in Case of a Will such Construction shall be made to support the Intent of the Testator.

So where *A.* upon Marriage conveyed Lands to the Use of himself for Life, Remainder to his first and other Sons in Tail Male successively; and if he dies without Issue Male, then to the Use of the Daughters for one hundred Years, for raising 1500*l.* for their Portions; *A.* had Issue a Son and a Daughter, and died; and after the Son died without Issue; and if the Daughter should have the Term was the Question; and it was argued, That he should not; because he did not die without Issue Male, for he left a Son, though such a Son after died without Issue; and it could not be intended that whenever the Issue Male failed that the Daughters should have their Portions, for that might be 100 Years after when all the Daughters were dead; and such Intention would make it ill in its Creation. But it was answered and adjudged, that *quandocumque* the Issue Male failed, the Husband in this Case may be said to be dead without Issue Male; and the Expectation of such a Term in Remainder is for their Advantage in Marriage; and such a Term may be as well created to arise upon Failure of Issue Male, as a Power to sell upon Failure of Issue Male; which hath been adjudged to be good.

2 Mod. 293;
Evered v.
Hone.

1 Leon. 285;
3 Leon. 106.
Cro. Eliz. 26.
Lee v. Vincent.

1 Lev. 35.
1 Vent 229.
1 Sid. 102.
Goodyer v.
Clerk.

(I) In What Cases a Remainder or Reversion shall be subject to the Acts or Charges of the particular Tenant.

1 Co. 62.
Pop. 6.
Moor 154.
2 Co. 52.
6 Co. 42.
Plow. 350.

A. Tenant in Tail, Remainder to *B.* in Tail, *B.* grants a Rent-Charge, *A.* suffers a common Recovery, and dies without Issue; the Grantee of the Rent-Charge distrains the Alienee of *A.* and the Distress was held unlawful. First, because the Alienee comes in under the Tenant in Tail in Possession, whose Estate was not subject to the Charges of him in the Remainder; for if the Tenant in Tail in Possession had made only a Feoffment in Fee, or a Lease for Years first, and then after a Feoffment in Fee, and died without Issue; yet, till the Feoffment avoided, the Leases or Charges of him in the Remainder should not take place either against the Lessee or Feoffee of the Tenant in Tail. Secondly, the Reason that these Leases or Charges out of such Remainder are good, is for the Possibility of the Remainders coming into Possession; for of itself it is a thing not manurable or visible, and consequently not liable to any Distress; and therefore if it be destroyed before it comes into Possession, the Charges granted thereout must fall too, as the Shadow fails with the Substance. Thirdly, another Reason is, that he who claims only out of such Remainder after an Estate cannot falsify the Recovery had against the Tenant in Tail, for the Recovery bars the Remainder itself; so that he cannot falsify or any way plead to defend his Remainder, unless he were vouched, nor by Consequence can those who derive their Interest under him.

Cro. Eliz.
718. *Pled-*
gyard v.
Lake.

But where *A.* was Tenant for Life, Remainder to *B.* in Tail, and *B.* granted a Rent-Charge, or made a Lease for Years, to begin after the Death of the Tenant for Life; and *A.* the Tenant for Life, after suffered a common Recovery, though with Voucher of *B.* in the Remainder in Tail; yet the Lease or Rent shall take Place according as they were made or granted, for there such a Lessee or Grantee may falsify the Recovery either by the Common Law or Statutes; for the Tenant for Life hath no Power to bar the Remainder, without the Assent or Concurrence of him in the Remainder, as the Tenant in Tail in the Possession hath; and his Assent or Concurrence cannot operate to defeat his own Acts, any more than a Recovery against Tenant in Tail in Possession can defeat his own Leases or Grants; because in both Cases the Recoverer comes in by the Tenant in Tail, whether in Possession or Remainder, who alone has Power over the Estate, and shall be bound by his own Acts.

1 Co. 67.
Co. Lit. 338.
7 Co. 65.
1 *Ld. Raym.*
521.

If *A.* be Tenant for Life, Remainder to his first and other Sons in Tail Male; Remainder to *B.* in Fee; and *A.* before the Birth of any Son makes a Lease for Years, grants a Rent-Charge, acknowledges a Statute, &c. and afterwards surrenders to him in the Remainder, or makes a Feoffment, or commits other Forfeiture, for which he in the Remainder enters; yet he shall hold the Estate subject to the Charges of the Tenant for Life; for these being his own Acts to determine his Estate, shall not turn to the Prejudice of the Lessee or Grantee, who is a Stranger; but his Estate for Life shall to this Purpose be still said to have Continuance, though as to all other Purposes it is determined; and therefore the contingent Remainders not being to arise out of the Estate for Life, but depending thereon till they come *in Esse*, are, by the Determination thereof before they come *in Esse*, destroyed and gone.

So where Lessee for Years of an Advowson granted the next Avoidance, and after surrendered the Term to the Lessor, yet this shall not defeat the Grantee of the next Avoidance; because the Surrender was his own Act, before which there was a good Grant, and that shall bind him in the Remainder, who to this Purpose comes in under the Estate of the Grantor.

8 Co. 145.
Davenport's Case.

So where two Jointenants for Life were, and Judgment in Debt was given against one of them, and then he released to the other Jointenant, who died, and he in the Reversion entered; yet it was adjudged, that he should hold a Moiety subject to the Judgment, during the Life of the Jointenant who released; for as to this Purpose, the Estate for Life in a Moiety hath still Continuance, though to all other Purposes the Lessor was in of his antient Reversion for the whole, and the Jointenant to whom the Release was made, was in by the first Lessor, and not by him who made the Release.

6 Co. 79.
Ld. Aburgavenny's Case.

One seised of Lands in Fee grants thereout a Rent-Charge to *A.* for Life, and after makes a Lease to *A.* for 500 Years of the same Lands; then *A.* surrenders his Lease to the Lessor, who accepts it; and after *A.* distrains, and avows for the Rent; and it was held he might, because by the Lease for Years the Rent was only suspended, and now, by the Surrender of that Lease the Suspension is taken off, and by Consequence the Rent revived; as if the Lease for Years had been made upon Condition only, by Breach of the Condition, the Lease being determined, the Rent would revive; though as to any Stranger who might have Prejudice by such Surrender, the Lease for Years shall still be said to have Continuance.

Cro. Car. 161.
Hutt. 91.
Sir Edw. Pere v. Pemberton.

Tenant for Life of a Copyhold, Remainder in Fee; he in Remainder makes a Lease by Parol (which, as it seems, must be warranted by Custom); then the Tenant for Life, and he in the Remainder, join in a Surrender to the Use of him in the Remainder in Fee; and the Question was, If this was a good Lease, and should take Effect in the Life of the Tenant for Life? And it was held that it should; for it was a good Lease against him in the Remainder; and by the Surrender of the Tenant for Life, to the Use of him in the Remainder, his Estate is merged in the Fee, and cannot hinder the Lease taking Effect, more than if he were dead; and the whole being in his Hands can have no Privilege severed from the Inheritance; as if he in the Remainder grant a Rent-Charge, and after the Tenant for Life surrenders, the Rent shall begin presently.

Cro. Eliz. 160.
Dove v. Williot, & vid. Co. Lit. 338.
Cro. Eliz. 547.

So where one made a Lease for Years, and after granted the Reversion to another for Years, to begin after the End or Expiration of the first Term; and then, during the Continuance of the first Term, made a Lease for Life to the first Lessee; whereupon the Grantee for Years of the Reversion brought an Ejectment; and it was held maintainable, because the first Lease for Years being, by the taking such Lease for Life, surrendered and gone, by the Act and Concurrence of the Lessee and Lessor, his Grant of the Reversion comes next to take Place.

Plow. 198.
Wrotley's Case.

If a Woman Inheritrix takes a Husband, and they have Issue a Son, and the Husband dies, and she takes a second Husband who lets the Lands to one for Life, and then the Tenant for Life surrenders his Estate to the second Husband, the Son may enter upon the second Husband during the Life of the Tenant for Life; because as to the Son the Estate for Life is drowned, and by Consequence the Inheritance, which the Husband gained wrongfully by making such Lease, is now by the Surrender thereof vanished and gone; and then the rightful Inheritance falls upon the Son, and he may enter as if no such Lease had been made, that which hindered his Entry being taken out of the Way. But if a Reversion be granted with Warranty, and the Tenant for Life surrenders his Estate for Life to the Grantee, yet shall not the Grantee have Execution

Lit. §. 636.
Co. Lit. 333.

in Value upon the Warranty against the Grantor, during the Life of the Tenant for Life. So if the Tenant for Life surrender to him in the Remainder, or Reversion, within Age, yet he shall not have his Age, because in these Cases such Surrenders would work a Prejudice to a third Person, which the Law will not allow; though when it is for the Benefit of a third Person, he shall take Advantage thereof.

¹ *Mod.* 108.

Raym. 236.

² *Lew.* 28.

³ *Keb.* 274.

287. *Benson v.*

Baron Hudson,

S. C.

A. seised of Lands in Fee makes a Feoffment to the Use of himself and the Heirs Male of his Body; Remainder in Tail to several others, Remainder to his own right Heirs; *Proviso*, that if there shall be a Failure of Issue Male of his Body, and that *B.* be dead, and *C.* be married, or of the Age of twenty-one Years, then she shall have 200*l.* per *Ann.* for ten Years; then *A.* dies, leaving *D.* his Son, who makes a Lease for one thousand Years, then levies a Fine and suffers a Recovery, and afterwards dies without Issue Male; and the Contingencies did all happen; and The Questions were, First, if this Rent was barred by the Recovery? Secondly, If the Lease for one thousand Years was chargeable with it? And it was adjudged *per tot Cur.* that this Recovery that barred all the Remainders did also bar this Rent, which was to arise out of them; for though it were to arise precedent to the Remainders, yet it was subsequent to the Estate-Tail of him who suffered the Recovery; and therefore being chargeable upon, and to arise only out of these Remainders, and they being barred by the Recovery, so was this Rent also, which was to arise thereout; and for the very same Reasons given in *Capell's Case*; which it was said was the same Case with this. Secondly, it was adjudged that this Rent could not be chargeable upon the Lease for one thousand Years; because that was derived out of the Estate-Tail, which was precedent to and Paramount the Commencement of the Rent; and the Lessee was in after the Remainders barred by the Recovery, in Continuance of the first Estate-Tail; which Lease being before the Recovery, the Recoveror took the Estate subject thereto; and they agreed that if a Gift in Tail be made, rendering Rent, or upon Condition of Re-entry, that no Recovery by the Tenant in Tail will bar the Rent or the Condition, they being coeval with the very Estate-Tail itself; and therefore the Recoveror, who comes in in Continuance of the Estate-Tail, takes it subject to such Rent or Condition; and yet, in this Case of the Rent, the Reversion is barred, though the Rent continues, as a Rent-Service distrainable for at Common Law; but the Condition they say must be a Condition annexed to the Rent, and not a collateral Condition; for that will be barred with the Reversion by a common Recovery.

(K) **To What Purposes the Remainder is accounted but as one with the particular Estate, and Where they are regarded as several Estates.**

Heb. 71.

IF one makes a Lease to *A.* for Life, Remainder to *B.* for Life in Tail, or in Fee, and *A.* dies, the Law adjudges the Freehold in *B.* presently, and he is Tenant to every *Præcipe* till he disclaims or disagrees to it; for both the particular Estate and Remainder make but one Degree, and a Writ of Entry *sur Disseisin* may be brought against him in Remainder after the particular Estate ended, as well as it might against the particular Tenant himself; and if there be Tenant for Life, Re-

mainder over of a Seignory, and the Tertenant aliens in Mortmain, they both shall have but one Year and a Day for Entry; and if Termor or Guardian lets for Life, the Remainder over, and he in the Reversion agrees, he is a Disseisor as well as the Tenant for Life.

If a Disseisor makes a Lease for Life, Remainder over in Fee, and the Disseisee release to the Tenant for Life, this shall enure to him in the Remainder, because by the Release all his Right is gone; but a Confirmation only of the Estate for Life shall not enure to him in the Remainder, because nothing is confirmed but the Estate for Life, and then the Remainder lies open without any Sanction given to it; but in the other Case, by the Release of the Disseisee to the Tenant for Life, all his Right is gone, and the Tenant for Life doing Wrong only during his own Estate, the Release can extend only to cure that Wrong, and therefore for the Residue must fall into the Remainder. So it is if Feoffee upon Condition makes a Lease for Life, Remainder in Fee, and the Feoffor release the Condition to the Lessee for Life, this shall enure also to him in Remainder, because the Condition went to the whole Estate, and therefore being discharged must exonerate the whole Estate, whereof he in the Remainder has Part.

If the Disseisee confirm the Estate of him in the Remainder, without any Confirmation made to the Tenant for Life, yet the Disseisee can't enter upon the Tenant for Life, because the Remainder is depending thereon; and if he should defeat the Estate for Life, he must also defeat the Remainder which he has confirmed; but this he can't do, therefore neither can he defeat the Estate for Life.

So if a Disseisor make a Lease for Life, saving the Reversion to himself, and the Disseisee confirm the Reversion of the Disseisor only, yet he can't enter upon the Tenant for Life, because then he must draw out and defeat the Reversion likewise, which against his own Confirmation he can't do, (and yet such Reversion is not depending upon the Estate for Life, as the Remainder is, but is paramount it); for if a Disseisor make a Lease for Life, and after levy a Fine with Proclamations, and five Years pass, so that the Disseisee is barred for the Reversion, he shall not enter upon the Lessee for Life.

If a Reversion or Seignory be granted to one for Life, Remainder to another in Fee, Attornment to the Tenant for Life is good to him in the Remainder likewise, because both make but one Estate and Degree; and for this Reason it is, that if no Attornment be to the Tenant for Life, but after his Death Attornment is made to him in the Remainder, this is void, because both making but one Estate, if the first be not completed, the other can't take Effect.

Admittance of the Tenant for Life of Copyhold Lands is also a good Admittance of him in the Remainder to all Purposes, except the Lord's Fines, if there be a Custom for two several Fines; and though the first Tenant were only for Years, yet Admittance of him is such an Admittance of him in the Remainder likewise, as shall make a *possessione fratris* of the Remainder, and carry it to the Sister of the whole Blood.

Custom of a Manor was, that upon Surrender of Copyhold Lands made to one and his Heirs, if three Proclamations passed, and he did not come in to be admitted, the Lord should have it as forfeited; and there a Surrender was made to the Use of *A.* for Life, Remainder to *B.* in Fee; *A.* suffers three Proclamations to pass without coming in to be admitted; yet it was held, that this should not forfeit the Estate of *B.* in Remainder, for they are divided Estates; and the Custom being to forfeit one Estate only, shall be taken strictly, and intended of an intire Fee-Simple in Possession.

Lit. § 521.
Co. Lit. 297.

Lit. §. 521.

Co. Lit. 298.

Co. Lit. 310.
2 *Co.* 67.

Cro. Eliz.
504, 662.
Moor, pl. 448,
658.
1 *Rel. Abr.*
505.
4 *Co.* 22.
Cro. Jac. 31.
1 *Mod.* 102,
120. 1 *Vent.* 260. 2 *Lev.* 107.

Cro. Eliz.
879.
Yelv. 1. *Bos-*
pool v. Long.

And

Moor, pl. 149. And yet where Copyholds were deviseable for three Lives *successive*,
Cro. Jac. 437. whereof each to take in Order as they were named; and the Custom
 was, that they could not cut Timber; the first Tenant for Life cuts
 Timber; this was held a Forfeiture of all their Estates; the Reason
 whereof may be, that this was but one intire Estate in Possession at
Cro. Eliz. 598. first, though the Custom after shares and divides it to go in Succession;
 for it is held, that if a Copyholder for Life commit Waste, this shall
 be no Forfeiture of the Estate of him in Remainder; wherein this
 Diversity appears, that for the Benefit of him in the Remainder his
 Estate is accounted as one with the particular Estate, and therefore
 one Admittance goes to both; but as to any Prejudice which he may
 receive by the Act of the particular Tenant, his Remainder is ac-
 counted as a several and divided Estate, and shall not share in it.

(L) Of cros Remainders, or those arising by Implication and Construction of Law.

Dyer 303. **A.** Having Issue five Sons, his Wife being *ensient*, devised two Thirds
 of his Lands to his four younger Sons, and the Child *in ventre*
(a) That each *sa mere* if he were a Son, and their Heirs; and *(a)* if they all die
 shall be Heir without Issue Male of their Bodies, or any of them, that the Lands
 to the other, shall revert to the right Heirs of the Devisor; by this Devise the younger
 makes cros Sons were Tenants in Tail in Possession, with cros Remainders in Tail
 Remainders. to each other, and no Part shall revert to the Heirs of the Devisor
Hob. 33, et till all the younger Sons be dead without Issue Male of their Bodies.
vide Cro. Jac.
260, 656,
695. 1 Bullf. 62. Owen 25. 1 And. 38. Savil 92. Moor 637. Raym. 455. 1 Vent. 224.

Cro. Jac. 655. But where one having Issue three Sons, *A. B.* and *C.* devises one
2 Rol. Rep. House to *A.* and his Heirs, another House to *B.* and his Heirs, and a
281. Gilbert third House to *C.* and his Heirs, provided that if all his said Chil-
v. Willy. dren shall die without Issue, that then all the said Messuages shall re-
Cart. 173. main and be to his Wife and her Heirs; and it was held by three
S. C. cited, Judges, that upon the Death of one of the Sons without Issue the
 and admitted Wife might enter, and that here there were no cros Remainders from
 to be Law. one Son to another, because being devised to them severally by ex-
 press Limitation, there shall be no greater Estate to them by Implica-
 tion; but *Lea Ch. Just.* doubted; and *Dodderidge Just.* said, that tho'
 perhaps cros Remainders may be by Implication where there is a De-
 vise to *(b)* two several Persons, yet not so if to more; for when one
 dies there can't be several Estates by Moieties to several Persons, and
 when another dies, Remainder again to another, because of the Incer-
 tainty and Inconvenience; and that it was never seen in any Book,
 where an Estate is limited to divers, that there could be cros Re-
 mainders.

(b) As in
4 Leon. 14.

Dyer 330. One seised of Lands in Fee, by his Will in Writing devises *Black-*
1 Benl. 212. *acre* to *A.* his Daughter and her Heirs, and *Whiteacre* to his Daughter
1 Rol. Abr. *B.* and her Heirs; and if she die before the Age of sixteen Years,
 839. living *A.* then *A.* shall have *Whiteacre* to her and her Heirs; and if *A.*
Vaugh. 267. die, having no Issue, living *B.* then *B.* shall have the Part of *A.* to
Glatche's Case. her and her Heirs; and if both die, having no Issue, then to *J. S.* and
 his Heirs, and dies; *B.* attains her Age of sixteen Years, and then
 dies without Issue in the Life of *A.* And first it was held by three Ju-
 stices against *Dyer*, That the Daughters had an Estate-Tail upon the
 whole

whole Will, and not a Fee determinable upon a Contingent subsequent ; secondly, That by the Words, *if both die without Issue*, no cross Remainders in Tail were created by Implication, but that upon *B.*'s Death without Issue, after sixteen, *J. S.* should have her Part presently without staying till the Death of *A.* without Issue.

A. seised of Lands in Fee, by his Will devises all his Lands in the County of _____ to his two Daughters *B.* and *C.* and their Heirs, equally to be divided betwixt them ; and in Case they happen to die without Issue, then he devises the said Lands to his Nephew *J. S.* and the Heirs Male of his Body, and dies ; and it was adjudged, that upon the Death of *B.* one of the Daughters, the other Sister took her Moiety as a cross Remainder.

Raym. 452.
Skin. 17.
2 Jon. 172.
2 Show. 136.
Pellex. 434.
S. C. Holmes
v. Meynel, et
vide 2 Vern.
545.
3 Mod. 107.

It hath been said in a great Variety of Cases, that cross Remainders can never arise between more than two, from the great Confusion it would otherwise create.

Cro. Jac. 655.
1 Vent. 224.
Raym. 455.
Fitzg. 97.
Shaw v. Weigh. 2 Jon. 82.

It is clearly agreed, that cross Remainders can only arise in last Wills, and are not to be allowed of in any Deed or Conveyance.

Co. Lit. 25.
1 Rol. Abr.
837.
2 Show. 136.

Richard Holden seised in Fee, and having Issue a Son and three Grandchildren, by his Will devised Part of his Estate to his Wife for her Life, and the Reversion of such Part expectant on her Death, and all other his Freehold Tenements, &c. he gave to his Son *Richard Holden* for Life, and after his Death to his first and other Sons successively in Tail Male ; and for Default of such Issue, and after the Determination of the said Estates, he gave the Premises to his Grandson *Richard Holden*, and his Granddaughter *Elizabeth Holden*, to be equally divided between them, and to the Heirs of their respective Bodies issuing ; and for Default of such Issue he gave the Premises to his Granddaughter *Anne* in Fee ; the Testator died seised, *Richard* the Son died without Issue Male, whereupon *Elizabeth* and the Grandson entered, and *Elizabeth* died without Issue generally ; *Anne Holden* married *John Jervis* ; and the Question was, Whether there were cross Remainders between *Elizabeth* and *Richard* the Grandson, or whether the Moiety of *Elizabeth* should go to *Anne* or to *Richard* ? And it was resolved, That there were no cross Remainders between them, because here are no express Words, nor is there a necessary Implication, without either of which cross Remainders can't be raised ; that the Words, *and for Default of such Issue*, being relative to what goes before, mean only, and for Default of Heirs of their respective Bodies, and then it is no more than as if it had been a Devise of one Moiety to *Richard* and the Heirs of his Body, and of the other Moiety to *Elizabeth* and the Heirs of her Body, and for Default of Heirs of their respective Bodies, Remainder over ; in which Case there could be no Doubt ; and it was held, that this Case differed from the Case *supra* of *Holmes* and *Meynell*, the Word *respective* being wanting in that Case, and the first Devisees were the Testator's Daughters, and the Remainder-Man only a Nephew ; whereas in the present Case *Anne* was as near to the Testator as *Richard*.

Comber v.
Hill. Pasch.
7 Geo. 2. in
B. R. and
Mich. 8 Geo.
2. a like Case
in B. R. be-
tween *Brown*
v. *Williams*.

Rent.

(A) Of the several Kinds of Rents: And herein,

1. Of Rent-Service.
2. Of a Rent-Charge.
3. Of a Rent-Seck.

(B) Out of what Things a Rent may Issue.

(C) Upon what Conveyance a Rent-Service may be reserved.

(D) By what Words a Rent may be reserved or created.

(E) How several Rents may be reserved in the same Deed.

(F) Of the Days of Payment.

(G) To whom Rents may be reserved or granted.

(H) Of the Continuance of the Rent, and to whom to be paid, and therein of the distinct Interests of the Heir and Executors of the Lessor.

(I) Of the Recovery and Demand of the Rent: And herein,

1. In what Cases a Demand is necessary.
2. The Time of Demand.
3. The Place where a Demand is to be made.

(K) The several Remedies for Recovery of Rents: And herein,

1. Of the Remedy by Distress.
2. Of the Remedy by Writ of Annuity.
3. Of the Remedy by Assise.
 4. Of the Clause of Re-entry.
5. Of the *Domine poenae*.
6. Of the Remedy by Action of Debt, and as grounded on several Acts of Parliament.

(L) Rent when and how discharged, and therein of the Eviction of the Tenant.

(M) Of Apportionment, and therein of the Suspension and Extinguishment of the Rent: And herein,

1. In what Cases a Rent may be apportioned by the Act of the Parties, and herein of the Difference between a Rent-Service and a Rent-Charge.
2. In what Cases they may be apportioned by the Act of Law, or the Act of God.
3. The manner of such Apportionment, and how the Tenant shall take Advantage of it.

(A) Of the several Kinds of Rents: And herein,

1. Of Rent-Service.

LITTLETON describes a Rent (a) Service to be where the Tenant holdeth his Land of his Lord by Fealty and certain Rent; or by Homage, Fealty and certain Rent; or by other Services and certain Rent.

made by the corporal Service of the Tenant in plowing his Lord's Demefne, and which came afterwards to be changed into Gabel or Rent; but the Service of Fealty is still incident to a Rent-Service. *Co. Lit.* 142. 2 *Infl.* 19. 1 *Vent.* 161. — That Suit to a Mill is Rent-Service, *Bro. tit. Ten. pl.* 26.

The Services are of two Sorts, either expressed in the Lease or Contract, or raised by Implication of Law. When the Services are expressed in the Contract, the *Quantum* must be either certainly mentioned, or be such as to a Reference to something else may be reduced to a Certainty; for if the Lessor's Demands be uncertain, it is impossible to give him an adequate Satisfaction or Compensation for them, as the Jury cannot determine what Injury he has sustained.

Hence it is, that the Lord cannot distrain his Tenant in *Frankalmoigne*, for the Duty of such Tenant being to make Orisons, Prayers and Masses, and other divine Services for the Soul of the Feoffor, but the Number of them not being express'd, the Service is altogether uncertain; and therefore the Remedy is before the Ordinary, who may inflict Ecclesiastical Censures for such Omission.

But if the Tenant holds of his Lord to sheer all his Sheep feeding in such a Manor, this is certain enough, because it is easy to compute the Number within the Precincts of the Manor, and consequently what Expence the Lord is at in employing others to that Work, and what Damages he has sustained by the Omission of his Tenant.

In Debt for Rent on a Demise, *Reddendum* after the Rate of 18 *l.* per *Ann.*, was adjudged a void Reservation for Incertainty; because it may be in Corn, or in any thing Satisfactory; also an Action might be brought every Day or every Hour, as no Time is limited when the Rent should be paid; and the Court was the more inclined to think it a void Reservation, from its being on a Lease at Will, where the Time of Payment of the Rent should be very certain, as the Tenant by holding over a Day must pay the Rent of the next Quarter.

The Services implied are such, as the Law obliges the Tenant to perform when there are none contracted for in the Grant; and these are more or less according to the Duration of the Gift; as at Common Law, before the Statute *Quia emptores terrarum*, if the Tenant made a Feoffment in Fee without any Reservation of Services, the Feoffee held by the same Services by which the Feoffor held over; because the Services being an Incumbrance on the Land, which the Tenant could not discharge without his Lord's Consent, must follow the Land into whose Hands soever it comes.

So when after the Statute *de Donis* the Feudal Right of Reverter was turned into a Reversion in the Feoffor, the Law obliged the Tenant in Tail to do the same Services to the Donor, which he was obliged to by his superior Lord; because this was an Estate of Inheritance which possibly might have continued for ever.

Hence it is, that if *A.* seised of two Acres, one holden of *B.* by Knights Service, and 12 *d.* Rent, and the other of *C.* in Socage and 6 *d.* Rent, makes a Gift in Tail of both acres, without any Reservation, though

though the Donor has but one Reversion, yet the Donee held by two distinct Tenures and different Services, and pursuant to the Tenure and the Services, the Avowry of the Donor must be several; because the Donee must hold as the Donor held over.

Co. Lit. 23. So if there be Lord Mesne and Tenant, and the Mesne holdeth by 12*d.* Rent, and the Tenant by 4*d.* the Tenant makes a Gift in Tail without any Reservation, the Donee shall hold by the 4*d.* Rent, because his Donor holdeth of the Mesne by that Service; and if the Donor die without Issue, by which the Reversion escheats to the Mesne, then the Donee must hold by 12*d.* because his Tenure is then of the Mesne; and the Tenant must hold by the same Services which his Lord holds over.

Co. Lit. 23. But the Law did not make this Construction on Leases for Lives or Years, for if the Lessor made no Reservation, the Law implied none, except Fealty, which every Tenant that has any determinate Interest must do; because it is necessary there should be some *indicium* of the Tenure, since all Lands must be held of some body.

2 Inst. 505. But since the Statute *Quia emptores terrarum*, if a Man makes a Feoffment in Fee, or Lease for Life, or a Gift in Tail, Remainder over in Fee; the Feoffee shall hold of the superior Lord by the same Services which the Feoffor or Donor held; for by that Act the Tenure upon such Donations must be of the capital Lord, and not of the Feoffor; wherefore upon such Grants there can be no Rent-Service reserved at this Day to the Feoffor, because the Feoffee is not obliged to swear Fealty to him, inasmuch as he is not in his Homage, and consequently not obliged to do any Services to him for Lands which he holds of the capital Lord.

Lit. §. 214. But since the Statute, if a Man makes a Lease for Life, or a Gift in Tail, saving the Reversion to himself, with a Reservation of Rent or other Services, this is a Rent-Service, for which the Law gives the Donor or Lessor a Remedy by Distress, as before the Statute; for neither the Lessee nor Donee is *Feoffatus* within the Act, because there is a Reversion in the Donor sufficient to support the Tenure of him.

Lit. §. 215.
7 Co. 24, 51.
Cro. Eliz. 656.
Plow. 134. Therefore in the Case of the Feoffment in Fee, or the Lease for Life, the Remainder in Fee; if the Feoffor reserves a Rent, such Rent is Seck, because it is unprofitable to the Feoffor, he having no Remedy for the Recovery of it; the Reason whereof is, because the Land out of which the Rent is reserved is not held of the Feoffor, and consequently the Feoffee is not obliged to the Oath of Fealty to him for Lands which are held of another; and where there was no Fealty due, there could be no Seizure by the old Law for Non-performance of the Services, and consequently no Distress without the particular Provision of the Parties; and hence the true Reason appears, why to a Rent-Service a Power of distraining is inseparably incident by the Common Law, without any Clause in the Lease or Provision of the Parties.

2. Of a Rent-Charge.

Vide Tit. Annuity. Where a Man seised of Lands grants by Deed Poll or Indenture a yearly Rent, to be issuing out of the same Land to another in Fee, in Tail, for Life or Years, with a Clause of Distress, this is a Rent-Charge, because the Lands are charged with a Distress by the express Grant or Provision of the Parties, which otherwise it would not be.

Lit. §. 217.
Co. Lit. 170.
a.
Plow. 134. So if a Man makes a Feoffment in Fee, reserving Rent, and if the Rent be behind, that it shall be lawful for him to distrain, this is a Rent-Charge, the Word *Reserving* amounting to a Grant from the Feoffee.

A Rent granted for Equality of Partition by one Coparcener to another is a Rent-Charge, and distrainable of common Right without Clause of Distress; and although there be no Tenure of the Sister who grants it; for as the Law for the Conveniency of Coparceners allows of such Grants, it must consequently give a Remedy to the Grantee for the Recovery of it.

Lit. §. 251, 252.— So if a Rent be granted to a Widow out of Lands, whereof she is dowable.
Co. Lit. 169.

3. Of a Rent-Seck.

A Rent-Seck is so called, because it is unprofitable to the Grantee, as before Seisin had he can have no Remedy for Recovery of it; as where a Man seised in Fee grants a Rent in Fee for Life or Years, or where a Man makes a Feoffment in Fee or for Life, Remainder in Fee, reserving Rent without any Clause of Distress, these are Rents-Seck; for which, by the Policy of the antient Law, there was no Remedy, as there was no Tenure between the Grantor and Grantee, or Feoffor and Feoffee, and consequently no Fealty could be due.

Lit. §. 215, 218.
Cro. Car. 520.
Kelw. 104.
Cro. Eliz. 656.

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 whenever 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 or appendix 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.

7 Co. 51.
Co. Lit. 147.

So it is, 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; and this comes within the Reason of the former Case, because both the Grantees have not a Remedy by way of Charge commensurate to the Rent granted; but if he to whom the Distress was not limited dies, the Survivor shall distrain, because the whole Rent is then in him, and the Remedy by Distress, which was given to him and his Heirs, ought in Reason to be extended to the Recovery of the whole Estate given, and he is now in Seisin of the whole Rent under the first Grant.

Co. Lit. 147. b.
7 Co. 51.

But if a Rent-Seck be granted, and the Grantee has Seisin of the Rent given to him, as by the Payment of a Penny, &c. and afterwards the Grantee is disseised of it, or is denied Payment, which is a Disseisin in Law, the Grantee may at Common Law maintain an Assise for it.

Lit. §. 236.
Cro. Jac. 142.

And it hath been ruled in Equity, that where an Annuity was devised by Will to *A.* and the Land subject to the Annuity to *B.* that *B.* should give Seisin of the Rent-Seck to *A.* that he might have Remedy for the Recovery of it at Common Law, it being the original Intention of the Gift, that the Devisee should have some Benefit from it.

Moor 626.
3 Chan. Ca. 92.

1 Chan. Ca. 120. Collet v. Jaques. So when a Bill was brought for 3 *l.* for a Rent of 5 *s.* Arrear for twelve Years, the Equity of the Bill being that the Deeds by which the Rent was created were lost, and consequently no Remedy for the Rent at Law; and the Court, upon the Plaintiff's proving constant Payment till the last twelve Years, decreed the Defendant to pay the Arrears and growing Rent; for since by the Payment it was evident the Plaintiff had a Right to the Rent, and that he could not without his Deeds make a Title at Law, therefore the Court decreed the Defendant to pay the Rent, and so subjected his Person, which possibly might not have been liable by the Deed that created the Rent.

And now by the 4 *Geo. 2. cap. 28.* it is enacted, ' That all Persons shall have like Remedy by Distress, and by impounding and selling the same in Cases of Rents-Seck, Rents of Assise and Chief Rents, which have been answered or paid for three Years within the Space of twenty Years, before the first Day of this Session of Parliament, or shall be hereafter created, as in Case of Rent reserved on a Lease.'

(B) Out of What Things a Rent may issue.

Co. Lit. 47. a. 142. a. IT is laid down as a general Rule, that no Rent can issue out of any incorporeal Inheritance which lies in Grant, because they are such Things in their Nature as a Man can never recur to for a Distress.

Cro. Jac. 679. Noy 60. (a) So of a Warren. 1 And. 26. Moor 115. 3 Leo 1. So of a Pifchary. Co. Lit. 144. (b) Though a Rent cannot As (a) a Common which was originally granted for the Benefit of the Beasts of every one of the Tenants, and therefore cannot be liable to a Distress by the Act of any particular Tenant, as the Right of Common which every Man has runs through the whole Common, and no particular Tenant has a Right to one Part more than another; it follows that no (b) Distress can be taken thereon, nor can the Recognizors of the Assise have the View of any particular Part to which the Grantee of the Rent hath a Right, and therefore cannot put him in Seisin of the Rent by a Twig or a Turf.

for the Reasons herein mentioned issue out of a Common, yet by the 11 *Geo. 2. cap. 19. §. 8.* it is enacted, That it shall be lawful for every Landlord, his Steward, Bailiff, Receiver, or other Person impowered by him, to seise as a Distress for Rent any Cattle or Stock of their Tenants feeding upon any Common appurtenant to any Part of the Premises demised.

Bro. Assise, pl. 2. So Rent cannot issue out of a Rent, for the Statute of *Westm. 2.* gives an Assise *in certo loco capiendo*; but a Rent cannot be put in View.

5 Co. 3. Cro. Car. 111, 173. So it is of Tithes, for a Reservation of Rent upon a Release of them is not good, because there is no Place upon which the Distress can be taken, nor any Land to be put in View to the Recognizors, or of which they may give him Seisin.

1 Chan. Ca. 79. Thorndide v. Allinton. But it has been decreed in Equity, that where a Rent-Charge of 20 *l.* was devised out of a Rectory, the Glebe whereof amounted but to 40 *s. per Annum*, that the whole Rectory should be liable to the Payment of the Rent; and the Proprietor of the Rectory was decreed to pay the Arrears of the Rent and Costs.

7 Co. 23. Noy 60. A Rent cannot issue out of a Hundred, Fair, Office, &c. for these were instituted for particular Purposes, and are for publick Utility. So of an Advowson, in which the Patron has no other Interest but to appoint an able and fit Person to the Church, without making any Profit to himself.

But though a Reversion or Remainder be incorporeal, and can pass only by Grant, yet a Rent reserved upon a Grant of them is good; for though the Grantor has no Remedy for them during the Continuance of the particular Estate, yet since they relate to Lands which were originally granted to make Profit of, the Judges have gone as far as they could to pursue the Intention of such original Donations, and therefore have admitted such Reservations to be good immediately, since the Lands in which the Grantor had the Reversion were originally given for that Purpose, *viz.* to make Profit of; and this Construction is the more reasonable, because in this Case there is a Remedy by Distress for all the Arrears, when the Reversion executes by the Determination of the particular Estate, whereas there is no Possibility of such Remedy in the Case of Tithes, Commons, Fairs, &c.

So, and for the same Reason it is, if the Lord grants his Seignory, reserving Rent; for here is a Prospect, though it be distant, of a Remedy by Distress upon the Escheat of the Tenancy.

So if there be Lord Mesne and Tenant, and the Mesne maketh a Gift in Tail of the Mesnalty, reserving Rent, this is a good Reservation, because the Tenancy may escheat to the Donee, and then the Donor shall have Remedy by Distress for all the Arrears.

Also if a Lease be made for Years of an incorporeal Inheritance, which lies only in Grant, reserving Rent, such Reservation is good to bind the Lessee by Way of Contract, for the Non-performance of which the Lessor shall have an Action of Debt, because if the Lessee undertakes to pay such an annual Sum by his Deed, such Undertaking gives the Lessor a Right to it, and the Law in all Cases gives Remedies adequate and correspondent to every Man's Right.

As when in Covenant, for Non-payment of Rent, the Plaintiff declared that he was seised of Tithes, and by Indenture demised them to the Defendant, rendering Rent, which he covenanted to pay, and for the Non-payment of which the Plaintiff brought his Action; but the Defendant having pleaded Ejection, to which the Plaintiff demurred, it was adjudged for the Defendant; the Court holding that this was a Rent, and that the Ejection was a Suspension of it, and therefore that the Plea was good.

If a Man makes a Lease of *Blackacre* to commence *in Futuro*, and of *Whiteacre* to begin *in Praesenti*, rendering Rent, payable at *Michaelmas*, before the Commencement of the Term of *Blackacre*, this is a good Reservation immediately, for it is but one intire Rent, and as such is payable according to the Reservation.

So it is, if a Man grants a future Interest in Land, as if it be a Lease for Years, to commence five Years after the making of the Lease, the Lessor may reserve a Rent immediately, because this is a good Contract to oblige the Lessee, and to ground an Action of Debt; and the Lessor may likewise have his Remedy by Distress for the Arrears when the Lessee comes into Possession.

A Lease of the Vesture or Herbage of Land, reserving Rent, is good, because the Lessor may come upon the Land to distrain the Lessee's Beasts feeding thereon.

Also the King may reserve Rent out of an incorporeal Inheritance, because by his Prerogative he may distrain in all the Lands of his Lessee for such Rent; and therefore since he has a Remedy for the Rent, there is no Reason that such Reservation should not be good.

But if the King's Tenant makes a Lease of the Lands not holden of the King, either for Years or at Will, the King cannot distrain such Lands in the Hands of the Under Lessee. So if they are extended on an *Elegit*, or if they be under Sequestration; but in this last Case, upon

10 E. 4. 4.
Bro. Tit.
Distress 47.
Perk. §. 627.
1 Co. 62.
Capel's Case.
Co. Lit. 47. a.

2 Rol. Abr.
446.

Perk. §. 627.
Cro. Eliz. 546.

5 Co. 3.
Ferwell's Case.
2 Saund. 303.
1 Vent. 98.
1 Lev. 308.

1 Ld. Raym.
77. Dalston
v. Reeve.

2 Rol. Rep.
467. Fal-
staff's Case.

2 Rol. Abr.
446, et vide
2 Rol. Rep.
407.
Plow. 423.

Co. Lit. 47.

Co. Lit. 47.
5 Co. 4. 56.
Lane 39.

1 P. Wil. 306
Attorney Ge-
neral v. Mayer
of Coventry.

upon Application to the Court of Chancery, Liberty will be given to distrain without incurring any Contempt of that Court.

(C) Upon What Conveyance a Rent-Service may be reserved.

HERE it may be laid down as a Rule, that a Rent-Service may be reserved upon every Conveyance that passes any Estate to the Tenant, or enlarges an Estate already in him; for the Rent being an annual Return by Way of Retribution for something given, it follows that where no Estate passes by the Conveyance, there ought to be no Retribution or Return; besides, the Thing given was antiently in Nature of a Pledge for the Rent, and therefore ought to be such that the Giver might formerly have reposed himself in, and now may have Recourse to for a Distress upon Non-payment of the Rent; hence therefore it is, that if the Disseisee releases all his Right to the Disseisor, reserving Rent, the Reservation is void.

10 E. 4. 3.
21 H. 6. 8.
Co. Lit. 144.
193.
2 Rol. Abr.
449.

Lit. §. 438.
Dyer 230.
Mo. 631.
13 Co. 55.

So it is, if there be Lord and Tenant, and the Tenant holdeth of his Lord by Fealty, and 20 s. Rent, and the Lord releases to his Tenant, or confirms his Estate in the Tenancy, yielding to him a Hawk or Rose yearly, this new Reservation is void, because there is no Estate given to the Tenant, for which he should make that new Return of Service to his Lord; but the Lord upon such Release or Confirmation may confirm the Tenant's Estate to hold by lesser Services, as in this Case by Fealty and 5 s. Rent, because by the same Reason that he may release his Seignory, he may likewise abridge himself of Part of it.

10 E. 4. 3.
Co. Lit. 193. b.
2 Rol. Abr.
449.

If there be Tenant for Life, and he in Reversion releases to him in Tail, reserving Rent, the Reservation is good, because the Tenant's Estate is enlarged by the Release, and therefore the Rent reserved ought to be paid in Return for the Inheritance given, and the Lessor has immediate Remedy by Distress for Recovery of it. So upon a Surrender by Deed, Rent may be reserved.

13 Co. 55.
Samme's Case.
Co. Lit. 193.

So if the Lord of a Manor, by Indenture at Common Law, releases to his Copyholder in Fee, to him and his Heirs, or confirms such Lands to his Copyholder and his Heirs, reserving a Rent, this Reservation is good, because the Release or Confirmation enures by Way of *Mitter le Estate*, to pass an Estate at Common Law to him, where before he had but a Copyhold or customary Estate at Will; but upon a Release or Confirmation, which enures by Way of *Mitter le droit*, no Rent can be reserved; and in the other Case, though the Reservation, be it by Indenture or Deed Poll, be good, yet without Clause of Distress it is only a Rent-Seek.

Co. Lit. 193.

So upon a Release that enures by Way of *Mitter le Estate*, as when one Jointenant releases to another, a Rent may be reserved; but *Quare*, if such Release carries the Fee-Simple, whether such Rent be a Rent-Service, inasmuch as the Releasee being in from the first Feoffor, there can be no Tenure of the Releasor, and consequently the Rent must be Seek, unless there be a Clause of Distress in the Deed of Release; for so it is in the Case of a Feoffment in Fee since the Statute *Quia emptores terrarum*, as is before observed.

2 Inst. 673.
2 Co. 54.
Co. L. 144. a.
Cro. Eliz. 595.

At Common Law no Rent could have been reserved upon a Bargain and Sale, because only a Use passed, which was not any Estate to which the Bargainor could have Recourse for a Distress; but now by the

the Statute 27 H. 8. the Possession is executed to the Use, and therefore the Bargainor may now have recourse to the Land for a Distress.

There can be no Rent Reserved upon any Conveyance, that enures by way of Entingishment of the Estate of the Grantor, because in such Case there is no Reversion left in him to create a Tenure; and therefore, if a Lessee surrenders his Estate reserving a Rent, the Reservation is not good; but this Case put by *Rolls* must, it seems, be understood of a Lease for Life; for such a Reservation may be good by way of Contract, upon a Surrender of a Lease for Years; for when the Lessor takes an Assignment or Surrender of the Lessee's Term, he agrees to take it under such a yearly Rent; and such Agreement or Contract is a good Foundation for an Action of Debt, if it be not performed, whether the Agreement be by Deed or Parol.

2 Rol. Abr.
449. but see
Allen 57.
2 Lev. 80.
Raym. 222.
2 Mod. 174.
Winton v.
Pinkney, and
1 Lutw. 364.
1 Ld. Raym.
82. *Sir John*
Brownlow v.
Howly.
Cartb. 162.

So if a Rent be reserved upon a Feoffment in Fee, though the Feoffor hath no Reversion, yet this is a Rent, and recoverable by the Name of Rent upon the Contract.

(D) By what Words a Rent may be reserved or created.

A Rent-Service being something in Retribution for the Land that passes, it must be reserved by such Words as imply a Return of something that was not in the Grantor before, in lieu of the Land given; and therefore *Reddendo*, *Reservando*, *Solvendo*, *Faciendo*, *Inveniundo*, and such like, are proper Words by which a Rent may be reserved.

Co. Lit. 47. a.
Perk. § 625.
Plow. 142.
2 Rol. Abr.
449.

But if a Man makes a Lease of Lands, except 12 d. or *preter* 12 d. Rent, these are no good Reservations, because these Words are only proper to reserve to the Lessor Part of something in Being, and which would otherwise pass by the Lease.

Perk. § 639.

So it is, if a Man makes a Lease, *Salvo* or saving 20 s. Rent, this is no good Reservation, because there can be no Saving of any thing not in Being; consequently a Rent-Service being a Return of something not in the Lessor, in lieu of the Land given, cannot be reserved by Words, that, in their most extended Signification, can only preserve something already *in Esse*.

2 Rol. Abr.
449.

But if there be Lord and Tenant by Knights Service, and the Tenant makes a Gift in Tail, to hold by a Penny, *Salvo forinseco Servitio*, that is, saving to the Tenant such Service by which he held the Land of his Lord; this is good to make the Donee hold by Knights Service; for though the Tenant had not that Service in himself, before the Gift, yet it was a Service in Being, for the Tenant was obliged to do it to his Lord; and therefore it is but reasonable that he might save that Service to himself which he was at the Time of the Gift obliged to perform to another.

Perk. § 650.

So it is, if there be Lord Mesne and Tenant, and the Mesne holds by Knights Service, and the Tenant by Socage; if the Tenant makes a Gift in Tail reserving Rent, and saving the Knights Service, the Donee in this Case likewise shall hold by Knights Service; because this Service was in Being and chargeable upon the Land at the Time of the Gift, though the Tenant was not obliged to it himself, and therefore

2 Rol. Abr.
449.

may be reasonably saved to him who parts with the Land upon which they were before chargeable; and the rather because such Construction is most beneficial to the Publick, and the Donee not injured; because he willingly takes it under such Charge.

Moor 459.
Cro. Eliz.
486. Har-
rington v.
Wife.

By Articles of Agreement indented between *A.* and *B.* it is covenanted and agreed, that *A.* doth let *Blackacre* to *B.* for five Years from *Michaelmas* following; provided always, that *B.* shall pay at *Michaelmas* and *Lady-day* 10*l.* by even Portions yearly; this *Proviso* is a good Reservation of the Rent; for as the Words amounted to an immediate Demise of the Lands, so the Rent, which is but a Retribution for the Land, ought to be paid immediately; and it cannot be construed to be a Sum in Gross, because by the Words of the Articles (which being indented are the Words of the Parties) it is to be paid Yearly.

Plov. 131.
Cro. Car.
207.
1 Rol Rep. 80.
Cro Jac. 398.
2 Bull. 281.
1 Jon. 231.

If Lands be leased to *A.* and he covenants and grants to render and pay for the said Lands every Year, during the said Term, to the Lessor, his Heirs and Assigns 10*l.* this amounts to a Reservation. So it is, if the Lessor covenants that the Lessee shall hold and enjoy the Land, and the Lessee in *Consideratione premissorum* covenants to pay to the Lessor, his Heirs and Assigns, an annual Rent of 10*l.* during the Term; for here the Rent is plainly given as a Retribution for the Land which the Lessee holds; and this being by Indenture, the Words are looked upon to be spoke by both Parties, and these may reasonably be construed that the Lessor, in Consideration of the Land demised, reserves the Rent agreed on by way of Retribution or Return; and therefore it has been adjudged, that such Rent goes with the Reversion to the Heir; and the Executor of the Lessor shall never recover it by way of Covenant.

(E) How several Rents may be reserved in the same Deed.

Hob. 172.
5 Co. 54.
Moor 51, 199.
Knight's Case.

HERE the Difference is to be observed between a Rent reserved intire in the *Reddendum*, upon a Demise of several Things in the same Lease (for there tho' the Rent be after apportioned to the particular Parcels leased, yet the Reservation shall be taken as one and intire) and where the Rent is not at first reserved intire, but upon the Reservation is several and apportioned to the several Things demised; for Instance, If a Lease be made of several Houses, rendering the annual Rent of 5*l.* at the two usual Feasts, *viz.* for one House 3*l.* for another 10*s.* and for the rest of the Houses the Residue of the said Rent of 5*l.* with a Clause of Re-entry into all the Houses for Non-payment of any Parcel of the Rent; this is but one Reservation of one intire Rent; because all the Houses were leased, and the 5*l.* was reserved as one intire Rent for them all, and the *viz.* after does not alter the Nature of the Reservation, but only declares the Value of each House.

Dyer 309.
5 Co. 55.
Moor 98.
Winter's Case.

But if the Lease had been of three Houses, rendering for one House 3*l.* for another 20*s.* and for the third 20*s.* with a Condition to re-enter in all for the Non-payment of any Parcel, these are three several Reservations, and in the Nature of three distinct Demises, for which the Avowries must likewise be several; for each House in this Case is only chargeable with its own Rent, the intire Sum not being at first reserved out of all the Houses demised, and afterwards apportioned to the several

ral

ral Houses, according to their respective Value, as in the former Cases; but the Particular Sums are at first reserved out of the several Houses; and therefore the Non-payment of the Rent of one House can be no Cause of Entry into another.

So if the Lord had reserved out of one House 3*l.* during five Years, ^{5 Co. 55.} and 20*s.* out of another House during ten Years; and 20*s.* out of the ^{2 Rol. Abr.} third House to commence ten Years after, these are distinct Reservations and several Demises; and each House is subject to a Distress but for its own Rent. ^{448.}

Tenant in Tail demised the Site and Demises of a Manor which had accustomedly been let, and also all the Manor, and all Lands ^{Cro Eliz. 341. Tanfield v. Rogers.} and Tenements belonging to it; *habendum* the said Site and Demises, and also the said Manor and Premises for twenty-one Years; yielding and paying for the said Site and Demises 10*s.* and yielding for the said Manor and Premises 20*s.* this was adjudged a good Lease for the Site and Demises which had been accustomedly let; but for the other Parts of the Manor not usually let the Lease was void; and the whole Lease was not held to be void, because that these were several Reservations, and so in nature of several Leases.

If a Lease be made of two Manors, *habendum* one Manor for 20*s.* ^{4 Leon. 30.} and the other Manor for 10*s.* these are several Reservations, and each Manor is charged with its respective Rent.

A. made a Lease of a Cellar for a Year, and if at the End of the Year the Parties should agree that the Demise should continue, then to have and to hold the same for three Years, *reddendo inde annuatim durante dicto termino* 40*s.* this is one intire Reservation, as well for the first Year as for the three Years; for the Words *dicto termino* extend to both Terms indifferently. ^{10 Co. 106. Hob. 276. Humphry Loffield's Case.}

And as there may be several Reservations in the same Lease by the Words of the Parties, so there may be by Act of Law; as where a Lease for Life is made to an Abbot or Bishop in their publick Capacities, and to *ſ. s.* reserving a Rent, the Lessees are not Jointenants but Tenants in common; and therefore the Reservation of the Rent must be several, and the Reversion, to which the Rent is incident, must follow the Nature of the particular Estates on which it depends, and therefore must be several too. ^{Moor 202.}

So it is, if there be two Tenants in Common, and they make a Lease for Life, rendering Rent, this Reservation, though made by Joint Words, shall follow the Nature of the Reversion, which is several in the Lessors; and therefore they shall be put to their several Assizes if they be disseised, as if there had been distinct Reservations; but if the Reservation had been of a Horse or Hawk, which is not in its Nature severable, then for the Necessity of the Case the Law admits them to join in one Assize. ^{Lit. § 314. Co. Lit. 197. a. Moor 202.}

(F) Of the Days of Payment.

THESE are either by the particular Appointment of the Parties in the Deed, or by Appointment of Law in Default thereof; and here it is regularly true, that the Law will never controul the express Appointment of the Parties, where such Appointment will answer their Intention; but though there be no particular Days mentioned in the Deed for the Payment of the Rent, yet if the manner of such Appointment

ment will not fully answer the Design of the Contract, the Law in such Case will alter or transpose the Words of the Deed; because it is the great End of the Law to execute all Contracts however unwarily or inartificially framed, according to the Purport and true Intention of the Parties upon the whole Deed; thus for Instance, if *A.* makes a Lease to *B.* the 6th of *August*, rendering yearly the Rent of 40*s.* at the two Feasts of the Year, *viz.* at *Lady-day* and *Michaelmas*, by equal Portions; though in this Case, by the Appointment of the Parties *Lady-day* be the first Term mentioned, yet the first Payment shall be made at *Michaelmas* ensuing the Date of the Lease; for without such (a) Transposition the Intention of the Parties could never be fulfilled; because the Rent is reserved annually, and the Lessor would lose the Profits of one half Year, if the Rent was not payable at the first *Michaelmas*; for then the Lessee must enjoy the Land from the Date of the Lease to the first *Michaelmas*, without paying any thing; and so likewise from the last *Lady-day* of the Term to the Expiration of it; because though the Lease ended in *August*, yet the Payment was not to be made till *Michaelmas*, before which the Lease expires.

(a) That the Law will marshal the Payments.
2 *Rol. Rep.* 213.
5 *Co.* 102.
3 *Bull.* 328.
2 *Jou.* 109.

2 *Rol. Abr.* 450.

If a Man makes a Lease the first Day of *May*, reserving Rent payable quarterly; this shall be intended quarterly from the making of the Lease; for if the Beginning of the Quarter should be construed to be any other Day than the Date of the Lease, the Lessor would lose the Profits of his Land for some Time, and consequently not have a quarterly Payment during the Continuance of the Lease; or the Lessee would be obliged to pay a Quarter's Rent before he had received a Quarter's Profits of the Lands.

2 *Rol. Abr.* 449.

If a Lease be made for Years, provided that the Lessee shall pay for it at *Michaelmas* and *Lady-day* 10*l.* by even Portions during the Term; though this Rent be not made payable yearly, yet the Law construes it to be so, because it is payable at the two Feasts during the Term; and then consequently it must be paid yearly, because if there be an Omission of the Payments any one Year, during the Lease, it is not paid at the two Feasts during the Term.

1 *Sid* 316.

If a Lease for Years be made, rendering Rent at the four Feasts, without saying yearly, yet this shall be construed to be yearly during the Term.

Moor 459.

So if the Rent had been payable Yearly, without saying during the Term, yet the Payment must be made every Year during the Continuance of the Lease.

1 *Lutw.* 231.

A Lease reserving Rent *pro quolibet Anno* is all one as if it had been made payable annually, and then it is to be paid at the End of every Year.

(a) *Latch* 264.

(b) 3 *Bull.* 329.

(c) *Lit. Rep.* 61.
Hell. 53.

A (a) Rent generally reserved is payable at the End of the Year, but (b) if Rent be reserved *annuatim durante termino predicto*, the first Payment to begin two Years after, this controuls the Words of Reservation. So (c) if a Rent is made payable yearly, during the Time the Lessee shall enjoy the Land, the Lessor cannot demand this Rent half-yearly, but must wait to the End of the Year.

2 *Rol. Abr.* 450.
Noy 18.

If a Man grants a Rent of 10*l.* to another, payable at the two usual Feasts of the Year, this shall be intended by equal Portions, though it be not so mentioned in the Deed; because where there are two several Days appointed for the Payment, it is the most equal Construction that a Moiety of the Rent shall be paid at each Day.

2 *Rol. Abr.* 450.
2 *And.* 122.

And if a Lease be made, rendering Rent at the two usual Feasts in the Year, without specifying what Feasts in certain, the Law construes such Payments to be at *Michaelmas* and *Lady-day*; because these are the usual Days appointed in Contracts of this Nature for such Payments.

Lessee for Life made a Lease for twenty Years, if he so long lived, reserving yearly, during the Term, 100*l.* at *Michaelmas* and *Lady-day* by equal Portions, or within thirteen Weeks after every of the said Feasts; if the Lessor dies after *Michaelmas* and within the thirteen Weeks, there is no Rent due for the last half Year; because the Lessee has Election in this Case either to pay the Rent at *Michaelmas*, or at any Time during the thirteen Weeks; and if it be not paid at *Michaelmas*, it is then the same as if the Rent had been made payable thirteen Weeks after *Michaelmas* only; and consequently the Lessor dying, and the Lease thereby determining before the Rent became due, the Lessee shall not be obliged to make any Return or Retribution for a thing he has not enjoyed to the Day he was to make the Retribution.

But if Tenant in Fee makes a Lease for Years to begin at *Michaelmas*, rendering 100*l.* per Annum at *Michaelmas* and *Lady-day*, or within ten Days after every Feast; it seems by the better Opinion, that the Rent is due the last *Michaelmas-day* of the Term, without any Regard to the ten Days; for the Reservation being annually at the two Feasts, or within ten Days, it shall be construed at the End of every ten Days during the Term, as most agreeable to the Design of the Contract; and therefore the Law rejects the ten Days after the last Feast, because the Term ending at *Michaelmas*, there cannot be ten Days after it during the Term for Payment of the Rent; and this Construction is the more reasonable, because to give the Lessee his Election to make the last Payment either at *Michaelmas* or within the ten Days, as in the former Case, were to put it in his Power to avoid the Payment of the last Half-Year's Rent; for if it were construed not to be due till the End of the ten Days, the Lessor could never oblige him to pay it, because then the Term would be ended before the Rent became due; but the Addition of the ten Days was only to enlarge the Time of Payment, but not to prevent the Payment, or to remit any Part of the Rents.

Debt upon an Obligation, Condition that whereas the Plaintiff had demised to the Defendant all the Tithes of *W.* which if the Defendant shall peaceably enjoy from 20 *February* 1661. *usque* or until *Michaelmas* 1668. the said Defendant paying every Half-Year the Sum of 30*l.* viz. on the 29th Day of *September* and *Lady-day*, or twenty-one Days after each Feast during the Term, that then, &c. and Breach was assigned in Non-payment of the Rent at *Michaelmas* 1668. to which the Defendant demurs, because the Enjoyment being to be *usque* or until *Michaelmas* 1668. this excludes *Michaelmas-day*; and so the Term is ended before *Michaelmas* 1668. and then no Rent can be due at *Michaelmas*. But the Court were clear of Opinion, that *Michaelmas-day* in this Case was to be taken inclusively; and *Hale* cited the Earl of *Northumberland's* Case, who declared on a Demise at Will, rendering Rent at *Michaelmas* and *Lady-day*, and declared that the Defendant enjoyed the Land *usque Festum Sancti Michaelis*, and demanded Rent due at *Michaelmas*; and there it was moved, that *usque Festum* excludes the Feast; and therefore the Will being determined before the Feast, the Rent was not due; but 'twas there ruled that *usque* included the Day; and they said, that Agreements were not to have such Constructions as Pleadings, but to be taken according to the Intent of the Parties, and being *usque* such a Day, the Day ought to be commenced before the Time is come; and they agreed that the Reservation during the Term goes to both Feasts, viz. 20 *February* 1661. and *Michaelmas* 1668. and that the Word *usque* shall be taken inclusively; for without such Construction no Rent would be then due, because the Term would be ended before *Michaelmas*; and they relied upon the Case in (*a*) *Leon.* and tho' there be Election given to pay on the said Days, or (*a*) 3 *Leon.* twenty-one Days after, yet this is not material when the last Feast

10 Co. 127.
Clun's Case.
Cro. Jac. 310.
500.
Cro. Eliz.
380, 565,
575.
4 Leon. 247.

Cro. Jac.
227, 233.
Yelv. 167.
1 Brownl.
105.
2 Brownl.
220.
1 Bullst. 1.
Barwick v.
Foster.

Mich. 27 Car.
2. in B. R.
Biggon v.
Bridge.
3 Keb. 534.
S. C.

(a) 3 Leon.
211.

(a) *Cro. Eliz.* comes, for then it is absolutely due on that Day; and though (a) *Cro. 702. Yelv. 74. Umble v. Fisher.* *Eliz.* and *Yelv.* seem contrary, yet they were not regarded, for otherwise the Lessor would lose the last Quarter.

Fisher.

2 *Ld. Raym.*

819.

1 *Salk.* 141.

Farest. 96.

Tomkins v.

Pincent.

In Debt for Rent the Plaintiff declared on a Demise, bearing Date the 25 *Aug. 11 W. 3.* for seven Years from the 24 *June* before, paying quarterly at the four most usual Feasts in the Year, or within twenty-one Days after each of the said Feasts, 3 *l. 10 s.* the first Payment to be made at *Michaelmas* next ensuing the Demise, &c. and further declared that 14 *l.* of the said Rent was in Arrear for one Year ended the 24 *December 13 W. 3.* for which, &c. to which the Defendant demurred; and it was objected that the Year did not end the 24 *December*, but at *St. Thomas's Day*, according to the *Reddendum*, which is 21 *December*; which the Court admitted, and held, that where special Days of Payment are limited by the *Reddendum*, the Rent must be computed according to the *Reddendum*, and not according to the *Habendum*; and that the Computation of the Rent, according to the *Habendum*, is only when the *Reddendum* is general, *viz.* yielding and paying quarterly so much Rent.

(G) To Whom Rents may be reserved or granted.

Lit. §. 346.
Co. Lit. 47. a.
143. b.

HERE *Littleton's* Text is to be laid down as a sure Rule, that no Rent (which is properly said a Rent) may be reserved upon any Feoffment, Gift or Lease, but only to the Feoffor, Donor, Lessor, or to their Heirs, and in no Manner may it be reserved to any Stranger; and the Reason of the Rule is, because the Rent is something paid by Way of Retribution for the Land, and therefore can only be made to him from whom the Land passes; besides, the Reservation to a Stranger was prohibited to avoid the Danger of Maintenance; for if that was allowable, Persons might make Reservations to powerful Men, who might extort more from the Tenant than was originally contracted for.

Mo. 162.
Co. Lit. 143.
2 Rol. Abr.
447.

Hence it is, that the King has been excepted out of the Rule, and allowed to make the Reservation of the Rent to a Stranger, because there could be no Danger of Maintenance in this Case, there being no Person so great and powerful in the Kingdom as the King himself, who parted with the Land.

1 *Ld. Raym.*
36.

But where the King made a Lease of a House belonging to his House-keeper of *Whiteball*, reserving a Rent to the House-keeper for the Time being; though in this Case it was admitted that the King might reserve Rent to a Stranger, yet it being here made to an Officer who was removeable at Will, the Reservation was held ill.

Lit. §. 345.

If *A.* infeoffs *B.* upon Condition that *B.* and his Heirs shall render to *C.* and his Heirs a yearly Rent of 10 *s.* and if he fail of Payment, that it shall be lawful for *A.* and his Heirs to re-enter, this is not in Nature of any Sort of Rent, but a Sum in Gross, which the Feoffee is obliged to pay to prevent the Re-entry of the Feoffor; for at Common Law, before the Statute of *Quia emptores*, it could not be good as a Rent-Service, because nothing passed from *C.* for which a Retribution ought to be made; nor can it be good by Way of Rent-Charge, because *C.* hath no Remedy given him by the Deed to charge the

Land

Land with it, or otherwise to recover it; nor is it a Rent-Seck, because though it should be once paid to C. and he thereby have Seisin of it, yet he shall never have an Assise for the Recovery of it, because the Penalty by the Deed is a Re-entry to A. and his Heirs, which forever determines it.

But if A. and C. in this Case had joined in a Feoffment of the Land by Deed, reserving Rent to them both and to their Heirs, and the Feoffee had granted that it should be lawful for them and their Heirs to distrain for the Rent, this had been a good Grant of a Rent-Charge to them both, because C. being Party to the Deed has a Remedy by Distress for the Recovery of it; and when the Feoffee impowers C. to distrain on the Land, such Grant always supposes that the Distress, which is in Nature of a Pledge, shall remain in the Person's Hands to whom it is given, till it be redeemed by the Payment of the Thing for which it was originally taken. *Co. Lit. 213.*

But where the Husband, possessed of a Term for Years in his own Right, joins with his Wife in an Assignment of the Term, reserving Rent to him and his Wife, and the Survivor of them, if they shall so long live; and that if the Rent be arrear, that it shall be lawful for them and the Survivor of them, and for the Assigns of the Survivor, to re-enter, but the Wife neither sealed nor delivered the Deed; this Rent determined by the Death of the Husband, for it could be no good Reservation to the Wife, because she had no Interest in the Land to part with, and therefore could have no Rent-Service reserved to her by Way of Retribution for a Thing she never had in her to part with; nor can this amount to a Grant of a Rent-Charge to her, as in the former Case of the Feoffment it did to C. because here the Wife having never sealed and delivered the Deed, could be no Party to it; and there does not appear to have been any Clause of Distress limited to the Wife by this Deed, as there was to C. by the Deed of Feoffment, and consequently it could not be good as a Charge upon the Land; nor is it good as a Rent-Seck in her, because issuing out of a Term for Years it must in its Nature be a Chattel Interest, for which no Assise lies, which is the only Remedy after Seisin for the Recovery of the Rent-Seck; nor could the Executor of the Husband be intitled to the Rent, though it was limited to them and the Survivor of them, and the Assigns of the Survivor during the Term, because the Reservation to the Wife was evidently intended to create an Interest and Right in her to the Rent, and therefore shall not be taken as Words of Limitation against the original Design of them. *Cro. Car. 288.*

If a Man makes a Lease for Years, reserving Rent to his Heirs, or makes a Lease to commence after his own Death, reserving Rent, this is a Rent-Service arising in the Heir, not by Way of new Purchase of such Rent, but as incident to the Reversion descending to the Heir, and therefore may be released by the Ancestor during his Life, which it could not be, if it were a new Purchase in the Heir; and so it is if the Rent were reserved upon a Lease for Life or Gift in Tail; the Reason is, because the Reversion descends from the Ancestor to such Heir, and the Rent-Service is incident to such Reversion, as well as a Man that hath an Estate in Land might grant such original Charges. *Hob. 130.*

But if the Reservation had been made to his Son, though he happened afterwards to be Heir, such Reservation is void; for it cannot be good by Way of Rent-Service, because the Son has not the Reversion to which the Rent is incident at the Time of the Lease made; and if the Son dies before the Rent commences, it may go to a different Person than the Reversion, which belongs to the Heir of the Father; and such Reservation cannot be good by Way of new Grant, because *Hob. 130.*
Oates v. Fryth.
2 Rol. Abr. 447.
2 Saund. 370.

because the Word *Reservation* will not import a new Grant, unless it be made to the Person from whom such Interest moves.

Bro. Tit.
Grant 86.
8 H. 7. 3.
Plow. 156.
Palm. 29.
2 Vent. 204.

If an original Grant be made of a Rent, to commence after the Death of *J. S.* this 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 *Quære* 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 tend to a Perpetuity.

Bro. Tit.
Grant 86.
Plow. 156.

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 Freeholds 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.

Cro. Car. 207.
Drake v.
Mundy.

If *A.* covenants and grants with *B.* that he shall have and enjoy *Blackacre* for six Years, and *B.* covenants to pay *A.* his Heirs, Executors and Administrators, an annual Rent during the Term; this being a good Reservation of a Rent, shall upon the Death of *A.* be paid to his Heir who has the Reversion, as a Retribution for the Profits of the Land which he cannot enjoy during the Term; and the Executors of *A.* shall never have any Thing by Virtue of the Covenant, though it is in express Words granted to *A.* and his Executors.

Co. Lit. 47.
2 Rol. Abr.
450.

So if *A.* makes a Lease, reserving Rent to him and his Executors and Assigns, and dies, this Rent is determined, for the Executors cannot have it for the former Reason, being Strangers to the Reversion, which is an Inheritance; and therefore being never to enjoy the Profits of the Land after the Expiration of the Term, can never have a Right to a Retribution or Compensation for them.

Mo. 51.
Eyre's Case.
Dyer 221.

If a Bishop leases for Years, reserving Rent, *Proviso quod tempore vacationis dicti Episcopatus redditus prædicti. secundum ratam temporis solvetur capitulo Ecclesie cathedralis dicti Episcopatus*, with a Clause of Re-entry to the Successor for Non-payment of Rent to the Chapter, this is a void Proviso; for the Chapter being never to come into the Succession of the Land belonging to the See, can have no Right to a Return of Service from the Lessee.

2 Rol. Abr.
447.
Co. Lit. 47.
1 Vent. 161.

If there be two Jointenants, and they make a Lease by Parol or Deed Poll, reserving Rent to one only, yet it shall enure to both; but if the Lease had been by Deed indented, the Reservation should have been good to him only to whom it was made, and the other should have taken nothing: The Reason of the Difference is this; where the Lease is by Deed Poll or Parol, the Rent shall follow the Reversion, which is jointly in both Lessors; and the rather, because the Rent being something in Retribution for the Land given, the Jointenant to whom it is reserved ought to be seised of it in the same Manner he was of the Land demised, which was equally for the Benefit of his Companion as himself; but where the Lease is by Deed indented, they are estopped to claim the Rent in any other Manner than it is reserved by the Deed, because the Indenture is the Deed of each Party, and no Man shall be allowed to recede from or vary his own solemn Act.

(H) Of the Continuance of the Rent, and to Whom to be paid; and therein of the distinct Interests of the Heir and Executor of the Lessor.

HERE first is observable the Difference between a general Reservation, without mentioning any Person in certain to whom the Rent shall be paid, and a particular Reservation to the Lessor without mentioning any other Person to whom it shall be paid; for where the Reservation is general, the Rent shall be carried over to the Person which should have succeeded to the Estate, if no Lease had been made; but where the Reservation is particular as to the Lessor, without going further, there the Rent shall determine with his Death, though the Lease upon which it is reserved be still continuing; as if *A.* makes a Lease for Years, reserving a certain Rent, without saying to the Lessor or his Heirs, yet this general Reservation shall carry the Rent not only to the Lessor, but even to his Heirs that succeed in the Reversion, because the Rent is reserved as a Retribution or Compensation for the Land demised, and therefore ought from the Nature of the Contract to be of equal Duration with the Demise; but if *A.* had made a Lease, reserving a certain Rent to himself, he has thereby determined how long the Reservation shall continue, and therefore it shall never be carried further than the Period of Time the Lessor himself has fixed it.

So if a Lease had been made by *A.* yielding and paying to him and his Assigns yearly the Rent of 10 s. this Rent shall likewise determine by his Death, and his Heir shall never have it, because there are no Words to carry it to the Heir who is to have the Reversion; and the Lessor having expressly limited it to himself has thereby determined it to his own Life, for his Assigns cannot have it longer than the Lessor himself should have had it, and these Words, *his Assigns*, cannot enlarge the Reservation; for if he had assigned over the Reversion, the Rent by his own Death had determined; *secus* if he had added *during the Term*.

So if the Reservation had been made to the Lessor and his Executors, or to him, his Executors and Assigns; in these Cases the Rent determines with the Life of the Lessor, because the Executor cannot take the Rent; for that if it be continued beyond the Life of the Lessor, it must be carried over to him who is to succeed in the Estate, and that is the Heir at Law; but the Heir cannot take in these Cases, because there are no Words in the Deed to carry it to him.

If *A.* makes a Lease, reserving Rent to him or his Heirs, this is a good Reservation during the Life of *A.* but void as to his Heirs, because the Reservation being to him or his Heirs in the Disjunctive, both cannot take it; and the Word *Heirs* cannot be Words of Limitation, because if they are to take at all, they must take originally; for if the Rent vests in the Lessor, it cannot afterwards go to the Heirs, for that would be contrary to the Words of the Reservation, which limited the Rent either to the Lessor or his Heirs, but not to both of them.

But it hath been adjudged, that where an Abbot made a Lease, rendering Rent to him or his Successor during the Term, that this Reservation was good to the Successor after the Death of the Lessor, because here the Rent by express Words is made payable during the Continuance of the Term, and therefore as an Incident to the Reversion

Co. Lit. 47. a.
2 *Roll. Abr.*
289, 450.
Dyer 45.
Hard. 95.

12 *Co.* 35.
Latch 274.
Co. Lit. 47.
Cro. Car. 290.
1 *Vent.* 162.
2 *Lev.* 13.
1 *Med.* 216.

2 *Roll. Abr.*
450.
Co. Lit. 47

Co. Lit. 214.
5 *Co.* 112.
1 *Vent.* 163.

5 *Co.* 111.
Mallory's Case.
Cro. Eliz.
805, 832.
1 *Vent.* 146,
163.

must go in Succession with the Inheritance ; and therefore the Successor of the Abbot or Assignee of the Reversion must necessarily have it ; for the Rent being but a Retribution for the Land, none can have a Right to it but those who would have succeeded in the Estate, if the Land for which the Retribution is given had never been leased.

*Hard. 89.
1 Vent. 163.*

If Tenant in special Tail leases for Years, reserving Rent to him, his Heirs and Assigns, this Rent shall go with the Reversion to the special Heir in Tail, though it be reserved to the Heirs generally ; for the Word *Heir* shall be taken in that Sense that will best answer the Nature of the Contract, which is, that those who would have succeeded in the Estate, if the Lease had never been made, shall enjoy the Rent, which is the Retribution given for the Want of the Land during the Lease.

*8 Co. 69.
Whitlock's
Case.*

If there be Tenant for Life with several Remainders over, so settled by Limitation of Uses, with a Power to Tenant for Life to make Leases, who makes a Lease, reserving Rent to him, his Heirs and Assigns, this is a good Reservation, and shall go to those in Remainder ; for when the Tenant for Life makes a Lease, pursuant to such Power given to him by the Settlement, such Lessee derives his Estate out of the Inheritance, which before the Settlement was in the Tenant for Life ; and the Settlement being by Construction of Law subsequent to the Estate of the Lessee, those in Remainder to the Tenant for Life are his Assignees, to whom the Rent by the express Words of the Lease is reserved and limited after the Death of the Tenant for Life.

8 Co. 71.

So if the Reservation had been in this Case to the Lessor, and every Person to whom the Reversion and Inheritance of the Land belongs during the Term, this is a good Reservation to those in Remainder, and the Law will in such Case distribute the Rent according to the several Interests under the Settlement ; but my Lord *Coke* says, the surest Way is for the Tenant for Life to reserve the Rent annually during the Term, and then the Law disposes of it as an Incident to the Reversion.

Co. Lit. 12.

If a Man seised of Land of the Part of his Mother, makes a Lease or a Gift in Tail, reserving Rent to him and his Heirs, this Rent shall go with the Reversion to the Heirs of the Part of the Mother, because the Nature of the Contract is such, that the Retribution should go to those who lose the Profit of the Land during the Gift or Lease.

Co. Lit. 12.

But if he had made a Feoffment in Fee, reserving Rent to him and his Heirs, the Rent shall go to the Heir of the Part of the Father, because here is an intire Disposition of the Land, and the Rent is in Nature of a new Purchase coming into the Family from the Grant of the Feoffee, and therefore the Blood of the Father shall be preferred.

1 Vent. 161.

If a Man possessed of a Term for one hundred Years makes a Lease for fifty Years, reserving Rent to him and his Heirs, this Rent determines with his Death ; for the Heir cannot have it, because he cannot succeed in the Estate (being a Chattel Interest), to which the Rent, if it continues after the Death of the Lessor, must belong ; and the Executors cannot have it, because there are no Words to carry it to them.

*Latch 99,
100. Sury v.
Brown.
1 Vent. 163,
et vide 2 Rol.
Abr. 451.*

But if a Man seised of Land in Fee makes a Lease for Years, reserving Rent to him and his Assigns during the Term, this Reservation shall not determine by the Death of the Lessor, but the Rent shall go to his Heir ; for though there be no Mention of the Heirs in the Reservation, yet there are Words that evidently declare the Intention of the Lessor, that the Payment of the Rent shall be of equal Duration with the Lease, the Lessor having expressly provided that it shall be paid during the Term, and consequently the Rent must be carried over to the Heir, who comes into the Inheritance after the Death of the

Lessor,

Lessor, and would have succeeded in the Possession of the Estate if no Lease had been made; and if the Lessor assigns over his Reversion, the Assignee shall have the Rent as incident to it, because the Rent is to continue during the Term, and therefore must follow the Reversion, since the Lessor made no particular Disposition of it separate from the Reversion.

If a Lease be made for Years, reserving Rent during the Term, to the Lessor, his Executors and Assigns, this, by the Judgment of *Richmond* and *Butcher's Case*, determined upon the Death of the Lessor, and did not go to the Heir; but this Judgment hath been since overthrown by the Authority of the Case of (*a*) *Sacheverel v. Frogate*, because the Reservation being to the Lessor and his Assigns during the Term, (for the Words *Executors and Administrators* are void, the Lessor having the Inheritance) such express Words evidently discover the Intent of the Contract, and that the Lessee agreed and bound himself to the Payment of the Rent during the Continuance of the Demise.

So and for the same Reason, if a Termor for fifty Years leases for twenty-five Years, reserving Rent to him and his Heirs during the Term, the Executors shall have the Rent after the Death of the Lessor.

If *A.* grants a Rent-Charge to *B.* for forty Years, with a Clause of Distress to *B.* and his Heirs during the Term, the Executor of *B.* may distrain for it during the Term; for the Distress is expressly given during the Term, and therefore must belong to the Executor who has a Right to the Rent-Charge, being a Chattel Interest.

A. Tenant for three Lives, to him and his Heirs, assigns over his whole Estate to *B.* and his Heirs, reserving a Rent of 10*l.* a Year to the Assignor, his Executors, Administrators and Assigns, with a Proviso, that upon Non-payment the Assignor and his Heirs might re-enter, and the Assignee covenanted to pay the Rent to *A.* his Executors and Administrators; the Question was, Whether this Rent should go to the Heir or Executor of the Assignor? And it was decreed in Equity that it should go to the Executor, as the Rent was reserved to him, and as there was no Reversion left in the Assignor to which the Rent could be incident, so as to carry it to the Heir; and it was held, that the Covenant to pay the Rent to the Executor and Administrator of the Assignor was good and binding both in Law and Equity; and though the Proviso was, that in Case of Non-payment of the Rent the Assignor and his Heirs might re-enter, yet the Court thought this immaterial, as in Equity the Heir in this Case must be looked upon as a Trustee for the Executor.

If a Lease be made, reserving Rent at *Michaelmas* or ten Days after, the Rent is not paid at *Michaelmas*, and before the ten Days are expired the Lessor dies, the Heir, and not the Executor, shall have the Rent; for though it was in the Election of the Lessee to pay the Rent at *Michaelmas*, yet the ten Days after are the true legal Term, so that the Rent was not legally due before that Time, and therefore no Chattel. So if the Lessor dies on the Day on which the Rent is to be paid, after Sunset, and before Midnight, the Heir, and not the Executor, shall have the Rent; for it is not due till the utmost Limit of the Day, which ends not till Twelve a-Clock, though the Time for demanding it for Conveniency be a convenient Time before the Sun sets.

A. pursuant to a Power in his Marriage-Settlement made Leases of several Parts of his Estate which were settled on his Wife, reserving Rent payable at *Lady-day* and *Michaelmas*, and died upon *Michaelmas-day* between Three and Four in the Afternoon, and before Sunset, leaving *B.* his Executor; one of the Tenants paid *A.* his Rent, being 18*l.*

the

5 Co. 112.
Cro. Eliz.

217.

(a) 2 Saund.
367.

2 Lev. 13.

Raym. 213.

1 Vent. 161.

Sacheverel v.

Frogate.

1 Vent. 162.

Cro. Eliz.

644. *Darrel*

v. Wilson.

1 P. Will.

555-6. *Sir*

Matth Jenni-

son v. Lord

Lexington.

10 Co. 127.

Clun's Case.

Cro. Jac.

309.

Cro. Eliz.

575.

Mo. pl. 1012.

Yelv. 167.

1 Saund. 287.

1 P. Will.

177, 179.

2 Salk. 578.

Lord Rocking-

ham v. Pen-

rice.

the Morning of the Day on which he died ; and the Question was, as to the Arrears due from all the Tenants, whether they should go to the Jointress as incident to the Reversion, or to *B.* the Executor ? And it was decreed by the Master of the Rolls, on the Authority of *Clun's* Case, that they should go to the Jointress, being incident to the Reversion, and to which the Heir would be intitled in Case there had been no Jointress ; but that as to the 18 *l.* Rent paid by one of the Tenants to the Lessor upon *Michaelmas-day* in the Morning on which the Lessor died, his Honour held this to be a good Payment as to the Lessee who paid it, and that he should not be compelled to pay it over again, but that *B.* the Executor, to whose Hands it came, should pay and account for it to the Jointress.

1 *P. Wil.*
178. *Cole v.*
Bellasis.
—From a
Note of Ju-
stice *Tracy*,
who said he
had consulted the Chief Justice *Holt* on the Point, and that upon Consideration of all the Cases he was of the same Opinion.

But where *A.* granted a Rent-Charge to *B.* for Life, payable at *Lady-day* and *Michaelmas*, and *B.* died on *Michaelmas-day* after Sunset ; and it was held by Judge *Tracy* at *Durham* Assises, that as *B.* lived till after Sunset, which was the legal Time for demanding the Rent, tho' he died before Twelve at Night, that it should go to the Executors.

Preced. Chan.
555. *Earl of*
Strafford v.
Lady Went-
worth.
1 *P. Wil.*
180. *S. C.*
cited.

A. Tenant for Life, Remainder to his Wife for Life, &c. makes a Lease at Will, reserving Rent at *Lady-day* and *Michaelmas*, and died on *Michaelmas-day* about Twelve a-Clock at Noon ; and it was held in this Case that his Administrator was intitled to this Rent ; and herein the Court took a Difference betwixt a Rent incident to a Reversion that must go somewhere (if not to the Executor, then to the Heir) and where the Rent was to go no where, unless to the Executor ; that in the latter Case if the Lessor lived to the Beginning of that Day, at which Time a voluntary Payment of the Rent might be made, this would be sufficient to intitle the Executor or Administrator to the Rent, rather than it should be lost ; for it would be strange if the Tenant should pay the Rent to no body ; and in this Case the Person in Remainder (*viz.* the Wife) can have no Pretence to the Rent, it being a Lease at Will, and consequently such as could have no Continuance with Respect to her.

1 *P. Wil.*
392. *Jenner*
v. Morgan.

A. Tenant for Life, Remainder to *B.* his Son in Tail, *A.* being in Debt and his Estate extended, the Creditor made a Lease to *J. S.* reserving 160 *l.* a Year payable quarterly ; *A.* died the 10th of *March*, and *J. S.* continued the Possession till after the *Lady-day* next following ; whereupon *B.* claimed the whole Rent from *Christmas* to *Lady-day* ; but the Court held, that as to the Rent from *Christmas* to the 10th of *March* it was a Gift in Law to the Tenant, not provided against by any of the Acts of Parliament ; and that there could be no Remedy as to any Apportionment in Point of (a) Time either in Law or Equity.

(a) *Salk.* 65.

But now by the 11 *Geo. 2. cap. 19. §. 15.* ' Where any Tenant for Life shall die before or on the Day on which any Rent was reserved, upon any Demise which determined on the Death of such Tenant for Life, the Executors or Administrators of such Tenant for Life may, on Action on the Case, recover of the under Tenants, if such Tenant for Life die on the Day on which the same was made payable, the whole ; or if before such Day, then a Proportion of such Rent, according to the Time such Tenant for Life lived of the last Year, or Quarter, or other Time in which the said Rent was growing due, making all just Allowances.'

(I) Of the Recovery and Demand of the Rent: And herein,

1. In what Cases a Demand is necessary.

HERE the Material Difference is between a Remedy by Re-entry, *Co. Lit. 201. l.* and a Remedy by Distress, for the Non-payment of the Rent; *Hob. 207.* for where the Remedy is by way of Re-entry for Non-payment, there *331.* must be an actual Demand made previous to the Entry, otherwise it *5 Co. 56.* is tortious; because such Condition of Re-entry is in Derogation of the *Dyer 51.* Grant, and the Estate at Law being once defeated is not to be restored *Plow 70.* by any subsequent Payment; and it is presumed that the Tenant is *7 Co. 56.* there residing on the Premises in order to pay the Rent for the *Maund's Case.* Preservation of his Estate, unless the contrary appears by the Lessor's *Vaugh. 32.* being there to demand it; and therefore unless there be a Demand made, and the Tenant thereby, contrary to the Presumption, appears not to be on the Land ready to pay the Rent, the Law will not give the Lessor the Benefit of Re-entry, to defeat the Tenant's Estate, without a wilful Default in him; which cannot appear without a Demand hath been actually made on the Land.

So if there had been a *Nomine Pænæ* 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; and the Demand in these Cases must be made at the Day prefix'd for the Payment, and alledged expressly to have been made in the Pleading. *Hutt. 114.*
Hob. 207.
331.
7 Co. 56.

But where the Remedy for the 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 of the Tenant to pay the Rent, which was all that was required by the Deed; and the Tenant is not injured by the taking of the Distress, because upon the Tender of the Rent the Pledges are immediately to be restored, or a Writ of *Detinue* lies after the *Quantum* of the Rent has been settled in a *Replevin*; whereas in the Case of Re-entry or of the Penalty, the Tenant is really injured either by the Loss of his Estate, or the Payment of a greater Sum than the Rent, which cannot be restored upon the Payment of the Rent; and therefore he shall not be punished in such Cases without a wilful Default in him, which cannot otherwise appear than by the Proof of a Demand, which was not answered by the Tenant. *Hob. 207.*
Hutt. 13, 23.
Moor 883.
2 Rol. Abr.
426.

But this general Distinction must be understood with these Restrictions.

First, That if the King makes a Lease, reserving Rent with a Clause of Re-entry for Non-payment, he is not obliged to make any Demand previous

previous to his Re-entry, but the Tenant is obliged to pay his Rent for the Preservation of his Estate, because it is beneath the King to attend his Subject to demand his Rent.

Moor 149,
160. *Bouny's*
Case.

But this Exception is not to be extended to the Duchy Lands, though they be in the Hands of the King, for the King must make a Demand before he can re-enter into such Lands; but this is by the 1 H. 4. which provides, that, when the Duchy Lands come to the King, they shall not be under such Government and Regulations as the Demefnes and Possessions belonging to the Crown.

Dyer 210.
Dyer 87.

So if a Prebend make a Lease, rendering Rent, and if the Rent be arrear and be demanded, that it should be lawful for the Prebend to re-enter; if the Reversion in this Case comes to the King, the King must in this Case demand the Rent, though he shall be by his Prerogative excused of an implied Demand; for the implied Demand is the Act of the Law, the other the exprefs Agreement of the Parties, which the King's Prerogative shall not defeat; therefore in Case of the King, if he make a Lease, reserving Rent, with a *Proviso*, that if the Rent be in Arrear for such a Time (being lawfully demanded, or demanded in due Form) that then the Lease shall be void; it seems that not only the Patentee of the Reversion in this Case, but also the King himself, whilst he continues the Reversion in his own Hands, is obliged to make an actual Demand by reason of the exprefs Agreement for that Purpose.

4 *Co.* 73,
Moor 404.
Cro. Eliz.
462.
Dyer 87.

But if the King, in Cases where he need not make a Demand, assigns over the Reversion, the Patentee cannot enter for Non-payment, without a previous Demand, because the Privilege is inseparably annexed to the Person of the King.

Hob. 208.
2 *Rel. Abr.*
426.
Moor 883.
1 *Brownl.*
171. & *vid.*
Hutt. 23.
Cont.

Secondly, Another Exception is, where the Rent is payable at a Place off the Land, with a Clause that if the Rent be behind, being lawfully demanded at the Place off the Land, or where the Clause is, that if the Rent be behind, being lawfully demanded of the Person that is to pay it, that then he may distrain; in these Cases, though the Remedy be by Distress only, yet the Grantee cannot distrain without a previous Demand; because here the Distress and Demand being not one complicate, but different Acts, to be performed at different Places and Times, the Demand must be previous to the Distress; for the Distress is an Act of Grace, not of common Right, and therefore must be used in the Manner that it is given.

2 *Rel. Abr.*
426
Hob. 208.
& *vid.* *Dyer*
348.

But where the Clause is no more than that if the Rent be behind, being lawfully demanded, (without saying at any Place off the Land, or of the Person of the Grantor) that then the Grantee may distrain, there needs no actual Demand, because here the Distress and Demand is but one complicate Act, the one included in the other, and all done at one Time and Place, *viz.* upon the Land; for the Distress is in itself a lawful Demand, and therefore there needs no actual Demand previous to it; because all that was required by the Deed was a lawful Demand, which the Distress in its own Nature is.

Plouv. 70.
4 *Co.* 73.
Moor 408,
598.
Cro. Eliz. 415,
435, 536.

And there seems to have been formerly another Exception admitted, that where the Remedy was by way of Entry for Non-payment, that yet there needed no Demand, if the Rent were made payable at any Place off the Land; because they looked upon the Money payable off the Land to be in Nature of a Sum in Grois, which the Tenant had at his own Peril undertaken to pay; but 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; and therefore the Presumption is, that the Tenant was there to pay it, unless it be overthrown by the Proof of a Demand, and without such Demand, and a Neglect or Refusal thereupon, there is no Injury to the Lessor,

and

and consequently the Estate of the Lessee ought not to be defeated.

But when 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. *Dyer 68.*

There is another Exception when the Remedy is by Distress, and that is, when the Tenant was ready on the Land to pay the Rent at the Day, and made a Tender of it; there it seems there must be a Demand previous to the Distress, because where the Tenant has shown himself ready on the Day by the Tender, he has done all that in Reason can be required of him; for it would put the Tenant to endless Trouble to oblige him every Day to make a Tender; it being altogether uncertain when the Lessor will come for his Rent, when he has omitted to receive it the Day which he himself has appointed by the Lease for Payment and Receipt; wherefore as the Lessee must expect the Lessor, and be ready to pay it at the Day appointed for the Payment of it, or else the Lessor may distrain for it without any Demand; so where the Lessor has lapsed the Day of Payment, and was not on the Land to receive it, he must give the Tenant Notice to pay it before he can distrain for it; for the Tenant shall be put to no trouble where it appears that he has omitted nothing on his Part. *Hob. 207. 2 Rol. Abr. 427.*

And where the Tender was made by the Tenant on the Land at the Day, there a Demand on the Land is sufficient to justify a Distress after the Day; because the Demand in such Case is of equal Notoriety with the Tender, and by a Parity of Reason the Tenant ought to take Notice of such Demand, as well as the Lessor of the Tender on the Land. *Hob. 207.*

But if the Tenant had tendered the Rent on the Day to the Person of the Lessor, and he refused, it seems by the better Opinion, that the Lessor cannot distrain for that Rent, without a Demand of the Person of the Tenant; because the Demand ought to be equally notorious to the Tenant, as the Tender was to the Lessor. *Hob. 207. 2 Rol. Abr. 427.*

So if the Services by which the Tenant holds be personal, as Homage, Fealty, &c. the Demand must be of the Person of the Tenant, because this Service is only performable by the very Person of the Tenant; and therefore a Demand, where he is not, would be improper. *Hutt. 13. Hob. 207.*

Again, if the Rent be Seck, and the Tenant be ready at the last Instant of the Day of Payment to pay the Rent, and the Grantor is not there to receive it, he must afterwards demand it of the Person of the Tenant on the Lands before he can have his Assise; because the Tenant, by the Tender at the Day, has done all that was required on his Part; and if the Grantee might have his Assise, after such Tender on the Day, without a Demand of the Person, the Tenant might be made a Disseisor, and Damages for the Disseisin laid upon him, without any wilful Default in him; but in the Case of a Rent-Charge, after such Tender of the Tenant on the Land, the Grantee may afterwards demand the Rent on the Land, because he has his Remedy by Distress, which is no more than a Pledge for the Rent, and this being to be found and taken of the Land, the Grantee need only demand his Rent where he can find his Remedy, which is on the Land; but in this Case, if the Grantee cannot find the Tenant on the Land to demand the Rent, he may, on the next Feast on which the Rent is payable, demand all the Arrears on the Land; and if the Tenant is not there to pay it, he has failed of his Duty, and is guilty of a wilful *Cro. Car. 508. 7 Co. 57. Hob. 207. 2 Rol. Abr. 427.*

ful Default, which amounts to a Denial; and that Denial being a Disseisin of the Rent, the Grantee may have his Assise, and by that shall recover all the Arrears.

Lit §. 233.
7 *Co.* 57.
2 *Rel. Abr.*
427.

But if there has been neither a Tender of the Rent, nor a Demand of the Grantee on the Day, there the Grantee may afterwards demand the Rent on the Land; because the Tenant having omitted to do his Duty by a Tender on the Day, he is still obliged to answer the legal Demands of the Grantee, which is well made upon the Land, because the Rent issues thereout; for where there is no Tender on the Day of Payment, the Rent is due and payable every Day afterwards; and therefore a Demand in the same manner as the Law requires is sufficient; and consequently the Non-payment, after a Demand on the Land, is a Denial and Disseisin, for which the Grantee may have his Assise.

Cro. Eliz.
332.
Cro. Car. 76.
Hob. 8.

If a Lease be made reserving Rent, and a Bond given for Performance of Covenants and Payment of the Rent, the Lessor may sue the Bond without demanding the Rent; for the Bond being only a collateral Security for the Rent, makes no Alteration in the Nature of it; but it must still be paid in the same manner, and at the same Time and Place, as if there had been no Bond given; and therefore is subject to the former Rules and Distinctions as to the Demand.

Vaugb. 71,
72.

If there be several Things demised in one Lease, with several Reservations, with a Clause, that, if the several yearly Rents reserved be behind or unpaid in Part, or in all, by the Space of one Month after any of the Days on which the same ought to be paid, that then it shall be lawful for the Lessor, into such of the Premises, whereupon such Rents being behind is or are reserved, to re-enter; these are in the Nature of distinct Demises, and several Reservations; and consequently there must be distinct Demands on each Demise to defeat the whole Estate demised.

Vaugb. 31,
32 *Tristram*
v. Countess of
Baltinglass.

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 duely 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 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; as if an Estate be made to a Woman *dum sola fuerit*, this is a Word of Limitation which determines her Estate upon her Marriage.

Hob 331.
2 *Rel. Abr.*
429.
2 *Mod.* 264.

Note; it seems the better way for the Lessor to have a Clause of Re-entry for Non-payment of the Rent, than a Clause that the Lease shall be void for Non-payment; because, in the Case of a Re-entry, a Demand by the Lessor and Non-payment by the Lessee does not avoid the Lease; because there must be an actual Entry to determine it, to which, as it is said, there must be an actual Demand precedent; so that in this Case an actual Demand does not determine the Lease, but only puts it in the Power of the Lessor to avoid it; and this being discretionary in the Lessor, he may either recover the Rent by Action of Debt, and so suffer the Lease to continue; or after such actual Demand he may by Entry defeat it. But if the Clause be, that for Non-payment the Lease shall be void, then if the Lessor should unadvisedly make an actual Demand of the Rent, and the Lessee not be able at that Time to pay it, he has thereby actually determined the Lease; because there is no Re-entry previous to determine an Estate already void in itself: Yet even in this Case, if the Lessor forbears to make an actual Demand when the Rent is in Arrear, he may recover it by
Action

Action of Debt or Distress, and so continue the Lease, because these Remedies, being not in Defeazance of the Grant, the Lessor may pursue without an actual Demand; but this Observation is to be intended only of a Lease for Years; for in Case of a Lease for Life no Demand can determine it without actual Entry, though the Clause be, that for Non-payment of the Rent the Lease shall cease and be void.

3 Co. 64.
Pennant's
Case.

One makes a Lease for Years, rendering Rent, payable at the two most usual Feasts in the Year, or within a Month after each of the said Feasts, at such a Place certain, with a Proviso, that if the Rent be arrear by the Space of a Month after either of the said Days (being demanded in due Form) that then the Lease shall be void. If the Lessee does not pay the Rent at the Feast-Day, but some Time after within the Month makes a Tender of it at the Place appointed, 'tis doubted if this be sufficient without a Tender at the last Instant of the last Day of the Month; but it seems not, because the Lessor might have been there on the last Instant of that Day to have demanded it, and then for Non-payment the Lease will be void, and consequently such Tender before the last Instant cannot save it.

Dyer 87, 88.

Nicholls prayed the Opinion of the Court in this Case; Lessee of Tithes (without any Barn or Soil) rendering Rent, with a Proviso, that if the Rent be not paid, that the Lease should be void, Whether the Lessor should be obliged to seek the Lessee and demand the Rent of him, or that the Lessee ought to seek the Lessor? And 'twas held that the Lessee ought to seek the Lessor, and that so it had been ruled before that Time, *for he that needs, must blow the Coals*, and at the Peril of the Lessee the Rent must be paid, otherwise the Lease is gone.

Nov 145.

2. The Time of Demand.

The Time for Payment of Rent, and consequently for a Demand, is such a convenient Time before the Sun-setting of the last Day, as will be sufficient to have the Money counted; but if the Tenant meet the Lessor on the Land at any Time of the last Day of Payment, and tender the Rent, that is a sufficient Tender, because the Money is to be paid indefinitely on that Day, and therefore a Tender on the Day is sufficient.

Co. Li. 201. a.
Dalst. 44.
1 And. 253.
Saw. 121.
4 Leon. 171.
1 Saund. 287.

If a Lease is made, rendering Rent at Michaelmas between the Hours of One and Five in the Afternoon, with a Clause of Re-entry, and the (a) Lessor comes at the Day about Two in the Afternoon, continues to Five, this is (b) sufficient.

Cro. Eliz. 15.
Id. Cromwell
v. Andrews.
(a) The De-
mand may be
by Attorney.

4 Leon. 179.—But the Power must be special, for such Land and of such Tenant. Yelv. 37. 1 Brownl. 138. (b) Demand must be proved by Witnesses. Dyer 68.—must be made of the precise Sum due. 1 Leon. 305. Saw. 121. Mo. 207.

If a Lease be made, reserving Rent, upon Condition that if the Rent be behind at the Day, and ten Days after, (being in the mean Time demanded) and no Distress to be found upon the Land, that the Lessor might re-enter; if the Rent be behind at the Day and ten Days after, and a sufficient Distress be upon the Land till the Afternoon of the tenth Day, and then the Lessee takes away his Cattle, and the Lessor demands the Rent at the last Hour of the Day, and the Lessee does not pay it, nor is there any Distress upon the Land; yet the Lessor could not enter, because he made no Demand in the mean Time between the Day of Payment and the ten Days, which by the Clause he was obliged to do.

Cro. Eliz. 63.
Worcester v.
Stone.

3. The Place where the Demand is to be made.

Co. Lit. 153, 201.
2 *Rol. Abr.* 428.
Here again we must observe the Difference between a Remedy by Re-entry and Distress; for when the Rent is reserved, upon Condition that if it be behind, that the Lessor may re-enter, in such Case the Demand must be upon the most notorious Place on the Land; and therefore if there be a House upon the Land, the Demand must be at the fore Door thereof, because the Tenant is presumed to be there residing, and the Demand being required to give Notice to the Tenant that he may not be turned out of Possession without a wilful Default, such Demand ought to be in the Place where the End and Intention will be best answered.

Dalsh. 59.
Co. Lit. 201.
1 *And.* 27.
3 *Leon.* 4, et
vide Cro.
Eliz. 15.
And it seems the better Opinion, that it is not necessary to enter the House, though the Doors be open, because that is a Place appropriated for the peculiar Use of the Inhabitant, into which no Person is permitted to enter without his Permission; and it is reasonable that the Lessor shall go no further to demand his Rent, than the Tenant shall be obliged to go, when he is bound to tender it; and a Tender by the Tenant at the Door of the House of the Lessor is sufficient, though it be open, without entering; and therefore by a Parity of Reason a Demand by the Lessor at the Door of the Tenant, without entering, is sufficient.

Co. Lit. 153.
But when the Demand is only in order for a Distress, there it is sufficient, if it be made on any notorious Part of the Land, because this is only to intitle him to his Remedy for his Rent; and therefore the whole Land being equally the Debtor, and chargeable with the Rent, a Demand upon it, without going to any particular Part of it, is sufficient.

Co. Lit. 202.
If a Wood be let, reserving Rent, the Demand ought to be made at the Gate, or some Highway leading through the Wood, as the most notorious Place.

Bendl. 59.
Cro. Eliz. 324.
Cro. Car. 507.
If a Rent-Seek be granted out of *A.* payable at *B.* the Grantee may demand it at *A.* and if the Tenant be not there to pay it, it is a Disseisin, for which the Grantee may have his Assise, and a Demand at *B.* had likewise been good, because that, by the express Appointment and Agreement of the Parties, was the Place where the Rent was made payable.

Cro. Car. 521.
Co. Lit. 153.
But a Demand of the Person of the Tenant is not sufficient off the Land, because the Demand is required to be made in order to an immediate Payment; but no Person is presumed to carry his Wealth about with him; that is reasonably supposed to be at his Place of Habitation, or upon the Land from whence it is gathered, and therefore the Demand of the Person off the Land being not sufficient to answer the Intention of the Demand, is useless and insignificant.

4 *Co.* 73.
Co. Lit. 201.
Cro. Eliz. 462.
Mo. 404.
Dyer 87.
If the King makes a Lease, reserving Rent, the Tenant must pay it without Demand, as is said, either to his Receiver for that Purpose, or at the Receipt of the Exchequer, as well as if by the Words of the Lease the Rent had been made payable at his Exchequer, or into the Hands of his Receiver; but if the King grants, the Reversion the Patentee must demand the Rent upon the Land, because that is the Place appointed by Law, for the Reasons already given, for a common Person to demand the Rent.

2 *Rol. Abr.* 428.
If a Rent be reserved, payable at the Church of *S.* or *D.* upon Condition, it ought to be demanded at both Places, because the Lessee hath his Election to pay it at either Place; and therefore to take Advantage of the Condition, the Lessor must demand it in such Places where by his own Agreement he has permitted the Tenant to pay it.

So if it had been reserved to be paid at or in the Church of D. it ^{2 Rol. Abr.} ought for the same Reason to be demanded both within and without ^{428.} the Church.

If a Lease be made of two Barns, rendering Rent, with Condition ^{Dier 329 in} of Re-entry for Non-payment, the Lessee tenders the Rent at one ^{Margin.} Barn, and the Lessor demands it at the other, yet the Lessor cannot re-enter, because one Barn being as notorious, and consequently as proper a Place as the other for the Payment, 'tis presumed that the Lessee was at the proper Place for Payment, unless that Presumption be overthrown by a Demand; and therefore since the Demand was not made at both the Barns, there is nothing to destroy the Presumption that the Tenant was at the proper Place ready to pay to save the Condition; and if the Lessor did not demand it at the proper Place, he shall not take Advantage of the Condition.

But however just and reasonable the above Cases and Distinctions might have been, and however necessary the Knowledge of them, yet now,

By the 4 Geo. 2. cap. 28. §. 2. it is enacted, ' That in all Cases between Landlord and Tenant, as often as one Half-Year's Rent shall be in Arrear, and the Landlord hath Right by Law to re-enter for Non-payment, such Landlord may without any formal Demand or Re-entry serve a Declaration in Ejectment; or in Case the same cannot be legally served, affix the same upon the Door of any demised Messuage, or upon some notorious Place of the Lands, &c. comprised in such Declaration, which Service or Affixing such Declaration shall stand instead of a Demand and Re-entry; and in Case of Judgment against the casual Ejector, or Nonsuit for not confessing Lease, Entry and Ouster, it shall be made appear to the Court by Affidavit, or be proved upon the Trial in Case the Defendant appears, that Half a Year's Rent was due before the Declaration was served, and no sufficient Distress was to be found, and that the Lessor in Ejectment had Power to re-enter, the Lessor in Ejectment shall recover Judgment and Execution in the same Manner, as if the Rent in Arrear had been legally demanded and a Re-entry made; and in Case the Lessee, or other Person claiming under the Lease, shall suffer Judgment to be recovered on such Ejectment, and Execution executed, without paying the Rent and Arrears, with Costs, and without filing any Bill for Relief in Equity within six Kalendar Months after Execution executed, the said Lessee and all Persons claiming under the Lease shall be barred from all Relief in Law or Equity, other than by Writ of Error, provided that nothing herein shall bar the Right of any Mortgagee of such Lease who shall not be in Possession, so as such Mortgagee within six Kalendar Months after Execution executed pay all Rent in Arrear, and Costs and Damages, and perform all Covenants and Agreements on the Part of the first Lessee.'

(K) The several Remedies for the Recovery of Rents: And herein,

1. Of the Remedy by Distress.

THE Remedy by Distress is by the Common Law incident to a ^{Vide Tit. Di-} Rent-Service, but in Case of a Rent-Charge it must be expressly ^{stres.} provided for by the Deed.

This

This Remedy by Distress is greatly enlarged by several Acts of Parliament, which are taken Notice of under the Head of **Distress**, and therefore I shall here only subjoin some Clauses in a late Law for the more easy Recovery of Rents.

By the 11 *Geo. 2. cap. 19. §. 1.* it is enacted, ' That in Case any Tenant or Lessee of Lands or Tenements, upon the Demise whereof any Rent is payable, shall fraudulently or clandestinely carry off his Goods to prevent the Landlord from distraining, it shall be lawful for every Landlord, or any Person by him impowered, within thirty Days next ensuing such Carrying off, to seise such Goods wherever the same shall be found, as a Distress for the Rent, and the same to sell or dispose of as if the said Goods had been distrained upon such Premises, provided that no Landlord shall seise Goods sold *bona fide* and for a valuable Consideration to any Person not privy to such Fraud.'

And by §. 3. ' If any such Tenant shall fraudulently remove his Goods, or if any Person shall knowingly assist such Tenant in fraudulently conveying away his Goods, or in concealing the same, all Persons so offending shall forfeit to the Landlord, from whose Estate such Goods were carried off, double the Value of the Goods, to be recovered by Action of Debt, &c.'

And by §. 8. ' It shall be lawful for every Landlord to seise for a Distress, Corn and Grass, Hops, Roots, Fruits, or other Product growing on the Estates demised, as a Distress for Rent; and the same to cut, gather and lay up when ripe in the Barns or other proper Place on the Premises; and in Case there shall be no proper Place, then in any other Barn or proper Place which such Landlord shall procure as near as may be to the Premises, and in convenient Time to appraise, sell or dispose of the same towards Satisfaction of the Rent, in the same Manner as other Goods may be seised and disposed of; the Appraisement to be taken when gathered and made.'

2. Of the Remedy by Writ of Annuity.

Lit. §. 219.
F. N. B. 152.
6 Co. 58.

If a Man grants by his Deed an annual Rent to *J. S.* in Fee, for Life or for Years, and the Rent is behind, the Grantee may bring his Writ of Annuity against the Grantor, and thereby charge his Person; and this Remedy is founded on the Words of the Contract, which being presumed to be founded on a valuable Consideration, are always taken most strongly against the Grantor; and therefore where a Man grants an annual Rent, the Person granting is as well liable to the Charge as the Land, because the Person of the Grantor ought to be liable to the Payment of what he himself hath given.

1 Rol. Abr.
226.

Hence it follows, that no Writ of Annuity lies for a Rent-Service, because the Rent-Service being something reserved by the Lessor, by Way of Retribution for the Land demised, proceeds not from the Grant of the Lessee, the Reservation being the Act of the Lessor, and consequently the Person of the Lessee ought not to be liable to the Discharge of a Thing it never granted; for the Lessee is only passive, and takes the Land upon such Terms as the Lessor is willing to part with it, and by such Acceptance of the Land agrees to the Reservation of the Rent.

6 Co. 58. b.

It follows also, that if a Man devises a Rent out of his Land, and dies, that no Writ of Annuity lies for such Rent, because the Devise cannot take Effect till after the Death of the Devisor, and then it is impossible to charge the Person.

So no Writ of Annuity lies for a Rent granted for Equality of Partition, or in lieu of Dower; for though 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.

But for the further Explanation hereof, *vide* Tit. Annuity and Rent-Charge.

3. Of the Remedy by Assise.

The Writ of Assise lies to restore the Party to the actual Seisin of *Vide* Tit. *Assise* that Freehold that he hath been devested of, and consequently the *Assise*. Party who brings it must have at least an Estate for Life in the Rent, and must have been in the Seisin and Enjoyment thereof.

4. Of the Clause of Re-entry.

The Condition of Re-entry for Non-payment of Rent was the Remedy by the antient Law, which was afterwards changed into a Distress; but is yet a Remedy allowable at Law, where the Party provides it by the Deed; as 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 Lands 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. §. 325. Co. Lit. 201. 202.*

But where a Feoffment is made of Lands, 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 Lands, 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. *Lit. §. 327.*

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. *Co. Lit. 205.*

And though Part of the Rent be paid him before Re-entry, yet if the whole be not satisfied, he may re-enter for any Part that is in Arrear, because the Condition is to enforce the Payment of the whole Rent, and therefore may take Advantage for Non-payment of any Part thereof. *Cro. Jac. 511. 4 Leon. 8.*

If a Man grants a Rent-Charge to *J. S.* his Heirs and Assigns, and if it shall happen that the Rent shall 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, and 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 has 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 Grantee's Interest in the Land be uncertain, (because 'tis uncertain when the Rents will be paid out of the Profits) yet while his Interest remains, if his Possession be disturbed or dejected, he may restore it by Ejection, 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 Ejection; 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 Possibility of a Use, which in its Nature is not assignable, yet by the Conveyance of the Rent it shall pass, because 'tis nothing more than a Remedy or Security for the Rent, and therefore shall attend that, into whose Hands soever it comes.

Cro. Car.
512.

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 those Arrears, because the Fine is guided by the Deed of Grant, and both amount but to one Assurance, and consequently the Fine shall have Relation to that Deed which leads the Use of it, and makes it operate.

1 *Sid.* 223,
262, 344.
1 *Lev.* 170.
1 *Keil.* 784.
Raym. 135,
158.
1 *Saund.* 112.
Jemett v.
Corvley.

So it is, if such a Rent had been granted to a Man and his Heirs, and if the Rent be behind and unpaid, then it shall be lawful for the Grantee and his Heirs to enter, &c. The Grantee, when the Rent is Arrear, may by such Proviso enter and hold the Land till he be paid the Rent by the Perception of the Profits; for though it was objected that there was no Estate conveyed, out of which a Use might arise to the Grantee upon the Non-payment 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 on any Estate certain, yet it is good in this Case, because 'tis created to attend a determinate Estate, and the Non-payment 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 arises into his Possession by Ejection, which is the proper Remedy to recover the Possession.

5. Of the *Nomine pœnæ*.

Stil. 4.
Palm. 206.
2 *Lutw.* 1151. This is not so much a Remedy for the Recovery of Rent, as a Penalty to oblige the Tenant to a punctual Payment, and this as well of a Rent-Charge as a Rent-Service; and herein these Things seem observable.

Hob. 82, 208.
1 *Brownl.* 171.
2 *Fon.* 33. That in Case of a Rent-Service or Rent-Charge, if it be granted that if the Rent be arrear, that the Tenant shall forfeit 8 s. a Day as a *Nomine pœnæ*, there must be an actual Demand of the Rent at the Day to give a Title to the Penalty, because till an actual Demand made it cannot appear that there was any Default or Neglect in the Tenant, and it were unreasonable to oblige the Tenant to pay such Penalty without a wilful Default; for the Presumption is, that he was ready to pay the Rent to save the Penalty; and there is no Way to

overthrow

overthrow that Presumption but by proving an actual Demand made, and then if such Demand be not answered by Payment, it is evident that the Tenant has wilfully neglected it, and consequently has submitted himself to the Penalty.

But if the Rent be demanded at the Day, and not paid, and consequently the Penalty forfeited; as if a Rent be granted to *A.* for Life, and if it shall be arrear by the Space of ten Days after the Feasts of Payment, being lawfully demanded, that then the Grantor shall forfeit 10 s. by Way of Pain, and that then and so often it shall be lawful for the Grantee to distrain till the Rent and Penalty be satisfied; by the Opinion of *Hob.* if the Grantee demands the Rent at the End of the ten Days, by which he becomes intitled to the Penalty, the Grantee on the eleventh Day must likewise demand the Penalty, because it is not due till after the ten Days incurred, and the Grantor has the whole Day, on which the Penalty becomes due, to pay it; but *Quære* whether the Grantee be obliged to demand the Penalty after it becomes due.

But if the Plaintiff brings an Action of Debt, or avows for the Rent and *Nomine pænæ*, without laying an actual Demand for the Rent, though he cannot recover the Penalty for want of such Demand, yet he shall by such Suit have Judgment for the Rent, because that is really due, and ought to be paid without any Demand.

If the Tenant that is chargeable with the Rent assigns over his Interest in the Land, it seems that the Assignee is chargeable with the Penalty for any Arrear incurred in his own Time, because the *Nomine pænæ* being intended as an Obligation on the Tenant to pay the Rent, that Obligation from the Nature of the Contract must have Continuance so long as the Rent is payable; and therefore whoever takes the Land, takes it under the Charge of the Rent, and consequently must be subject to that Security which was originally taken upon the Creation of the Rent.

If the Rent be devised without Mention of the *Nomine pænæ*, yet it shall pass as incident to the Rent, because whoever has a Right to the Rent ought to have all that Security for the Payment of it, which was taken upon the original Creation of it.

The *Nomine pænæ*, as an Incident to the Rent, shall descend to the Heir, because being a Security or Penalty to engage the Payment of the Rent, whoever has a Right to the Rent ought in Reason to have the Penalty, which is to oblige the Tenant to pay it; but the Statute of 32 H. 8. gives no Remedy for the Recovery of the *Nomine pænæ*, as it does for Rents, because the Grantee of a Rent-Charge might have an Action of Debt for the Arrears of the *Nomine pænæ* at Common Law; for being only a Penalty, they looked on it to be only a Chattel, since it did not grow due with every Gale of the Rent, but arose casually upon the Non-payment of the Rent at the Day; and for the same Reason the Executors of the Grantee might have an Action of Debt, and consequently there was no Necessity for the Statute to provide a Remedy.

6. Of the Remedy by Action of Debt, &c. and as grounded on several Acts of Parliament.

The Remedy by Action of Debt extended only to Rents reserved on Leases for Years, but did not affect Freehold Rents; the Reason whereof is this; Actions of Debt were given for Rent reserved upon Leases for Years, for that such Terms being of short Continuance, it was necessary that the Lessor should follow the Chattels of his Tenant wherever

wherever they were or wheresoever he should remove them ; but when the Rents were reserved on the durable Estate of the Feud, the Feud itself, and the Chattels thereupon, were Pledges for the Rent ; and if the Land were unstocked for two Years, the Lord had his *Cessavit per biennium* to recover the Land itself ; and hence it is, that if the durable Estate of the Feud determined, as if the Lessee for Life died, the Lessor may have an Action of Debt for the Arrears ; because the Land was no longer a Security for the Rent ; and therefore the Chattels of the Tenant were liable to satisfy the Arrears in an Action of Debt wherever the Tenant removed them.

Co. Lit. 162. So it was in Case of a Rent-Charge ; for if a Man were seised of it in Fee, and it was Arrear, he could have no Action of Debt for the Arrears ; and if he dies, his Heir cannot have any real Action for the Arrears, for that is proper for the Recovery of the Possession, which is still in him, nor can he have a personal Action, because, besides the former Reason, it were absurd to give a real Action for the Rent running on in his own Time, and a personal Action for the Arrears in the Life-time of the Ancestor at the same time ; for it could not be supposed to be both a real and personal thing ; for this Reason also the Executor could have no Action for the Arrears, who is intitled to the personal Estate ; as also because the Executor could not intitle himself by Virtue of the Contract that created the Rent, since the Heir was constituted Representative by the Contract, and by Consequence that Representation excluded all other Persons from taking any Benefit as Representatives, that did not come under that Character.

8 Annæ, cap. 14. But these Inconveniencies and Mischiefs are remedied by a late Act of Parliament, by which it is provided, ' That whereas no Action of Debt lies against a Tenant for Life or Lives, for any Arrears of Rent, during the Continuance of such Estate for Life or Lives, be it enacted, that, from the first Day of May 1710, it shall and may be lawful for any Person or Persons, having any Rent in Arrear, or due upon any Lease or Demise for Life or Lives, to bring an Action or Actions of Debt for such Arrears of Rent, in the same Manner as they might have done in Case such Rent were due and reserved upon a Lease for Years.'

Co. Lit. 162. And by the Statute of 32 H. 8. the Executors of a Man seised either of a Rent-Charge, Rent-Service, or Rent-Seck, either in Fee-Simple or Fee-Tail, have now a double Remedy given them for such Arrears, either by Action of Debt or Distress ; the Action of Debt lies not only against the Tenant that ought to have paid the Rent, but against his Executors and Administrators ; the Distress runs with the Land as long as it continues in the Tenant's Possession that suffered the Rent to run in Arrear, or of any other Person claiming by or from him.

4 Co. 50. And therefore, if a Man grants a Rent-Charge in Fee, and afterwards makes a Feoffment of the Land, out of which it issues, and the Feoffee makes a Lease at Will, the Executors of the Grantee may distrain the Tenant at Will for any Arrears that became due in the Life-time of the Grantor, because such Tenant claims from the Grantor ; and so every Feoffee of the first Feoffee *in infinitum* claims immediately from the Grantor.

2 And. 178. So if the Tenant makes a Gift in Tail, and the Donee dies, the Issue is chargeable with the Arrears of the Rent ; because though he claims by Descent *per formam doni*, yet it is by Virtue of the Gift made by the Tenant.

4 Leo. 115. But if Tenant in Tail makes a Gift in Fee, and dies, and the Discontinuee charges the Land with a Rent in Fee, and then incossets the Issue in Tail within Age, so as he is remitted, the Issue is chargeable with none of the Arrears ; because being remitted by the Feoffment to the

Noy 48.
Moor 486.
pl. 1143.
2 Rol. Abr.
422.
2 Vern. 612.

the old Estate-Tail, he cannot claim under the Discontinuee, but from the first Donor.

So it is, if the Tenant dies without Heirs, so that the Tenancy escheats to the Lord, he shall not be chargeable with any Arrears of a Rent-Charge incurred in the Life of the Tenant. *Co. Lit. 162.*

But before these Acts, if there had been Tenant for Life of a Rent, and he dies, the Rent being in Arrear, his Executors, by the Common Law, might have an Action of Debt for the Arrears; for the Executor, representing the Person of the Testator, succeeds in all his personal Rights; and when the Rent is Arrear at his Death, it is no more than a single personal Duty, distinct and separate from the real Estate; for which there can be no Remedy by real Action, which recovers the Freehold of which the Possessor was disseised; but the Arrears of Rent being no Freehold, but a perfect Chattel or single Duty, were recoverable by the Executor as all other personal Things; and though the Freehold determined by the Death of the Tenant for Life, yet they did not construe such Duties to cease, because there were no Words in the Contract to found such a Construction upon; for the Contract gave him the intire Rent during Life, and the Act of God did not take it away. *Co. Lit. 162.*

If Tenant *pur auter vie* or Tenant for Years held over, yet the Lessor could not distrain them for the Rent that became due before the Determination of their respective Leases, though they continued in the Possession of the Land afterwards; for when the Lease was determined, the Lessor could not avow on them as his Tenants, claiming under a Lease that was ended; to remedy this * It is provided that whereas Tenant *pur auter vie* and Lessees for Years, or at Will, frequently hold over the Tenements to them devised, after the Determination of such Leases; and whereas after the Determination of such, or any other Leases, no Distress can by Law be made for any Arrears of Rent that grew due on such respective Leases before the Determination thereof; It is enacted, ' That it shall and may be lawful for any Person or Persons, having any Rent in Arrear or due upon any Lease for Life or Lives, or for Years or at Will, ended or determined, to distrain for such Arrears, after the Determination of the said respective Leases, in the same Manner as they might have done if such Lease or Leases had not been ended or determined; provided that such Distress be made within the Space of six Calendar Months after the Determination of such Lease, and during the Continuance of such Landlord's Title or Interest, and during the Possession of the Tenant from whom such Arrears became due. * By the said Statute 8 Annæ.

Also for the more effectual Recovery of Rents it is provided, ' That in Case any Tenant for Life or Years, or other Person who shall come into Possession of any Lands, &c. under or by Collusion with such Tenant, shall wilfully hold over after the Determination of such Term, and after Demand made in Writing, for delivering of the Possession thereof, by the Person to whom the Remainder or Reversion shall belong, or his Agent, such Person holding over shall pay double the yearly Value of the Lands, &c. so detained, to be recovered by Action of Debt, whereunto the Defendant shall be obliged to give special Bail; against which Penalty there shall be no Relief in Equity. 4 Geo. 2. cap. 28.

And by a subsequent Act it is provided, ' That in Case any Tenant shall give Notice of his Intention to quit the Premises, and shall not accordingly deliver up the Possession at the Time in such Notice contained, the said Tenant, his Executors or Administrators, shall pay to the Landlord double the Rent which he should otherwise have paid. 11 Geo. 2. cap. 19.

11 *Geo. 2.* And by the said last mentioned Statute it is enacted, 'That where
 §. 14. the Demise is not by Deed, the Landlord shall recover a reasonable
 (a) That on Satisfaction for the Tenements (a) occupied by the Defendant, in an
 a Lease at Action on the Case, for the Use and Occupation of what was so held
 Will the or enjoyed; and if, in Evidence on the Trial of such Action, any
 Plaintiff must Parol Demise, or any Agreement (not being by Deed) whereon a
 show an Oc- certain Rent was reserved, shall appear, the Plaintiff in such Action
 c upation; *secus* shall not be nonsuited, but may make Use thereof as an Evidence of
 on a Lease for certain Rent was reserved, shall appear, the Plaintiff in such Action
 Years. *Lutw.* shall not be nonsuited, but may make Use thereof as an Evidence of
 313. 1 *Salk.* the *Quantum* of the Damages to be recovered.'
 209. 1 *Ld.*
Raym. 170, 28. *Comb.* 255.

3 *Lev.* 150. And though at Common Law no Action lay for Rent, but an Action
 —That an of Debt, yet it was held, that for the Use and Occupation of a Farm,
Assumpsit will *Et c.* an *Assumpsit* would lie.
 lie on an ex- and where the Reservation is of a Sum in Gross. *Hard.* 61. 4 *Mod.* 78. *Noy* 60. *Allen*
 press Promise, 57. 1 *Vent.* 98, 272. 2 *Vent.* 67.

(L) Rent When and how discharged; and therein of the Eviction of the Tenant.

2 *Rol. Abr.* IF the Lands demised be evicted from the Tenant, or recovered by
 429. a Title Paramount, the Lessee is discharged from the Payment of
Hob. 82. the Rent from the Time of such Eviction; but, notwithstanding such
Cro. Eliz. Recovery or Eviction, the Tenant shall pay the Rent that became due
 47. before the Recovery; because the Enjoyment of the Land being the
Co. Lit. 148, Consideration for which the Tenant was obliged to pay the Rent, so
 201. long as the Consideration continued, the Obligation must be in Force;
 there being the same Reason that the Tenant should pay the Rent for
 Part of the Time contracted for, as for the whole Term, if he had
 enjoyed the Land so long.

2 *Rol. Abr.* So if a Disseisor makes a Lease for Years, rendering Rent, and af-
 429, 430. terwards the Disseisee enters, and (a) ousts the Lessee, yet the Lessee
 (a) Must be shall be accountable for the Rent incurred before the *Ouster*; be-
 an actual cause the Lessee cannot be taken for a Trespasser, since he came into
Ouster. 1 *Ld.* the Lands under the Sanction of a legal Contract; though the Dis-
Raym. 370. seisor having but a defeasible Title could not perform that Contract;
 however, till it was destroyed, and while the Lessee had the peaceable
 Enjoyment, the Obligation to pay the Rent, which was founded on
 the Enjoyment, must continue, and consequently the Lessee be obliged
 to pay the Rent till the Entry of the Disseisee.

10 *Co.* 128. a. For the same Reason, if Part only of the Land letten be evicted
Dyer 56. from the Tenant, such Eviction is a Discharge of the Rent in Propor-
 1 *Rol. Abr.* tion to the Value of the Land evicted.
 235.

1 *Ch. Ca.* 31, If *A.* lets several Lands to *B.* and afterwards the Inhabitants of the
 32. *Jero v.* Town, where Part of the Lands lie, recovers a Right of Common in
Tirkwell. Part of the Lands demised; this Recovery, it seems, by the strict
 Rules of the Common Law, shall make no Apportionment of the
 Rent; because the Recovery of the Common is no Eviction of the
 Land, because the Soil still remains in the Lessee; and therefore
 there can be no Apportionment; but a Court of Equity considers
 that the Lessee can have little Benefit by the Soil itself, while others
 are

are permitted to take the Profits in Common with the Lessee, and therefore in such Cases have apportioned the Rent; unless it appears, that, notwithstanding such Right of Common recovered, the Lands demised are well worth the Rent reserved upon the Lease.

But the former Cases are to be understood with this Restriction, that if the Tenant be ousted by a Title Paramount, before the Day appointed for the Payment of the Rent, such Eviction intirely discharges the Tenant from the Payment of any Part of the Rent; for Instance, If *A.* Lessee for Life, makes a Lease to *B.* for Years, rendering Rent, payable at *Easter*, and *B.* by Virtue of the Lease enjoys the Land for nine Months, and then *A.* dies, by which the Interest of *B.* is determined; in this Case *B.* shall pay no Rent at all, for though he held the Land for nine Months, yet his Lease being ended before the Expiration of the Year, (for the Rent being made payable at *Easter* only was payable but once in a Year) there could be no Rent due by the Contract, for it was in Consideration of the Enjoyment of the Land that the Lessee was by the Contract obliged to pay the Rent at the Expiration of the Year; and when the Enjoyment is interrupted and destroyed, the Lessee shall not be obliged to pay for what he had not; nor can there be any Apportionment, because by the express Words of the Lease it was to be paid at *Easter*, and not before.

As the Tenant is discharged from the Payment of the Rent when the Land is evicted by a Title Paramount, so by a Parity of Reason he shall be discharged from it when the Lord purchases the Tenancy; for in such Case the Lord cannot have both the Land and the Rent, nor shall the Tenant be under any Obligation to pay the Rent, when the Land, which was the Consideration, is resumed by the Lord into his own Hands; and this Resumption or Purchase of the Tenancy by the Lord, makes what the Law Books call an Entinguisment of the Rent.

But if the Conveyance to the Lord was not absolute, but upon Condition, or if it were only of a particular Estate of shorter Duration than the Estate which the Lord had in the Rent-Service; in these Cases, though there be an Union of the Tenancy, and the Rent in the same Hand, yet, because that Union is but Temporary, for upon the Performance of the Condition or Determination of the particular Estate, the Tenant is restored to the Enjoyment of the Land, and consequently the Obligation to pay the Rent revives; therefore the Rent in such Case is only suspended, and not extinguished.

By the 11 *Geo. 2. cap. 19.* Reciting, that, where any Lessor or Landlord, having only an Estate for Life in the Land, &c. dies before or on the Day on which any Rent is reserved or made payable, such Rent, or any Part thereof, is not recoverable by the Executors, &c. of such Lessor; nor is the Person in Reversion intitled thereto, any other than for the Use and Occupation of such Lands, &c. from the Death of the Tenant for Life; of which Advantage hath been taken by the Undertenants, who thereby avoid paying any thing for the same; for Remedy whereof it is enacted, That where any Tenant for Life shall die before or on the Day on which any Rent was reserved, or made payable on any Demise or Lease of any Lands, &c. which determined on the Death of such Tenant for Life, the Executors or Administrators of such Tenant for Life shall and may, in an Action on the Case, recover of and from such Undertenant or Undertenants of such Lands, &c. if such Tenant for Life die on the Day on which the same was made payable, the whole; or if before the Day, then a Proportion of such Rent, according to the Time such Tenant for Life lived of the last Year, or Quarter of a Year, or other

10 Co. 128.
1 Salk 65.
1 P. Wil.
392.

Vaugh. 199.
Pollex. 142.

Bro. Tit. Ex-
tinguisment
(17).
Vaugh. 39.
Pollex. 142.

11 Geo. 2.
cap. 19.

other Time, in which the said Rent was growing due as aforesaid, making all just Allowances, or a proportionable Part thereof respectively.

(M) Of Apportionment, and therein of the Suspension and Extinguishment of the Rent: And herein,

1. In what Cases a Rent may be apportioned by the Act of the Parties; and herein of the Difference between a Rent-Service and a Rent-Charge.

*Lit. §. 222.
8 Co. 105. b.*

AND first, it is necessary to distinguish between a Rent-Service and a Rent-Charge; for if a Man who hath a Rent-Service, purchases Part of the Land out of which the Rent issues, the Rent-Service is not extinguished, but shall be apportioned according to the Value of the Land; so that such Purchase is a Discharge to the Tenant for so much of the Rent only, as the Value of the Land purchased amounts to; but if a Man has a Rent-Charge, and purchases Part of the Land out of which the Rent issues, the whole Rent is extinguished.

*Co. Lit. 147-8.
1 Rol. Abr.
236.*

But if the Grantor, by Deed reciting the Purchase, had granted that the Grantee should distrain for the same Rent in the Residue of the Land, the whole Rent-Charge had been preserved; because such Power of Distress had amounted to a new Grant.

*Co. Lit. 148. b.
Where intire
Services, as a
Horse,
Hawk, &c.
shall be ex-
tinguished or
revive, *vid.*
6 Co. 1, 2.
Co. Lit. 149.
8 Co. 105.*

If a Man grants a Rent-Charge out of two Acres, and afterwards the Grantee recovereth one Acre by Title Paramount the Grant, the whole Rent shall not be extinguished; because the Law, which gives the Remedy for the Recovery of a Man's Right, will not prevent the Prosecution of such Right, by depriving the Prosecutor of a greater Profit than the thing recovered may amount to; but in this Case there shall be no Apportionment, but the Grantee shall have the whole Rent after he has recovered one Acre.

*Co. Lit. 148.
vide Cro.
Eliz. 742.
which seems
contrary.
Quere whe-
ther by the
Statute 4 &
5 Annæ such
Grants be
good without
the Attorn-
ment of the
Tenant.*

In some Cases a Rent-Charge may be apportioned by the Act of the Party; as if the Grantee releases Part of his Rent to the Tenant of the Land, such Release does not extinguish the whole Rent. So if the Grantee gives Part of it to a Stranger, and the Tenant attorns, such Grant shall not extinguish the Residue which the Grantee never parted with, because such Release or Disposition makes no Alteration in the original Grant, nor defeats the Intention of it, as the Purchase of Part of the Land does; for the whole Rent is still issuable out of the whole Land, according to the original Intention of the Grant; besides, since the Law allowed of such Sort of Grants, and thereby established such Sort of Property, it would have been unreasonable and severe to hinder the Proprietor to make a proper Distribution of it for the Promotion of his Children, or to provide for the Contingencies of his Family, which were in his View. The Objection, that has been made to these Sort of Apportionments or Divisions of Rent-Charges, is this, that the Tenant thereby would be exposed to several Suits and Distresses for a thing, which in its original Creation was intire and recoverable upon one Avowry.

And

And if a Rent-Charge may partly be assigned by the Grant of the Party, much more may Part of it be extended for his Debts, by the Favour and Assistance of the Law; for though the Tenant is thereby, without his Attornment, possibly made liable to several Suits and Distresses, yet it is an Inconvenience he may avoid by a punctual Performance of his own Grant.

It is next to be considered, whether a Rent-Service, incident to the Reversion, may be apportioned by the Grant of Part of the Reversion; and it seems formerly to have been doubted whether upon such Grant there could be any Apportionment? or whether the whole Rent should not be extinguished and lost? for since the Reversion and Rent incident thereto, were intire in their Creation, they thought it hard that by the Act of the Lessor they should be divided, and thereby the Tenant made liable to several Actions and Distresses for the Recovery of them; but this Conception was too narrow and absurd to govern Men's Property long; for if I make a Lease of three Acres, reserving 3 s. Rent, as I may dispose of the whole Reversion, so may I also of any Part of it, since it is a thing in its Nature severable, and the Rent, as incident to the Reversion, may be divided too; because that being given in Retribution for the Land, ought from the Nature of it to be paid to those who are to have the Land upon the Expiration of the Lease; and hence it is, that the Rent passes incidently with the Reversion without any express Mention of it in the Grant; but the Tenant has really no Prejudice from such Grant, because it is in his Power and his Duty to prevent the several Suits and Distresses by a punctual Payment of the Rent; and therefore he ought not to complain of a Mischief which he has wilfully brought upon himself; besides that formerly such Grants could not take Effect without the Attornment and Consent of the Tenant; but on the other hand it would be extremely prejudicial, if upon such Grants the Rent should not be apportioned; because then the Lessor could not out of his Property make a Provision for his younger Children, or answer the Contingencies of his Family which are in View.

And upon this Reason the Apportionment of Rents has been carried a Step farther; as if *A.* possess of a Term for 20 Years, leases it for 10 Years, reserving 30 l. Rent, and afterwards *A.* devises 20 l. of the Rent to three of his Sons equally to be divided, this is a good Devise, and each of the Sons shall have an Action of Debt for his third Part, though the Reversion, to which the Rent was originally incident, remains intire; for there is nothing in the Nature of the Thing to hinder such a Division or Apportionment; and if the Tenant omits to pay the Rent, the several Actions are a Mischief which he brought on himself, and which he might and ought to have prevented.

If *A.* seised in Fee of one Acre, and possessed of a Term for Years in another, grants a Rent out of both to *B.* in Fee, *B.* takes a Lease or Grant of the Leasehold Acre, the Rent shall not thereby be suspended.

If Lessee for Life or Years surrenders Part, or if he commits a Forfeiture of Part, by making a Feoffment or doing Waste, the Rent shall be apportioned; because the Rent is a Retribution for the Land, and therefore must necessarily cease, according to the Proportion of the Land resumed.

Where the Lessor takes a Lease of Part of the Land, or enters wrongfully into Part, there are Variety of Opinions, whether the intire Rent shall not be suspended during the Continuance of such Lease or tortious Entry; and in the last Case it seems to be the better Opinion and the settled Law at this Day, that the Tenant is discharged from the Payment of the whole Rent till he be restored to the whole Possession, that no Man might be encouraged to injure or disturb his Te-

Cro. Eliz.
742. *Wotton*
v. Shirt.

2 *Inst.* 504.
1 *Rol. Abr.*
234.
Cro. Eliz. 851,
651.
Co. Lit. 148. a.
8 *Co.* 79. b.
Dy. 326.
Hob. 177.
13 *Co.* 57, 58.
Moor pl. 255,
260.

Cro. Eliz.
637, 651.
Ardes v. Wat-
kins.
1 *Rol. Abr.*
234.
Moor pl. 737.
Cro. Eliz.
771. *Exceer*
& *Moyle.*

7 *Co.* 23.
Butt's Case.
Co. Lit. 147.
S. P.
Co. Lit. 148. a.
1 *Rol. Abr.*
235.
Dyer 5. a.
13 *Co.* 58.
Moor pl. 255.

Co. Lit. 148. b.
Ero. Tit. Ex-
tinguishment
48.
1 *Rol. Abr.*
938.
4 *Co.* 52.
9 *Co.* 135.
Pollex. 142,
144.
1 *Vent.* 277.

nant in his Possession, whom by the Policy of the Feudal Law he ought to protect and defend.

But there is no Colour of Reason why the whole Rent should be suspended, when the Lord or Lessor takes a Lease of Part of the Land, because here is the Concurrence of the Tenant, who by his own Act and Consent parts with so much of the Land as is redemised, and thereby supercedes the former Contract as to that Part; but since the Obligation to pay the Rent was by the first Contract founded upon the Consideration of the Tenant's Enjoying the Land, that Obligation must still continue on the Tenant so far as it is not cancelled or revoked by any subsequent Contract between the Parties, and consequently the whole Rent shall not be extinguished by such Redemise; but the Tenant shall pay Rent in Proportion to the Land he enjoys, because the Obligation of the first Contract must subsist so far as the Tenant enjoys the Consideration which first engaged him in such Contract.

Pollex. 141, to 145.
1 Vent. 176.
2 Lev. 143.
Hodgeskins and Thornborough.
3 Keb. 500, 505.
1 Rol. Abr. 938.
7 E. 3. 56, 57. and the following Cases and Books denied to be Law.
Co. L. 148. *b.*
4 Co. 52. *b.*
9 Co. 134. *Bro. Tit. Extinguishment* 48. and *per Hale*, Ch. J. if the Tenant upon such Re-demise reserved a Rent, no Part of the Rent reserved upon the first Contract shall be suspended. *1 Vent.* 276.

2. In what Cases they may be apportioned by the Act of Law, or by the Act of God.

In this Place we are to consider, whether the Tenant shall pay the whole Rent, though Part of the Thing demised be lost and of no Profit to him, or though the Use of the whole be for some Time intercepted or taken away without his Default; and here it seems extremely reasonable, that if the Use of the Thing be intirely lost or taken away from the Tenant, the Rent ought to be abated or apportioned, because the Title to the Rent is founded upon this Presumption, that the Tenant enjoys the Thing during the Contract; and therefore if Part of the Land be surrounded or covered with the Sea, this being the Act of God, the Tenant shall not suffer by it, because the Tenant without his Default wants the Enjoyment of Part of the Thing, which was the Consideration of his paying the Rent; nor has the Lessor Reason to complain, because if the Land had been in his own Hands, he must have lost the Benefit of so much as the Sea had covered.

1 Rol. Abr. 236.

1 Rol. Abr. 236.

If a Lease be made of Land with a Flock of Sheep, and all the Sheep die, *Quære* whether the Rent shall be apportioned. *Dyer* 56. — When a House was burnt down, Tenant liable for the Rent. *2 Ld. Raym.* 1477.

1 Rol. Abr. 237.

If *A.* seised of one Acre in Fee, and possessed of another for Years, makes a Lease of both, reserving Rent, and dies, the Rent shall be apportioned with the Reversion, and the Heir and Executor shall have each his Proportion.

1 Rol. Abr. 237. *Cambell's Case.*

So if a Moiety of a Reversion be extended by *Elegit*, the Rent shall be apportioned, and the Lessor shall still enjoy Half the Rent as incident to the Reversion that remains in him.

1 Rol. Abr. 237.

So if a Husband leases for Years reserving Rent, and dies, the Wife recovers a third Part of the Reversion, and shall have the same Proportion of the Rent; for in all these Cases the Law distributes the Rent as it disposes of the Reversion.

Lit. §. 224.
1 Rol. Abr. 236. *S. P.*

If Part of the Lands descend on the Grantee of a Rent-Charge, the Rent shall be apportioned according to the Value of the Land; for the

the Grantee in this Case is perfectly passive, and concurs not by any Act of his to defeat the Grant.

3. The Manner of such Apportionment, and how the Tenant shall take Advantage of it.

This is properly the Business of a Jury, who upon the Evidence offered are to judge of the Value of the Land purchased by the Lord or Lessor, or aliened by the Tenant, according to the Statute *Quia emptores, &c.* from whence it is easy for them to compute how much is due from the Tenant for the Residue of the Land in his Hands. <sup>1 Vent. 276.
1 Rol. Abr. 237.</sup>

This may be done upon a Plea of *Nil debet* pleaded by the Tenant, because when Issue is joined on such Plea, 'tis the Business of the Jury to determine whether any Thing and how much is due; and this is done with Regard to the real Value of the Land remaining in his Hands, and not with Regard to the Quantity of it. ^{1 Vent. 276.}

So the Tenant may in his Pleading set forth the Value of the Land purchased by the Lessor, and that the Rent ought to be apportioned or abated in Proportion to the Value thereof. ^{1 Vent. 276.}

But the Rent cannot be apportioned upon a Demurrer, because the Judges only determine what is the Law in such Case, but the Value of the Land never comes in Question. ^{Hodgeskins v. Thornborough.}

If there be Lord and Tenant by Fealty, and 20 s. Rent, the Lord purchases two Acres, and then distrains for 18 s. Rent, supposing the Tenant rescues, and the Lord brings his Assise, and the Tenant pleads *Nil Tort*, the Recognitors of the Assise shall extend the Land according to the real Value; for the Jury upon View of the Land are capable of judging of the Value of each Acre; and therefore if they find the two Acres aliened of better Value than the rest, they may apportion the Rent accordingly, and give the Lord but 16 s. for the remaining eighteen Acres; and though the Lord demanded more than his due, yet he shall recover what in Justice he ought to have, because it were unreasonable to expect the Lord should exactly judge of the Value of the Land, and consequently too severe to put him to the Expence of a fresh Suit for such Mistake. <sup>2 Inst. 503.
1 Rol. Abr. 237.</sup>

But in this Case, if the Lord demand less than his due, he shall not recover more than he demanded, because the Court must give Judgment correspondent to the Right of the Demandant. ^{2 Inst. 504.}

But if in Debt or Covenant the Landlord declares for more Rent than is due to him, he may release the Overplus, and take Judgment for that which is really owing. <sup>5 Mod. 214.
Comb. 365.
but vide 1 Ld. Raym. 255.</sup>

Replevin and Abowry.

- (A) The Nature and Description thereof.
- (B) The different Kinds of Replevins; and therein of Replevin by Writ at Common Law, and by Plaint or Act of Parliament.
- (C) Replevins, out of what Courts and by what Authority they issue; and therein of the Power and Duty of the Sheriff.
- (D) Of the Pledges in Replevin, and the Proceedings against them.
- (E) Of the Writs or Processes in Replevin: And herein,
1. Of the original Writ of Replevin.
 2. Of the Withernam.
 3. Of the Writ of Second Deliverance.
 4. Of the Writ *de proprietate probanda*, and the Claim of Property.
 5. Of the Writ *de returno habendo*.
 6. Of Returns irrepleviseable.
 7. In what Manner the Sheriff is to return and execute such Processes.
- (F) Of what Property and for what Things a Replevin lies.
- (G) Replevin, for and against whom it lies.
- (H) Of the Declaration in Replevin.
- (I) Pleas in Replevin.
- (K) Abowries in Replevin; and therein of what Seisin and Services, and the Certainty required therein.

Costs and Damages in Replevin. Vide Tit. Costs Letter (F).

(A) The Nature and Description thereof.

Co. Lit. 145.
b.
2 Inst. 139.

REPLEVIN is a Redelivering to the Owner, by the Sheriff, his Cattle or Goods distrained upon any Cause, upon Surety that he will pursue the Action against him that distrained; and if he pursue it not, or if it be adjudged against him, then he who took the Distress shall have it again, and for that Purpose may have a Writ of *returno habendo*.

Replevin

Replevin is a Writ, and usually granted in Cases of Distress, and is a Matter of Right; so that if a Man grants a Rent with Clause of Distress, and grants further, that the Distresses taken shall be irreplevisable, yet may they be replevied; for such a Restraint is against the Nature of a Distress, and no private Person can alter the common Course of the Law. *Co. Lit. 145.*

In this Writ or Action both the Plaintiff and Defendant are called Actors; the one, *i. e.* the Plaintiff, suing for Damages, and the Avowant or Defendant to have a Return of the Goods or Cattle. *2 Bendl. 84. Cro. Eliz. 799. 2 Mod. 149.*

That the Avowant is in Nature of a Plaintiff, appears, 1st, from his being called an Actor, which is a Term in the Civil Law, and signifies Plaintiff; 2dly, from his being intitled to have Judgment *de re- turno habendo*, and Damages as Plaintiff; 3dly, from this, that the Plaintiff might plead in Abatement of the Avowry, and consequently such Avowry must be in Nature of an Action. *Carth. 127. 6 Mod. 103. Yelv. 148.*

The Avowant being in Nature of a Plaintiff, need not aver his Avowry with an *hoc paratus est verificare*, more than any other Plaintiff need aver his Count. *Plow. 263.*

An Avowant being an Actor, shall not have a Protection cast for him more than any other Plaintiff. *2 Inst. 339.*

But tho' an Avowry be in Nature of an Action, yet one Tenant in common may avow for taking Cattle Damage-Fesant. *Cro. Eliz. 530.*

That an Avowant shall not have a *Decem tales*. *2 Bendl. 26.*

Replevin is an Action founded on the Right, and different from (a) Trespass. *Carth. 74. Yelv. 148. Hob. 16.*

Cro. Eliz. 799. (a) Different from a Writ of Execution. *Carth. 380.*—Different from Detinue. *Winch 26.*

In *Finch* it is held, that when in the Pleadings in Replevin the Title of the Lands is brought in Question, it is then a Real Action; but if otherwise, that it is a Personal one; but this Distinction has of late been exploded, and it is now (a) held, that as no Lands can be recovered in this Action, it cannot with any Propriety be considered as a Real Action, tho' the Title of Lands may incidently come in Question, as it may do in an Action of Trespass, or even of Debt, which are Actions merely Personal. *Finch's Law, 316. & vide Comb. 476. Fitzg. 109. (a) In the Case of Eaton v. Southby, Mich. 12 G. 2. in C. B.*

(B) The different Kinds of Replevins; and therein of Replevin by Writ at Common Law, and by Plaint or Act of Parliament.

REPLEVIN may be made either by original Writ of Replevin at Common Law, or by Plaint by the Statute of *Marl. cap. 21.* *Co. Lit. 145. F. N. B. 69.*

By this Statute, enacted *52 Hen. 3.* it is provided, 'That if the Beasts of any Person be taken, and wrongfully with-holden, the Sheriff, after Complaint made to him thereof, may deliver them without Lett or Gainfaying of him that took the Beasts, if they were taken out of Liberties; and if the Beasts were taken within any Liberties, and the Bailiff of the Liberty will not deliver them, then the Sheriff for Default of those Bailiffs shall cause them to be delivered.'

2 *Inst.* 139. The Mischiefs before this Act were the great Delay and Loss the
13 *Co.* 31. Party was at by having his Beasts or Goods with-holden from him; as
also that Cattle, when distrained and impounded within any Liberty
that had Return of Writs, the Sheriff was obliged to make a Warrant
to the Bailiff of the Liberty to make Deliverance; and there was ano-
ther Mischief when the Distress was taken without and impounded within
the Liberty; to remedy which,

2 *Inst.* 139. By this Statute the Sheriff, upon a Plaint made unto him without
1 *Keb.* 205. Writ, may either by Parol or Precept command his Bailiff to deliver
Dalt. Sb. 430. the Beasts or Goods, that is, to make Replevin of them, and by these
Words (*Post querimoniam sibi factam*) the Sheriff may take a Plaint out
of the County Court and make Replevin presently, which he is to en-
ter in the Court, as it would be inconvenient and against the Scope of
the Statute that the Owner, for whose Benefit the Statute was made,
should tarry for his Beasts till the next County Court, which is holden
from Month to Month. And by this Act the Sheriff may hold Plea in
the County Court on Replevin by Plaint, tho' the Value be of 20*l.* or
above; and yet in other Actions he shall hold Plea where the Matter is
under 40*s.* Value.

Cum. 591. By the Words of this Law, *Si averia capiant, Vicecomes post querimo-
niam sibi factam deliberare possit*; so that it becomes the Sheriff's Duty
upon such Complaint, by Parol or by Precept to his Bailiff, to replevy
them, which Precept may be given before any County Court; but such
Plaint is afterwards to be entered, and as holden in *Cum.* by the Party
who made the Complaint, and not by the Sheriff.

(C) Replevins, out of what Courts, and by what Authority they issue; and therein of the Power and Duty of the Sheriff.

Dyer 246. **R**EPLEVINS by Writ issue (a) properly out of the Courts of
(a) Lies by *K. B.* and *C. B.* at *Westminster*, and are returnable into such
Writ in the Courts.
Cinque Ports.
F. N. B. 67. *Reg. Brev.* 79.

Bro. Rep. pl. Replevins by Plaint are made by the Sheriff by Force of the above-
40. mentioned Statute of *Marleb.* by which he is directed, upon Complaint
Co. Lit. 145. made to him by the Party that his Goods or Cattle are distrained, to
2 *Inst.* 139. command his Bailiff (which may be by Parol or Precept) to make Deli-
verance; and which Plaint may be taken at any Time, and as well out
of, as in Court.

Carth. 380. Also it hath been agreed, that the Hundred Court, and (a) other
(a) Replevin Courts of Lords of Manors, may by Prescription hold Plea in Reple-
lies by Plaint vin, and so may incidently have Power to replevy Goods or Cattle
in *London.* taken; but that, it seems, must be by Process of the Court after a
2 *Lill. Reg.* 557. Plaint entered, but not by a Parol Complaint out of Court.

—But where
on a *Pluries* to the Sheriffs of *London* they return the Custom of the City, that Replevin ought to be made in
the Sheriff's Court there, and not by the King's Writ, and an Attachment was granted; for they cannot oust
the King's Courts of their Jurisdiction by their Customs, tho' confirmed by Act of Parliament. *Dyer* 245.
F. N. B. 68.—By the Usage in *Northamptonshire*, in the Absence of the Sheriffs, Bailiff, &c. the Frank-
pledge may make Deliverance by Replevin. 2 *Inst.* 139.—Replevin does not lie in the *Marshalsea* Court.
10 *Co.* 74.—Nor in the Court of *Canterbury.* 3 *Keb.* 573.—Whether to the Court of *Hallifax,* 2
3 *Keb.* 550.

And

And therefore where in Trespafs for taking, &c. the Defendant justified that the Place where, &c. was a Hundred, and Time out of Mind had a Court of all Actions, Replevins, &c. grantable in or out of Court, and that a Replevin was granted to him by the Steward out of Court, *Virtute cuius*, &c. the Question was, if good or not? and the Reason of the Doubt was, because the County Court could not hold Plea in Replevin at Common Law; but were enabled by the Statute of *Marlebridge*, which extends not to the Hundred Court, which is a Court derived out of the County Court; but *per cur.* clearly, supposing they may grant them in Court, yet they cannot prescribe to grant them out of Court.

2 Salk. 580.
5 Mod. 252.
Skin. 674.
Carth. 380.
1 Ld. Raym. 219.
Hallet v. Birt.

The Sheriff is obliged to grant Replevins in all such Cases as they are allowed of by Law; and the Officer, who takes the Goods by Virtue of a Replevin issuing for what Cause soever, is not liable to an Action of Trespafs, unless the Party in whose Possession the Goods were claims Property in them; and note, that in all Cases of Misbehaviour by the Sheriff or other Officers, in relation to Replevins, they are subject to the Control of the King's superior Courts, and punishable by Attachment for such Misbehaviour.

Carth. 381.

And tho' the Sheriff may grant Replevins by Plaint, and may proceed thereon in his County Court, yet if any Thing touching the Freehold come in Question, or Antient Demesne be pleaded, the Sheriff can proceed no further; nor can any such Proceedings be carried in the Hundred Court, Court Baron, or any other Court claiming a Jurisdiction herein by Prescription.

4 H. 6. 30.
2 H. 7. 6.
Co. Lit. 145.

So when the King is Party, or the Taking is in Right of the Crown, in these Cases the Sheriff is to surcease.

Bro. Repl. pl. 3
1 Brown. 33.

It was rul'd in the Case of one *Bradshaw*, that when an Act of Parliament orders a Distress and Sale of Goods, this is in Nature of an Execution, and Replevin does not lie; but if the Sheriff grants one, yet it is not such a Contempt as to grant an Attachment against him; and *Powell* Justice said, he remember'd a Case in the *Exchequer*, where a Distress was taken for a Fee-Farm Rent due to the King, yet upon Debate in the Court no Attachment was granted, tho' it was in the King's Case.

Trin. 12 W. 3.
in C. B.
Bradshaw's
Case.

Vide 14 Car.
2. cap. 12.

And for the greater Ease in bringing Replevins, and as a Duty incumbent on the Sheriff, it is enacted, by the 1st and 2d *Ph. & Mar.* cap. 18. ' That the Sheriff shall at his first County Day, or within two Months after he receives the Patent, depute and proclaim in the Shire-Town four Deputies to make Replevins, not dwelling above 12 Miles distant from one another, in Pain to forfeit for every Month he wants such Deputy or Deputies 5*l.* to be divided between the King and the Prosecutor.'

1 & 2 P. & M. cap. 18.

(D) Of the Pledges in Replevin, and the Proceedings against them.

WHEN the Sheriff makes Replevin, he ought to take two Kinds of Pledges, *Plegii de prosequendo*, by the Common Law, and *Plegii de returno habendo*, by the Statute of *West.* 2. cap. 2. by which it is provided, ' That Sheriffs or Bailiffs from thenceforth shall not only receive of the Plaintiff Pledges for the pursuing of the Suit, before they make Deliverance of the Distress, but also for the Return of

2 Inst. 340.
Dalt. Sh. 433.
Hutt. 77.

' the

‘ the Beasts, if Return be awarded; and if any take Pledges otherwise, he shall answer for the Price of the Beasts, and the Lord that distrains shall have his Recovery by Writ; that he shall restore to him so many Beasts or Cattle; and if the Bailiff be not able to restore, his Superior shall restore.’

In the Construction hereof the following Cases have been ruled, and Opinions holden.

Co. Lit. 145.
2 Inst. 340.
10 Co. 102.

That if the Sheriff returns insufficient Pledges, he shall answer according to the Statute; for insufficient Pledges are no Pledges in Law; and such Pledges must not only be sufficient in Estate, viz. capable to answer in Value, but likewise sufficient in Law, and under no Incapacity; and therefore Infants, Feme Coverts, Persons Outlawed, &c. are not to be taken as Pledges, nor are Persons Politic, or Bodies Corporate.

Nov. 156.
Trin. 4 Car. 1.

In Replevin the Sheriff does not return any Pledges, and after Issue joined and found, it was moved, if they could be put in by the Court after Verdict; and the Court held they might; notwithstanding the said Statute of *Westm. 2.* as before that Statute the Court might take Pledges on the Omission of the Sheriff; and a Diversity was taken between Pledges for Prosecuting, which were at Common Law, and *pro returno habendo* given by this Statute; and the Court held; that tho’ upon the Default of the Sheriff he was subject to the Actions of the Party, that yet the Taking of Pledges by the Court did not make the Judgment erroneous.

Skin. 244.
2 Show. 421.
Comb. 1, 2.
3 Mod. 56.
S. C.

A Replevin by Plaintiff was sued in the Sheriff’s Court in *London*, and Pledges were found *de returno habendo si*, &c. this Plaintiff 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.* Upon this a Return awarded, and upon an *Elongat’* returned a *Scire Facias* went against the Pledges in the Sheriff’s Court of *London*. Upon a Demurrer the Question was, whether this Case being removed by a *Certiorari*, the Pledges in the inferior Court are discharged, or whether they remain liable to be charged by this *Scire Facias*? The Court were inclined to be of Opinion, that the Pledges are not discharged, for the Mischief that might ensue; for then the Plaintiff might bring a *Certiorari*, and the Defendant would lose his Pledges; and on the other Side, they doubted whether the Principal be in Court but at his Pleasure, and that he is not demandable, and cannot be nonsuited; but afterwards at another Day it was adjudged, that the Pledges were not discharged.

Cro. Car. 446.
1 Jon. 378.
S. C. *Meyser*
v. Gray,
Mayor of *Beverly*.

In Case the Plaintiff declared, that he distrained for 7*l.* 10*s.* Rent, reserved on a Lease, and that the Defendant delivered the Cattle without taking Pledges; to which the Defendant pleaded, that the Plaintiff in the Replevin delivered to him 3*l.* 10*s.* for Pledges, which he accepted; and on Demurrer the Court held, that Pledges being to be found to answer the Party, if he had good Cause of Avowry, and to be answerable for the Amercement to the King, if he be nonsuited; or if it be found against him, the Taking of Money or a Pledge was not lawful; and that altho’ he might take Money for Pledges, yet he ought not to accept less than the Plaintiff’s Demands; on which Account the Court likewise held the Plea vicious; but they agreed, that if the Mayor had taken but one Pledge, (if he had been sufficient) it had been well enough.

1 *Ld. Raym.*
278.
2 *Lutw.* 686.
Blakitt v.
Criffop.

But it hath been adjudged, that a Bond taken by the Sheriff, conditioned that if the Party applying for the Replevin should appear at the next County Court, &c. and prosecute his Action with Effect, and should make Return of the Thing replevied, if Return should be adjudged,

judged, and save the Sheriff harmless, &c. was good in Law, and agreeable to the Intent of the Statute of *Marleb.* which requires Pledges or Sureties, of which Nature the Obligors are; and this Method of taking Bond instead of Pledges was said to be of antient Usage; and that in the old Books *Plegii* signified the same as Sureties; and that there being a proper Remedy on such Bond, it differed from the above Case in *Cro. Car.* of taking a Deposite or Sum of Money; but the Court agreed, that at Common Law this Bond had been void, because it had been to save the Sheriff harmless in making Replevin by Plaint, which he could not have done before the Statute of *Marleb.*

If in Replevin in an inferior Court, the Condition of the Bond is, *Carth. 248.*
If he prosecute his Suit commenced with Effect in the Court of and *1 Show. 400.*
do make Return, &c. if a Return be adjudged by Law, and it happens, *S. C. Chapman v. Buscher.*
 that the Plaintiff hath Judgment in the Court below, which is afterwards reversed on a Writ of Error in *B. R.* in such Case, unless the Party makes a Return, he forfeits his Bond; for tho' he had Judgment in the Court below, yet the Words, *if he prosecute his Suit commenced,* &c. extend to the Prosecution of the Writ of Error, which is Part of the Suit commenced in the Court below; and in this Case, the Taking such Bond was held to be * lawful, and said to be the common Practice. * *Fitzg. 158.*

In Debt upon a Replevin Bond taken by the Sheriff, conditioned that if *C. B.* appear at the next County Court, and prosecute with Effect for Taking, &c. and make Return, &c. if Return be adjudged, and save harmless the Sheriff, &c. then, &c. the Defendant after Oyer pleaded, that at the next County Court, *tent' tali die,* he did appear, and prosecuted, &c. until it was removed by *Recordari,* and did save harmless the Sheriff, but doth not say, that no Return *habend'* was adjudged; and upon Demurrer the Court inclined for the Plaintiff; for the Defendant should have said, that no Return was adjudged at all; and tho' he prosecuted to the *Recordari,* yet Return *habend'* might be adjudged afterwards; and the Condition goes to any Adjudication of Return. *Comb. 228. Lane v. Foulk.*

An Action was brought upon a Bond in Replevin to prosecute his Suit with Effect, and also to make Return, &c. the Defendant pleaded, that *E. G.* did levy a Plaint in Replevin in the Court before the Steward of *Westminster,* and that afterwards, and before the Suit was determined, *viz.* on such a Day, &c. *E. G.* died, *per quod* the Suit abated; the Plaintiff replied, *quod bene & verum est,* that *E. G.* levied such a Plaint against the Defendant, who immediately afterwards exhibited an *English* Bill in the Exchequer against the Plaintiff in that Suit, and by Injunction hindered the Proceedings below until such a Day, &c. on which the said *E. G.* died; so that he did not prosecute his Suit with Effect; and upon a Demurrer to this Replication the Defendant had Judgment; for *per Holt,* Ch. J. this was a Prosecution with Effect, because there was neither a Nonsuit or Verdict against *E. G.* *Carth. 519. Duke of Ormond v. Barry.*

In an Action upon a Replevin-Bond Common Bail shall be filed. *1 Salk. 99.*

There are two Sorts of Pledges, *Plegii de prosequendo* and *Plegii de retorno habendo*; the Pledges of prosecuting were at Common Law, but those *de retorno habendo* were appointed by *West. 2. cap. 2.* by which Statute an Action lies against the Sheriff, if he omits to take Pledges, or if he takes those that are insufficient; for the Party may have a *Scire Facias* against the Pledges, where the Suit is in any Court of Record; and tho' in the County Court, &c. a *Scire Facias* will not lie against the Pledges, because these are not Courts of Record, and every *Scire Facias* ought to be grounded on a Record, yet there the Party may have a Precept in Nature of a *Scire Facias* against the Pledges. *1 Ld. Raym. 278. Per Holt, Ch. J. & vide Comb. 1, 2. Cum. 593.*

Mich. 12 Geo.
2. Rouse v.
Paterfon in
B. R.

An Action on the Case was brought against a Sheriff for taking insufficient Pledges upon a Replevin; to which he pleaded Not guilty, and a Verdict being found against him, and Judgment given thereon in the Court of C. B. on a Writ of Error in B. R. it was objected, first, that an Action on the Case was not the proper Remedy; 2dly, supposing such Action lay, that there ought to have been a *Scire Facias* first sued out against the Pledges. As to the first the Court held, that the Party distraining has by the Statute of *Westm. 2.* an Interest in the Pledges, and if the Sheriff omits to take such, or, which is the same Thing, takes insufficient ones, he is aggrieved, and consequently intitled to his Action. 2dly, That tho' a *Scire Facias* may be brought against the Pledges, yet it does not follow from thence, that an Action does not lie against the Sheriff; and such *Scire Facias*, which is only to certify the Sufficiency of the Pledges, is the less necessary in the present Case, such Insufficiency being set forth in the Declaration, and found by the Verdict.

And for the greater Security of Persons distraining for Rent, it is enacted,

11 Geo. 2.
cap. 19. §. 23.

‘ That Sheriffs, and other Officers having Authority to grant Replevins, shall in every Replevin of a Distress for Rent take in their own Names, from the Plaintiff and two Sureties, a Bond in double the Value of the Goods distrained, (such Value to be ascertained by the Oath of one or more Witnesses not interested, which Oath the Person granting such Replevin is to administer) and conditioned for prosecuting the Suit with Effect and without Delay, and for returning the Goods, in Case a Return shall be awarded, before any Deliverance be made of the Distress; and such Sheriff or Officer taking such Bond, shall, at the Request and Costs of the Avowant or Person making Cognizance, assign such Bond to the Avowant, &c. by indorsing the same, and attesting it under his Hand and Seal in the Presence of two Witnesses, which may be done without any Stamp, provided the Assignment be stamped before any Action be brought thereon; and if the Bond be forfeited, the Avowant, &c. may bring an Action thereupon in his own Name, and the Court may by Rule give such Relief to the Parties upon such Bond, as may be agreeable to Justice; and such Rule shall have the Effect of a Deafeazance.’

(E) Of the Writs or Processes in Replevin: And herein,

1. Of the original Writ of Replevin.

F.N.B. 69, 70.
Doct. pl. 313,
314.
2 Inst. 139.
Salk. 410.—
That it is
usual to take
out the Writ
and Alias and

Pluries at the same Time. *Dalt. Sh. 273.*

THE original Writ of Replevin issues out of Chancery, and neither it nor the *Alias* Replevin are returnable, but are only in Nature of a *Justicies* to empower the Sheriff to hold Plea in his County Court, where a Day is given the Parties; but the *Pluries* Replevin is always with this Clause *vel causam nobis significes*, and it is a returnable Process.

1 Rol. Abr.
485. Garwen
v. Ludlow.

If a *Pluries* Replevin be returned in *Michaelmas* Term, that the Defendant claimed Property, and after Nothing is done, nor any Appearance nor Continuance till *Easter* Term after, at which Term they appeared

peared and pleaded, and Judgment was thereupon given; tho' no Continuance was between *Michaelmas* and *Easter*, yet this is not any Discontinuance, because there is not any Continuance till Appearance, for the Parties have not any express Day in Court, and where there is not any Continuance, there cannot be any Discontinuance.

Moor 403. S. C. adjudged, that the Plaintiff may have a Writ *de proprietate probanda* without

Continuance of the Replevin, tho' it be two or three Years after, because by the Claim of Property the first Suit is determined.

The *Pluries* Replevin supercedes the Proceedings of the Sheriff, and the Proceedings are upon that, and not upon the Plaint, as they are when that is removed by *Recordari*; and tho' there is no Summons in the Writ, yet it gives a good Day to the Defendant to appear, and if he does not appear, then a *Pone* issues, and then a *Capias*.

1 *Ld. Raym.* 617.

Capias and Procefs of Outlawry lies in Replevin; for when on the *Pluries Replegiari fac'* the Sheriff returns *Averia elongata*, then a *Capias* in Withernam issues, and on that's being returned *Nulla bona*, a *Capias* issues, and so to Outlawry.—*Capias* and Procefs of Outlawry in Replevin were given by 25 E. 3. 17.

6 *Mod.* 84.

2. Of the Withernam.

2. If on the *Pluries* Replevin the Sheriff return, that the Cattle are eloigned to Places unknown (*a*), &c. so that he cannot deliver them to the Plaintiff, then shall issue a (*b*) *Withernam* directed to the Sheriff, commanding him to take the Cattle or Goods of the Defendant, and detain them till the Cattle or Goods distrained are restored to the Plaintiff; and if upon the first *Withernam* a *Nihil* be returned, then an *Alias* and *Pluries* Replevin shall issue, and so to a *Capias* and *Exigent*.

F. N. B. 73.
(a) On what Returns made by the Sheriff a Withernam shall issue.
Dalt. Sh. 276.
(b) The Derivation of the Word, and

that it is a Reprisal of other Goods in Lieu of them that were formerly taken, and eloigned or withholden. 2 *Inst.* 141.

The Writ of Withernam ought to rehearse the Cause which the Sheriff returns, for which he cannot replevy the Cattle or Goods; so that it does not lie upon a bare Suggestion, that the Beasts are eloigned, &c.

F. N. B. 69, 73.

If upon the Withernam the Cattle are restored to the Party who eloigned them, yet he shall pay a Fine for his Contempt.

2 *Leon.* 174.

Cattle taken in Withernam may be worked, or if Cows, may be milked; for the Party has them in Lieu of his own.

1 *Leon.* 220.
Dyer 280. in Margin.
Owen 46.
Cro Eliz. 162.
3 *Leon.* 235.

And as the Party is to have the Use of the Cattle, he is not to have any Allowance or Payment made to him for the Expences he has been at in Maintaining them.

Scire Facias against an Executor, reciting that where Replevin was brought against his Testator for a Cow, and Judgment against him *de returno habendo*, which was not executed, that he should shew Cause why he should not have Execution. The Executor pleads *Plene administravit*, upon which the Plaintiff demurred; and *Wylde* Justice said, that upon the Judgment the Cow is in the Custody of the Law, and therefore he ought to have Execution; but the Doubt is, because the Replevin is determined by the Death of the Party; yet by him and *Rainsford*, being only in Court, the Plaintiff shall have Execution, for the Defendant cannot be prejudiced; for if the Sheriff return *Averia elongata*, he shall not have a Withernam but of the Goods of the Testator; or if there are no Goods of the Testator, the Sheriff can take nothing, but shall return *Nulla bona*, and then the Plaintiff hath his ordinary Way to charge the Defendant, if he hath made a *Devastavit*; and it was adjudged for the Plaintiff.

Pasch. 27 *Car.* 2. in B. R.
Suchlin v. Green.

Nov 50.

Webb v. Hind,
and said, that
the Courte of
B. R. is con-
trary to that
of C. B.

W. sues a Replevin, *H.* removes it by *Recordari* into the King's Bench, the Plaintiff does not declare, and upon that a Return awarded to *H.* upon which the Sheriff returns *Averia elongata*, and then a Withernam was awarded and executed; and now the Plaintiff comes and prays he may be admitted to declare, and prays a Deliverance of the Withernam; and it was testified by the Clerks, that upon the Plaintiff's Submission to a Fine for not declaring, and that's being imposed upon him by the Judges, he shall have Deliverance of the Withernam; and a Fine of 3 s. 4 d. being accordingly imposed on the Plaintiff, he then declared, and had Deliverance.

1 *Ld. Raym.*
614.

(a) That both
the Plaintiff
and Defendant
may have a
Withernam,
Bro. Tit. Withernam, pl. 17.

If upon an *Elongata* returned the Sheriff's Cattle are taken in Withernam, yet upon the Defendant's Appearance, and pleading *Non cepit*, or claiming Property, the Defendant shall have his Cattle again; and if they are eloigned, a Withernam against the (a) Plaintiff; for if the Property or Taking be in Question, there is no Reason that the Plaintiff should have the Defendant's Cattle.

1 *Ld. Raym.*
614. & *vide*
Comb. 201.
Salk. 582.

The Withernam is but Mesne Procefs, and cannot be an Execution, because it is granted before Judgment.

3. Of the Writ of Second Deliverance.

2 *Inst.* 340.

At the Common Law, if the Plaintiff in the Replevin had been nonsuited either before or after Verdict, the Defendant who distrained should have had Return, but not irrepleviseable; so as the Plaintiff after Nonsuit might have had as many Replevins as he would, which was vexatious and mischievous; for Remedy whereof the Act of *Westm. 2. cap. 2.* restrains the Plaintiff from any more Replevins after Nonsuit, but gives a Writ of Second Deliverance.

2 *Inst.* 341.

And if in such Writ of Second Deliverance the Plaintiff be nonsuited, or if the Plea be discontinued, or the Writ abates, or if he prevails not in his Suit, Return irrepleviable shall be granted.

2 *Rol. Abr.*
435.

If Defendant in Replevin has Return awarded upon Nonsuit of the Plaintiff, upon which he sues a Writ *de returno habendo*, upon which Writ the Sheriff returns *Averia elongata per querentem*, and upon this a Withernam is awarded, and upon the Withernam the Defendant has *tot Cattella* to him delivered of the Goods of the Plaintiff, and thereupon the Plaintiff sues a Second Deliverance; he shall sue it for the first Distress taken, and not for the Withernam; and this appears by the Nature and Form of the Writ of Second Deliverance.

Dyer 41.

Dalt. Sb. 275.

If a *returno habendo* be awarded to the Sheriff after a Writ of Second Deliverance prayed by the Plaintiff, this is a *Supersedeas* to the *returno habendo*, and closes the Sheriff's Hand from making any Return thereto; and if the Sheriff will not execute the Writ of Second Deliverance, the Party has his Remedy against him.

Plow. 206.

This Statute of *Westm. 2.* gives the Writ of Second Deliverance out of the same Court, where the first Replevin was granted, and a Man cannot have it elsewhere; for if he may, then he shall (a) vary from the Place limited as to this by the Statute.

(a) That the
Writ of Se-
cond Deliver-
ance cannot

vary from the first in Year, Day, Place, or Number of Beasts. *Bro. Tit. Second Deliverance* (3). But if the first Writ was of a Heifer, the second may be of a Cow, as by Presumption it may in that Distance of Time grow to such. 26 *H. 8.* pl. 7.

In Replevin the Defendant avowed, and the Plaintiff being nonsuited brought a Writ of Second Deliverance, whereupon it was moved to stay the Writ of Inquiry of Damages; & *per Curiam*, this is a *Superjedeas* to the *Retorno habendo*, but not to the Writ of Inquiry of Damages; for these Damages are not for the Thing avowed for, but are given by the Statute of 21 H. 8. cap. 19. as a Compensation for the Expence and Trouble the Avowant has been at.

1 Salk 95.
and like Point
adjudged,
Palm. 403.
Litch 72.

Error of a Judgment in C. B. in a Second Deliverance; upon Demurrer in Pleading the Error assigned was, because there was not any Writ of Second Deliverance certified, and *In nullo est erratum* being pleaded, it was moved not to be material, because it is awarded on the Roll, and the Parties had appeared and pleaded to it; but it was adjudged ill, and reversed for that Cause; for there ought to be a Writ, and if it vary from the Declaration in the Replevin, it shall be abated.

Cro. Jac. 424.
Newman v.
Moor.

No Second Deliverance lies after a Judgment upon a Demurrer, or after a Verdict, or Confession of the Avowry; but in all these Cases the Judgment must be entered with a Return irrepleviseable; but upon a Nonsuit, either before or after Evidence, a Writ of Second Deliverance will lie, because there is no Determination of the Matter, and there a Writ of Second Deliverance lies to bring the Matter in Question; but in the Case of a Demurrer and Verdict the Matter is determined by Law; and in the Case of a Confession it is determined by the Confession of the Party.

Lill. Reg.
457.

If the Plaintiff's Writ abates, he may have a new Writ, and is not put to his Writ of Second Deliverance.

Cum. 122.

Note, by the 17 Car. 2. cap. 7. that in an Avowry for Rent the Writ of Second Deliverance is taken.

If the Plaintiff in Replevin be nonsuited for Want of delivering a Declaration, if it happened thro' any Cause that would have intitled him to a Writ of a Second Deliverance, as Sickness of the Person employed, &c. the Court will order the Defendant to accept of a Declaration on Payment of Costs; otherwise the Plaintiff would be remediless, the Writ of Second Deliverance being taken away by the 17 Car. 2.

1 Vent. 64.

4. Of the Writ de Proprietate probanda, and the Claim of Property.

If the Defendant in Replevin claims Property, the Sheriff cannot proceed; for Property must be tried by Writ; and in this Case the Plaintiff may have the Writ *de Proprietate probanda* to the Sheriff; and if it be found for the Plaintiff, then the Sheriff is to make Deliverance; if for the Defendant, then he is to proceed no further; but as this is but an Inquest of Office, if it be found against the Plaintiff, he may have a Replevin to the Sheriff; and if he return the Claim of Property, yet shall it proceed in the C. B. where the Property shall be put in Issue and finally tried.

Co. Lit. 145. b.
F. N. B. 77.
Dyer 173.
Cum. 592.

None but he who is Party to the Replevin shall have the Writ *de Proprietate probanda*; so that if upon a Replevin the Beasts of a Stranger are delivered to the Plaintiff, such Stranger being no Party to the Replevin, shall not have this Writ.

14 H. 4. 25.
2 Rol. Abr.
431.

The Sheriff is to return the Claim of Property on the *Pluries*, before which Time the Writ *de Proprietate probanda* does not issue, for it recites the *Pluries*.

Reg. 83.
Cum. 595.

The Writ *de Proprietate probanda* is an Inquest of Office, and the Sheriff is to give Notice to the Parties of the Time and Place of executing of it.

Dalt. Sh. 274.

Moor 403. If the Defendant claims Property in Replevin, the Plaintiff may have the Writ *de Proprietate probanda* without Continuance of the Replevin, tho' it be two or three Years after, because by the Claim of Property the first Suit is determined.

7 *H. 4.* 46.
Cum. 594. If the Party who hath the Cattle claims Property, the Sheriff cannot determine it without a Writ *de Proprietate probanda*; and then if the Property be found for the Party claiming it, it is but an Inquest of Office, and the Party who made the Plaint may after sue a Writ of Replevin, to which Property may again be pleaded.

Cro. Eliz. 475.
Winch 26.
1 *Sbore.* 402.
Salk. 5. 94.
6 *Mod.* 81. If the Plaintiff has Property, and omits to claim it before the Sheriff, he may notwithstanding plead Property in himself or in a Stranger, either in Abatement or in Bar, tho' it was formerly held, that Property in a Stranger could only be pleaded in Abatement.

Comb. 477.
Barrett v.
Scrimshaw. In Replevin the Defendant in his Avowry pleads, that the Beasts taken belong to a third Person, and not to the Plaintiff, and therefore prays a Return; to which the Plaintiff demurs; for on the Avowant's own shewing he ought not to have Return, having admitted the Property of the Beasts to be in another; but Judgment was given for the Defendant, for the prior Possession was in him, and he hath a Right against all others but the right Owner, and the Plaintiff by his Demurrer hath admitted, that he hath no Property in them.

6 *Mod.* 68.
139. *Leonard*
v. Stacy, &
vide 2 *Mod.*
242. In Trespafs for entering the Plaintiff's House, and taking away his Goods, the Defendant justifies by Virtue of a Replevin out of the Sheriff's Court in *London*, and a Precept thereupon to *J. S.* an Officer, and that he the Defendant came in Aid of him; Plaintiff replies, that before the Taking away the Goods he claimed Property in them, and gave Notice thereof to the Defendant; and the Question upon a special Verdict was, whether the Taking away, after the Claim of Property, and Notice thereof, did not make him a Trespasser *ab initio*? And it was held *per tot. Cur.* that he was a Trespasser *ab initio*; for tho' the Claimer ought to be to the Sheriff or Officer, and that a Claimer to a Person that comes to Assistance be not enough to the making the Execution illegal, if the Officer does not desist; yet if it be notified to him that comes in Aid, that Claim of Property is made, he at his Peril ought to desist.

5. Of the Writ de returno habendo.

35 *H. 6.* 40.
Dyer 280.
Co. Lit 145. The *Returno habendo* is a Judicial Writ, that lies for him who has avowed the Distress, and proved the same to be lawfully taken; or where, upon the Removal of the Plaint into the Courts above, the Plaintiff, whose Cattle were replevied, makes Default, or does not declare or prosecute his Action, and thereby becomes nonsuited, &c. and by this Writ the Sheriff is commanded to make a Return of the Cattle to the Defendant in the Replevin.

Co. Ent. 59. A Bailiff who makes Conuzance may have Judgment of a Return, and consequently a Writ *de returno habendo* grounded on such Judgment.

2 *Rol. Abr.*
433. The Writ *de returno habendo* is not a returnable Process.

F. N. B. 172. If the Defendant hath a Return awarded to him, and he sueth a Writ *de returno habendo*, and the Sheriff return on the *Pluries, quod Averia elongata sunt*, &c. he shall have a *Scire Facias* against the Pledges, &c. according to the Statute of *Westm. 2.* and if they have Nothing, then he shall have a *Witbernarn* against the Plaintiff of the Plaintiff's own Cattle.

6. Of Returns irrepleviseable.

Return irrepleviseable is a Judicial Writ directed to the Sheriff for ^{2 Rol. Abr.} the final Restitution or Return of Cattle unjustly taken by another, ^{434.} and so found by Verdict, or after a Nonfuit in a Second Deliverance.

If the Plea be to the Writ, or any other Plea be tried by Verdict, or ^{2 Inst. 340.} judged upon Demurrer, Return irrepleviseable shall be awarded, and ^{Dyer 280.} no new Replevin shall be granted, nor any Second Deliverance by the Act of *Westm. 2.* but only upon a Nonfuit.

If upon Issue joined in Replevin the Plaintiff does not appear on the ^{3 Leon. 49.} Trial, being called for that Purpose, yet Return irrepleviseable shall not be awarded, as in Case of a Verdict's being given, but the Party may have a Writ of Second Deliverance, as well as if it had been a Nonfuit before Declaration or Appearance.

If a Man has Return irrepleviseable, and a Beast die in the Pound, ^{Hob. 61.} he may distrain anew; so if the Beast die before Judgment.

If Return irrepleviseable be awarded, the Owner of the Cattle may ^{1 Ld. Raym.} offer the Arrearages; and if the Defendant refuses to deliver the Di- ^{720.}stres, the Plaintiff may have Detinue, because the Distres is only in Nature of a Pledge.

7. In what Manner the Sheriff is to execute and return such Processes.

By the Statute of *Westm. 1. cap. 17.* if the Party who distrains, con- ^{2 Inst. 193.}veys the Distres into any House, Park, Castle, or other Place of ^{5 Co. 93.} Strength, and refuses to suffer them to be replevied, the Sheriff may ^{Dalt. Sh. 373.} take the *Possé Com.* and on Request and Refusal may break open such House, Castle, &c. and make Deliverance; and this was a necessary Law so soon after the irregular Time of *H. 3.*

If the Sheriff returns, that the Beasts are inclosed in a Park among ^{F. N. B. 157.} Savages, or inclosed in a Castle, &c. he shall be amerced, and another ^{Halt's Notes.} Writ of Replevin shall be awarded; for he ought to have taken the *Possé Com.* for this was a Denial.

If the Sheriff return, *quod mandavi Ballivo Libertatis, &c. qui nullum* ^{F. N. B. 157.} *dedit mihi responsum,* or that the Bailiff will not make Deliverance of the Cattle, these are not good Returns; for by the said Statute *Westm. 1.* the Sheriff, upon such Return made to him by the Bailiff, ought presently to enter into the Franchise, and make Deliverance of the Cattle taken.

If a Man sue a Replevin in the County Court without Writ, and ^{F. N. B. 158.} the Bailiff return to the Sheriff, that he cannot have View of the Cattle to deliver them, the Sheriff by Inquest of Office ought to inquire into the Truth thereof; and if it be found by a Jury, that the Cattle are eloigned, &c. the Sheriff in the County Court may award a Withernam to take the Defendant's Cattle; and if the Sheriff will not award a Withernam, then the Plaintiff shall have a Writ out of Chancery directed unto the Sheriff rehearsing the whole Matter, commanding him to award a Withernam, &c. and he may have an *Alias*, and after a *Pluries*, and an Attachment against the Sheriff, if he will not execute the King's Command.

If the Sheriff return, *quod Averia elongata ad loca incognita*, this is a ^{Bro. Retur. de} good Return, and the Party must pursue his Writ of *Withernam*; but ^{Er. pl. 100.} if the Sheriff return *Averia elongata ad loca incognita infra Comitatum meum*,

- meum*, he shall be amerced, for the Law intends that he may have Notice in his County.
- Bro. Retur. de Br. pl. 125.* If in Replevin the Sheriff return, *quod Averia mortua sunt*, this is a good Return.
- Dalt. Sb. 556. (a) Allen 33.* It is a good Return, *quod nullus venit ex parte querentis ad demonstranda Averia*; (*a*) but it seems the Sheriff is not obliged to require this.
- 2 Rol. Abr. 552. Cum. 596.* If the Sheriff be shewn a Stranger's Goods, and he takes them, an Action of Trespafs lies against him, for otherwise he could have no Remedy; for being a Stranger he cannot have the Writ *de Proprietate probanda*, and were he not intitled to this Remedy, it would be in the
- (a) Kelw. 119.* Power of the Sheriff to strip a Man's House of all his Goods; but (*a*) *Kelw.* seems to hold, that the Action lies more properly against the Person who shews the Goods.
- 20 H. 6. 28. 2 Rol. Abr. 552.* If the Sheriff comes to make Replevin of Beasts impounded in another Man's Soil; if the Place be inclosed, and has a Gate open to the Inclosure, he cannot break the Inclosure, and enter thereby, where he may enter by the open Gate; but if the Owner hinders him, so that he cannot go by the open Gate for fear of Death, he may break the Inclosure and enter there.
- 1 Ld. Raym. 613. 1 Lutw. 581.* The Sheriff is to return, that the Cattle are eloigned, or that no Person came to shew, &c. or a Delivery; but he cannot return, that the Defendant *non cepit* the Cattle, because it is supposed in the Writ, and is the Ground of it, which the Sheriff cannot falsify.

(F) Of What Property, and for What Things a Replevin lies.

- Co. Lit. 145.* **I**T is a general Rule, that the Plaintiff ought to have the Property of the Goods in him at the Time of Taking; yet if the Goods of a Villain be distrained, the Lord of the Villain shall have a Replevin, because the Bringing the Replevin amounts to a Claim in Law, and vests the Property in the Plaintiff; but in this Case, if the Goods of a Villain be taken by a Trespasser who claims Property in them, the Lord can have no Replevin, because the Villain had but a Right.
- Co. Lit. 145.* Also in a special Case one may have a Replevin of Goods, tho' they were not distrained; as if the Mesne put in his Cattle in Lieu of the Cattle of the Tenant Peravail, whom he is bound to acquit, he shall have a Replevin of them.
- F. N. B. 69.* If the Lord distrains his Tenant's Cattle wrongfully, and afterwards the Cattle return back to the Tenant, yet the Tenant shall have a Replevin against the Lord for those Cattle, and shall recover Damages for the wrongfully Distraining of them, because he cannot have an Action of Trespafs against his Lord for that Distress, but against a Bailiff or Servant he may.
- Co. Lit. 145.* Not only a general Property which every Owner hath, but also a special Property, such as a Person has, who hath Goods pledged to him, or who hath the Cattle of another to manure his Lands, &c. is sufficient to maintain a Replevin (*a*), and in such like Cases either Party may bring a Replevin.
- 2 Rol. Abr. 430. Godb. 124.* A Replevin does not lie of Things which are *Fer.e Natur.e*, as Conies, Hares, Monkies, Dogs, &c. but if Things wild by Nature are made

made tame, or are reclaimed, so long as they continue in that Condition, they belong to the Person who has the Possession of them, and he may bring a Replevin; and the general Rule herein seems to be, 4 Co. 54. that a Replevin lies for any Thing that may by Law be distrained.

A Replevin lies of a *Leveret*; for it has *Animum revertendi*; so and for the same Reason it lies of a *Ferret*; but it is said not to lie for a Mastiff-Dog, tho' an Action of Trespafs will.

Bro. Repl. 64.
2 Rol. Abr.
430.

Replevin lies of a Swarm of Bees.

F. N. B. 68.

Replevin does not lie of Trees, or Timber growing; nor of Things annexed to the Freehold, because such Things cannot be distrained; but a Replevin lies of certain Iron belonging to the Party's Mill.

F. N. B. 68.

So Replevin does not lie of Deeds or Charters concerning Lands; for they are of no Value, but as they relate thereto.

Bro. Repl. 34.

Replevin lies not of Money, nor of Leather made into Shoes.

Moor 394.
2 Brownl 139.

If a Mare in Foal, a Cow in Calf, &c. are distrained, and they happen to bring forth their Young, whilst they are in the Custody of the Distrainer, a Replevin lies of the Foal, Calf, &c.

Bro. Repl. 41.
F. N. B. 69.
1 Sid. 82.

Replevin lies for a Ship; so of the Sails of a Ship.

March 110.
Raym. 232.

It was ruled by *Pollexfen* Ch. J. upon Evidence at *Guildhall* in Replevin for Goods taken by Order of the *East-India* Company from Interlopers in the *Indies*, that no Replevin lies for Goods taken beyond the Seas, tho' brought hither by the Defendant afterwards.

1 Show. 91.

(G) Replevin, for and against Whom it lies.

HEREIN the general Rule is, that he who brings a Replevin, must have a general or special Property in him at the Time, and that therefore a Lord for a Heriot, a Parson for a Mortuary, shall not have it before Seifure; for the Seifure vests the Property in such Cases.

Plow. 281.
Co. Lit. 145.

An Executor shall have a Replevin of the Taking of Beasts in the Life-time of his Testator; for this affirms the Property to remain.

Bro. Repl. 59.
1 Sid. 82.

If the Cattle of a Feme Sole be taken, and afterwards she marries, the Husband alone may have a Replevin; but it hath been held, that in such Case the Wife cannot join, for that this Action admits and affirms Property in the Feme at the Time of the Marriage, which by Consequence must have vested in the Husband.

F. N. B. 69.
1 Vent. 261.
2 Lev. 107.
1 Sid. 172.

But of the Taking of Goods which a Feme has as Executrix, the Husband and she may join in Replevin.

Bro. Bar. Fem.
pl. 85.

And in a late Case where Husband and Wife brought a Replevin, and concluded their Declaration *ad Damnum ipsorum*, Defendant avowed for Rent in Arrear on a Demise for Years; Plaintiff in Bar of the Avowry pleaded *Non demisit*, and Issue being joined on the Demise, a Verdict was found for the Plaintiffs, and 1 s. Damages; and in Arrest of Judgment two Objections were made, first, that Husband and Wife cannot join in Replevin; 2dly, that tho' they might join in an Action, yet it cannot be laid to the Wife's Damages, she having no Property in Personal Chattels during the Coverture; and in Support of these Exceptions were cited *F. N. B.* 69. *1 Sid.* 172. because Replevin admits and affirms Property in the Wife at the Time of the Marriage, which must necessarily vest in the Husband; and the Court can make no Intendment, that they were Jointenants before Coverture, or that the Feme had the Goods as Executrix; but *per Cur.* As to the first Excep-

Pa/sch. 8 *Geo.*
2. in B. R.
Bourne & Ux.
v. Mattaire.

tion, tho' it be generally true, that Husband and Wife cannot have a joint Property in Personal Chattels after Marriage; yet as a Man and a Woman may have a joint Property before Marriage, or the Wife might have these Goods as Executrix, and the Taking in both Cases might be before Marriage, we do not see why they may not declare jointly in an Action for such Taking; and if the Law will admit of such a joint Action, the Fact is admitted by the Pleading; for the Defendant has not made it a Point of Contest with the Plaintiff, whose the Property was at the Time of Taking; and therefore if there can be a Case where Husband and Wife may join in an Action for a Personal Chattel, we think, that after a Verdict this ought to be intended that Case. As to *F. N. B.* 69. the Book says, the Husband may have a Replevin singly; but this does not prove he may not join his Wife with him. And as to *1 Sid.* 172. we think the Distinction there made not Law, and that it is not necessary the Husband should sue alone in such Cases as affirm a Property; but this is expressly contrary to the Year Books, and to the Opinion in *1 Vent.* 261. where it is held, they may join in Detinue, which affirms Property as well as Replevin; for the specific Goods there are to be recovered. And as to the second Exception, this must follow the Fate of the first; for if the Tort preceded the Marriage, the Action would survive; and *Cro. Eliz.* 259. is express, that where Damages may survive, they may be assessed to both.

2 Rol. Abr.
431.

If *A.* takes Beasts by the Command of *B.* the Replevin may be brought against both, or it may be brought against the Commander only, as Trespas may be.

Co. Lit. 145.
5 Co. 19. a.
38. b.

If the Beasts of several Men be distrained, they cannot join in a Replevin; so it is a good Plea to say, that the Property is to the Plaintiff and a Stranger, and where there be two Plaintiffs, that the Property is to one.

(H) Of the Declaration in Replevin.

Cater 218.
Salk 654.
1 Co. 45.

IT hath been holden by some Opinions, that the Count or Declaration in Replevin must be certain and particular in setting forth the Numbers, Kinds and Qualities of the Cattle or Things distrained; for that otherwise the Sheriff cannot tell how to make Deliverance of the same.

Allen 33.
Stil. 71. S. C.
More v. Clip-
lam.

As in Replevin the Plaintiff declared, that the Defendant took *centum Oves Matrices & Verveces* of the Plaintiff's; after Verdict for the Plaintiff Exception was taken to the Declaration, because it did not appear in the Declaration how many Ewes and how many Wethers; and the Sheriff is bound to make Deliverance of either Sort according to the Writ; and tho' he may be informed by the Party; so that it is a good Return to say, that none came on the Behalf of the Party to shew the Beasts, yet he is not bound to require it, but ought to have sufficient Certainty within the Record, and therefore Judgment was given for the Plaintiff; but it was agreed, that *Oves* without Addition had been good enough.

7 Co. 25.
1 Show. 170.

But notwithstanding this Case, it seems to be now settled, that a Declaration in Replevin being certain to a general Intent is sufficient, especially if it be after a Verdict.

As where a Replevin was brought, *quare Defend' cepit bona & catalla*, (*viz.*) *quandam parcell' linte'i & quandam parcell' Papiri*, Defendant avowed for Rent; and after Verdict for the Plaintiff Exception was taken in Arrest of Judgment, that the Declaration was uncertain in not specifying the Quantities contained in the Parcels; and *Parker Ch. J.* who delivered the Opinion of the Court, said, that the Declaration would undoubtedly have been ill on Demurrer; but that the Defendant having avowed the Taking the Goods in the Declaration, the Avowry had cured the Defect, as thereby both Parties were agreed what the Goods were; and the Defendant himself having prayed a Return of them, there was no Controversy between him and the Plaintiff about them; and to oblige the Plaintiff to a greater Certainty, would have been of no Service to the Defendant; for if he had demanded 500 Reams of Paper, and proved only one, he must recover; and as to the Difficulty of Delivering the Goods upon a *Returno habendo*, he said there was no Weight in that Objection; for the Sheriff, when he came to make a Return, might have the Defendant's Assistance to shew him which were the Goods; and he was not obliged to execute the Writ without Somebody attended to point out the Things he was to deliver; and in this Case that of *Allen 33.* was fully considered, and over-ruled.

Trin. 1 Geo. 1. in B. R. Kempster v. Nelson.

So in the Case beforementioned of *Bourne versus Mattaire*, where a Replevin was brought for 14 Skimmers and Ladles; and the Objection that the Plaintiff had not distinguished in his Count how many Skimmers and how many Ladles, was over-ruled.

Pasch. 8 Geo. 2. in B. R. Bourne & Ux. v. Mattaire.

The Plaintiff in his Count must alledge the Taking to be at a certain Place, or according to the Precedents, *in quodam loco vocat'*, that the Defendant may have Notice to what he is to answer, and make his Title; and therefore the Alléding the Taking *apud Dale*; or such a Vill, is too general and uncertain.

Cro. Eliz. 896. Ward v. Saville. Godb. 186. Brownl. 176. et vide Hob. 16. Moor 678. Raym. 34. Cartb. 186. F. N. B. 68. in the Notes to the new Edition.

In Replevin both the Vill and Place where are traversable.

A Man may count of several Takings, Part at one Day and Place, and Part at another Day and Place.

In Replevin the Plaintiff counted of four Oxen taken at divers Times and Places, and that Delivery was made of two, but the other two were with-held to his Damage 10 s. and this was held sufficient without any Severance made as to the Damages.

Bro. Tit. Damages 42.

In Replevin in *T.* the Plaintiff declared the Taking of twenty Beasts in *A.* and *B.* & *per Cur.* he need not shew how many he took in one Vill, and how many in another.

Bro. Repl. 48.

The Count, as in other Actions, must agree with the Writ; so that if the Writ is *de Averiiis*, and the Count *de Averiiis & Catallis*, this is ill.

3 Keb. 671. vide Tit. Pleadings.

In Replevin the Writ was in the *Detinet*, and the Count in the *Detinuit*, and this was thought to be a material Variance; for in Replevin in the *Detinet* the Plaintiff recovers as well the Value of the Goods, as Damages for Taking; but when the Writ and Count are, that the Defendant *detinuit* the Goods against Pledges, &c. by this it is implied, that the Plaintiff has had his Goods again; and for this he shall only recover Damages for the Taking; but the Parties agreed to amend.

2 Lutw. 1150.

(I) Pleas in Replevin.

- Vide* 9 Co. 134. **P**LEAS in Replevin are generally of four Kinds; *viz.* either, first, Pleas in Bar; 2d, In Justification; 3d, By Way of Conuzance; 4th, By Way of Avowry.
- 3 Lev. 205. In Replevin the Defendant may either justify or avow at his Election, with this Difference, that if he justifies, he cannot have a Return.
- 2 Keb. 729.
- 1 Vent. 249. The general Issue in Replevin is *Non cepit*.
- 2 Lev. 92. If the Defendant in Replevin claim Property to himself, or a Stranger, above, as he may do; though it ought to have been before the Sheriff, this does not amount to the General Issue, but may be pleaded in Bar or Abatement; and if the Plaintiff demur, the Defendant shall have a Return without avowing; for it appears the Beasts are not the Plaintiff's; but on Issue *Non cepit*, Property cannot be given in Evidence, for that were contrary to it.
- 1 Vent. 249. Salk. 594. 6 Mod. 81, 103. If the Defendant in Replevin make Conuzance as Bailiff to *J. S.* the Plaintiff cannot traverse that he is his Bailiff; for it is a Matter of which by no Intendment he can have Knowledge; but if in Bar of the Avowry the Plaintiff pleads, that another had made Conuzance as Bailiff to *J. S.* for the same Cause, and was barred, he need not shew that it was with the Privity of *J. S.* for it shall be intended; and if in Truth it was without, the Defendant may traverse his being ever his Bailiff.
- Cro. Eliz. 14. 1 Vent. 314. 2 Lev. 210. & wide 3 Lev. 20. If the Defendant in Replevin make Conuzance as Bailiff to *J. S.* the Plaintiff cannot traverse that he is his Bailiff; for it is a Matter of which by no Intendment he can have Knowledge; but if in Bar of the Avowry the Plaintiff pleads, that another had made Conuzance as Bailiff to *J. S.* for the same Cause, and was barred, he need not shew that it was with the Privity of *J. S.* for it shall be intended; and if in Truth it was without, the Defendant may traverse his being ever his Bailiff.
- Salk. 107, 409. In a Replevin against the Master and Bailiff or Servant, if the Bailiff makes Conuzance as Bailiff, and the Master pleads, that he did not take, the Servant shall not have any Return upon his Conuzance; for by the Plea of the Master his Conuzance is changed into a Justification.
- 2 Rol. Abr. 433. 1 Show. 169. cited. In a Replevin against the Master and Bailiff or Servant, if the Bailiff makes Conuzance as Bailiff, and the Master pleads, that he did not take, the Servant shall not have any Return upon his Conuzance; for by the Plea of the Master his Conuzance is changed into a Justification.
- 1 Sid. 81. Arundell v. Trevil. In Replevin for a Mare and Colt the Defendant pleaded Not guilty of the Taking within six Years; and in Support of this Plea it was insisted upon, that it was the same in Effect with the Plea of *Non cepit*, and that if the Statute of Limitations had destroyed the Plaintiff's Action as to the Taking, the Defendant could not be guilty of the Detaining; and if this were not to be allowed, the Statute would be evaded, and could never be a Bar in Replevin; but *per Cur.* the Plea is not good in not answering to the Detainer; for it might happen, that at the Time of Taking the Mare the Colt was not in Being, but might have foaled in the Pound; and a Thing may be lawfully distrained, but unlawfully detained, as by being put into a Castle, &c.
- 6 Mod. 103. Cum. 122. *Prisel in auter Lieu* is only Matter in Abatement, and the Plaintiff may have a new Writ without being put to his Second Deliverance.
- 1 Vent. 137. In Replevin of Beasts taken at *D.* the Defendant pleads in Abatement, that they were taken at another Place, *absque hoc*, that they were taken at *D.* and *pro returno habendo* avows for Rent on a Lease for Years, &c. the Plaintiff replies and traverses the Lease, &c. this is ill; for though the Defendant, when he pleads in Abatement, must also avow to have a Return, yet the Plaintiff cannot answer to it, but must take Issue on the other Matter.

(K) Avowries in Replevin; and therein of what Seisin and Services, and the Certainty required therein.

AN Avowry, as has been before observed, is the Setting forth, as in *Vide 1 Darw.* a Declaration, the Nature and Merits of the Defendant's Case; *510.* and the shewing that the Distress taken by him was lawful, and which *2 Co. 25.* must be done with such sufficient Certainty as will intitle him to *9 Co. 20.* *8 Co. 64.* *1 Vent. 99.* *Cro. Jac. 160.* *Dyer 280.* *turno habendo*; but the Cases on this Head are of such different Natures, that it is difficult to range them in any Order; and as the Niceties herein are in many Instances remedied by late Acts of Parliament, it may be sufficient to take Notice of those that follow.

In an Avowry for a Distress for Rent, the Avowant was to shew a Seisin, and such Seisin by the Statute *32 H. 8. c. 2.* must be (a) alledged within 40 Years next before the making of the Avowry or Conufance. *Co. Lit. 268.* (a) And tho' by the Statute of *21 H. 8. c. 19.* the Lord need not avow upon any Person in certain, yet he must alledge Seisin by the Hands of some Tenant in certain, within 40 Years. *Co. Lit. 65.*

If a Man makes a Gift in Tail, rendering Rent, he may avow without laying any Seisin, because the Reversion gives him a sufficient Privi- *Bro. Avowry 52.* vity, and he shall count upon the Reservation, for that is his Title; *1 Rol. Abr. 314.* and where the Commencement of the Rent appears, Seisin is not material. *8 Co. 65.*

If *A.* by Deed indented makes a Feoffment in Fee to *B.* and his Heirs, rendering *10 s. per Ann.* to *A.* and his Heirs, of which Rent *A.* or his Heirs have not been seised within 40 Years, yet the Heirs of *A.* may distrain, &c. for the Statute must be intended in such Cases only, where before the Statute the Avowant was obliged to alledge a Seisin, and that was where the Seisin was so material, and of such Force, that though it was by Incroachment, yet it could not be avoided in an Avowry. *8 Co. 64.* *1 Brownl. 169.* *Cooper v. Foster.*

So this Statute extends not to a new Rent created by Act of Parliament. *Cro. Car. 80.* *1 Jon. 233.*

If Homage be done to the Lord, he may avow for all other Services superior, as well as inferior, for in doing thereof the Tenant takes upon himself to do all other Services. *4 Co. 8.*

Seisin of Rent, Suit, &c. which is annual, is a sufficient Seisin of Escuage, Homage, Fealty, Heriot Service, Service to cover the Hall, and such other Services as may not fall in 40 Years. *4 Co. 8. Bevil's Case.* *3 Lew. 21.* *S. P.*

But Seisin of one annual Service is no Seisin of another annual Service; for in that Case it is the Folly of the Lord if he hath not an actual Seisin of the other Service itself, when it becomes due yearly. *4 Co. 9.*

If the Avowant alledge a Seisin of the Rent, this is a sufficient Averment that he was seised of Homage. *Winch 31.* *Hutt. 50.*

If there be Lord and Tenant by Fealty and Rent, and the Tenant makes a Lease for Years, and though the Lessor hath done Fealty and constantly paid the Rent, yet the Lord distrains the Cattle of the Lessee for Rent, (where in Truth none is due) and avows upon a meer Stranger that never had any Thing, as upon his very Tenant, for Rent arrear; upon the special Matter shewn the Lessor may join in Aid to the Lessee, and abate the Avowry, and compel the Lord to avow upon his Tenant in Right and in Law. *9 Co. 20, 21.* *2 Mod. 103.* *S. C. cited.*

- 1 *Rol. Abr.* 318. If there be Lessee for Years, and the Reversion descends on a Feme Covert, and after the Rent is arrear, and the Baron distrains, and the Lessee brings a Replevin, the Baron ought to avow in the Name of himself and his Wife, and not in the Name of himself only, for the Avowry is to be made according to the Reversion which is in the Feme. This Case, as reported in *Roll*, a *Quare* is made how this could be made good; but in *Cro. Jac. S. C.* the Reason is given, because he had shewed the Truth of the Matter as it was, and had averred the Life of the Feme, and so the Distress well taken, and the Rent due to him; it was adjudged that the Avowry was good.
- Vide Title Jointenants,*
1 *Ld. Raym.* 64. Coparceners are to join in an Avowry for Rent; so of Jointenants, but Tenants in Common are to sever in their Avowries.
- 1 *Rol. Abr.* 320. So one Tenant in Common cannot avow the Taking the Cattle of a Stranger upon the Land Damage-fesant, without making himself Bailiff or Servant to his Companion.
1 *Jon.* 253.
Cro. Eliz. 530.
Cro. Eliz. 530. A Commoner may avow the Taking the Cattle of a Stranger upon the Common Damage-fesant, though he can have no Action of Trespass.
- 8 *Co.* 64. *Sir William Foster's Case.* Executors and Administrators may distrain and avow in like Manner, as their Testators or Intestates might have done, by the Statute 32 *H. 8. c.* 37.
- Cro. Eliz.* 547.
Co. Lit. 162. If Executors by the 32 *H. 8.* avow for the Arrears of a Rent in Fee accrued to their Testator, they must shew that the Land continues in the Seisin of a Tenant who ought to have paid it, or in the Hands of some other who claims by or from him, according to the Statute.
- 5 *Co.* 19. In Replevin against two they make several Avowries, each in his own Right, and both Avowries abated; for if both the Issues should be found for the Avowants, the Court could not give Judgment severally for the same Thing.
- 1 *Vent.* 250. If one distrain for Rent, and before the Avowry the Estate on which it is reserved determines, the Avowry shall be as if the Estate on which it was reserved had continued, for the Avowant is to have the Rent notwithstanding; but if the Distress were for a Personal Service, then the Defendant must have a special Justification, for he cannot have the Service in *Specie* when the Estate is determined.
- Cro. Car.* 260.
Major v. Brandwood.
Hutt. 176. Replevin of an Ox taken, &c. the Defendant makes Conufance as Bailiff to *J. S.* for that he was seised in Fee of the Manor of *D.* and that one *D.* was seised in Fee of such a Tenement holden of the said Manor by Rent and Heriot Service, payable after the Death of the Tenant, and that *D.* died possessed *de animalibus et Cattallis*, and because the Heriot was not paid, he, by the Command of the said *J. S.* distrained, and so made Conufance, and the Issue was upon the Tenure, and found for the Defendant; and an Exception was taken in Arrest of Judgment, because he does not shew what was the best Beast which he demanded, nor the Kind thereof, nor the Price of it. But *per Cur.* the Avowry was held to be good; for peradventure the Avowant does not know what was the best Beast; and when the Lord distrains it is because the Heriot is elaigned, and the Plaintiff having done Wrong by his Eloignement, he at his Peril ought to tender sufficient Recompence.
- Hob.* 176. But when the Defendant avowed for a Heriot Service, and the Plaintiff pleaded in Bar, that the Tenant at the Time of his Death *nulla habet animalia*; and on Demurrer it was adjudged for the Plaintiff, because the Avowry was insufficient, for that it did not alledge in certain what the Heriot should be, *scil.* Beast, or other Thing.

In Replevin, and the Title was by a Lease made by a Parson, and the Avowry was, that *A.* was seised of the Rectory of *H.* and made the Lease without shewing that he was Parson; and by the Court that would have been a good Exception, had it not been said in the Avowry, that he was seised *in Jure Ecclesie*, which supplies all.

Noy 70. Bold v. Waters.

If one avows for Parcel of a Rent, and does not shew how he was satisfied as to the Residue, this has been held to be ill; in like Manner it has been said that an Avowry for Part of an Annuity, without shewing how the rest has been discharged, is ill.

Cro. Car. 104. Comb. 346. et vide 1 Ld. Raym. 154. 644.

If *A.* holds Lands of *B.* by certain Rent, and of his Manor of *D.* and *A.* conveys those Lands to the King, who grants them to *J. S.* in an Avowry for this Rent, *B.* must set forth the special Matter, and not avow generally, because the Place where, &c. is held of him as of his Manor of *D.* &c. for this is no Rent-Service, but Rent distrainable of common Right; adjudged upon a Demurrer, and that such general Avowry was naught in (a) Substance, and not to be amended.

1 And. 159. 160. Broker v. Smith.

(a) For the several Forms

of an Avowry, *vide Co. Lit. 269.* — *bene Advocat, &c.* for *bene Cognovit, &c.* but Matter of Form, *Jenk. 338. Cro. Jac. 372.* — *Ahuc aretro existit*, but Matter of Form, *Cro. Jac. 283. Dalf. 72.* — *bene Cognovit cap. pred. loco in quo, &c.* but *tempore in quo* omitted. *2 Mod. 4, 5.*

In an Avowry for a Rent-Charge the Defendant made a Title to *Jane Stiles*, with whom he married *Anno 1603.* and because at *Michaëmas 1597.* 20*l.* was arrear, and not paid to him and his Wife, he avowed; and this was adjudged a good Avowry; for the Saying it was arrear to him and his Wife, was but Surplusage, when the contrary appears, he not being then married.

Cro. Jac. 282; Bowles v. Poor. 1 Bull. 135. S. C.

So where the Defendant made Conufance as Bailiff to *A.* Administrator to *B.* and it appeared that *A.* had a Right, but not as Administrator, and the Conufance stood as Bailiff of *A.* and the rest rejected as Surplusage.

Hob 208. Mo. 887. Brown v. Dunnery.

Where an Avowry is made for several Rents, and it appears Part is not due, yet the whole Avowry shall not abate.

11 Co. 45.

In Avowry for Rent, and so many Hens for Quit-Rent, the Avowant had a Verdict for the whole; but it afterwards appearing upon the Face of the Avowry, that the Hens were not due at the Time of the Distress, the Avowant had Leave to release his Damages as to them, and take Judgment for the Rent, with his Costs.

1 Ld Raym. 317. Carth. 437. S. C. Morris v. Gelder.

An Avowant in Replevin may abate his own Avowry for Part of the Rent distrained for, but not after Judgment.

Cum. 42.

In Replevin *J. S.* avowed for a Rent-Charge, due *Anno 1660.* and afterwards he distrained and avowed for another Part of the same Rent-Charge which became due before the said Year, and which was against a different Tenant; and in this Case it was held by three Judges against *Mallet*, that the Avowant was not estopped by his first Avowry in such Manner, as a Lessor is by giving an Acquittance for the last Gale of Rent, but that he may at his Pleasure avow for Part of his Rent at one Time, and for Part at another, in the same Manner as the Lord may command his Bailiff to distrain for so much Rent, and afterwards for the Sum due before.

1 Sid. 44. Raym. 21. Pamer v. Stabick.

In an Avowry the Defendant may say, that *B.* was seised of the Place where, &c. and held the same of *A.* by Fealty and Rent, and so for Rent arrear, as Bailiff to *A.* make Conufance according to the Statute, as in Lands held of him; though it was objected, that when in the Beginning he names the Tenant, he ought to have gone on in the same Manner, and avowed upon him as at Common Law.

Cro. Eliz 146. Lay v. Fisher. 1 Leon. 302. S. C.

If *A.* holds one Acre by Knight-Service, and 12*d.* Rent, and the other in Socage and 1*d.* Rent, and makes a Gift in Tail of both Acres, without any express Reservation of any Tenure, the same Te-

Co. Lit. 32.

nures

nures are by Law created between the Donor and Donee; and though there is but one Reversion, yet, because the Tenures are several, the Donor must make several Avowries, for the Avowry is made in Respect of the Tenures.

1 *Rol. Rep.*
35.

A Person cannot make one Avowry both for a Rent-Service and a Rent-Charge, but he may avow the Taking so many Cattle for a Rent-Service, and so many for a Rent-Charge.

1 *Bull.* 101,
202.

And in a Replevin for a Colt and a Cow, the Defendant may avow for several Heriots, and shew that the Father of the Plaintiff was seised, &c. and shew the several Heriotable Tenures, and Death, &c. and that he took the Colt and Cow *nomine herictorum*, without shewing which he took in Respect of the one Tenure, and which in Respect of the other.

Cum. 78.
Cartb. 44.

If a Man takes a Distress for a Thing for which he had not good Cause of Distress, but had good Cause of Distress for another Thing, if a Replevin is brought, and he comes into Court, he may avow for which Thing he pleases.

Cro. Eliz. 547.
Co. Lit. 102.

If Executors by 32 *H. 8. c. 37.* avow for the Arrears of a Rent in Fee accrued to their Testator, they must shew that the Land continues in the Seisin of the Tenant who ought to have paid it, or in the Hands of some other who claims by or from him according to the Statute; but in this Case, because the Avowant is a Stranger, he need not shew in particular how, but only shew it generally, according to the Words of the Statute.

1 *Ld. Raym.*
173.
2 *Lutw.*
1227. *S. C.*
Hoel v. Bell.

An Executor of Tenant for Life of a Rent-charge may, pursuant to the Statute of 32 *H. 8.* avow for the Arrearages incurred in the Life-time of the Testator, without averring that the Place where, &c. was in the Seisin of the Plaintiff, or that he claims by, from or under him that was Tenant, and it will come more properly on the other Side to shew the contrary.

Winch 31.
Hutt. 50.

In an Avowry for Homage, it need not be shewn whether the Tenancy came to the Tenant by Descent or Purchase.

9 *Co.* 20.
Mo. 870.

A Stranger to an Avowry can plead nothing in Bar thereof but *Horse de son Fee*, or that which is tantamount; but the right Heir, though he be a Stranger to the Avowry, being made a Party by *Aid prier*, may plead Matter in Abatement of the Avowry.

Hob. 108,
109.

But at Common Law, where the Avowry was made only on the Land, as in Case of customary Profits, as a Fine for Alienation, &c. so in Case of a Rent-Charge, the Plaintiff might have pleaded any Discharge, though he was a meer Stranger, and had nothing in the Land.

Co. Lit. 1.
—2 *Mod.* 104.
cited, and
there said by
the Ch. J.
that this Rule

If a Stranger claims a Seignory, and distrains, and avows for the Service, the Tenant may plead that the Tenancy is *extra feodum*, &c. of him that is out of the Seignory, or not holden of him; but he cannot plead *extra feodum*, &c. unless he takes the Tenancy upon himself.

is to be intended in Cases of an Assise, and that so were all the Books cited in *Co. Lit.* for Proof of this Opinion.

9 *Co.* 34.

In an Avowry the Tenant cannot plead *Ne unque seise* of such Services generally, because he leaves no Remedy for the Lord either by Avowry or by Writ of Customs and Services, and therefore if he is a Tenant in Fee-Simple, he ought either to disclaim or plead *Horse de son Fee*.

2 *Mod.* 103.
Sberrard v.
Smith.

(a) So in an
Avowry a
Stranger may

If in (a) Trespass for taking of Goods the Defendant justifies by the Command of the Lord of the Manor, of whom the Plaintiff held by Fealty and Rent, and that for Non-payment of the Rent, he took them

4
and so may Tenant for Years. 2 *Mod.* 104.

them *nomine distractionis*, the Plaintiff may reply, that the *locus in quo est extra, absque hoc quod est infra feodum*, &c. adjudged upon a special Demurrer, it being shewn for Cause, that the Plaintiff had not taken the Tenancy upon himself.

By the 21 H. 8. c. 19. all Plaintiffs and Defendants shall have like Pleas and like Aid *Priors* in all such Avowries, Conusances and Justifications, (Pleas of Disclaimer only excepted) as they might have had before the Act. *Co. Lit. 268. Cro. Jac. 127. Mo. 870.*

If the Defendant avows for, and alledges a Seisin of Rent payable at two Feasts, the Plaintiff may say that he holds by the same Rent payable at one, *absque* that it is payable at the two Feasts, for this is another Tenure. *9 Co. 34.*

If in an Avowry for Rent the Defendant alledges the Tenure to be by Fealty, Rent and Suit of Court, where the true Tenure is by Fealty and Rent only, the Seisin of the Suit is not material; for the Tenancy was not originally charged with any Service of this Nature, and therefore in this Case the Tenure is traversable. *Kelw. 31. 9 Co. 36. Cro. Eliz. 799.*

But when the Lord gets quiet and peaceable Seisin of more Rent than is due, because the Tenancy is charged with a Service of such Nature, the Seisin is traversable, and not the Tenure. *9 Co. 36.*

But unless the Tenant (*a*) confess a Tenure in Part, he cannot traverse the Tenure; for he cannot say he holds of a Stranger, *absque hoc*, that he holds of the Avowant; but in that Case he ought to disclaim, or plead *Horse de son Fee*. *9 Co. 35. (a) At Common Law he could not have pleaded Non-tenure generally.*

ally, and therefore he cannot, though the Avowry be on the Statute. *Cro. Jac. 127.*

But in a *Ne injuste vexes*, *Cessavit*, Assise, Rescous or Trespafs, such Seisin of more Rent shall be avoided, for the Tenure, and not the Seisin, is traversable. *9 Co. 34.*

If the Lord avows for Services, and alledges Seisin by the Hands of any one in certain, as by the Hand of his very Tenant, the Plaintiff may plead that the Avowant was never seised by his Hands. *9 Co. 35.*

The Seisin of that Service is only traversable for which the Avowry is made, unless the Seisin of a superior Service is alledged, which in Law is a Seisin of that. *9 Co. 35.*

The Lord of a Copyhold may avow in *B. R.* for a Rent issuing out of a Copyhold, for this is a Duty due and payable at Common Law. *Cro. Eliz. 524. Laughier v.*

In an Avowry for *Aid pur file Marrier, or faire fitz Chevalier*, it is a good Plea in Bar to say, that the Avowant had not such a Son or such a Daughter alive at the Time of the Aid levied. *Humphry. Dav. Rep. 2.*

In Replevin of a Cow the Defendant avows Damage-fesant; the Plaintiff prescribes for Common for four Cows and Half a Cow; Issue on the Prescription, and found for the Plaintiff; it was moved in Arrest, that the Issue was senseless and void; but 'twas adjudged, that if in Replevin so much of the Prescription be found as will serve the Party, though the whole be not found, it is sufficient; and here the Action is for one Cow only, and the Prescription for four is a good Justification for putting in one Cow. *1 Lev. 141.*

In Replevin the Plaintiff intitles himself by a Lease of the *3d of March*; the Defendant traverses the Lease *modo et forma*; the Jury find a Lease of another Date, yet Judgment was given for the Plaintiff; for the Substance of the Issue is, whether he has a Lease or no; yet if they had found a Lease from another, it would not do; but if he had declared thus in Ejectment it had been against him, for there he is to recover the Term, and is to make his Title truly. *Hob. 73. 1 Lev. 141. 2 Lev. 11.*

Where there is a Custom for the Lord to seise the best Beast for an Heriot, the Lord in his Avowry need not alledge that the Beast seised

by him was the best; but this is a Matter that must be shewn by the other Side, and pleaded to the Avowry.

1 *Mod.* 63.

So though the Cattle of a Stranger cannot be distrained unless they were *Levant* and *Couchant*, yet it must come on the other Side to shew that they were not so.

4 *Mod.* 402.
Hunt v.
Brains.

In Replevin for taking *Bona, Catella et Averia, &c.* the Defendant made Conufance for the taking *Averia* only, for that a Rent-Charge of 100 *l. per Annum* was granted out of the Lands, *&c.* payable half-yearly at *Michaelmas* and *Lady-day*; that the 33 *l.* Parcel of 50 *l.* for Half a Year's Rent being behind and unpaid, he distrained, and so justifies the Taking, *et petit Judicium, &c.* and upon Demurrer to this Avowry it was held to be insufficient, because it did not shew when the other 17 *l.* was paid to make up the Half-year's Rent; besides, the Action was brought for taking *Bona, Catella et Averia*; and the Defendant avowed the Taking *Averia* only, which is an Answer only for the live Cattle, and not for the whole; so that for these Reasons the Plaintiff had Judgment.

5 *Mod.* 77.
Johnson v.
Adams et al.

In Replevin for taking live Cattle and several Stacks of Hay, *&c.* Defendants plead *bene cognoscunt captionem Averiorum et Catallorum in loco præd. quia dicunt quod Averia præd. &c.* but say nothing as to the Chattels; but they conclude, and pray Judgment *Averiorum et Catallorum*; and this was held ill; for when they acknowledge the Taking the whole, a Justification as to a Part cannot be a full and sufficient Answer.

Cro. Jac. 611.

The Defendant in Replevin cannot have a Return of more Cattle than he avows for.

Cro. Eliz. 524.
Bonner v.
Walker.

In an Avowry the Issue was, whether the Place where, *&c.* was the Freehold of the Avowant or not; and it was found by the Verdict, that it was the Freehold of the Avowant's Wife; *et per Cur.* it is found against the Avowant; for when he saith his Freehold, it is to be intended his sole Freehold, and in his own Right.

Cro. Eliz. 799.
Lewes v.
Bucknall.

In Replevin the Issue was, whether the Plaintiff held of the Defendant such Land by Fealty, Rent of 3 *s.* and 4 *d.* and Suit of Court, and the Avowry was for the Rent. The Jury found a special Verdict, that the Plaintiff held by Fealty and Rent only, and not by Suit of Court, *&c.* and if by this Verdict the Defendant shall have Return, was the Question; and the Court held that it was found against the Avowant, for in an Avowry all the Tenure alledged is material; but in Trespass or Rescous, if any Part of the Tenure be found, it is sufficient.

Winch 49.
Cloworthy v.
Mitbell.

In Replevin the Defendant avowed for Rent, and shewed that his Father was seised, and leased for Years, *&c.* and that on his Death the Lands descended to him. The Plaintiff in Bar said, that the Father devised the Lands to *J. S.* and Issue being joined herein, it was found by special Verdict that the Lands were holden by Knight-Service, so that the Devise was only of two Parts, and that the third descended to the Heir at Law, the Avowant; and on (a) this finding it was held, that the Avowant should have Judgment.

(a) Where there were two Issues,

and one only found for the Avowant, he had Judgment. *Cro. Jac.* 442. — Where the Parties agree in the Facts, the Jury's finding otherwise, not material. 2 *Lutw.* 1216. 2 *Mod.* 4, 5.

Ley 77.

(b) It must shew the Certainty of the Place, Day and Cattle,

to intitle the Avowant to a Writ of Inquiry of Damages. *Dyer* 280.

6 *Mod.* 103.

The Claim of Right to distrain must be made out by the Avowant against the Plaintiff, who claims Property in the Distress.

6 *Mod.* 159.

And there is no Difference between an Avowry and Justification, for whatever is set forth in either must be maintained.

The Defendant in Replevin, to intitle himself to a Return of the Goods distrained, must make his Avowry, unless it be in such Case in which he claims Property; so that though the Plaintiff's Writ abates, yet the Defendant is not intitled to a *Returno habend.* unless he had made his Avowry. 1 *Shovv.* 402.
2 *Comb.* 196.
3 *Lev.* 204.

The Bailiff, who distrains for Damage-fesant in Right of a Devisee, must set forth what Estate the Devisor had; and it is not sufficient to say in general, that he was seised. *Cro. Eliz.* 530.

Seisitus fuit not sufficient in an Avowry, but the Party must set forth in Fee, Tail, for Life, &c. *Carth.* 9. —
That the general Rule of

Pleading is, that where a Title is made under a particular Estate, the Commencement of that Estate must be shewn, but that an Estate in Fee may be alledged generally. *Carth.* 445. 1 *Ld. Raym.* 331. *Salk.* 562. 6 *Mod.* 223. 2 *Lutw.* 1217, 1231. *Comb.* 27, 473, 476.

If one avow for Rent, he must shew his Title and Tenure in particular, and the Defendant may traverse any Part which he sets forth; *secus* for Damage-fesant. 6 *Mod.* 158.

But now by the 11 *Geo. 2. c. 19.* 'It shall be lawful for all Defendants in Replevin to avow or make Conufance generally, that the Plaintiff in Replevin, or other Tenant of the Lands whereon such Distress was made, enjoyed the same under a Grant or Demise at such a certain Rent during the Time wherein the Rent distrained for incurred, which Rent was then and still remains due, or that the Place where the Distress was taken was Parcel of such certain Tenements held of such Honour, Lordship or Manor, for which Tenements the Rent, Relief, Heriot or other Service distrained for, was at the Time of such Distress and still remains due, without further setting forth the Grant, Tenure, Demise or Title of such Lessors or Owners of such Manor; and if the Plaintiff in such Action shall become nonsuit, &c. the Defendant shall recover double Cofts.'

Rescue.

Rescue.

- (A) What it is, and of what Things it may be.
 (B) In what Cases a Rescue may be justified.
 (C) Of the Offence of making a Rescue, and how the Offenders are to be proceeded against.
 (D) The Form of the Proceedings on a Rescous.
 (E) Of the Return of a Rescous: And herein,
1. In what Cases the Sheriff may return a Rescous; and therein of the Difference between a Rescous on mesne Process and Execution.
 2. Of the Form of the Return, and for what Defects it may be quashed.
 3. Whether the Sheriff's Return of a Rescous be traversable.

(A) Rescue, What it is, and of what Things it may be.

Co. Lit. 160.
F. N. B. 226.

RESCUE is the Taking away and Setting at Liberty against Law a Distress taken for Rent, or Services or, Damage-fesant; but the more general Notion of Rescous is, the forcibly Freeing another from an Arrest or some legal Commitment, which being a high Offence, subjects the Offender not only to an Action at the Suit of the Party injured, but likewise to Fine and Imprisonment at the Suit of the King.

Co. Lit. 161. If a Man distrain Cattle, and as he is driving them to the Pound they go into the Owner's House, and he refuse to deliver them, this is a Rescue in Law.

Co. Lit. 161. *a.* But here we must observe, that there can be no Rescous but where the Party has had the (*a*) actual Possession of the Cattle or other Things whereof the Rescous is supposed to be made; for if a Man come to arrest another, or to distrain, and is disturbed (*b*), regularly his Remedy is by Action on the Case.
Hell. 145. (*a*) A Rescue was returned *quod arrestavit*, and quashed, because not said *et in custodia habuit.* 1 *Sid.* 332. (*b*) That it is a Contempt of the Court, and punishable as a Misdemeanor. 6 *Mod.* 210.

Hell. 145. If upon a *Fieri facias* the Sheriff seizes Goods which are taken away
Lit. Rep. 296. by a Stranger, this is not properly a Rescue; for by the Seizure of the
Sheriff of Goods, by Virtue of the *Fieri facias*, the Sheriff has a Property in
Surrey v. hem, and (*c*) may maintain Trespass or Trover for them; also the
Alderton. Party injured may have an Action on the Case against the wrong
 Doer.
 (*c*) For this
vide Cro.
Eliz. 639.
2 Saund. 411. 1 *Vent.* 52.

If upon a *Fieri facias* the Sheriff return that he had seized the Goods, ^{1 Vent. 21.} but that they were rescued by B. and C. &c. this is not a good Return, ^{2 Saund. 343.} but he shall be amerced; the Party also, at whose Suit the Execution ^{1 Show. 180.} issued, may charge him by *Scire facias* for the Value of the Goods.

(B) In what Cases a Rescue may be justified.

IF the Lord distrain for Rent when none is due, the Tenant may ^{Co. Lit. 47,} lawfully make Rescue; so may a Stranger, if his Beasts be distrained ^{160. b. 161.} when no Rent is due. So if the Tenant tender the Rent when the ^{a.} Lord comes to distrain, and yet he does distrain, or if he distrain any Thing not distrainable, as Beasts of the Plough, when other sufficient Distress may be taken, the Tenant may make Rescous; so may he if the Lord distrain in the Highway or out of his Fee.

But though there must be Reason for the Distress, and that other- ^{Salk. 247.} wise the Rescue cannot be unlawful; yet it hath been held in a *Parco* ^{Cotsworth v.} *frasto*, that the Defendant cannot justify Breaking the Pound and ^{Bettison.} Taking out the Cattle, though the Distress was without Cause, because they are now in the actual Custody of the Law.

There is a Difference between a Man's being arrested by a Warrant ^{Co. Lit. 161.} on Record, and by a general Authority in Law; for if a *Capias* be ^{Vide 5 Co. 68.} awarded to the Sheriff to arrest a Man for Felony, though he be inno- ^{Mackalley's} cent, he cannot make Rescue; but if a Sheriff will by the general ^{Case.} Authority committed to him by Law arrest any Man for Felony, if he ^{6 Co. 54.} be innocent he may rescue himself. ^{Cro. Jac. 486.}

(C) The Offence of making a Rescue, and how the Offenders are to be proceeded against.

IT seems agreed, that the Rescuing a Person imprisoned for Felony is ^{1 Hal. Hist.} also Felony by the Common Law. ^{P. C. 606.}

Also it is agreed, that a Stranger who rescues a Person committed for, ^{Stamf. P. C.} and guilty of High Treason (a), knowing him to be so committed, is ^{11.} in all Cases guilty of High Treason.

(a) Whether ^{1 Jon. 455.} he knew that the Prisoners were so committed or not. ^{Cro. Car. 583.}

To make a Rescue Felony, the following Rules are laid down by ^{1 Hal. Hist.} Lord Chief Justice Hale; 1st, That it is necessary that the Felon be ^{P. C. 606.} in Custody or under Arrest for Felony; and therefore if A. hinder an ^{3 E. 3. Coram.} Arrest, whereby the Felon escapes, the Township shall be amerced for ^{333.} the Escape, and A. shall be fined for the Hindrance of his Taking; but ^{Stamf. 31.} it is not Felony in A. because the Felon was not taken.

So to make a Rescue Felony, the Party rescued must be under Cu- ^{1 Hal. Hist.} stody for Felony or Suspicion of Felony; and it is all one whether he ^{P. C. 606.} be in Custody for that Account by a private Person or by an Officer, or Warrant of a Justice; for where the Arrest of a Felon is lawful, the Rescue of him is Felony; but it seems necessary that he should

have Knowledge that the Person is under Arrest for Felony, if he be in the Custody of a private Person.

¹ *Hal. Hist.* But if he be in Custody of an Officer, as Constable or Sheriff, there, *P. C.* 606. at his Peril, he is to take Notice of it; and so it is if there be Felons in a Prison, and *A.* not knowing of it, breaks the Prison and lets out the Prisoners, though he knew not that there were Felons there, it is Felony. *Cro. Car.* 583.

² *Hawk. P. C.* A Person committed for High Treason, who breaks the Prison and escapes, is guilty of Felony only, unless he lets others also escape whom he knows to be committed for High Treason; in which Case he is guilty of High Treason, not in Respect of his own Breaking of Prison, but of the Rescous of the others. 140.

¹ *Hal. Hist.* If the Person rescued were indicted or attainted of several Felonies, yet the Escape or Rescue of such a Person makes but one Felony. *P. C.* 599.

² *Hawk. P. C.* Wherever the Imprisonment is so far groundless or irregular, or the Breaking of a Prison is occasioned by such a Necessity, &c. that the Party himself breaking Prison is either by the Common Law, or by the Statute *de frangentibus Prisonam*, saved from the Penalty of a capital Offender, a Stranger who rescues him from such an Imprisonment is in like Manner also excused; *et sic e converso*. 139.

¹ *Hal. Hist.* A Return of a Rescue of a Felon by the Sheriff against *A.* is not sufficient to put him to answer for it as a Felony, without Indictment or Presentment, by the Statute 25 *E. 3. c. 4.* *P. C.* 606.

¹ *Hal. Hist.* As in Case of an Escape, so in Case of a Rescue, if the Party rescued be imprisoned for Felony, and be rescued before Indictment, the Indictment must surmise a Felony done, as well as an Imprisonment for Felony or Suspicion thereof; but if the Party be indicted, and taken by a *Capias*, and rescued, then there needs only a Recital that he was indicted *prout*, and taken and rescued. *P. C.* 607.

¹ *Hal. Hist.* But though the Rescuer may be indicted before the Principal be convicted and attainted, yet he shall not be arraigned or tried before the Principal be attaint; but (a) if the Person rescued were imprisoned for High Treason, the Rescuer may immediately be arraigned, for that in High Treason all are Principals; also it seems that he may be immediately proceeded against for a Misprison only, if the King please. *P. C.* 607.

¹ *Hal. Hist.* The Rescuer of a Prisoner for Felony, though not within Clergy, yet shall have his Clergy. *P. C.* 607.

As those who break Prison are punishable, as for a high Misprison by Fine and Imprisonment in those Cases, wherein they are saved from Judgment of Death by the Statute *de frangentibus Prisonam*; so also are those who rescue such Prisoners in the like Cases, in the same Manner punishable. *2 Hawk. P. C.* 140.

See also By the 6 *Geo. 1. c. 23. sect. 5.* it is enacted, That if any Person shall rescue Felons ordered for Transportation, or assist them in making their Escape, he shall be guilty of Felony, and suffer Death without Benefit of Clergy. *9 G. 1. c. 28.* by which the Rescuing Persons arrested in the Mint, &c. is made Felony.

Co Lit. 161. As the Offence of rescuing Persons in Cases of Treason and Felony is usually punished by Indictment, so the Offence of rescuing a Person arrested on mesne Process, or in Execution after Judgment, subjects the Offender to a (b) Writ of Rescous or a general Action of Trespass *vi et armis*, or (c) an Action on the Case, in all which Damages are recoverable. Also it is the frequent Practice of the Courts to grant an At- *Co. Ent.* 614. *Rast. Ent.* 577. *(b)* For this, *vide F. N. B.* 226. — A Writ of Rescous against

the Father and Son, the Father for rescuing the Son, and the Son for rescuing himself. *2 Bull.* 137. — In Rescous the Writ is conceived on the special Matter. *9 Co.* 12. *b.* (c) On a Motion for an Information against one for rescuing a Person from the Sheriff in the Temple, the Court advised them to get the Rescous returned, and to bring an Action on the Case against him as the better Way. *Cases in B. R.* 556.

(a) Attachment against such wrong Doers, it being the highest Violence and Contempt that can be offered to the Process of the Court.

(a) A Rescuer shall be doubly punished, for
punished, for
out again him.

upon the Return of the Sheriff he shall be fined to the King, and an Attachment shall issue
3 *Bull.* 201. — On all Returns of a Rescous, Process of Outlawry lies. 13 *H.* 7. 21. *pl.* 5. 2 *Inst.*
665. *cont. Fitz. Process* 56, 213. 29 *E.* 3. 18.

He who rescues a Prisoner from any of the Courts of *Westminster-Hall* without striking a Blow, shall forfeit his Goods and the Profits of his Lands, and suffer Imprisonment during Life; but not lose his Hand, because he did not strike.

22 *E.* 3. 13.
3 *Inst.* 141.

It is clearly agreed, that for a Rescous on mesne Process the Party injured may have either an Action of Trespass *vi et Armis*, or an Action on the Case, in which he shall recover his Debt and Damages against the wrong Doer; and the rather, because on (b) mesne Process he can have no Remedy against the Sheriff.

Cro. Jac. 486.
Hob. 180.

(b) *Vide postea.*

Also it hath been adjudged, that for the Rescous of a Person in Execution on a *Capias Satis*. or *Capias Uita*. an Action will lie against the Rescuer, though the Party injured hath his Remedy against the Sheriff, and the Sheriff hath his Remedy over against the wrong Doer; for perhaps the Sheriff may be dead or insolvent; but herein it hath been held, that if he bring his Action against the Party who made the Rescue, he may plead it in Bar to an Action brought by the Sheriff; so if against the Sheriff or his Bailiff, they may plead that he had Satisfaction from the Party, so that if he recovers against one, the other is discharged.

Hel. 95.
Cro. Car. 109.
Hutt. 98.
Hob. 180.

By the Statute 2 *W. & M. Stat.* 1. *cap.* 5. *sect.* 5. it is enacted, 'That upon Pound-breach or Rescous of Goods distrained for Rent, the Person grieved shall in a special Action on the Case recover treble Damages and Costs against the Offenders, or against the Owner of the Goods if they come to his Use.

In an Action upon the Case for a Rescous, upon this Statute it hath been held, that the Plaintiff shall recover treble Costs as well as treble Damages, for the Damages are not given by the Statute but increased; an Action on the Case lying for a Rescous at Common Law.

1 *Salk.* 205;
Lawson v. Storie.

An Attachment will be granted not only against a common Person, but even against a Peer of the Realm, for rescuing a Person arrested by due Course of Law; so that if the Sheriff shall in any Case return to the Court, that a Person arrested, or Goods seized, or Possession of Lands delivered by him, by Virtue of the King's Writ, were rescued or violently taken from him, &c. they will award an Attachment against the Rescuers.

Dyer 212.
2 *Jon.* 39.
Salk. 321.

But herein it seems to be the Practice of late, not to grant an Attachment in any Case for a Rescous, unless the Officer will (c) return it, for that it hath been found by Experience, that Officers will often take upon them to swear a Rescous where they will not venture to return one.

2 *Hawk. P.C.* 153.
(c) A Distinction between a Rescous on mesne Process, and upon a Writ of Execution;

in which last it was said by *Holt Ch. J.* the Sheriff could not return a Rescous, and therefore the Court can have no other Ground for an Attachment but Affidavits, and ought to be contented therewith; but on mesne Process a Rescous might be returned, which being Matter of Record, and by Consequence a better Motive, ought to be given to the Court. 6 *Mod.* 141.

In a late Case, a Distinction was taken where an Attachment is prayed for a Rescous in the first Instance, and where a Rule to shew Cause is only asked; in this Affidavits of the Fact are sufficient; in the other Case the Sheriff's Return is requisite.

Trin. 5 *G.* 2.
in *B. R.*
Young v. Payne.

Where

Salk. 586. Where, upon the Return of a Rescue, an Attachment is granted, and
Rex v. Belt. the Party examined upon Interrogatories, upon answering them he
 —Said by Sir shall be discharged; but if the Rescous is returned to the Philazer, and
Sam. Astry to be the con- Process of Outlawry issues, and the Rescuer is brought into Court, he
 stant Course shall not be discharged upon Affidavits.
 upon the Re-
 turn of a Rescue, to set four Nobles Fine upon each Offender. *Salk.* 586. 2 *Jon.* 198. accord.

(D) The Form of the Proceedings on a Rescous.

Dyer 164. — AN Indictment of a Rescous ought to set forth the special Circum-
 That no De- stances of the Fact with such Certainty, as to enable the Defen-
 fect can be dant to make a proper Defence.
 aided by the
 Verdict. 1 *Rol. Abr.* 781.

Moor 555. And therefore, if an Indictment lay the Offence on an uncertain or
Rast. Ent. impossible Day, as where it lays it on a future Day, or lays one and
 263. the same Offence at different Days, or lays it on such a Day which
 makes the Indictment repugnant to itself, it is void.

Dyer 164. pl. Where an Indictment of Rescous set forth that *J. S.* committed such
 60. a Felony, such a Day and Year and Place, *per quod A. B. predictum*
J. S. cepit et arrestavit, et in salva Custodia sua ad tunc et ibidem eundem
J. S. habuit et custodivit, it is made a *Quære* whether the Indictment be
 not insufficient, because no Time of the Arrest is alledged in the same
 Sentence with it; and it is doubtful whether the Time of the Custody,
 which is alledged in the next Sentence by Force of the Copulative,
 be applied also to the Arrest or not; and *Dyer* seems rather to incline
 to the contrary Opinion.

Dyer 164. Also it is held in *Dyer*, that an Indictment of a Rescous is not good
 without expressly shewing the Day and Year both of the Arrest and also
 of the Rescous, and that the Time of the latter is not sufficiently shewn
 by shewing that of the former.

Cro. Jac. 345. But it hath been since adjudged, upon Exceptions taken to an Indict-
 2 *Bull.* 208. ment for a Rescous, that it was not necessary to alledge the Place where
S. C. Cram- the Rescue was made, and that it should be intended, that where the
lington's Case. Arrest was, there also was the Rescue without the Word *Ibidem*.

Cro. Jac. 345. An Exception taken to an Indictment of Rescous, that it wanted the
 — The same Words *Vi et Armis* or *Manu forti*, but over-ruled, it being held by the
 Exception ta- Court that the Word *recussit* implies it to be done by Force.
 ken in *Cro.*

Jac. 473. over-ruled, and there held, that though it were Error at Common Law, yet it is made good by the Statute
 37 *H.* 8. c. 8.

Cro. Jac. 472. An Exception taken to an Indictment of a Rescous from a Serjeant
Hari's Case. at Mace, who had taken a Man on a Plaint in *London*, because it did
 not set forth that the Person was taken by Virtue of any Warrant; but
 it being alledged that he was lawfully arrested, it shall be intended by
 a good Warrant.

2 *Inst.* 665. It is said that an Indictment of Rescous is not within the Statute
 2 *Shew.* 84. of Additions, and that the naming the Person indicted of such a Pa-
 rish, without giving him any Title, is sufficient.

Note; Upon an Indictment of Rescous, if it were upon an Arrest
 upon mesne Process, and the Party has appeared, the Court will be
 easily

easily induced to quash it; so if it be on Proceſs out of an inferior Court, though the Party has not appeared; for no Aid is given to inferior Jurifdictions.

In an Action for a Rescue the Plaintiff must alledge in his Declaration all the material Circumstances; as that such a Writ issued, that he was arrested and in Custody, and that he was rescued, &c. *Godb. 125. Lutw. 130.*

In an Action on the Case for a Rescous on mesne Proceſs, the Evidence was, the Bailiff stood at the Street Door, and sent his Follower up three Pair of Pairs in Disguise with the Warrant, who laid Hands on the Party, and told him that he arrested him; but he with the Help of some Women got from the Follower and ran down Stairs, and the Defendant hearing a Noise ran up, and put the Party into a Room, locked the Door, and would not suffer the Bailiff to enter. *6 Mod. 211. Wiljn v. Gary.* Holt Ch. J. doubted whether this was a lawful Arrest, being by the Bailiff's Servant, and not in his Presence; but said, that the Plaintiff must prove his Cause of Action against the Party, that he must prove the Writ and Warrant by producing sworn Copies of them; he must prove the Manner of the Arrest, that it may appear to the Court to be legal, and in Point of Damage he must prove the Loss of his Debt, viz. that the Party became insolvent, and could not be retaken.

(E) Of the Return of a Rescous: And herein,

1. In what Cases the Sheriff may return a Rescous; and therein of the Difference between a Rescous on mesne Proceſs and Execution.

THE Distinction herein laid down in Variety of Books and Cases is, that on a Rescue on mesne Proceſs the Sheriff may return the Rescue, and is subject to no Action; for that on a mesne Proceſs he was not (a) obliged to raise his *Posse Comitatus*, nor would it be convenient so to do on the Execution of every mean Proceſs. *Cro. Eliz. 863. 1 March 1. 1 Jon. 201. 3 Bull. 198. 1 Rol. Rep. 389. Noy 40.*

Moor 852. 2 Lev. 144. 6 Mod. 141. Lutw. 130, 131. (a) But the Sheriff may, if he pleases, take his *Posse* to arrest one on mesne Proceſs. *Noy 40.*

But if the Sheriff takes a Man upon an Execution, as upon (b) a *Capias Satisfaciend.* and he is rescued from him before he can bring him to Prison, though he returns the Rescue, yet this shall not excuse him; for when Judgment is passed, and he and his Bail do not surrender him, nor pay the Condemnation Money, and then a *Capias* issues, to which there can be no Bail, there it is presumed that he will not be forth-coming, because neither he nor his Bail have satisfied the Judgment, and therefore the Sheriff ought to take the *Posse Comitatus*; and consequently it cannot be a good Return, that he took the Body, but that it was rescued; and the Party may have an Action of Escape against the Sheriff on this Return; and this is provided by the Statute *Westm. 2. cap. 39.* which was made to prevent Sheriffs from returning Rescuers to the King's Writs. *Cro. Jac. 419. 1 Rol. Rep. 388, 440. 3 Bull. 198. Moor 852. S. C. Proby v. Lumley. (b) Or upon a Capias Utlagatum after Judgment. Cro. Jac. 419. 1 Rol. Rep. 389.*

In an Action on the Case against the Sheriff for an Escape upon mesne Proceſs, the Defendant pleaded a Rescue, which on Demurrer was held a good Plea, though he did not shew that the Rescue was returned. *3 Lev. 46. Lord Gorges v. Gore, adjudged.*

1 *Rol. Rep.* 441. But if one taken on mesne Proceſs be once in Priſon, the Sheriff cannot return a Reſcous, for the Law preſumes that he hath (a) Power to keep him there.
 3 *Bull.* 198.
Cro. Jac. 419.
 (a) But if the Priſon is broke by the King's Enemies, this ſhall excuſe the Sheriff; 4 *Co.* 84. 1 *Vent.* 239. — but not if broke by Rebels and Traitors, for the Sheriff or Gaoler hath his Remedy over againſt them. 4 *Co.* 84. *Cro. Eliz.* 815. 2 *Mod.* 28. 1 *Vent.* 239.

1 *Hal. Hiſt.* P. C. 602. If a Felon be attaint, and in carrying him to Execution he is reſcued from the Sheriff, the Sheriff is puniſhable notwithstanding the Reſcue; and there ſaid that a Reſcue for there is Judgment given, and the Sheriff ſhould have taken ſufficient Power with him; and therefore in that Caſe the Township is not in Felony. finiſhable.

2. Of the Form of the Return, and for what Defects it may be quaſhed.

3 *H. 7.* 11. It hath been adjudged, that the Return of a Reſcue by a Sheriff muſt ſhew the Year and Day on which it was made, ſuch Return being in Lieu of an Indictment.
pl. 3.
Bro. return de breif 97.
Fitz. Coro. 45. *Attach.* 1.

Palm. 532. But it hath been held, that the Sheriff's Return of a Reſcue on a *Latitat*, without mentioning the Day of the Caption, was ſufficient, all the Clerks in Court affirming the Precedents to have been ſo.

Moor 422. *pl.* 585. The Sheriff's Return of a Reſcue, without mentioning the Place where it was made, was held naught, and the Party diſcharged.

Yelv. 51. *Wolfreſton's* Caſe. So where upon a *Latitat* awarded againſt *J. S.* the Sheriff returned a Reſcous on ſuch a Day, but did not mention any Place where the Reſcous was made; and adjudged a void Return, becauſe it doth not appear that either the Arreſt or Reſcous were within his Jurisdiction; but if it had appeared to have been done in the County, it ſhould be intended within his Bailiwick though it was within a Liberty in the ſame County; and even in ſuch Caſe the Reſcous had been unlawful, becauſe the Arreſt was good, nobody being prejudiced thereby but the Lord of the Liberty.

2 *Rol. Rep.* 255. *Webb v. Withers.* But where the Return of a Reſcous recited that a *Latitat* was directed to him, &c. and that he made his Warrant to his Bailiffs, who arreſted *A.* and that he was reſcued by *J. S.* this was held good, though it did not ſhew the Time or Place where the Reſcue was made.

Stil. 155. Upon reading the Sheriff's Return of a Reſcous, theſe Exceptions were taken to it; 1ſt, It is ſaid *feci Warrantum meum Thomæ Taylor*, and doth not ſay that *Thomas Taylor* was his Bailiff. 2dly, He doth not ſay for what Cauſe he made his Warrant, and ſo it appears not whether it was lawful or not; and upon theſe Exceptions it was quaſhed.

1 *Sid.* 332. Exception to a Sheriff's Return of a Reſcue, that it was not alledged that the Party was in Cuſtody, it being only by Implication that he was reſcued out of the Bailiff's Cuſtody; and for this it was quaſhed; ſo that it was not returned who reſcued, or that the Party reſcued himſelf.

Lit. Rep. 2. The Sheriff returned a Reſcous on a ſpecial Bailiff, *viz.* that *Cook* and ſeven others made an Aſſault on the Bailiff, &c. and the Party arreſted *cepit et abduxit*, when it ought to have been *ceperunt et abduxerunt*; and the Court held the Return good as to *Cook*, but void as to the others;

others; and he was admitted to make his Fine by (a) Attorney, which was 6 s. 8 d. (a) An Indictment for a Rescous re-

turned against one into B. R. ought not to be quashed, although it be erroneous, except the Party that is indicted for it do appear personally in Court; for he cannot in such Case appear by Attorney, because the Offence was criminal and personal, for which he must answer in Person. 2 Lil. Reg. 468.

A Rescue of a Person arrested on mesne Process was returned against divers particularly named, and the Return was that they *rescufferunt*, without saying *et quilibet eorum rescussit*; and held well enough, it being in the Affirmative. 1 Vent. 2. 2 Keb. 436.

Exception taken to the Return of a Rescue, that it was *feci Warrant* without saying *sub sigillo Officii*, but over-ruled; for it cannot be a Warrant unless it be under Seal, and the saying *feci Warrant* direct implies it was so. 2 Jon. 197.

The Sheriff returned a Rescous thus; 1st, *Non est inventus in ball mea, and Executio residui istius brevis patet in Scheda huic brevi annex,* and that was of a Taking and Rescous; and the Return of the Rescous was quashed for the Repugnancy; for *per Cur.* after *Non est inventus* all the rest is idle, and there remains no more for the Sheriff to do. But Note; Upon the Return of a Rescous the Sheriff always concludes, that after the Rescous made the Defendant *Non est invent. in Balliva.* 6 Mod. 220. Rex v. Weekes.

The Return of a Rescue was, that the Party was in Custody of three of the Bailiffs, and that the Defendants *insultum fecerunt* upon one, which the Sheriff called *Ballivos meos*; and for that Reason it was quashed. 5 Mod. 218.

It hath been a great Question, and much debated in Variety of Cases, whether upon a Rescue of a Person out of the Custody of a Sheriff's Bailiff, the Sheriff is to return the Rescue *secundum veritatem facti*, or *secundum veritatem in lege*, that is, that he was rescued out of the Custody of the Bailiff, being the Truth in Fact, or out of his own Custody, being the Truth in Law; the Bailiff's Custody being in Law the Custody of the Sheriff himself; and it seems now agreed that a Return either Way is good; and herein some Books distinguish between a Bailiff of a (b) Liberty and a common Bailiff, and say that the Return of a Rescue out of the Custody of a Bailiff of a Liberty ought to be so expressed, because he is such a publick Officer of whom the Court takes Notice. Others distinguish (c) between an Action on the Case and an Indictment for a Rescous, for that in the first the Plaintiff must declare as the Truth is, *viz.* that he was rescued being in the Custody of the Bailiff, but that in an Indictment it must be according to the Operation it hath in Law. Palm. 532. 2 Jon. 197. Cro. Eliz. 780. 1 Lev. 214. 2 Lev. 28. Raym. 161. 4 Mod. 293. 5 Mod. 217. 1 Sid. 332. Stil. 417. (b) 2 Rol. Rep. 263. Stil. 417. 1 Lev. 214. (c) Cro. Jac. 242. Raym. 161. 5 Mod. 217.

But where the Sheriff returned *Virtute brevis mihi directi feci Warrant* A. & B. *Ballivis meis qui virtute inde ceperunt* the Defendant, *et in Custodia mea habuerunt quousque* such and such *rescufferunt* him *ex Custodia ballivorum meorum*; and this Return was on Motion quashed; for *per Holt Ch. J.* 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; an Answer either Way is good, *viz.* that he was rescued out of the Bailiffs Custody, or that he was rescued out of the Sheriff's Custody; but to say that he was in the Custody of the Sheriff, and yet rescued out of the Custody of the Bailiffs, is repugnant. 2 Salk. 586.

3. Whether the Sheriff's Return of a Rescue be traversable.

Cro. Eliz. 781.
Dyer 212.
2 Jon. 39.
1 Vent. 224.
2 Vent. 175.
Comb. 295.

It seems that antiently, when the Sheriff returned a Rescue, the Party was admitted to plead to it as to an Indictment; but the Course of late has been not to admit any Plea to it, but drive the Party to his Action against the Sheriff in case the Return were false; and hence it is now settled that the Return of a Rescue is not traversable, but yet it hath been held that the Submission to the Fine doth not conclude the Party grieved from bringing his Action for the false Return, if it were so.

Scandalum Magnatum.

2 Mod. 156.

AT the Time of making the Law, on which this Action is founded, the Constitution of this Kingdom was Martial, and given to Arms; the very Tenures were military, and were the Services; as Knights-Service, Castle-Guard and Escuage; so that all Provocations by vilifying Words were revenged by the Sword, which often created Factions in the Commonwealth, and endangered even the Government itself; for in these Kind of Quarrels the great Men, or Peers of the Realm, usually engaged their Vassals, Tenants and Friends; so that Laws were then made against wearing of Liveries or Badges, and against riding armed; so the *Stat. West. 2.* appoints, that the Offender shall suffer Imprisonment until he produces the Author of a false Report.

This Statute is recited by the *12 R. 2. c. 11.* and thereby it is further provided, that the Offender shall be punished by the Advice of the Council.
4 Inst. 51.
4 Co. 12. b.

The Law on which this Action is grounded, is the *2 R. 2. Stat. 1. c. 5.* which enacts, ' That of Counterfeiters of false News, and horrible Lies, of Prelates, Dukes, Earls, Barons, and other Nobles and great Men of the Realm, and also of the Chancellor, Treasurer, Clerk of the Privy Seal, Steward of the King's House, Justices of the one Bench or of the other, and other great Officers of the Realm, it is defended that none contrive or tell any false Things of Prelates, Lords, and of other aforesaid, whereof Discord or Slander might rise within the Realm, and he who doth the same shall be imprisoned 'till he have brought him forth that did speak the same.

For the better Understanding of this Statute we shall consider,

- (A) The Persons who may bring this Action.
- (B) For what Words it lies.
- (C) The Proceedings in this Action.

(A) The Persons who may bring this Action:

IT hath been held, that the King is not included in the Words *Great Crompt. Jur. Men of the Realm*, as the Statute begins with an Enumeration of 19, 35. Persons of an inferior Rank, as Prelates, Dukes, &c.

Also it is held, that a Woman noble by Birth is not intitled to this Action. *Crompt. Jur. 34.*

It hath been adjudged, that though there was no Viscount at the Time of making this Statute, (the first Viscount being *John Beaumont*, who was created Viscount 18 H. 6.) yet when created Noble, though by a new Title, he was intitled to his Action on this Statute. *Cro. Car. 136. Pal. 567. Viscount Say and Seal v. Stephens.*

Also it hath been adjudged, that since the Union a Peer of *Scotland* may have an Action on this Statute, and that it is not necessary for him to alledge that he hath a Seat and Voice in Parliament; for by the 5 Ann. 8. Art. 23. all Peers of *Scotland* after the Union shall be Peers of *Great Britain*, and have Rank and Precedency, &c. be tried, &c. and enjoy all Privileges of Peers as fully as the Peers of *England* now do or hereafter may enjoy, except the Right and Privilege of sitting in the House of Lords, and the Privileges depending thereon, and particularly the Right of sitting upon the Trial of Peers. *Cum. 439. Lord Viscount Falkland v. Phipps.*

(B) For what Words it lies.

IT hath been contended for, that no Words of Slander are punishable by this Statute, unless they are actionable at Common Law, and that they are only aggravated by the Statute, which in this Respect is like the King's Proclamation. *2 Mod. 161. Sir Robert Atkins in his Argument. Freem. 222.*

But the contrary hereof seems to have been holden in most of the Cases on this Head, and not without Reason, as it would be to no Purpose to make a Law, and thereby to give a Peer an Action for such Words as a common Person might have before the making of the Statute, and for which the Peer himself had equally a Remedy by the Common Law; and therefore the Design of the Statute must be, not only to punish such Things as import a great Scandal in themselves, or such for which an Action lay at the Common Law, but also such Things as favoured of any Contempt of the Persons of the Peers or great Men, and brought them into Disgrace with the Commons, whereby they took Occasion of Provocation and Revenge. *2 Mod. 156.*

It hath been observed, that no Action had been brought on this Statute 'till 100 Years after the making thereof, the Lords still continuing the military Way of Revenge to which they had been accustomed. *2 Mod. 156. Sir Fran. Perberton's Argument. — It is said by my Lord Coke,*

that at Common Law, Scandal of a Peer might be punished by Pillory and Loss of Ears, and that this Offence is now aggravated by the Statute. *5 Co. 125. De Libellis famosis. 12 Co. 37. 9 Co. 59. 2 Mod. 162. — That it was usual to punish Offenders of this Kind in the Star-chamber. 2 Mod. 152.*

The first Case on this Statute, said to be reported, is in *Kekw.* where the Lord *Beauchamp* brought an Action of *Scan. Mag.* against Sir *Richard Crofts*, for that the said Sir *Richard* had sued out a Writ of Forgery of false Deeds against him; and it was held, that the taking out

the Writ being done in a legal Way, and in a Course of Justice, the Action did not lie.

Cromp. Jur. 13. *Duke of Buckingham's* Case.—So in the same Book, *You said you would wind my Guts about your Neck*, held actionable. *Lord Abergens's Case*, *Cromp Jur.* 13.

Cromp. Jur. 35. *Lord Dyer's Case*. So for saying of a Judge, *You are a corrupt Judge*.

Heil. 55. *Bishop of Winchester v. Markham*; but *vide Dalf.* 38. S. C. *contra*.

3 *Leon.* 376. *Lord Winchester's Case* cited. *Freem.* 221. So for these Words, *He imprisoned me 'till I gave a Release*.

Cro. Eliz. 1. *Bishop of Norwich v. Prickett*. So these Words, *You have writ a Letter to me, which I have to shew, which is against the Word of God, against the Queen's Authority, and to the Maintenance of Superstition, and that I will stand to prove against you*, were held actionable, and 500 Marks Damages given.

Cro. Eliz. 67. *Lord Mordant v. Bridges*. So of these Words, *My Lord Mordant did know that Prude robbed Shotbolt, and bid me compound with Shotbolt for the same, and said he would see me satisfied for the same though it cost him 100l. which I did for him, being my Master, otherwise the Evidence I could have given would have banged Prude*.

4 *Co.* 14. *Lord Cromwell's Case*. *Scan. Mag.* was brought for speaking these Words, *You like not of me since you like those that maintain Sedition against the Queen's Proceeding*; the Defendant justifies by shewing the Occasion of speaking the Words, and that the Plaintiff encouraging Men to preach against the Common Prayer, he only meant that he liked of those who maintained Sedition (*innuendo Seditiosam illam doctrinam*) against the Queen's Proceedings; and this was held a sufficient Extenuation of the Words.

Cro. Jac. 196. *Earl of Lincoln v. Broughton*. In *Scan. Mag.* for these Words, *My Lord L. is a base Earl and paltry Lord, and keeps none but Rogues and Rascals like himself*. *Williams and Croke* Justices held, the Action lay, for the Words touch him in his Honour and Dignity, and may raise Contempt from the People, and that in Case of Nobility general Words will maintain an Action. But *Telverton* and *Fleming* seemed to incline to the contrary, and said the Words touched not his Life, Loyalty or Dignity, but were only Words of Spleen; *et adjornatur*; and after the Defendant died, and the Writ abated.

Moor 142. *Lord Lumley v. Fox*. For these Words wrote (a) in a Letter, *I have heard that your Lordship hath sought by uncharitable Means to bereft me of my Life, Lands and Liberty*, an Action lies.

4 *Co.* 16. S. C. (a) That the Action as well lies for Words written as those spoken. 2 *Shovv.* 505.

Moor 142. *Lord Sturton v. Chaffin*. So where one, on hearing that his Barns were burnt down, said, *I can't imagine who it should be but Lord Sturton*.

Goulf. 115. It hath been held that for these Words, *The Earl of L.'s Men by his Command took the Goods of H. by a forged Warrant*, an Action of *Scan. Mag.* does not lie, because not said the Earl knew the Warrant to be forged. Q.

12 *Co.* *Earl of Northampton's Case*. An Action of *Scan. Mag.* was brought for these Words, *There are more Jesuits come into England since the Earl of Northampton was Lord of the Cinque-Ports than ever there were before*, and held actionable.

In *Scan. Mag.* for these Words spoken by a Parson in the Pulpit, *The Lord of Leicester is a wicked and cruel Man, and an Enemy to the Reformation in England,* adjudged actionable, and 500 l. Damages given. 2 Sid. 21. Lord Leicester v. Mandy.

So for these Words, *The Earl of Pembroke is of so little Esteem in the Country, that no Man of Reputation hath any Esteem for him, and no Man will take his Word for 2 d. and no Man of Reputation values him more than I do the Dirt under my Feet;* and held actionable, though said they would not be so in the Case of a common Person. Freem. 49. Earl of Pembroke v. Saniel.

If one says, *I met J. S. whom I do not know, but my Lord P. sent after me to take my Purse,* an Action of *Scandalum Magnatum* lies, tho' not positively said my Lord P. sent him, or that it was to take the Purse feloniously; which last, in Case of an Action by a common Person, might be a good Exception. 1 Lew. 277. 1 Sid. 434. 2 Keb. 537. Earl of Peterborough v. Sir John Mordant. 1 Vent. Mitiori sensu.

59. S. C. adjudged, and there said that in these Actions the Words shall not be taken in

So these Words, *I value my Lord Marquis of D. no more than I value the Dog that lies there,* were without Debate adjudged for the Plaintiff, but a Writ of Error was brought, pending which *Proby* was killed, but his Executors after paid the Money. 1 Sid. 233. 1 Keb. 813. 1 Lew. 148. Marquis of Dorchester v. Proby.

So of these Words, *My Lord S. may kiss my A——, I care not a T—— for him, he keeps none but a Company of Rogues about him;* on Not guilty pleaded and a Trial at Bar, the Plaintiff had a Verdict and 100 l. Damages. Pascb. 27 Car. 2. in B. R. Lord Salisbury v. Charles Arthur.

If one says of a Peer, *He is an unworthy Man, and acts against Law and Reason,* an Action of *Scandalum Magnatum* lies notwithstanding the Words are general and charge him with nothing certain; and so adjudged by *North, Windham* and *Scrogs* against the Opinion of *Atkins*, who said the Statute extended not to Words of so small and trivial a Nature, but to such only which were of greater Magnitude, by which Discord might arise, &c. and therefore the Words *horrible Lies* were inserted in the Statute. *Note;* the Rule laid down by the Court in this Case was, that Words should not be construed either in a rigid or mild Sense, but according to the genuine and natural Meaning, and agreeable to the common Understanding of all Men. 2 Mod. 151, &c. 1 Mod. 232. Freem. 220. Lord Townsend v. Dr. Hughes.

(C) The Proceedings in this Action.

HERE I shall take Notice of the following Particulars:

That it is now clearly agreed, that though there be no express Words in the Statute which give an Action, yet the Party injured may maintain one on this Principle of Law, that when a Statute prohibits the doing of a Thing, which if done might be prejudicial to another, in such Case he may have an Action on that very Statute for his Damages. 2 Mod. 152.

That though the Action is to be brought *tam pro domino rege quam pro se ipso*, yet the Party is to recover all the Damages. 1 Peer Will. 690.

That if the Words are actionable at Common Law, the Peer hath his Election to proceed on the Statute or at Common Law. Freem. 49.

It

- Cro. Car.* 136. It hath been held, that this being a general Law the Plaintiff need
2 Sid. 21. not recite it particularly, and that if he sets forth so much thereof as
Freem. 425. shews his Case to be within the Statute, it is sufficient.
- 2 Mod.* 151. That it is now settled that no new Trial is to be granted in *Scan.*
1 Mod. 231. *Mag.* for excessive Damages; which Point seems to have been first deter-
 mined in the before mentioned Case of Lord *Townsend v. Dr. Hughes*,
 where the Jury gave 4000*l.* Damages.
- Hill.* 33-4. In *Scan. Mag.* the Plaintiff declared that the Defendant spake these
Car. 2. in Words of him, *My Lord of London is a bold, daring, impudent Man*
C. B. Bishop for sending Heads of Divinity to his Clergy in these Parts contrary to Law,
of London v. ad damnum 2000*l.* which Sum the Jury gave in Damages. *Wallop*
Edmond Hick- and *Williams* for the Defendant moved for a new Trial, in regard
eringbill. there was no Proportion betwixt the Scandal and the Damages, and
 likewise because there was no particular Damage proved at the Trial;
 the Defendant also had made an Affidavit that he was not worth
 2000*l.* at the Time of the Action brought, nor since; but notwith-
 standing the Court refused to grant a new Trial.
- 2 Mod.* 166. It has been ruled, that in *Scan. Mag.* the Defendant cannot justify,
Freem. 221. let the Words be ever so true, because the Action is brought *qui tam*,
Poph. 67. in which the King is concerned; but it has been held that the Defen-
 dant may explain the Words by shewing the Occasion of speaking of
 them, and thereby extenuate the Meaning of them, as was done in
 Lord * *Cromwell's Case*.
- * *4 Co.* 14. In *Scan. Mag.* the Court will never change the Venue on the com-
Carth. 400. mon Affidavit that the Words were spoken in another County, because
2 Salk. 668. a Scandal raised on a Peer of the Realm reflects on him through the
 whole Kingdom, and he is a Person of so great Notoriety, that there
 is no Necessity of his being tied down to try his Cause among his
 Neighbourhood.
- 1 Lev.* 56. As in the Case of Viscount *Stamford v. Nedham*, where the Action
1 Keb. 514. was laid in *London*, and the Defendant moved to change the Venue,
 for that he was prohibited to stay in *London* having been in Arms
 against the King; but the Motion was denied; the Plaintiff being a
 Peer of Parliament then (a) sitting at *Westminster*, and has Election to
 lay his Action where it is most convenient for himself; and there is the
 less Reason for removing it, because the Action is as well on Behalf
 of the King as himself.
- (a) *Vid.* *1 Sid.* 185.
2 Mod. 216. But in the Case of Lord *Shaftesbury v. Graham*, the Court in *Scan.*
2 Jon. 198. *Mag.* on a Special Affidavit of the Plaintiff's Power and Interest in
1 Vent. 363. the County where the Action was laid, made a Rule for changing the
Skin. 40. Venue; but Note, that the Books which report and cite this Case,
2 Show. 200. mention it as a Case of the Times, and that it was owing to the great
 Influence that Lord had in the City of *London* that the Court varied
 from the general Rule, and which Rule hath ever since, and not-
 withstanding this Case, been adhered to.
- Cro. Car.* 386. It hath been held, that the Statute which appoints that Actions for
 Words shall be commenced within two Years, does not extend to
Scan. Mag.
- Cro. Car.* 385. Also it hath been held, that the Statute 27 *Eliz.* for bringing a
1 Sid. 143. Writ of Error into the Exchequer Chamber does not extend to this
 Action.
- 3 Mod.* 41. It hath been held, that in an Action of *Scan. Mag.* Special Bail is
Holt. Rep. not required.
 640.
2 Show. 506, It hath been held, that no Costs are to be given the Plaintiff on his
 obtaining a Verdict.

Scire Facias.

- (A) The Nature of the Writ.
 (B) In what Cases it is a proper Remedy.
 (C) In what Cases necessary, and therein who are to be Parties to it, and of the Privy required herein: And herein,

1. Of the *Sci. Fa.* to revive Judgments, and after what Time necessary.
2. Of the *Sci. Fa.* on Recognizances and Statutes.
3. Of the *Sci. Fa.* on Letters Patent.
4. *Sci. Fa.* by and against Executors and Administrators.
5. By and against Heirs and Tertenants.
6. By and against Husband and Wife.
7. *Sci. Fa.* against Bail.

- (D) The Form of the Writ and Proceedings, and how far it must pursue the Nature of the original Action.
 (E) Pleadings to a *Sci. Fa.*

(A) The Nature of the Writ.

A *Scire Facias* is deemed a (a) judicial Writ, and founded on some Matter of (b) Record, as Judgments, Recognizances and Letters Patent on which it lies to inforce the Execution of them, or to vacate or set them aside; and though it be a Judicial or Writ of Execution, yet it is so far in (c) Nature of an Original, that the Defendant may plead to it, and is in that Respect considered as an (d) Action; and therefore it is held, that a Release of all Actions, or a Release of all Executions, is a good Bar to a *Sci. Fa.*

and partly upon such a Suggestion, without which no Proceeding could be on the Record. 2 *Inst.* 470.— That the Rule holds not always good, That where one comes in by Matter of Record, he ought not to be ousted without a *Sci. Fa.* for he, whose Lands are extended upon an *Elegit*, upon a Recognizance, after the Debt be satisfied, may enter without a *Sci. Fa.* but the Conusee of a Statute, because he is to have Costs or Damages which be not known, cannot be ousted without a *Sci. Fa.* *Cro. Car.* 589. 4 *Co.* 67. 2 *Rol. Abr.* 497.—*Sci. Fa.* lies in Chancery on a Patent; for the Patent being inrolled is a Record of that Court; but where *Sci. Fa.* is brought for the Forfeiture of a Patent or other Thing in another Court, there ought to be found an Office in such other Court before the *Sci. Fa.* issues, except the Forfeiture appears of Record in the same Court, whereupon to found the *Sci. Fa.* 3 *Lev.* 223. (c) In Nature of an Original. *Skin.* 682. *Comb.* 455.—That there are many *Sci. Fa.* in the Register among the original Writs. *Lucas* 258. (d) Is in Nature of a Declaration, 1 *Sid.* 406.—and may be formed according to the subject Matter. *Carth.* 107.

- Cro. Car.* 286, 300, 464.
1 Rol Rep. 264.
1 Vent. 38.
1 Salk. 263.
 But though it be held that a *Sci. Fa.* is in Nature of an Original, yet it hath been adjudged, that no Writ of Error lies into the Exchequer Chamber on a Judgment given in *B. R.* on a *Sci. Fa.* the Statute 27 *Eliz. cap. 8.* which gives the Writ of Error, mentioning only Suits or Actions of Debt, Detinue, Covenant, Account, Actions upon the Case, *Ejectione Firme*, or Trespafs.
- Dalf.* 95.
3 Bulf. 322.
 Also it was formerly held, that the Plaintiff could not in a *Sci. Fa.* recover Costs; but this is now remedied by the Statute 8 & 9 *W. 3. cap.*

(B) In what Cases it is a proper Remedy.

- 2 Inst.* 438.
IF a Bill of Exceptions be tendred to a Judge, and he signs it and dies, a *Sci. Fa.* lies against his Executors or Administrators to certify it.
- 2 Inst.* 428.
vid. Tit. Outlawry.
 So if a Man be outlawed, who at the Time of the Outlawry was beyond Sea in the King's Service, and he brings a Writ of Error to reverse this Outlawry, and obtains a Certificate of the Marshal of the King's Host, (as he ought to do) in this Case, notwithstanding the Marshal dies, yet may he assign the same for Error, and upon shewing the Certificate have a *Sci. Fa.* to the Executors or Administrators of the Marshal.
- Hutt.* 32.
Cro. Jac. 514.
1 And. 247.
Godb. 276.
 A *Sci. Fa.* lies against a Sheriff who levies Money on a *Fi. Fa.* and retains it in his Hands.
- Cro. Car.* 409.
 -- Lies to have Seat of a Forest.
 Execution of Damages recovered in an Appeal. *Cro. Jac.* 549.
- Comb.* 1. --
 Upon an *Elongavit* returned by the Sheriff, a *Sci. Fa.* lies against the That a *Sci. Fa.* lies against the Sheriff for taking of insufficient Pledges in Replevin. *Hutt.* 77.
 Pledges in a Replevin, by Plaint in the Sheriff's Court transmitted to the *Hustings*, and so to *B. R.* by *Certiorari*.
- Moor* 241.
Cro. Eliz. 44, 325.
 (a) Where having the Thing gives a sufficient Privity to maintain a *Sci. Fa.* *Kelw.* 168, 169.
 If one hath Judgment in a *Quare Impedit*, and after, and before Execution, the Party is outlawed, the King may have a *Sci. Fa.* to execute the Judgment, the King having Privity enough in this Case to sue Execution, because the Thing (a) as it was in the Plaintiff vested in the King.
- Stil.* 348.
 On a Motion for a *Sci. Fa.* to avoid a Judgment, made void by the general Act of Pardon, 12 *Car. 2.* the Court doubted whether this was to be done by *Sci. Fa.* or *Audita Querela.* *1 Sid.* 231.
 On a Motion to discharge an Outlawry which was pardoned by the Act of Oblivion, the Court held that it could not be done on Motion, but that the Party must bring a *Sci. Fa.* on the Act.
- 5 Mod.* 88.
 Where one obtained Judgment, and after had Judgment in a *Sci. Fa.* thereupon, and then became a Bankrupt, and the original Judgment was assigned by the Commissioners to *S. S.* upon Motion it was entred to intitle him to the Benefit of the Judgment in the *Sci. Fa.* without bringing a new one.

A *Sci. Fa.* brought by the Successor of a President of the College of Physicians in London, upon a Judgment in Debt obtained by him upon the Statute 14 H. 8. against Practising Physick in London without a Licence, but died before Execution; it was objected on Demurrer, that the *Sci. Fa.* ought to have been brought by the Executor or Administrator of him who recovered; but without Argument the Court held that the Successor might well maintain the Action, for the Suit is given to the College by a private Statute, and the Suit is to be brought by the President for the Time being; and he having recovered in Right of the Corporation, the Law shall transfer that Duty to the Successor of him who recovered.

*Cro. Jac. 159.
Dr. Atkins v.
Gardener.*

A *Sci. Fa.* was brought in the Court of C. B. to reverse a Fine in Ancient Demesne, and it was ruled that no such Writ lay, but that the Party ought to bring his Writ of Deceit.

*Mich. 7 W. 3.
in C. B.
Zouch v.
Thompson.*

(C) In What Cases necessary; and therein Who are to be Parties to it, and of the Privity required herein: And herein,

1. Of the *Sci. Fa.* to revive Judgments, and after what Time necessary.

THERE have been different Opinions whether a *Sci. Fa.* lay at Common Law; but this Doubt, says my Lord Coke, arose for want of distinguishing between Personal and Real Actions.

2 Inst. 469.

At (a) Common Law, if after Judgment given, or Recognizance acknowledged, the Plaintiff sued out no Execution within the Year, the Plaintiff or his Conussee was driven to his Original upon the Judgment, and the *Scire Facias* in Personal Actions was given by the Statute of (b) *Westm. 2. cap. 45.*

(a) In *Salk. 600. Far. 67. Holt Ch. J.* said he was not satisfied that no *Sci. Fa.* lay at

Common Law upon a Judgment in a Personal Action; for the Words *five alia quaecunque irrotulata*, in the Statute of *Westm. 2.* came after *Contractus et Conventiones*, and therefore could not be construed of Judgments, but that the Law had been taken to be otherwise, and therefore he must submit. (b) Which see explained, *2 Inst. 469, 470.* and that this Statute gave the *Sci. Fa.* in Personal Actions. *Co. Lit. 290. b. 1 Sid. 351. 3 Co. 12. 4 Mod. 248. 3 Mod. 189.*

But in Real Actions, or upon a Fine, though no Execution was sued out within a Year after the Judgment given or Fine levied, yet after the Year a *Sci. Fa.* lay for the Land, &c. (a) because no new Original lay upon the Judgment or Fine.

2 Inst. 470. (a) The Reason why it lay in this Case was, for that in a Real Ac-

tion one could have no other Advantage of his Judgment; but in a Personal Action, Debt would lie on the Judgment. *Farest. 64, 66.*

A *Sci. Fa.* lay as well in Mixed as Real Actions, as upon a Judgment in an Assise. So it lay upon a Judgment in a Writ of Annuity.

Salk. 258, 600.

It hath been adjudged, that if there be Judgment in Ejectment, and no Execution sued thereon in a Year and a Day, an *Habere facias possessionem* cannot be sued out after without a *Sci. Fa.* and *Holt Ch. J.* said, that as to the Possession of the Land an Ejectment was real, and the only Remedy a Termor for Years had, and that a Recovery therein bound the Right of Inheritance.

Salk. 258, 600. Comb. 250. Farest. 64. et vid. 1 Sid. 317, 351. 2 Keb. 307. Skin. 161.

But *3 Lev. 100. Lutw. 1268.*

5 Co. 88. But though after a Year and a Day there can be no Execution of a Judgment without a *Sci. Fa.* yet if the Plaintiff hath been delayed by a Writ of Error, he may take out Execution within a Year and a Day after the Judgment affirmed.
Moor 566.
pl. 772.
Cro. Eliz. 706.
Godb. 372.
Palm. 448.
 and 2 *Inff.* 471. where it is said, that though it had been otherwise holden, yet common Experience and later Resolutions are so.

1 *Rol. Abr.* 899. And therefore it hath been adjudged, that if a Man recovers Debt or Damages in *B. R.* and after within the Year the Defendant brings a Writ of Error in the Exchequer Chamber, where the first Judgment is affirmed after the Year expired, yet the Recoverer may have Execution by *Capias* or *Fi. Fa.* within the Year after the Affirmance, without a *Sci. Fa.* for the Affirmance is a new Judgment.
Lan. 20. *Den-*
nis v. Drake.
Cro. Eliz. 416.
 S. P.

1 *Rol. Abr.* 899. *et vide* So if after the Year after the Recovery the Defendant brings a Writ of Error, and the Judgment is affirmed, though before the Writ of Error brought the Recoverer was put to his *Sci. Fa.* yet this Affirmance is a new Judgment, and the Recoverer may have within the Year after the Affirmance a *Fi. Fa.* or *Capias* without a *Scire Facias.*
Palm. 449.
Latch 193.

Cro. Jac. 364. So if he be Nonfuit in the Writ of Error, or if the Writ of Error be discontinued; for though in these Cases there is not any new Judgment given, yet the bringing of the Writ of Error revives the first Judgment.
 1 *Rol. Rep.* 104, 133.

1 *Rol. Abr.* 899. *Trin.* If *A.* recovers against *B.* in *B. R.* Damages and Costs, and thereupon hath Judgment against the Bail after a *Sci. Fa.* &c. and after *B.* and the Bail join in a Writ of Error upon the Statute in the Exchequer Chamber, and after the Year and Day passes, in this Case, notwithstanding this Writ of Error, the Court of *B. R.* may grant Execution, for this is a void Writ of Error, and as if no Writ of Error had been brought, and therefore it shall be no Continuance of the first Judgment; but the Year and Day being past, the Plaintiff cannot have Execution without a *Sci. Fa.* though the Year passed after the Writ brought.
 9 *Car.* 1.
Barns v. Hill.

6 *Mod.* 14, 288. If upon a Judgment there be a *Cesset executio* for a Year after the Judgment, the Plaintiff within the Year may take out Execution without a *Sci. Fa.*
Farell. 64.
Salk. 600.

3 *Lev.* 404. Also it hath been held, that where Execution hath been taken out after the Year and Day, it is not void, but voidable only.
Salk. 273.

(d) 6 *Mod.* 28. But though it seems agreed that the Execution being staid by the Act of the Defendant, the Plaintiff may after the Year and Day take out Execution without a *Sci. Fa.* yet it hath been held, that (a) if the Execution is staid by Injunction, though the Act of the Defendant, yet the Court will not take Notice thereof.
 1 *Salk.* 322.
et vide Tit.
Injunction.

Cartb. 283. If Judgment be given in Debt, and no Execution sued out within the Year, yet the Plaintiff may after an Award of an *Elegit* on the Rule of the Judgment as of the same Term with the Judgment, and thence continue it by *Viccomes non misit breve*; so held on a Motion to set aside the Execution; and though the Court said that an *Elegit* ought to be actually taken out within the Year, yet being informed by the Clerks of the Court, that it had been the Practice for many Years to make such Entry, &c. it was said to be the Law of the Court, and they ordered the Execution to stand.
Seymour v.
Greenwil.
 2 *Shrew.* 235.
 S. P.
Comb. 232.
 S. P. where
 it was said
 by Sir *Sam.*
Astry, that it
 was not the
 Practice to a-

ward an *Elegit* on the Rule, because Attornies think they can have no Execution after; but it was said by the Court to be a mischievous Practice.

If the Demandant or Plaintiff taketh his Procefs of Execution within the Year, though it be not served within the Year, yet if he continue the same, he may have Execution at any Time after the Year.

2 Inst. 471.
Co. L. 290. f.
et vide 2 Leon.
77, 78, 87.
6 Med. 288.

3 Leon. 259. 4 Leon. 44. 1 Sid. 59. 1 Keb. 159.

If the Plaintiff delay the Executing a Writ of Inquiry 'till a Year after the interlocutory Judgment, he cannot do it after without a *Sci. Fa.*

Cases in B. R.
Pasch. 13 W. 3.
Haw v. Cuton.

In the Case of the King there need not be any *Sci. Fa.* after the Year and Day.

2 Salk. 603.

If a Judgment be above ten Years standing, the Plaintiff cannot sue a *Sci. Fa.* without a Motion in Court; if under ten, but above seven, he cannot have a *Sci. Fa.* without a Motion at Side Bar. Note; if after such Motion, and Judgment revived by *Sci. Fa.* the Defendant dies before Execution, the Plaintiff must sue a new *Sci. Fa.* but may have it without Motion, for the Judgment was revived before.

Salk. 598.
Hardisty v.
Larny.

After a Judgment, if the Plaintiff within the Year sues a *Sci. Fa.* he cannot after have a *Capias* within the Year 'till he hath a new Judgment in the *Sci. Fa.*

1 Rol. Abr.
900. Trin. 13
Car. 1. Roberts v. Pifing.

2. Of the *Sci. Fa.* on Recognizances and Statutes.

Recognizances and Statutes are considered as Judgments, being Obligations solemnly acknowledged, and entred of Record, and the *Sci. Fa.* on those is the Judicial Writ and (a) proper Remedy the Conusee hath; but herein we must distinguish (b) between Recognizances at Common Law and Statutes Merchant, &c. for upon the former, if the Conusee did not take out Execution within a Year after the Day of Payment assigned in the Recognizance, he was obliged to commence the Suit again by Original; the Law presuming the Debt might have been paid, if they did not sue Execution within the Year after the Money became payable; but this Law is altered by *Westm. 2. cap. 49.* by which the Conusee hath a *Sci. Fa.* given him to revive the Judgment and put it in Execution, if the Conusor cannot stop it by pleading such Matters as the Law judges sufficient for that End, such as a Release, &c. but the Conusee of a Statute Merchant, &c. may at any Time sue Execution on them without the Delay or Charge of a *Sci. Fa.*

Lit. Rep. 86.
(a) That a
Capias lies
not on a Re-
cognizance,
but only a
Sci. Fa.
1 Brown. 83.
(b) Co. Lit.
291.
2 Inst. 469.
F. N. B. 296.
Bro. Recog. 173

Also as to Recognizances at Common Law, and Statutes and Recognizances introduced by Statute Law, we must further distinguish, that if on the first the Conusee dies before Execution sued, his Executor shall not sue it, even within the Year, without bringing a *Sci. Fa.* against the Conusor; the Reason is, because the Law presumes the Debt might have been paid to the Testator, and therefore will not suffer the Debtor to be molested, unless it appear that he hath omitted to perform the Judgment; and this is to be done by *Sci. Fa.* brought by the Executor, for the Alteration of the Person altereth the Procefs at Common Law; but this tending to delay the *Sci. Fa.* is taken away in Statutes and Recognizances by Statute Law by the several Acts of Parliament which introduced them; and therefore upon the Death of the Conusee of a Statute Merchant, &c. his Executors may come into Chancery, and upon their producing the Testament and the Statute, shall have Execution without a *Sci. Fa.* as the Testator himself might.

2 Inst. 395,
471.
Bro. Stat.
Merch. 16,
43, 50.

4 *Inst.* 181. If a Man be bound in a Recognizance to the King, upon Condition
 1 *Rol. Abr.* to be of good Behaviour, &c. he cannot be indicted for (a) Breach of
 900. the good Behaviour, by which he forfeits his Recognizance, without a
 (a) What shall *Sci. Fa.* for if a *Sci. Fa.* had been brought, he might have pleaded some
 be said a Matter in Discharge thereof.
 Breach, *vide* *Cro. Car.* 498.
 — And how to be assigned, *vide* 3 *Bull.* 220. *Cro. Jac.* 412. *Stil.* 369.

21 *E. 3.* 22. b. If a Man acknowledges a Recognizance to be paid at a Day within
 1 *Rol. Abr.* the Year after the Date of the Recognizance, in this Case he may
 899, 900. have Execution by *Fi. Fa.* or *Elegit* within the Year after the Day of
 2 *Inst.* 471. Payment, though the Year be past from the Date of the Recogni-
 zance.

2 *Rol. Abr.* If *A.* enters into a Recognizance or Statute, &c. to *B.* and the Sum
 468. is made payable at three several Days, as 20*l.* at each Day, the whole
Co. Lit. 292. Debt being 60*l.* when the first Day of Payment is lapsed, the Conu-
 2 *Inst.* 395, seee may have Execution for 20*l.* immediately, and so for the rest as
 471. it becomes due, without waiting for the last Day of Payment, as he
 5 *Co.* 81. must have done if the Debt had been due by Bond; and this holds
 as well on Recognizances at Common Law as upon Statutes; and the
 Reason is because these are in Nature of three several Judgments.

1 *Rol. Abr.* If a Man recovers an Annuity, he shall have Execution for every
 900. Time that occurs after by *Fi. Fa.* or *Elegit* within the Year after the
 2 *Inst.* 471. Time incurred, though the Year be past from the Judgment, but not
Salk. 258, after the Year without a *Sci. Fa.*
 600.

2 *Inst.* 395. If two acknowledge a Recognizance of 100*l.* *quilibet eorum in so-*
lido, that is jointly and severally, the Conusee may sue several *Sci. Fa.*
 against the Conusors upon this Recognizance.

2 *Rol. Abr.* So if *A. B.* and *C.* bind themselves jointly and severally in a Statute,
 468. the Conusee may have Execution against one of them alone, or against
 all together; but he cannot have Execution against two only, for the
 Execution must pursue the Statute which is joint or several, but Exe-
 cution against two is neither one nor other.

Co. Lit. 290. By the Statute 32 *H. 8. cap. 5.* it is enacted, That if Lands delivered
 2 *Inst.* 678. in Execution on just Cause be recovered from the Tenant by Execu-
 4 *Co.* 67. tion before he hath received his whole Debt, the Conusee (and by a
 favourable Construction of the Statute, his Executors) may have a
Sci. Fa. out of that Court where the Execution is first awarded, or out
 of any Court where the Record shall be moved by Writ of Error and
 affirmed; but this Statute is to be construed under these Restrictions,
 that where the Conusee hath Remedy for Part of his Debt *in presenti*,
 or *futuro* for the whole or for Part, there he can have no Aid nor Be-
 nefit of this Statute.

2 *Rol. Abr.* Herein likewise we may consider that a *Sci. Fa. ad rehabendum terram*
 480. lies for avoiding Executions on these Statutes, which differs from the
 Writ of *Audita Querela*, for that avoids an Execution unjustly obtained
 at first; but the *Sci. Fa.* allows the Execution just at first, but shews
 that the End for which it was granted being obtained, it ought of Con-
 sequence to cease.

4 *Co.* 67. And therefore if the Conusor, after his Land is extended, tenders
 2 *Inst.* 398. the Money to the Conusee, who refuses it, or if the Debt, with all
 2 *Rol. Abr.* Costs and Damages, which the Statute *de Mercatoribus* allows, be satis-
 497, 480. fied from any casual Profit arising from the Land, in these Cases the
 Conusor is put to his *Sci. Fa.* and cannot enter; but in Case of an
Elegit on a Recognizance at Common Law, when the Conusee is an-
 swered his Debt by the Perception of the certain and usual Profits of
 the Land, the Debtor may enter, and is not put to his *Sci. Fa.* yet in
 this Case, if the Creditor be satisfied by an accidental Perquisite, there
 the

the Debtor cannot enter, but must have a *Sci. Fa. ad rehabendum terram*; and the Reason of these Distinctions is, because in the first Case the Execution issues according to the Direction of the Statute, not only 'till the principal Debt be levied, but all Costs and Damages arising by Reason thereof; and therefore since the Damages are not ascertained, the Record will always oppose an Entry, which is but an Act in *Pais*, and cannot be turned into a Defeasance of a Matter of Record 'till such Damages are settled on Record in the *Sci. Fa.* But in the second Case, when the Debt is certain, and the Value of the Land ascertained in the Extent, there, when such Debt is paid by Perception of such settled Profits, there is no Act on Record to oppose an Entry, and therefore an Entry is lawful; but where the Satisfaction arises from accidental Profits which do not appear in the Extent, this then is still Matter of Record in Opposition to the Entry, since such accidental Profits do not appear in the Valuation of the Land settled by the Extent on Record.

So if Lands be extended on a Statute, and the Time of the Extent expired, the Conusor is put to his *Sci. Fa.* because the Conusee may have Cause to hold the Land longer than the Time of Extent, for he may retain it 'till he has received his Costs of Suit and reasonable Expences. ^{4 Co. 67.} ^{2 Rol. Abr. 497.}

But no *Sci. Fa.* lies upon a general Averment that the Conusee has levied the Debt before the Time of the Extent expired, because this may happen by the Conusee's Industry in improving the Land, which the Debtor can take no Advantage of. So if the Land taken in Execution be really worth 20 *l. per Ann.* but it is extended only at 10 *l.* though by this Computation 'tis evident the Conusee might levy the Debt before the Time of the Extent is ended, yet the Conusor, upon an Averment that the Debt is levied, shall have no *Sci. Fa.* because that would be contrary to the Record, and the Court is to judge of the Value according to the Extent; by which it appears that the Debt is not levied; but if the Conusee has levied Part by cutting of Wood, and has received the Residue, as appears by an Acquittance, in this Case he shall have a *Sci. Fa.* The Reason is, because the End of the Extent being only to satisfy the Conusee his reasonable Demands, whenever it appears to the Court that they are answered, whether it be by the Perception of the Profits or otherwise, they grant a *Sci. Fa.* to avoid the Extent. ^{2 Rol. Abr. 482.}

If the Conusee has levied Part of the Debt according to the Extent, the Conusor, upon Tender of the Residue in Court, shall have a *Sci. Fa.* to recover the Lands within the Time of the Extent; for here it appears on Record how much was due at first, how much was paid, and what remains due and in Arrear; but if the Conusor had tendred the Remainder of the Debt out of Court, or if in Court he had only offered to come to an Agreement with the Conusee, in neither of these Cases shall the *Sci. Fa.* be granted, because it does not appear on Record that the Debt is paid. ^{2 Rol. Abr. 482.}

The Grantee of a Reversion may bring a *Sci. Fa.* against him who hath Execution of the Lands on a Statute Merchant, on alledging that he hath Satisfaction by some casual Profits, though he was not Party or Privy. ^{Dyer 1. pl. 6.}

3. Of the *Sci. Fa.* on Letters Patent.

The Writ of *Sci. Fa.* to repeal Letters Patent lieth in three Cases; first, When the King by his Letters Patent doth grant by several Letters Patent one and the self same Thing to several Persons, the first Patentee ^{4 Inst. 82.}

Patentee shall have a *Sci. Fa.* to repeal the second; 2dly, When the King doth grant a Thing upon a false Suggestion, he *Prærogativâ Regis* may by *Sci. Fa.* repeal his own Grant; 3dly, When the King doth grant any Thing which by Law he cannot grant, he *Jure Regis*, and for the Advancement of Justice and Right, may have a *Sci. Fa.* to repeal his own Letters Patent; and the Judgment in all these Cases is, *Quod Prædictæ Literæ Patentis dicti Domini Regis revocentur, cancellentur, evacucentur, annullentur, et vacuæ et invalidæ pro nullo penitus habeantur et teneantur, ac etiam quod irrotulamentum eorundem cancelletur, cassetur et adnibiletur.*

2 Vent. 344.
The King v.
Sir Oliver
Butler.

3 Lev. 220,
221. S. C.
6 Mod. 229.
S. P.

3 Lev. 221.

(a) For this
vid. Dyer 197.
11 Co. 74.
8 Co. Prince's
Case.

(b) It is the
highest Point
of the Lord

Chancellor's Jurisdiction to cancel the King's Letters Patent under the Great Seal. 4 Inst. 88. vide Tit. Jurisdiction of the Court of Chancery.

3 Lev. 223.

(c) 9 Co. 96.

Where a Patent is granted to the Prejudice of the Subject, the King of Right is to permit him upon his Petition to use his Name for the Repeal of it in a *Sci. Fa.* at the King's Suit; and to prevent Multiplicity of Actions; for such Actions will lie notwithstanding such void Patent; as where the King grants a Patent for holding a Fair or a Market without a Writ of *Ad quod damnum*, or where such Writ hath been deceitfully executed, in such Case a *Sci. Fa.* lies to repeal the Patent.

And though in the above Case it was urged that a *Sci. Fa.* did not lie to repeal such Patents, because there is (a) another Remedy by the Common Law, *i. e.* by Assise of Nufance, *Quod permittat*, &c. where the Matter shall be tried by a Jury and several Judges, and not by one Judge only, as it is in (b) Chancery; yet it was resolved that the King has an undoubted Right to repeal a Patent wherein he is deceived, or his Subjects prejudiced, and that by *Sci. Fa.*

It was likewise objected in the above Case, that there ought to have been an Office found before the *Sci. Fa.* issued, for that a *Sci. Fa.* is a Judicial Writ, and ought to be founded on a Record; to which it was answered and resolved, that true it is, a *Sci. Fa.* ought to be founded on a Record; and so 'tis here, for the Patent is a Record in Chancery upon which this *Sci. Fa.* issued, and it is a sufficient Record whereon to found it; but where the *Sci. Fa.* is brought for the Forfeiture of a Patent or other Thing in another Court, there ought to be found an Office in such other Court before the *Sci. Fa.* issues, except the Forfeiture appears of Record in the same Court whereupon to found the *Sci. Fa.* and where the Office is found, the King shall seise (c) presently upon the Office found; but where the Office is founded upon the Office itself, as here, the King cannot seise 'till the Forfeiture, or other Defect of the Patent be tried upon the *Sci. Fa.*

4. *Sci. Fa.* by and against Executors and Administrators.

2 Inst. 471.
Godb. 83.
Carr. 112,
193.

One that is no Party to the Record, Recognizance, Fine or Judgment, as the Heir, Executor or Administrator, though they be privy, and it be within the Year, shall have no Writ of Execution, but a *Sci. Fa.* to enable themselves to the Suit; and so of the Tenant or Defendant, for the Alteration of the Person altereth the Process; otherwise in the Case of a Statute Staple or Merchant, because the Process is given by other Acts of Parliament.

Farefl. 68.
per Holt, who
said that it
had been so

lately adjudged; for this vide Moor 367. pl. 503. Noy 150. Carter 112, 122, 180, 193. (d) 5 Mod. 339. S. P. Resolv'd, if a Suggestion of his Death be made on the Record, but not otherwise, because then it would not be agreeable with the Record. Salk. 319. 6 Mod. 108, et vide Stat. 8 & 9 W. 3. c. 11. § .7.

So if there be Judgment against *A.* and thereupon a *Fi. Fa.* is sued out, but before Execution *A.* dies intestate, there needs no *Sci. Fa.* to renew this Judgment, but Execution of the Goods may be made in the Hands of the Administrator; for as the Party himself could not have made any Defence to the Writ of Execution, there is no Reason that his Representative should be in a better Condition.

1 Mod. 182.
Farrer v.
Brooks, et
vide Tit. Exec-
ution.

It was formerly held, that if an Administrator, having obtained Judgment against a Creditor of the Intestate's, died, the Administrator *de bonis non* could not have a *Sci. Fa.* on this Judgment for want of Privity, but must begin anew.

Cro. Jac. 4.
Yale v. Gough,
adjudged by
three Judges
against one.
126. 33. S. C.
2 Saund. 149.

But for this vide Cro. Car. 167. Latch 40. Palm. 443. 5 Co. 9. 1 And. 23. Moor 40. 1 Sid. 29. 2 Sid. 122.

But now by the 17 Car. 2. cap. 8. it is enacted, 'That where any (a) Judgment after Verdict shall be had, by or in the Name of any Executor or Administrator, in such Case an Administrator *de bonis non* may sue forth a *Sci. Fa.* and take Execution upon such Judgment. For which vide 1 Salk. 322. (a) If an Administrator obtains a Decree, but dies before Inrolment, the Administrator *de bonis non* may revive this Decree within the Equity of this Statute. 2 Vern. 237.

For which
vide 1 Salk.
322.
(a) If an Ad-
ministrator
obtains a De-
cree, but dies
before Inrolment,
the Administrator
de bonis non
may revive this
Decree within the
Equity of this
Statute. 2 Vern.
237.

If an Administrator *durante Minoritate* brings an Action and recovers, and then his Time determines, the Executor may have a *Sci. Fa.* upon that Judgment.

1 Rol. Abr.
888.
Cro. Car. 227.
2 Brownl 83.

Godb. 104. 1 Lev. 181. 1 Keb. 750. 1 Vern. 25.

So if such an Administrator obtains Judgment, he may bring a *Sci. Fa.* against the Bail, and they cannot object that the Infant is of full Age, for the Recognizance being to the Administrator himself by Name, though he be Administrator *durante Minori etate tantum*, yet he may have a *Sci. Fa.* against the Bail.

2 Lev. 37.
Enbrin v.
Mompesson.

5. By and against Heirs and Tertenants.

It is clearly agreed, that in all Real Actions a *Sci. Fa.* lay at the Common Law, and consequently that an Heir may by such Writ revive and inforce the Execution of a Judgment obtained by his Ancestor.

2 Inst. 469.
3 Co. 12.
Salk. 600.
4 Mod. 248.

Also it is held, that if the Demandant in a Writ of Coufenge, or other (b) Real Action, in which Land and Damages are recovered, has Judgment, and dies, the Heir shall take out Execution as to the Land, and the Executor as to the Damages.

19 E. 4. 5. b.
43 E. 3. 2.
1 Rol. Abr.
889.

Waste, the Heir shall have Execution of the Land, and the Executor of Damages. 43 E. 3. 2. 1 Rol. Abr. 889.

(b) So of a
Recovery in

And as a *Sci. Fa.* lies for the Heir, so it lies against (c) him on a Judgment obtained against his Ancestor; but this is to be understood where Lands in Fee-Simple descend to the Heir, for it would be unreasonable to subject the Heir to the Payment of his Ancestor's Debts any further than the Value of the Assets descended. Also if the Heir be within Age, he is not liable to Execution during his Minority, but in such Case the Parol must demur.

Dyer 81.
Co. Lit. 103,
290.
(c) Against the
Heir of an
Heir. Cro.
Jac. 186.

And though an Heir only, who hath Lands in Fee-Simple descended, is bound, yet if *A.* be Tenant for Life, Remainder to *B.* his Son in Tail, and *A.* enters into a Recognizance and dies, *C.* brings a *Sci. Fa.* and *B.* is returned Heir and Tertenant, and warned, but makes De-

1 Sid. 54.
Raym. 19.

fault, he can have no *Audita Querela* to avoid this Execution, because he had a Day given in Court to set aside the Recognizance, and it was his Folly not to appear when warned.

1 *Vern.* 143.
2 *Vern.* 37,
88, 89.
3 *Lev.* 355.

If there be a Sequestration for a personal Duty against the Ancestor where the Heir is not bound, and the Defendant dies, there is an End of the Sequestration; and it cannot be revived against the Heir, because neither the Heir nor the Lands are bound by such Decree; but if the Decree was upon a Covenant that bound the Heir, and the Defendant died, such Decree might be revived by *Subpœna Sci. Fa.* against the Heir, to shew Cause against the Decree, if the Decree be inrolled of Record, or if not, by Bill of Revivor; and when revived against the Heir and Executor, (which is the usual and regular Way) the Sequestration also will be revived on Motion, if upon coming into Court Cause is not shewn why the Decree should not be revived.

Carth. 107.

Where a Judgment is had against one who dies before Execution, a *Sci. Fa.* will not lie against his Heir and Tertenants until a *Nilil* is returned against his Executor.

1 *And.* 161.

It is laid down as a general Rule, that in all Cases where the (a) Inheritance or Freehold is affected, the Tenant of the Freehold is to be made a Party.

(a) On a Motion to reverse an Outlawry

in Treason it was objected, that there ought to be a *Sci. Fa.* to the Lords mediate and immediate before the Outlawry should be reversed; but held not to be necessary, the Forfeitures in Treason belonging to the King, and not to them. 4 *Mod.* 366.

Salk. 339,
598.

Comb. 318.

Dyer 321.

Co. Ent. 233.

Cro. Eliz.

474, 739.

Bridgm. 69. *Moor* 524.

Hence it hath become a settled Point, not to reverse a Fine without a *Sci. Fa.* returned against the Tertenants for; the Conusees are but nominal Persons, and the Tertenants ought not to be put out of Possession without Warning to defend themselves, for they may have a Release to plead, or some other Defence to make.

Carth. 111.

3 *Mod.* 119.

Skin. 273.

Earl of Pembroke's Case.

So upon a Writ of Error to reverse a Common Recovery, it was said by *Holt Ch. J.* that though the Granting a *Sci. Fa.* in such Cases against the Tertenants is discretionary, and not *stricti Juris*, yet that it being the constant Course of the Court to grant it, he was of Opinion not to depart from that which had been the usual Course of the Court, and therefore awarded a *Sci. Fa.* though the Case was of a hard Nature, and attended with extraordinary Circumstances.

27 *H. 6.* 135.

1 *E. 2.* 242.

3 *Co.* 13. a.

Cro. Car. 295,

313.

(b) A *Sci. Fa.*

may be against

the Heir and

Tertenants,

and the Heir

cannot object,

that a *Sci. Fa.*

ought first to

issue against

him. *Cro. Eliz.* 895. *Sir Christopher Heyden's Case.*

Regularly the *Sci. Fa.* is to be awarded to the (b) Heir and Tertenants; and it seems to be the better Opinion, that the Tertenant alone is not to be charged, and that therefore until the Heir be summoned, or that it be returned, that there is not any Heir to be summoned, or that the Heir hath not any Lands to be charged, the Tertenant ought not to be charged, for the Heir may have a Release to plead, or other Matter to bar the Execution; and his Land is rather to be charged than the Land of the Tertenant, for the Heir shall not have Contribution against the Tertenant, as the Tertenant shall have; also if the Heir be within Age, the Parol shall demur, and the Tertenant shall have Advantage thereof.

Salk. 601.

(c) But when

a Tertenant is

summoned,

and he doth

not plead, that there are other Tertenants not summoned, he shall never afterwards have a *Sci. Fa.* or *Audita Querela* to compel the others to contribute. *Moor* 524. (d) Where Plea, that another was jointly seised with him, *vide* 1 *Roll. Rep.* 57. 2 *Jon.* 122. *Comb.* 185.

All the Tertenants are to be summoned, and therefore in a *Sci. Fa.* against some of them they may (c) plead, that there are other (d) Tertenants

tenants

tenants not named, and pray Judgment if they ought to answer *quousque* the others are summoned.

But it hath been doubted whether such Tertenants could plead other Tertenants not warned in another County, which is now held that they may; and accordingly it hath been determined, that when one Tertenant is returned summoned upon a *Sci. Fa.* he may plead that there are other Tertenants though in another County, and that this is not within the Statute 16 & 17 *Car. 2. cap. 5.* which relates to an Extent executed.

Upon a Judgment in Debt a *Sci. Fa.* issued against the Tertenants, and *A.* was returned Tenant, who pleaded that *J. S.* was seised of 20 Acres of Land, which were the Defendant's at the Time of the Judgment given, and prayed Judgment if he should be put to Judgment till *J. S.* was warned; and on Demurrer this was held a good Plea; but it was said that the Writ should not abate, but that the Defendant should not answer till the other was warned. And it was said by *Houghton* Justice, that there was a Diversity between a *Sci. Fa.* to have Execution on a Judgment in Debt, and to have Execution on a Judgment in a Real Action; for in the last Case it is no Plea, for every Tenant shall answer for himself, and one may lose, and the other not; but in the first Case each ought to be contributory for his Part.

If there be Judgment in Debt against two, and one dies, a *Sci. Fa.* lies against the other alone, reciting the Death; and he cannot plead that the Heir of him that is dead has Assets by Descent, and demand Judgment if he ought to be charged alone; for at (a) Common Law the Charge upon a Judgment being (b) personal, survives; and the Statute *Westm. 2.* that gives the *Elegit* does not take away the Remedy of the Plaintiff at the Common Law, and therefore the Party may take out his Execution which way he pleases, for the Words of the Statute are *fit in Electione*; but if he should, after the Allowance of this Writ, and Revival of the Judgment, take out an *Elegit* to charge the Land, the Party may have Remedy by (c) Suggestion, or else by *Audita Querela*.

and that a Personal Execution will survive, though a Real one will not, *vide 3 Co. 14. Yelv. 209. Raym. 153. 2 Keb. 3, 331. 4 Mod. 315. 3 Keb. 295. Salk. 319. 1 Show. 402. (c) For this vide F. N. B. 166. 44 E. 3. 10.*

The *Sci. Fa.* may either be (d) general against all Tertenants, or against the Tertenants naming them; but it is (e) said, that if a Person undertakes to name them, he must be sure to name them all.

cutors generally, or to them by their Names, *2 Bull. 231. (e) Comb. 282.*

To a *Sci. Fa.* against the Heir and Tertenants, the Sheriff must return that they are Tenants of all the Lands *in Balliva sua*, and not that they are Tenants of Lands *in Balliva sua*.

6. By and against Husband and Wife.

If a Woman, Executrix to *J. S.* marries, and the Husband and Wife bring an Action of Debt upon an Obligation in the Right of the Wife as Executrix to *J. S.* against *J. D.* and have Judgment against him to recover the Debt with Damages and Costs, and after the Wife dies before

Judgment was for the Costs and Damages which belonged to the Husband, though the Debt did not, and therefore the *Sci. Fa.* should be maintained for the Damages; but a *Sci. Fa.* being as well for the Debt as Damages, it was held not maintainable; and whether he might maintain a *Sci. Fa.* for the Damages and Costs, they would give no Opinion. *1 Jon. 248. S. C. adjudged, and said this Recovery does not turn it to the proper Debt of the Husband, as it would if the Baron and Feme recovered the proper Debt of the Feme.*

2 Vent. 104. Pryane v. Slaughter.

Cro. Jac. 505. Mitchel v. Sir John Crofts.

1 Lev. 30. Raym. 26. 1 Keb. 92. Edsar v. Smart.

(a) *1 E. 3. 13. pl. 41.*

3 E. 3. pl. 37.

29 Aff. pl. 37.

29 E. 3. 29.

(b) For the Difference between a Real and a Personal Execution,

vide F. N. B.

Salk. 600.

(d) Whether to be directed to all the Executors generally, or to them by their Names, *2 Bull. 231.*

(e) *Comb. 282.*

Salk. 598.

Cro. Car. 207, 227. Beaumont v. Long, adjudged, tho' objected the

fore Execution sued, the Husband shall not have a *Sci. Fa.* upon this Judgment; for that he, though he was privy to the Judgment, shall not have the Thing recovered, but it belongs to the succeeding Executor or Administrator.

¹ *Sid.* 337. But if Husband and Wife obtain Judgment in Debt, and the Wife dies, the Husband, without taking out Administration to her, may have a *Sci. Fa.* for by the Judgment it is become a Debt to him.

¹ *Cro. Eliz.* 844.

³ *Mod.* 188.

² *Leon.* 14.

⁴ *Leon.* 186.

Salk. 116.

Woodier v.

Gresham, adjudged.

Comb. 455.

S. C. by which

it appears the

Year expired

before the *Sci.*

Fa. taken out,

and said by *Holt* Ch. J. that the Debt was attached in him jointly with his Wife; so that although the Award of the Execution did not alter the Nature of the Debt, yet it altered the Property.

Carth. 415.

If a Woman obtains a Judgment in Debt, and after marries, and the Husband and Wife sue out a *Sci. Fa.* and thereupon have an Award of Execution, though the Wife dies, yet the Husband (without taking out Administration) may have Execution upon the Judgment, for the Award upon the *Sci. Fa.* attached in the Husband, and shall survive, though objected, the Award on the *Sci. Fa.* made no Alteration, because the Execution must be on the first Judgment.

Fa. taken out, and said by *Holt* Ch. J. that the Debt was attached in him jointly with his Wife; so that although the Award of the Execution did not alter the Nature of the Debt, yet it altered the Property.

Carth. 30.

Salk. 116.

³ *Mod.* 186.

Comb. 103.

Skin. 682.

Obrien v.

Ram.

If a Judgment in Debt is obtained against a Feme Sole, who afterwards marries, and then a *Sci. Fa.* is thereupon brought against Husband and Wife, and after two *Nibils* returned, Judgment is given that the Plaintiff shall have Execution against them, and the Wife dies, the Husband shall be liable to this Execution.

7. Sci. Fa. against Bail.

Moor 432.

Cro. Eliz. 597.

¹ *Lev.* 225,

et vide Tit.

Bail, Letter

(D).

(a) That it

must be a-

warded with-

in the Year, else not 'till a *Sci. Fa.* against the Principal.

Fa. *Cro. Jac.* 97.

A *Sci. Fa.* is the usual and proper Remedy against the Bail when Judgment hath been obtained against the Principal, and no Satisfaction made by him; and this is founded on a Record, to wit, the Act of the Court in admitting the Party to Bail, and the Judgment against him; but it must appear that the Party himself hath not satisfied the Judgment; and hence it hath become a settled Rule that there must be (a) a *Capias* returned against the Principal before the *Sci. Fa.* is to issue against the Bail.

2 *Jon.* 96. — Not necessary to recite it in the *Sci. Fa.*

Stil. 105.

If there is Judgment against *A.* to account, and Manucaptors found by him to appear before Auditors assigned, no *Sci. Fa.* lies against the Manucaptors or Bail without a Certificate from the Auditors to the Court, that he hath not conformed; for the Auditors are Judges of the Cause, and may excuse the Non-appearance, and may appoint a shorter or longer Day for the Party to appear, as they think fit.

Cro. Jac. 163.

Hutt. 47.

(b) *Cro. Jac.*

97.

Moor 175.

Poph. 186.

Winch 61.

Stil. 324.

² *Mod.* 28, 308.

(c) But if he dies after the Return of the *Capias*, this will not excuse the Bail.

¹ *Roll. Abr.* 336.

In a *Sci. Fa.* against Bail, they cannot plead, that the Principal died before the *Sci. Fa.* issued (b), but they may plead, that the Principal died (c) before the Return of the *Capias* against him; so they may plead, that the Principal died before any Judgment against him, because they cannot have a Writ of Error to reverse that Judgment.

Moor 388.

¹ *Leon.* 58.

² *Bulf.* 260.

If the Principal surrenders himself, or the Bail render him up, this will discharge the Bail, and may be pleaded to the *Sci. Fa.* but such Surrender or Render are not sufficient, unless the Plaintiff or his Attorney

torney have Notice of it; and this is required, that the Plaintiff may, if he pleases, charge him in Execution; also that he may not be at any further Trouble or Charge in proceeding against the Bail.

In a *Sci. Fa.* by the Executor of the Plaintiff, upon a Judgment against the Principal, the Defendant pleaded that the Testator sued Execution by *Sci. Fa.* against the Bail, and had Judgment and Execution awarded against them; and it was held no Plea, because not shewed the Plaintiff was satisfied by the Execution against the Bail; for otherwise, without Satisfaction, he may always charge the Bail.

If one be Bail for *A. B. C.* and *D.* and before the Return of the second *Sci. Fa.* the Plaintiff takes *A.* in Execution, yet he hath not thereby disabled himself to take Execution against the other Principals, for the Bail undertook to bring in all four.

Cro. Jac. 545.
Freeman v. Freeman.
2 Lev. 195.
1 Vent. 315.
2 Mod. 312.
2 Jon. 75.
Astry v. Ballard.

(D) The Form of the Writ and Proceedings, and how far it must pursue the Nature of the original Action.

IT is said, that a *Sci. Fa.* being a Judicial Writ, shall not abate for want of (a) Form; and that therefore where the Words (b) *Si sibi viderit expedire* were left out in a *Sci. Fa.* yet the Writ was held sufficient.

1 Sid. 406. (b) *3 Keb.* 190. cont. *2 Lutw.* 1281.

Also it hath been agreed, that wherever an Original was amendable, there a *Sci. Fa.* would be so too, and that a Discontinuance herein by the Demise of the King is aided by the Statute *1 Ann. cap. 8.*

If the Bail sues an *Audita Querela*, and a *Sci. Fa.* thereupon, which recites the *Audita Querela* and the *Capias* against the Principal, and the Return thereupon, which *Capias* was awarded *tempore regine Eliz.* and the *Sci. Fa.* is recited to be *per breve domine Regine Angliæ vicecomiti nostro de S. direct.*, which is to the Sheriff of the King that now is, this is Error by the Common Law, but is (c) now amendable.

(c) By the 18 *Eliz. cap. 14.*

no Judgment to be staid or reversed after Verdict for want of Form in any Judicial Writ; for which *vide Cro. Jac.* 89, 162, 372. *2 Sid.* 7, 12. *1 Vent.* 105.

But where in Ejectment there was Judgment for two Messuages, and after a Year a *Sci. Fa.* upon it recited a Judgment of one Messuage only; and *Nul tiel record* being pleaded, it was moved to amend it, but denied; for the Court held, that the Writ was good, for aught appeared on the Face of it, and that if there were a Judgment for one Messuage, this would be a good Writ to revive it; so being good in itself, though not apposite to this Purpose, to amend would be to make a new Writ, or to alter a good Writ, and fit it to another Purpose; and to amend this Writ would falsify the Defendant's Plea, which was good at the Time when pleaded; but if the Fault had appeared in the very Writ, it might be amended; and for his Expedition the Plaintiff took another Writ, which the Court held he might do without getting this quashed; for if this Writ abates, then it is not the same Cause.

6 Mod. 263, 310. *Williams v. Hofkins.*

So in a *Sci. Fa.* on a Judgment, and by Mistake in the *Sci. Fa.* the Plaintiff's Name was put for the Defendant's, *Sir Radulphus* for *Jacobus*; and it was moved to amend it, being the Fault of the Clerk, but denied.

Salk. 52. *Va. v. Baile.*

nied *per Cur.* for the Writ does not appear to us to be wrong, and there may be such a Judgment for aught we know.

Latch 112.

It is said that a *Sci. Fa.* is in Nature of a Bill in Chancery, and that the same Certainty is not required therein as by the Common Law.

Hill. 15 *Et*

16 *Car.* 2. in

B. R. *Dudley*

v. Lord Byron.

1 *Sid.* 173.

1 *Keb.* 648.

S. C.

In a *Sci. Fa.* upon a Judgment in the Upper Bench before *Oliver*, Lord Protector of the Commonwealth of *England, Scotland* and *Ireland*, and the Dominions thereunto belonging, &c. the *Sci. Fa.* was *Coram Olivero domino nuper protectore* only; *Nul tiel record* was pleaded; and if this was a Variance between the *Sci. Fa.* and the Record, was the Question. *Twisden* held it variant, in that there might have been another Judgment *Coram domino protectore* only; and said, the Act for Confirmation of Judicial Proceedings confirms them, and makes them Records only under that Stile; but the other Judges held that this was no material Variance; and that in a *Sci. Fa.* it was not necessary to set forth the Stile of the King at large.

2 *Inst.* 470.

By the Statute *Westm.* 2. *cap.* 45. there shall be no Effoin nor Protection in a *Sci. Fa.* but Aid, Age and Receipt shall be granted; for the Words *Solemnitates curiæ* are to be understood the solemn Judicial Proceedings of the Court, but extend not to the Right of the Party to have his Age, or to be received, or to have Aid of another.

6 *Mod.* 68.

Jevon v. Turner.

ner.

A *Sci. Fa.* to revive a Judgment against an Executor, mentioned first a Day of Appearance *Coram nobis ubicunque*, but after gave a Day to the Party to appear *ad præd. diem apud Westm.* and it was moved to amend it; but the Court said, that it being in the Writ they could not do it of Grace or Favour, but would give Day to shew Cause why it should not be amended *ex merito justitiæ*; but the Plaintiff for his Expedition moved to quash it.

Yelv. 112.

Cro. Jac. 59.

et vid. Skin.

633.

If two *Nibils* are returned on a *Sci. Fa.* this amounts to a Warning. There must be two *Sci. Fa.* where a *Nihil* is returned upon a *Sci. Fa.* and a *Sci. Fa.* returned.

Carth. 468.

2 *Salk.* 599.

et vide 2 Jon.

228. *Cro. Eliz.* 738.

and the Court held it aided by the Statute 17 *Car.* 2. *cap.* 8. 1 *Lutw.* 26.

It hath been adjudged, that in a *Sci. Fa.* it is sufficient that there be (a) 15 Days inclusive between the Teste of the Writ of the first *Sci. Fa.* and the Return of the second.

(a) Where there was but 14 Days between the Teste and Return of the *Sci. Fa.* and the Court held it aided by the Statute 17 *Car.* 2. *cap.* 8. 1 *Lutw.* 26.

6 *Mod.* 86.

per Cur.

But where two *Sci. Fa.* were taken out with the same Teste, but different Returns, the one returnable in *Quinden. Hill.* and another *Craftin' Pur.* though there were different Returns and at convenient Distances, yet because they were actually taken out at one Time, it was adjudged wrong; for thus the Party would lose the Benefit of two *Sci. Fa.* which the Law gives him.

Cro. Jac. 331.

Yelv. 218.

Hob. 4. S. C.

Wharton v.

Sir Edward

Musgrave.

It is a general Rule, that the *Sci. Fa.* must pursue the Nature of the first Action; and therefore where an Action of Debt was brought in *Cumberland*, and Judgment had by Confession, and a *Sci. Fa.* brought thereon against the Executor in *Middlesex*, this was held to be erroneous, though the Confession was at *Westminster*, and that the *Sci. Fa.* ought to have been brought in *Cumberland*.

Salk. 600.

On a Recognizance taken in *B. R.* the *Sci. Fa.* must be brought in *Middlesex*, for the Recognizances there are not obligatory by the Caption, but by their being entred of Record in the Court. So 'tis of a Debt.

Salk. 600.

But for this

Diversity wide

Stil. 9.

All. 12.

Hob. 195.

But on a Recognizance in *C. B.* the *Sci. Fa.* may be laid in the County where the Caption was, or in *Middlesex* where 'tis filed; for 'tis a Record by the Caption, and becomes immediately obligatory, and therefore may be brought there; and 'tis also filed at *Westminster* in *C. B.* and there remains of Record.

Also, though regularly the first *Sci. Fa.* upon a Recognizance to have Execution, ought to be in the County where it was acknowledged; yet if it be returned that he hath no Lands there, that no Heir can be found, or that the Party is dead, a *Testatum Sci. Fa.* may issue to any other County where the Party surmifeth that there are Lands.

It hath been resolved that a *Sci. Fa.* on a Recognizance of Bail taken by Commissioners in the County of *York*, may be brought in *Middlesex* or *York*, at the Election of the Party.

If there be a Judgment in Debt against *A.* and *B.* one *Sci. Fa.* will not lie thereon against the Heir of *B.* and another against *A.* for the *Sci. Fa.* ought to pursue the Judgment, and that being joint, so ought the *Sci. Fa.* to be, for otherwise there would be several independent Suits.

Cro. Car. 313.

2 Lutw. 1287.
Redman v. Winford.

2 Salk. 598.
Carth. 105.
S. C. et vide Skin. 82.

(E) Pleadings to a *Sci. Fa.*

A *Sci. Fa.* whether considered as an Original or Judicial Writ, is an Action, and such as the Defendant may (a) plead to; and therefore it is held, that a Release of all Actions, or all Executions, is a good Bar to a *Sci. Fa.* So in a *Sci. Fa.* on a Fine, a Release of all Actions is a good Plea in Bar.

Lit. sect. 506.
Ca. Lit. 291.

(a) A Man may plead in Bar or Abatement to a *Sci.*

Fa. as well as to other Actions. The Plea in Bar is always concluded by an *Executio non*, as by an *Actio non.* *Lucas 112. Yelv. 218.*

But the Defendant cannot regularly to a *Sci. Fa.* to have Execution of a Judgment, plead that which might have been pleaded to the original Action; as where *A.* as Administrator to *J. S.* by Virtue of Administration granted to him by the Archbishop of *Canterbury*, brought Debt against *B.* and had Judgment to recover, and after the Year brought a *Sci. Fa.* on the Judgment; the Defendant pleaded, that the Intestate died in *London*, and had not *bona notabilia* in divers Dioceses, and that after the Judgment the Bishop of *London* committed Administration to the Wife; and upon Demurrer it was held, that this was a Matter he could have pleaded before, and that it was annulling the Record, which is not sufferable.

Cro. Eliz. 283.
Allen v. Andrews.

So where in a *Sci. Fa.* on a Judgment the Defendant pleaded the Statute of Usury, and it was held no Plea, because he should have pleaded it to the original Action.

1 Sid. 182.

So if a *Sci. Fa.* be brought on a Judgment in Assise for the Office of Marshal, the Defendant cannot plead, that the Plaintiff was an alien Enemy, for this was pleadable to the Assise; and as he admitted the Plaintiff able to have Judgment, he cannot now disable him from having Execution.

1 Salk. 2.
West v. Sutton.

But a Diversity is held between a *Sci. Fa.* upon a Judgment in Debt and in Ejectment, and that in the last the Party may controvert the original Title.

Cases in B. R. 499.

In a Writ of Annuity for an Annuity granted to a Seneschal for holding Courts, there was Judgment for the Annuitant, who brought a *Sci. Fa.* for Arrearages incurred after the Judgment; to which the Defendant pleaded, that the Seneschal, though often requested, refused to hold any Court; and this was held a good Plea.

Dyer 377. a.

Goldf. 170. Foe v. Bolton, vide Tit. Execution. The Sheriff levied the Debt on the Defendant's Goods, but did not return the Writ; whereupon the Plaintiff brought a *Sci. Fa.* against the Defendant to shew Cause why he should not have Execution on the same Judgment; to which the Defendant pleaded, that the Sheriff had levied the Debt on his Goods, &c. and this was held a good Plea.

3 Lev. 119. Kettleby v. Hales. But where to a *Sci. Fa.* on a Judgment the Defendant pleaded, that the Sheriff had levied Part upon a *Fi. Fa.* and that after it was agreed between the Plaintiff and Defendant, that the Defendant should pay the Under Sheriff 10*l.* in full Satisfaction for the Residue, and that he paid it accordingly; and on Demurrer the Plea was held insufficient, Payment being no Plea in Debt upon a Bill obligatory; *a fortiori* not in Debt upon a Judgment of Record.

But now by the 4 & 5 *Ann. cap. 16. §. 12.* it is enacted, 'That where an Action of Debt shall be brought upon any single Bill, or where Debt or *Sci. Fa.* shall be brought on any Judgment, if the Defendant hath paid the Money, such Payment may be pleaded in Bar.'

2 Rol. Rep. 54. Cro. Eliz 872. 6 Mod. 226. It seems agreed, that a general *Non-tenure* is not a good Plea to a *Sci. Fa.* upon a Judgment in a Personal Action, because it falsifies the Sheriff's Return; but that in a *Sci. Fa.* to have Execution of a Judgment in a Real Action, one may plead *Non-tenure* against the Return of the Sheriff, because of the high Regard the Law has to the Freehold.

Owen 134. 3 Lev. 205. But a special *Non-tenure* may be pleaded to a *Sci. Fa.* upon a Judgment in a Personal Action; as to a *Sci. Fa.* on a Judgment for Debt or Damages against Tenant for Years, he may plead that he has only a Term for Years.

2 Rol. Rep. 54. vide supra. If one Jointenant is returned, he may plead that another is Tenant of a Moiety.

Sequestration.

(A) The Nature and first Introduction of such Process.

(B) In what Cases to be awarded: And herein,

1. Against what Persons.
2. To what Places.
3. What Estate or Interest shall be liable to a Sequestration, and from what Time.

(C) Of the Power and Duty of the Sequestrator.

(D) Sequestration, when determined.

(A) The

(A) The Nature and first Introduction of such Process.

A Sequestration out of Chancery is grounded on the Return of the (a) Serjeant at Arms, wherein it is certified that the Defendant had secreted himself; and therefore this Process issues, and gives Authority and Power to the Sequestrators (who are Persons of the Plaintiff's own naming) to enter upon and seize his, the Defendant's Real and Personal Estate.

for a Sequestration can issue; and the Reason hereof is, that the Court will not issue Process upon the whole Lands and Goods of the Defendant, 'till one of its own Officers see that the Defendant do totally disappear. *Vide Proceed. Chan. 549, &c.*

It appears that there were great Struggles between the Common Law Courts and Courts of Equity before this Process came to be established; the former holding that a Court of Conscience could only give Remedy *in Personam*, and not *in Rem* (b); that Sequestrators were Trespassers, against whom an Action lay; and in the Case of (c) *Colston v. Gardiner* the Chancellor cites a Case, where they ruled, that if a Man killed a Sequestrator in the Execution of such Process, it was no Murther.

stration, it will be as binding as any other Process according to the Rules of the Common Law. *Ca. 44.*

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 rendered illusory, that they could not long stand; but this Process got the better of these Resolutions on this Ground; 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 a Power to commit the Person, they might take from him his Estate 'till he had answered his Contempts. 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 itself.

It has been said, that the first Instance of a Sequestration after a Decree was Sir *Thomas Read's* Case in Lord *Coventry's* Time, and that it was afterwards awarded in Chancery in the Case of *Hyde v. Pitt*, 1666. and affirmed in Parliament, and by the Court of Exchequer, *Gnavus v. Fountaine*, 1687. and since, without Scruple; the Doubt formerly was, that Lands were not liable to Execution before the Statute *Westm. 2. cap. 18.*

In *Vernon's Reports* it is said that Sequestrations were first introduced in Lord *Bacon's* Time, and then but sparingly used in Process, and after a Decree to sequester the Thing in Demand only.

(a) There must be a Serjeant at Arms after the Return of the Commission of Rebellion be-

Cro. Eliz. 651. Prograve v. Watts.

(b) 1 *Mod.* 259. ——— But 2 *Mod.* 258, That the Chancellor having issued such Seque-

(c) 2 *Chan.*

2 *Peer Will.* (621.) 2 *Ch. Ca.* 44.

1 *Ch. Ca.* 92. 2 *Ch. Ca.* 44.

1 *Vern. 421.*

(B) In what Cases to be awarded:
And herein,

1. Against what Persons.

² Peer Will. 385.
¹ Ch. Ca. 61,
138. S. P.—A Sequestration granted against an Infant Peer. ² Ch. Ca. 163.—That formerly an Attachment lay. *Comb.* 62.—That it must be founded upon a proper Affidavit, being a Judicial Act of the Court. *Eq. Rep.* 178.

A Sequestration *nisi* is the first Process against a Peer or Member of the House of Commons.

¹ Peer Will. 535.
² Peer Will. 385.

A Sequestration is also the first Process against the menial Servant of a Peer, within the Words and Meaning of the Statute 12 *W.* 3. for that otherwise such Servant would have greater Privilege than his Lord.

If there be a Sequestration *nisi* against a Peer for want of an Answer, and the Peer puts in an Answer, that is insufficient; yet the Order for a Sequestration shall not be absolute, but a new Sequestration *nisi*.

2. To what Places.

¹ Vern. 76.
² Ch. Ca. 189.
² Peer Will. 261.

Notwithstanding the superintendent Power of the Courts in this Kingdom over those in *Ireland*, and what is said in some of our Books, it seems to be now the better Opinion, that the Court of Chancery here cannot award a Sequestration against Lands in *Ireland*.

² Peer Will. 261.
It was said that such Process had been awarded to the Governor of *North Carolina*; but herein it was doubted whether such Sequestration should not be directed by the King in Council, where alone an Appeal lies from the Decrees in the Plantations.

3. What Estate or Interest shall be liable to a Sequestration,
and from what Time.

² Ch. Ca. 46.
Vide ¹ *Bernd.* 431.
Cases in Lord Talbot's Time 222.

Copyholds may be sequestered, though not extendible at Common Law or the Statute of *Westm.* 2. for Courts of Equity have *potestatem extraordinam et absolutam*; but it seems a Doubt whether such a Sequestration can be revived against the Heir of the Copyholder, which arises from the Difficulty of obliging the Lord to admit, and depriving the Lord of his Fine, &c. upon the Death of his Tenant.

A Sequestration out of Chancery is more effectual than an Execution by *Fieri Facias* at Law; for a Sequestration may be against the Goods, though the Party is in Custody upon the Attachment; whereas in Law, if a *Capias ad Satisfaciendum* is executed, there can no *Fi. Fa.* issue.

Where the Sequestrators seize the Real Estate of the Party, any Tenant or other Person who claims Title to the Estate so sequestered, either by Mortgage, Judgment, Lease or otherwise, who hath a Title Paramount to the Sequestration, shall not be obliged to bring a Bill to contest such Title, but he shall be let in to contest such a Title in a summary Way.

He may move by his Counsel as of Course to be examined *pro Interesse suo*; and in this Case the Plaintiff is to exhibit Interrogatories in order

order to examine him for a Discovery of his Title to the Estate, and he must be examined upon such Interrogatories accordingly; and the Master must state the Matter to the Court, and the Parties may enter into Proof touching the Title to the Estate in Question; and when the Master hath stated the whole Matter, the Court proceeds to give Judgment therein upon the Report; and if it appears that the Party who is examined *pro Interesse suo* hath a plain Title to the Estate, and is not affected with the Sequestration, then it is to be discharged as against him, with or without Costs, as the Court shall determine upon the Circumstances of the Case, and so *vice versa*.

The Sequestration binds from the Time of awarding the Commission, and not only from the Time of executing it and its being laid on by the Commissioners; for if that should be admitted, then the inferior Officer would have *Ligandi et non Ligandi potestatem*.

(C) Of the Power and Duty of the Sequestrators.

THE Sequestrators are Officers of the Court, and as such are deemed meanable to the Court, and are to act from Time to Time in the Execution of their Office as the Court shall direct; they are to account for what comes to their Hands, and are to bring the Money into Court as the Court shall direct, to be put out at Interest, or otherwise, as shall be found necessary; but this Money is not usually paid to the Plaintiff, but is to remain in Court 'till the Defendant hath appeared or answered and cleared his Contempt; and then whatsoever hath been seized shall be accounted for and paid over to him; however, the Court hath the whole under their Power, and may do therein as they please, and as shall be most agreeable to the Justice and Equity of the Case.

The Plaintiff's Counsel may move and obtain an Order for the Tenants to attorn and pay their Rents to the Sequestrators, or for the Sequestrators to sell and dispose of the Goods of the Party, and to keep the Money in their Hands, or to bring it into Court, as shall be most adviseable and discretionary, and fitting for the Court to do.

Sequestrators on mesne Process are accountable for all the Profits, and can retain only so far as to satisfy for Contempt.

If Sequestrators, having Power to sell Timber, dispose of 7000 *l.* worth, and only bring 2000 *l.* to Account, they, as Officers and Agents of the Court, are responsible, and not the Plaintiff.

A Sequestration is in Nature of a *Levari* at Common Law, and the Party sequestering has neither *jus in rem vel in re*; the legal Estate of the Premises remaining in every Respect as before.

Sequestrators being in Possession of a great House in *St. James's Square*, which was the Defendant's for Life, the Court ordered that the Master allow a Tenant for the House, and the Sequestrators to make a Lease, and the Tenant to enjoy.

It was moved, that the Irregularity of a Sequestration might be referred to the Deputy, which was taken out against the Defendant for not appearing, by Reason of its being taken out sooner than by the Course of the Court it could, and yet the Sequestrators had taken the Goods off the Premises, and threatened to sell them; the Chief Baron said, that as to the Carrying the Goods off the Premises, it was clear the

the Sequestrators could do that, because a Sequestration upon mesne Procefs answers to a *Distringas* at Law; but however, as to selling them, the Court agreed in the present Case it could not be lawful, and said it had lately been settled on Debate; and observed further, that Courts of Equity could not authorise Sequestrators to sell Goods even upon a Decree 'till Lord *Stamford's* Case, which makes Decrees in this Respect equivalent to a Judgment; and even now the Counsel said, Sequestrators cannot sell but by Leave of the Court; however, the Court said this was a Matter proper for them to consider upon another Occasion, and therefore only referred the Irregularity of the Sequestration as to the Point of Time to the Deputy.

4 Feb. 16 &
17 Car. 2. in
Can. Sands
v. Darrel.

Lands were decreed to be liable to 500 *l. per Ann.* for the Life of *A.* and a Sequestration and Injunction for the Possession to that Purpose; the Defendant against the Injunction enters upon the Lands, and receives the Profits to the Value of 1972 *l.* and thereupon was decreed to pay it; and after the Death of *A.* it was decreed that the Sequestration should continue against the Defendant for the Payment of that Money; and now the Defendant moved to have Liberty to sell Timber to raise Money for his Subsistence, alledging that the Sequestrators had only the Possession and the Perception of the annual Profits by the Course of the Court, and therefore it could be no Prejudice to have this granted: But Sir *H. Grimston*, Master of the Rolls, refused; for 1st, This invades the Decree which is for the quiet Possession, which will be disturbed if the Defendant enters to cut down Timber; 2dly, The Defendant not having performed the Decree by the Payment of the Money, he shall not receive any Favour from the Court whilst he stands in Contempt; 3dly, If he will with the Sale of this Timber pay the Plaintiff his Debt, and so discharge the Sequestration, there might be some Reason for it; but for him to raise Monies to other Purposes, he shall not be favoured; and unless the Plaintiff will consent, he shall not have Liberty to sell.

(D) Sequestration, When Determined.

1 Vern. 58.

A Sequestration that issues as a mesne Procefs of the Court will be discontinued and determined by the Death of the Party; but where a Sequestration issues in pursuance of a Decree, and to compel the Execution of it, there though the same be for a personal Duty, it shall not be determined by the Death of the Party.

1 Ch. Ca. 241.

2 Ch. Ca. 46.

1 Vern. 118.

A Sequestration against the Father who appeared to be only Tenant for Life, and on his Death the Sequestration was discharged.

The Bill was to revive a Sequestration obtained against the Defendant's Husband for a Personal Duty before his Inter-marriage with the Defendant, and to avoid the Defendant's Estate in Dower in the Lands that were sequestered before the Marriage, it being insisted that those Lands were so bound by the Sequestration, and covered therewith, that the Defendant's Right of Dower could never attach them; but on a Demurrer to this Bill, the Demurrer was allowed; and it was ruled, that such a Sequestration should not bind the Feme who came in for her Jointure or Dower; but whether the Heir in Fee-Simple should in such Case have the Estate bound, and subject to such a Sequestration, or not, was doubted; and the Case not being before my Lord Keeper, he refused giving any Opinion therein.

Afterwards

Afterwards this last Point came before the same Lord Keeper in another Case, when his Lordship inclined to think that a Sequestration for a Personal Duty determined with the Death of the Party, and could not be revived against the Heir; but his Lordship took Time to consider of it, and would be attended with Precedents. *1 Vern. 166.*

It seems to be now settled, that a Sequestration is a Personal Process, which abates by the Death of the Party; so that such Sequestration being grounded on a Decree for a Debt or Personal Duty, cannot be revived against the Heir of the Defendant; otherwise in those Cases in which the Heir is bound. *2 Peter Will. (621.)*

Sheriff.

- (A) The Nature of his Office.
- (B) Who are qualified or exempt from serving.
- (C) Manner of appointing him; and therein of his Oath.
- (D) That he must attend his Office singly, and cannot execute any other.
- (E) How long to continue in his Office, and by what determined.
- (F) That he must be resident in his County, and whether he hath any Jurisdiction out of it.
- (G) Cannot dispose of his Bailwick.
- (H) Of the High Sheriff's Power and Duty in appointing an Under Sheriff and other Deputies; And herein,
 1. Of the Under Sheriff, and in what Manner appointed.
 2. Of Covenants between the High Sheriff, his Under Sheriff, and other Officers.
 3. Of Acts that may be done by either of them, or where the High Sheriff must himself be personally present.
 4. The Manner of appointing Bailiffs and other Officers, and therein of his being answerable for their Acts.
 5. Of his Jurisdiction over Gaols and Gaolers.
- (I) Of the preceding and succeeding Sheriff, and therein of the Acts necessary to be done by each of them.
- (K) Where more than one Sheriff.
- (L) Of his Duty and Acts as a Judicial Officer.
- (M) Of his Duty and Acts as a Ministerial Officer; And herein,
 1. That he is the proper Officer to execute all Writs, except in Case of Partiality.

2. That he cannot dispute the Authority by which they issue, nor any Irregularity in them.

(N) How he is to execute such Writ : And herein,

1. That it must be without Favour or Oppression, and after such a Writ is actually taken out, and before it is returnable.
2. Of his raising the *Posse Comitatus*.
3. Of breaking open Doors.
4. Whether he can execute his Writ on a *Sunday*.
5. In what Manner he is to do Execution.

(O) Of his Duty in admitting Persons to Bail ; and therein of Securities taken for Case and Favour.

(A) The Nature of his Office.

Dav. 60.
Savil 43.
1 *Rol. Rep.*
274.
Co. Lit. 168.
a.
Vide Pref. to
9 *Rep.*
7 *Co.* 33.

IT seems that antiently the Government of the County was by the King lodged in the Earl or Count, who was the immediate Officer to the Crown ; and this high Office was granted by the King at Will, sometimes for Life, and afterwards in Fee ; but when it became too burthensome, and could not be commodiously executed by a Person of so high Rank and Quality, it was thought necessary to constitute a Person duly qualified to officiate in his Room and Stead, who from hence is called in *Latin*, *Viccomes*, and Sheriff from *Shire Reeve*, *i. e.* Governor of the Shire or County. He is likewise considered in our Books 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.

9 *Co.* 49.
Dalt. Sb. 2.

It is said by Lord *Coke* and *Dalton*, that *Earls*, by Reason of their high Employments and Attendance upon the King, being not able to follow all the Business of the County, were delivered of all that Burthen, and only enjoyed the Honour as they now do, and that Labour was laid upon the Sheriff ; so that now the Sheriff doth all the King's Business in the County ; and the Sheriff, tho' he be still called *Viccomes*, yet all he doth, and all his Authority, is immediately from and under the King, and not from or under the Earl ; so that at this Day the Sheriff hath all the Authority for the Administration and Execution of Justice which the Count or Earl had ; the King by his Letters Patent now committing to the Sheriff *Custodiam Com.*

Co. Lit. 168.
Dalt. Sb. 5.

He is therefore at this Day considered as an Officer of great Antiquity, Trust and Authority, having, as Mr. *Dalton* observes, from the King the Custody, Keeping, Command and Government (in some Sort) of the whole County committed to his Charge and Care ; and, according to my Lord *Coke*, he is said to have *triplicem custodiam, viz. Vitæ justitiæ, vitæ legis et vitæ reipublicæ, &c.* *Vitæ justitiæ* to serve Process, and to return indifferent Juries for the Trial of Mens Lives, Liberties, Lands and Goods ; *vitæ legis* to execute Process and make Execution, which is the Life of the Law, and *vitæ reipublicæ* to keep the Peace.

It seems that antiently, and before the Statute 9 *Ed. 2.* Sheriffs were elected by the Freeholders of the County, as the Coroners are at this Day, and consequently that their Offices did not determine by the Death of the King.

2 Inf. 558.
2 Brownl. 282. but *Q.*

And though at this Day the King hath the sole Appointment of Sheriffs (*a*), except in Counties Palatine, and where there are *Jura regalia*, yet it hath been (*b*) adjudged, that the Office of Sheriff is an intire Thing, and that therefore the King cannot apportion or divide it, that is, he cannot determine it in Part, as for one Town or one Hundred; neither can he abridge the Sheriff of any Thing incident to or belonging to his Office.

(*a*) *Dav. 63.*
(*b*) *4 Co. 33.*
Milton's Case.
Dalt. Sb. 6.
Hob. 13.
Raym. 363.

(B) Who are qualified or exempt from serving.

IT is provided by several (*c*) Acts of Parliament, that no Man shall be Sheriff in any County, except he have sufficient Lands within the same County where he shall be Sheriff, whereof to answer the King and his People in Case that any Person shall complain against them; and that none that is Steward or Bailiff to a great Lord shall be made Sheriff.

(*c*) *9 Ed. 2.*
2 Ed. 3. c. 4.
4 Ed. 3. c. 9.
5 Ed. 3. c. 4.

It is holden that the King hath an Interest in every Subject, and a Right to his Service, and that no Man can be exempt from the Office of Sheriff but by Act of Parliament or Letters Patent.

Sav. 43.
9 Co. 46.

And on this Foundation it was adjudged in Sir *John Read's Case*, who was made High Sheriff of *Hertfordshire* at the Time he was excommunicated for Non-payment of Alimony, that an Information properly lay against him for not executing the Office; though it was objected on his Behalf, that the Oath and Sacrament enjoined by Act of Parliament are necessary Qualifications for all Sheriffs, which he was disabled to take by Reason of the Excommunication; but the Court held that he was punishable for not removing the Disability, it being in his Power to get himself dissolved from the Excommunication, and that therefore it could be no Excuse.

2 Mod. 299.
Attorney General v. Sir John Read.

And though in the above Case it was admitted, that the Subject was bound to serve the King in such Capacity as he is in at the Time of the Service commanded, yet it was insisted upon, that he was not obliged to qualify himself to serve in every Capacity; and that therefore a Prisoner for Debt is not bound or compellable to be Sheriff, no more than a Person is bound to purchase Lands to qualify himself to be either a Coroner or Justice of the Peace; and it was likewise said, that by the Statute 3 *Jac. 1.* every Recusant is disabled; he may conform, but he is not bound to it; for if he submits to the Penalty, it is as much as is required by Law.

2 Mod. 301.

An Information was exhibited against *L.* for refusing to take upon him the Office of Sheriff of *Norwich*, who pleaded the Statute 13 *Car. 2.* by which it is enacted, that a Person elected to any Office in a Corporation, shall be such as within one Year before hath taken the Sacrament according to the Church of *England*, or else the Election shall be void; and averred, that he had not taken the Sacrament, &c. at any Time within one Year next before the Election of him to be Sheriff, &c. wherefore the Election was void. The Attorney General replied, and set forth that Part of the Act of Uniformity, by which every Person is obliged to take the Sacrament three Times in the Year according

Carth. 306.
1 Salk. 167.
4 Mod. 269.
The King and Queen v. Larwood.

ing

ing to the Liturgy, &c. the Defendant rejoined, and set forth the Statute 1 *W. & M.* for tolerating Dissenters; and on Demurrer it was adjudged, that the Defendant's Rejoinder was a Departure from his Plea, and therefore he could have no Advantage of the Act of Toleration, supposing it was for his Purpose, it being a private Statute, and therefore to be pleaded; and though Judgment was given principally on this Point, yet all the Court, except Justice *Saw. Eyre*, held, that this Case was not within the Meaning of the Toleration Act, which was not made in Favour of Dissenters, but the contrary, and was rather to exclude them from beneficial Offices, than to ease them of Offices of Charge.

Salk. 168.
4 Mod. 273.

If a Man is disabled by a Judgment in Law to bear an Office, he is excused; *nam judicium redditur in invitum*; for though his Fault or Neglect was the Occasion of such Judgment, yet it is a Mark set upon him by the Government.

Salk. 142.
Carth. 480.
5 Mod. 438.
City of London v. Van-acre.

And as nothing but an invincible Necessity can exempt a Person from serving the Office of Sheriff, on this Foundation a By-Law made in *London*, that no Freeman chosen Sheriff, &c. shall be excused unless he voluntarily swears he is not worth 10,000 *l.* &c. and if he openly refuse to take the Office, then to forfeit the Sum of 400 *l.* &c. was adjudged good.

(C) Manner of appointing him; and therein of his Oath.

Dalt. Sh. 7.
Where see the Form of such Patents.

(a) As the Sheriff is made

by Letters Patent of Record, if therefore it shall come in Question, whether he be Sheriff or not, it is to be tried by the Record, or it may be tried by the Examination of the Sheriff. *Dalt. Sh.* 8. *9 Co.* 31. *Jenk.* 90.—For the Fees of his Patent, *vide 3 Geo.* 1. *c.* 15.

Dalt. Sh. 6.
(b) But it may be put off to another Day.
Cro. Car. 13, 595.

By the Statute 9 *E. 2.* the Chancellor, Treasurer and Judges are to meet (b) *Crastino Animarum*, being the 3d of *November*, every Year, in the Exchequer Chamber, to nominate Persons to be made Sheriffs; and the Manner is, The Lord Chancellor, Treasurer and other high Officers, being of the Privy Council, together with the Judges of both Benches and the Barons of the Exchequer, being assembled in the Exchequer Chamber, nominate three Persons in every County to be presented to the King, that he may prick one of them to be Sheriff of every County.

Dyer 225.
Dalt. Sh. 6.

And yet the King by his Prerogative may make and appoint the Sheriffs without this usual Assembly, and Election or Nomination in the Exchequer, as is the daily Practice at this Day upon the Death of any Sheriff.

34 H. 8. *c.* 26.
Dalt. Sh. 6.

The Sheriffs in every of the Shires of *Wales* shall be nominated yearly by the Lord President, Council and Justices of *Wales*, and shall be certified up by them, and after appointed and elected by the King as other Sheriffs be.

Dalt. Sh. 7.

The Sheriff, before he doth exercise any Part of his Office, and before his Patent is made out, is to give Security in the King's Remembrancer's

brancer's Office in the Exchequer, under Pain of 100 *l.* for the Payment of his Proffers, and all other Profits of his Sheriffwick ; but these Securities are never sued, unless there is a Deficiency in the Sheriff's Effects.

The Sheriff, before he takes upon him the Exercise of his Office, *Dalt. Sb. 9.* must not only take the Oaths of Allegiance and Abjuration enjoined all Officers by divers Acts of Parliament, but likewise a particular Oath of Office, which is (a) said to be by the antient Common Law, and (a) *Dyer 163.* contains a concise Account of the Nature and several Branches of his Office. This antient Oath is set down in *Dalton 9.*

But there being in this Oath some Things which were thought too (b) strict with Respect to Sheriffs, instead thereof it is now enacted (b) *Vide Cro. Car. 26.* by the 3 *Geo. 1. c. 15. §. 18.* that the following Oath shall be taken by all High Sheriffs, except the Sheriffs of *Wales* and of the County Palatine of *Chester, &c. viz.* ' I *A. B.* do swear that I will well and truly serve the King's Majesty in the Office of Sheriff of the County of _____ and promote his Majesty's Profit in all Things that belong to my Office as far as I legally can or may. I will truly preserve the King's Rights and all that belongeth to the Crown. I will not assent to decrease, lessen or conceal the King's Rights, or the Rights of his Franchises ; and wheresoever I shall have Knowledge that the Rights of the Crown are concealed or withdrawn, be it in Lands, Rents, Franchises, Suits or Services, or in any other Matter or Thing, I will do my utmost to make them be restored to the Crown again ; and if I may not do it myself, I will certify and inform the King thereof, or some of his Judges. I will not respite or delay to levy the King's Debts for any Gift, Promise, Reward or Favour, where I may raise the same without great Grievance to the Debtors. I will do Right as well to Poor as to Rich, in all Things belonging to my Office. I will do no Wrong to any Man for any Gift, Reward or Promise, nor for Favour or Hatred. I will disturb no Man's Right, and will truly and faithfully acquit at the Exchequer all those of whom I shall receive any Debts or Duties belonging to the Crown. I will take nothing whereby the King may lose, or whereby his Right may be disturbed, injured or delayed. I will truly return, and truly serve all the King's Writs according to the best of my Skill and Knowledge. I will take no Bailiffs into my Service but such as I will answer for, and will cause each of them to take such Oaths as I do in what belongeth to their Business and Occupation. I will truly set and return reasonable and due Issues of them that be within my Bailwick, according to their Estate and Circumstances, and make due Panels of Persons able and sufficient, and not suspected or procured, as is appointed by the Statutes of this Realm. I have not sold or let to Farm nor contracted for, nor have I granted or promised for Reward or Benefit, nor will I sell or let to Farm, nor contract for or grant for Reward or Benefit by myself or any other Person for me, or for my Use, directly or indirectly, my Sheriffwick or any Bailiwick thereof, or any Office belonging thereunto or the Profits of the same to any Person or Persons whatsoever. I will truly and diligently execute the good Laws and Statutes of this Realm, and in all Things well and truly behave myself in my Office for the Honour of the King and the Good of his Subjects, and discharge the same according to the best of my Skill and Power. So help me God.'

If a Person refused to take upon him the Office of Sheriff, it was *Dalt. Sb. 15.* usual to punish him in the Star-chamber ; and he may now be proceeded against by Information in the Court of King's Bench. Also if he refuses to take the Oaths enjoined him, or officiates in the Office before he hath thus qualified himself, that Court, which hath a general

- (a) 3 *Lev.* 116. *Carth.* 307. ral Superintendancy over all Officers and Ministers of Justice, will grant an Information against him; and it hath been (a) held, that a Refusal of Oaths enjoined to be taken, amounts to a Refusal of the Office.
- Dalt. Sb.* 13, 14. If the Sheriff be not in *London*, the Oath may be taken by *Dedimus potestatem*, directed to any two Justices of the Peace of the same County, one to be of the *Quorum*, or to any other Commissioner or Commissioners, or before one of the Judges of Assize for that County, or one of the Masters in Chancery, who, it is said, may as well as the Judge administer such Oath without any *Dedimus*.
- Dyer* 168. If the Commissioners shall return the Commission or Writ, and the Oaths to be taken when they were not taken, this is finable.
- Dalt. Sb.* 14. It is held, that the Breach or Violation of this Oath, although an high Offence, is not however Perjury, nor punishable as such.
- 11 *Co.* 98.

(D) That he must attend to this Office singly, and cannot execute any other.

- 4 *Inst.* 48. *Lit. Rep.* 326. *Sir Simon* *Derwe's Jour.* 38, 436. IT is holden, that a Sheriff cannot be elected *Knight* of the Shire for that County for which he is Sheriff.
- Dalt. Sb.* 27. And although a Sheriff is by Virtue of his Office a Conservator of the Peace, yet it is enacted by the 1 *Mar. Stat.* 2. *cap.* 8. §. 2. 'That no Person having the Office of Sheriff of any County shall exercise the Office of Justice of the Peace in any County where he shall be Sheriff during the Time he shall use the Office of Sheriff.'
- Dalt. Sb.* 454. By the 1 *H.* 5. *cap.* 4. it is enacted, 'That no Under Sheriff, Sheriff's Clerk, Receiver, nor Sheriff's Bailiff, shall be Attorney in any of the King's Courts during the Time that he is in Office.'

(E) How long to continue in his Office, and by what determined.

- Confirmed by the 23 *H.* 6. c. 8. BY the 14 *E.* 3. *cap.* 7. it is enacted, 'That no Sheriff, (a) Under Sheriff, nor Sheriff's Clerk, shall tarry or abide in his Office above one Year, upon Pain to forfeit two hundred Pounds yearly as long as he occupieth the Office; and that every Pardon made for such Offence or Forfeiture shall be void; and all (b) Letters Patent made to occupy such Office above one Year shall be void, any Words or Clause of *Non obstante* put into such Patent notwithstanding; and that whosoever shall presume to take upon himself the Office of a Sheriff above one Year by Force of such Letters Patent, shall be disabled from ever after to be Sheriff within any County of *England*.
- (a) By the 42 *E.* 3. c. 9. (b) Notwithstanding this it hath been adjudged in the Year Books, 2 *H.* 7. 6. b. that the King, by the Clause of *Non obstante*, might make a good Patent of such Office for Life; and by the following Authorities, which seem to be grounded on this Resolution, it is said, that the King by his Prerogative may dispense with these Statutes, and grant the Office of Sheriff for Years, Life, or in Fee. 7 *Co.* 14. *Finch of Law* 234. *Plow.* 502. *Dalt. Sb.* 22. But yet *vide* 2 *Harok. P. C.* 390. where the contrary Opinion is holden, and the Reasons of these Authorities refuted.

By the 1 Ric. 2. cap. 11. it is enacted, 'That none that hath been Sheriff of any County a Year shall be within two Years next chosen again, or put in the same Office, if there be other sufficient.'

And by the 1 Hen. 3. cap. 4. it is enacted, 'That they that be Bailiffs of Sheriffs one Year shall be in no such Office by three Years next following, except Bailiffs of Sheriffs which inherit in their Office.'

By the Common Law the Patents of Sheriffs, like all other Commissions, determined by the Death or Demise of the King; but now by the Statutes 7 W. & M. and 1 Ann. such Commission shall remain in full Force for the Space of six Months next after such Death or Demise, unless superseded, determined or made void by the next Successor.

But though such Patent was determined by the Death of the King, yet it was adjudged, that if the Sheriff after such Demise, and before his taking out a new Patent, suffered a Prisoner to escape, that an Action lay against him.

It hath been held, that the Office of Sheriff does not determine by the Party's becoming a Peer on the Death of his Father; but that he still remains Sheriff *ad voluntatem regis*.

(F) That he must be resident in his County, and whether he hath any Jurisdiction out of it.

BY the 4 H. 4. cap. 5. it is enacted, 'That every Sheriff shall be dwelling in proper Person within his Bailiwick for the Time he shall be such Officer, and that the Sheriff shall be sworn to do the same.'

well translated by the Word *dwelling*. Lit. Rep. 323. (b) Is now left out of the new Oath.

Hence it is clear, that a Sheriff hath no Jurisdiction in any other County, nor can he do a Judicial Act, and in which his personal Presence is required, out of his County; but it is held that he may do a Ministerial Act, as make a Panel, return a Writ out of his County.

But if the Sheriff be beyond Sea, and maketh a Panel or any Return there, and sends it into *England*, it is not good, for he is an Officer but only in *England*.

If on a *Habeas Corpus*, &c. the Sheriff is commanded to carry a Prisoner to a certain Place out of his County, and in doing this he is obliged to go through several Counties, to this special Purpose he hath Authority in these other Counties.

So if a Prisoner of his own Wrong shall make an Escape, and fly into another County, the Sheriff or his Officers upon fresh Suit may take him again in another County.

(G) Cannot

(G) Cannot dispose of his Bailiwick.

BY the 23 *H. 6. cap. 10.* it is provided, ' That no Sheriff shall let to Farm in any Manner his County, nor any of his Bailiwicks, Hundreds or Wapentakes.

3 *Keb. 678.*
Ellis v. Nelson.

In the Construction hereof it hath been holden, that this is a particular Law, and must be pleaded, otherwise the Judges cannot take Notice of it.

20 *H. 7. 13.*
Dalt. Sb. 23.

It hath been holden, that a Lease thereof, though no Rent was ever received, is within the Statute, the Intent thereof being that Sheriffs should keep their Counties in their own Hands.

Plowd. 87.
Dalt. Sb. 23.

It seems the better Opinion, that a Lease, reserving only Part of the Profits, is within the Statute.

Dalt. Sb. 24.

It hath been doubted, whether a Lease made by the Sheriff of his Office or County only by Parol, be within the Statute.

Moor 781.
Stockwith v. North.

It hath been adjudged in the Case of the Sheriff of *Nottingham*, who took Money for his Bailiwick, which he first gave his Servants, and which they sold, but he himself received the Money, that this was within the Statute 4 *H. 4. cap. 5.* which prohibits the letting to Farm, &c. under certain Penalties; and that it was not only *malum prohibitum*, but likewise *malum in se*, as tending to Extortion and other Oppressions.

Vide Tit. Of fice.

By the 3 *Geo. 1. cap. 15. §. 10.* ' It shall not be lawful for any Person to buy, sell, let or take to Farm the Office of Under Sheriff or Deputy Sheriff, Seal-Keeper, County-Clerk, Shire-Clerk, Gaoler, Bailiff or any other Office pertaining to the Office of High Sheriff, or to contract for any of the said Offices, on Forfeiture of 500*l.* one Moiety to his Majesty, the other to such as shall sue in any Court at *Westminster* within two Years after the Offence.

' Provided that nothing in this Act shall hinder any High Sheriff from constituting an Under Sheriff or Deputy Sheriff, as by Law he may, nor to hinder the Under Sheriff in Case of the High Sheriff's Death, when he acts as High Sheriff, from constituting a Deputy, nor to hinder such Sheriff or Under Sheriff from receiving the lawful Fees of his Office, or from taking Security for the due answering the same, nor to hinder such Under Sheriff, Deputy Sheriff, Seal-Keeper, &c. from accounting to the High Sheriff for all such lawful Fees as shall be by them taken, nor for giving Security so to do, nor to hinder the High Sheriff from allowing a Salary to his Under Sheriff, &c. or other Officers.

(H) Of the High Sheriff's Power and Duty in appointing an Under Sheriff, and other Deputies: And herein,

1. Of the Under Sheriff, and in what Manner appointed.

Dalt. 3, 514.
Hob. 13.

ALTHOUGH the King by his Letters Patent granteth to the Sheriff *Custodiam Comitatus*, without any express Words to make a Deputy, yet hath the Sheriff Power to make a Deputy or Under Sheriff, who

who may execute all the Ministerial Parts of the Office; for Experience, says my Lord *Hobart*, proves, that many Sheriffs cannot execute it themselves; from the (a) Antiquity therefore and Necessity of this Office the Law takes Notice of him, and on his being appointed, the Law implicitly gives him Power to execute all the ordinary Offices of the Sheriff himself that can be transferred by Law.

(a) Was formerly called *Seneschallus Vicecomitis.*
Dalt. Sh. 3.—
And in the

Statute *Westm. 2. c. 39.* he is called *Subviccomes*; and in the Statute *11 H. 7. c. 15.* *Shire Clerk.* 4 Co. *Milton's Case.* 9 Co. 49. *Dyer* 355.

He is, says my Lord *Hobart*, in Nature of a general Bailiff to the Sheriff over the whole Shire, as others are over the Hundred; and being in Effect but the Sheriff's Deputy, according to the Nature of a Deputation, he is removeable as an Attorney is; and though made irrevocable, yet may the High Sheriff remove him; but having once appointed him, though he may totally remove him, yet he cannot (b) abridge him of any Part of his Power.

Hob. 13.
(b) 2 *Brownl.* 281.

The High Sheriff may execute the Office himself, and the Under Sheriff hath not, nor ought to have, any Estate or Interest in the Office itself; neither may he do any Thing in his (c) own Name, but only in the Name of the High Sheriff, who is answerable for him.

Dalt. Sh. 3.
(c) An Under Sheriff must act in the

Name of the High Sheriff, because the Writs are directed to the High Sheriff. *Salk.* 96.

By the 3 *Geo. 1. cap. 15. §. 8.* it is enacted, 'That if any Sheriff shall die before the Expiration of his Year, or before he be superseded, the Under Sheriff shall nevertheless continue in his Office, and execute the same in the Name of the Deceased 'till another Sheriff be appointed and sworn; and the Under Sheriff shall be answerable for the Execution of the Office during such Interval, as the High Sheriff would have been; and the Security given by the Under Sheriff and his Pledges shall stand a Security to the King, and all Persons whatsoever, for the due performing his Office during such Interval.'

The Under Sheriff, before he intermeddle with the Office, is to be sworn; this is enjoined (d) by the Statute 27 *Eliz. cap. 12.* and the Form of the Oath there prescribed.

(d) That before this Statute the Under

der Sheriff was never sworn. 1 *Roll. Rep.* 274. *Per Coke.*

And now by the 3 *Geo. 1. cap. 15. §. 19.* it is enacted, 'That all Under Sheriffs of any Counties in *South Britain*, except the Counties in *Wales* and County Palatine of *Chester*, before they enter upon their Offices, shall take the following Oath, viz. 'I *A. B.* do swear, that I will well and truly serve the King's Majesty in the Office of Under Sheriff of the County of _____ and promote his Majesty's Profit in all Things that belong to the said Office as far as I legally can or may, and will preserve the King's Rights and all that belongeth to the Crown. I will not assent to decrease, lessen or conceal the King's Rights, or the Rights of his Franchises; and whensoever I shall have Knowledge that the Rights of the Crown are concealed or withdrawn, be it in Lands, Rents, Franchises, Suits or Services, or in any other Matter or Thing, I will do my utmost to make them be restored to the Crown again; and if I may not do it of myself, I will certify and inform some of his Majesty's Judges thereof, and will not respite or delay to levy the King's Debts for any Gift, Promise, Reward or Favour, where I may raise the same without great Grievance to the Debtors. I will do Right as well to Poor as to Rich, in all Things belonging to my Office. I will do no Wrong to any Man for any Gift, Reward or Promise, nor for Favour or Hatred. I will disturb no Man's Right, and will truly and faithfully acquit at the Exchequer

‘ all those of whom I shall receive any Debts, Duties or Sums of Money belonging to the Crown. I will take nothing whereby the King may lose, or whereby his Right may be disturbed, injured or delayed. I will truly return, and truly serve all the King’s Writs to the best of my Skill and Knowledge. I will truly set and return reasonable and due Issues of them that be within my Bailwick, according to their Estates and Circumstances, and make due Panels of Persons able and sufficient, and not suspected or procured, as is appointed by the Statutes of this Realm. I have not bought, purchased, or taken to Farm or contracted for, nor have I promised or given any Consideration, nor will I buy, purchase, or take to Farm, or contract for, promise or give any Consideration whatsoever by myself or any other Person for me, or for my Use, directly or indirectly, to any Person or Persons whatsoever, for the Office of Under Sheriff of the County of _____ which I am now to enter upon and enjoy, nor for the Profits of the same, nor for any Bailiwick thereof, or any other Place or Office belonging thereunto. I have not sold or contracted for, or let to Farm, nor have I granted or promised for Reward or Benefit by myself or any other Person for me, or for my Use, directly or indirectly, any Bailiwick thereof, or any other Place or Office belonging thereunto. I will truly and diligently execute the good Laws and Statutes of this Realm, and in all Things well and truly behave myself in the said Office for his Majesty’s Advantage and for the Good of his Subjects, and discharge my whole Duty according to the best of my Skill and Power. So help me God.’

Which Oath is to be administered by such Commissioners as shall be named to administer the Oath to the High Sheriff, as often as a Commission of *Dedimus* shall be sued forth for that Purpose, or by the Barons, or one of them, when the Sheriff desires to be sworn in Town.

2. Of Covenants between the High Sheriff, his Under Sheriff, and other Officers.

Dalt. Sb. 445.
2 Keb. 352. It is meet and safe, says *Dalton*, for the High Sheriff to take good Security from his Under Sheriff and other Officers before he trust them with their Offices; and for this commonly the High Sheriff taketh Bonds and Covenants from the Under Sheriff and Friends, as also of his Bailiffs and Gaoler.

Hob. 12, 13.
Moor 856.
Godb. 212.
1 Brownl. 65. And as this is allowed by Law, it is holden, that 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.

Hob. 12, 13.
Godb. 212.
2 Brownl.
281. Sir
Daniel Norton
v. Sims. But if the High Sheriff makes *7. S.* 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, in as much as when he is made Under Sheriff, he is liable by the Law to execute all Process as well as the Sheriff is.

Hob. 14. But it was resolved in the above Case, that though this Covenant was void in Law, that yet the Bond was good for the rest of the Covenants which were agreeable to Law; and a Difference was taken between a Bond made void by Statute and by Common Law; for upon the Statute of 23 *H. 6.* if a Sheriff will take a Bond for a Point against that

that Law, and also for a due Debt, the whole Bond is void, for the Letter of the Statute is so; for a Statute is a strict Law; but the Common Law doth divide according to common Reason, and having made that void that is against Law, lets the rest stand.

Also it was resolved, that this Case was not within the Statute 23 *Hib. 13.*
H. 6. because it was not a Bond made by or on the Behalf of a Prisoner, and because the Statute is not pleaded, as it ought to be, being a special Law.

So in Debt upon an Obligation entred into by the Sheriff's Clerk, or Under Sheriff, for Payment of Money into the Exchequer within 14 *Moor 242.*
Cartwright v. Daleworth. Days after he received it, who pleaded the Statute 23 *H. 6.* and averred that it was taken *colore officii*; but adjudged upon Demurrer, that the Statute extended only to Bonds taken from those who were to appear, or who were in Ward, and not to this Case.

In Debt on an Obligation by the Under Sheriff to the High Sheriff for saving him harmless, the Defendant pleaded, that he had saved him harmless; which on Demurrer was held an ill Plea, because he might have saved him harmless in some Things though not in all, and therefore *Non damnificatus* had been the proper Plea. *Stil. 16.*
Wrotb v. Elsey, vide Tit. Pleadings.

In Debt by an Under Sheriff against his Bailiff on an Obligation to save him harmless in executing of Processes and other Things contained in the Condition, it was objected, that it was not alledged that the Process was to be executed within the Hundred wherein he had Jurisdiction; and this the Court held a good Objection, because the Bailiff cannot execute a Process out of the Hundred wherein he is Bailiff, by Virtue of his general Authority, but only as a special Bailiff. *Stil. 18.*
Stoughton v. Day.
Allen 10. S. C.
 For though the Words of the Condition were general to make Re-

turn of all Warrants directed to him, yet it was to be understood of such only as were to be executed within the Hundred of which he was made Bailiff. *2 Saund. 414. S. C. cited.*

Debt on a Bond to perform Covenants, which was, that the Defendant should not let at large any Prisoner arrested without the Sheriff's Warrant; the Plaintiff shews the Defendant had let such a Prisoner at large at *Westminster, &c.* it is good without shewing the Time and Place of the Arrest, for the Escape is the material Part of the Covenant, and the Manner of the Arrest is not in Question; and whether he were legally taken or imprisoned, was not material when he was suffered to go at large. *Sid. 30. Jenkins v. Hancock.*

In Debt on an Obligation conditioned to perform the Covenants and Agreements in an Indenture made between the Sheriff of *Essex* *Hil. 26 & 27*
Car. 2. in and the Under Sheriff, in which the Under Sheriff covenanted to pay *B. R. Lewin*
v. Allop. all Sums of Money, and to discharge the Sheriff of them, which ought *3 Keb. 448.*
S. C. to be paid by the Sheriff touching the Execution of the said Office; Defendant pleads Performance generally; Plaintiff in his Replication assigns a Breach in Non-payment of 40 *l.* to the Gaoler of *Chelmsford*, expended *pro materia tangent' execut' offic' prædict', viz.* for the conducting of a Prisoner from *Chelmsford* to *York* Castle, and for his Meat and Drink in the Journey, which Sum the Gaoler hath recovered against the Sheriff. Defendant rejoins that the Recovery was for a particular Matter between them, and not for Matter touching his Office, and concludes to the Country; upon which the Plaintiff demurs. It was urged for the Plaintiff, and agreed to by *Wylde* Justice, that the Defendant ought not to have concluded his Rejoinder to the Country, but to have left it to the Plaintiff to answer to. *Per Cur.* there is no good Breach assigned; for the Recovery within this Covenant ought to be for such Matter as concerns the Sheriff, and which by Law he is compellable. The Recovery against the Sheriff was in an *Assumpsit*. It does not appear that the Sheriff was obliged to bring him to *York*. It does not appear that there was any *Habeas Corpus*; and the Sheriff cannot

not deliver his Prisoner to another Sheriff without an *Habeas Corpus*, upon the Back of which he writes his Charges, which are allowed by the Judges of Assise; and this shall be allowed to him upon his Account in the Exchequer, if the Prisoner was carried into another County; but if it was in the same County, he shall not have Allowance for his Charges; as to that which is assigned, that Part became due for finding Meat and Drink for the Prisoner; this is no Breach; for before the Party is convicted he ought to live at his own Charges, and therefore till Conviction hath his Goods, but after Conviction at the Charge of the King; and therefore the Sheriff shall have Allowance in the Exchequer. At the Plaintiff's Request the Court permitted him to discontinue paying the Defendant all his Costs without Process.

3. Of Acts that may be done by either of them, or where the High Sheriff must himself be personally present.

Hob. 12, 13.
Salk. 95. As it is impossible the High Sheriff can himself personally execute every Branch and Thing belonging to his Office, and as the Law from the Necessity of the Thing, and in Furtherance of Justice, allows him to make a Deputy, hence it is necessary that such Deputy should in all Things, in which the High Sheriff's personal Presence is not required, have the same Power with the Sheriff himself; and as by the Nomination of him the Sheriff implicitly confers on him a Power of doing all such Offices as he himself could execute, and which may be transferred by the Law, it is likewise held, that the Deputy's Authority is by Law so equal with the Principal's, that any Condition, Covenant or other Bargain to restrain it is void; and therefore it is now universally agreed, that the Under Sheriff may make Bills of Sale upon Executions, assign Bail-Bonds, make Return to Writs, and in general do every Thing that the Sheriff himself can do.

Dalt. Sb. 103. Upon any Writ or Process delivered to the Under Sheriff, he, as well as the High Sheriff, may direct his Bailiff or other Officer to arrest or otherwise to execute such Process; but such Bailiff or other Officer must serve or execute it himself, for he cannot command any other to do it either by Word or Writing.

Dalt. Sb. 104. So the Under Sheriff, Bailiff, or other such Officer, may if need be, take the *Posse Comitatus*, that is, what Number of other Persons they shall think good, to execute any Writ, Process or other lawful Warrant to them directed, and such as shall not assist them therein, being required, shall make Fine to the King.

Cases in B. R.
454. And as the Under Sheriff is principally active in the Execution of the Office, so the Courts have refused to grant an Attachment against the High Sheriff where the Under Sheriff refuses to return a Writ, but will grant an Attachment against such Under Sheriff, and by (a) Rule oblige the High Sheriff to return such Attachment against the Under Sheriff; but the usual Course is to direct the Attachment to the Coroners.

Cro. Eliz. 294.
Levett v. Far-
var. A Writ upon the Statute of *Northampton* was awarded to the Sheriff and Justices of Peace of the County of *Norfolk* to remove a Force; the Under Sheriff by Command of the High Sheriff executed the Writ, and by Virtue thereof arrested *J. S.* and it was held, that the Execution of the Writ by the Under Sheriff was good, especially as it named him only by the Name of his Office, and not by his proper Name, and as it did not expressly command him to act in his proper Person.

Dalt. Sb. 34. But in all Cases where the Writ commands the Sheriff to go in Person, there the Writ is his Commission, from which he cannot de-

viate;

viate; 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 'tis become Matter of Record, against which no Averment in *Pais* lies, neither can the Party have Error upon the Return.

As in a Writ of Partition, the Sheriff must be on the Lands in Person according to the Direction of the Writ; and if he be 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. *Cro. Eliz. 6, 10. Clay's Case.*

So in a Writ of Redisseisin, in which by the Statute of *Merton* the Sheriff is Judge, as well as Officer, he must execute it in Person, and cannot make a Deputy. *11 H. 4. 7. 6 Co. 12. Hob. 13. Jenk. 181.*

So in a Writ of Enquiry of Waste, the Sheriff must himself go in Person and view the Place wasted; for though in this Case he is not in Strictness Judge, but is to inquire by the Oaths of twelve Men, &c. yet his Writ being in Nature of a Commission, he must execute it in Person; and as he is *in loco Judicis*, if the Land lie in a Franchise, the Sheriff cannot make his Warrant to the Bailiff of the Franchise, or return *Mandavi Ballivo*, &c. for he cannot grant over the Judicial Power, but he must enter the Liberty and execute the Writ himself. *Reg. 23. 6 Co. 12. 8 Co. 52. 4 Co. 65. 2 Inst. 390. Dalt. 34. Dyer 204. pl. 1.*

So in a Writ of Admeasurement of Dower and Pasture, the High Sheriff must execute these in Person, being Vicountiel and not returnable, and to which the Parties may plead before the Sheriff in the County, if they think fit, unless they are removed in *C. B.* by a *Pote*, which the Plaintiff may do without shewing any Cause. *F. N. B. 148. Dalt. Sb. 34. Noy 21.*

So in a Writ *de nativo habendo*, if it goeth to the Sheriff to hold Plea of the Matter, there he is both Judge and Officer, and must execute it in Person; but where it is directed to the Sheriff returnable in *B.* there his Office is ministerial only, and he may execute it by his Under Sheriff or Deputy. *Bro. Offic. 36. Dalt. Sb. 34.*

In a Writ of *Justicies*, which is a Commission to the Sheriff to hold Plea above 40 s. the High Sheriff must execute it in Person; and if it be done by the Under Sheriff, the Judgment thereon is utterly void, and *coram non Judice*. *2 Leon. 34.— Yet in this Case my Lord Coke holds, that the Suit-*

ors are Judges, and not the Sheriff. *6 Co. 12, 13.*

It hath been adjudged, that an Assignment of Prisoners by the Under Sheriff is as valid as if made by the High Sheriff himself. *Mich. 6 Geo. 2. in C. B. Holt v. Greenlaw.*

4. The Manner of appointing Bailiffs and other (a) Officers; and therein of his being answerable for their Acts. *(a) By the 1 & 2 Ph. & M. c. 12.*

must appoint four Persons in the County in his Name to make Replevins, &c. *Replevins, &c.*

Although all Writs and Processes are directed to the High Sheriff, and usually delivered to the Under Sheriff, yet it being impossible for them to execute them all themselves, they are to make out Warrants or Precepts to their (b) Bailiffs and other Officers, who are to execute the same; and for that Purpose they are impowered to appoint a Bailiff in each Hundred, and may appoint a special Bailiff or particular Person to execute a Writ upon any certain Occasion. *Dalt. Sb. 103, 117. Keilw. 86. (b) A Bailiff is to take the same Oath appointed to be taken by the*

Under Sheriff, by the Statute 27 *Eliz. c. 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 Jon. 249. 2 Lev. 151.* — The Sheriff may take Security from them, as he is answerable for their Acts. *Stil. 18.* — For the Form of such Securities, *vide Dalt. 118.* — Cannot abridge them of their Power. *2 Brownl. 283.*

Dalt. Sb. 117. But though the Sheriff, having a Writ directed to him, may authorise others to execute it, yet the Person to whom he directs it must himself (a) personally execute it; but any one may lawfully assist him.

(a) And there-

fore an Arrest

by a Bailiff's Follower is not good. *6 Mod.* 211.—And there made a *Quære* whether good, though in the Bailiff's Presence.—If a Warrant be directed to two Men jointly to arrest another, yet either of them alone may do it. *Co. Lit.* 181.—If a Warrant be directed to a Bailiff, and Stranger *conjunctim et divisim*, it may be executed by the Stranger only. *Dalt. Sb.* 104.

Noy 101.

Moor 770.

If a blank Warrant be filled up with the Name of a special Bailiff, either by the Party himself or Bailiff, without the Privity or subsequent Agreement of the Sheriff, this is such an Abuse and Contempt, for which an Attachment will be granted.

Cases in B. R.

527. *Per*

Holt Ch. J.

Also the Sheriff ought not to make a blank Warrant for the Attorney to fill up with a special Bailiff.

2 *Lev.* 19.

Jones v. Green.

Vide 1 Saund.

298.

In Trespass for a Battery and Imprisonment, the Defendant justifies by a Writ out of the King's Bench directed to the Sheriff, and a Warrant thereupon made to him; the Plaintiff demurs specially, because it is not pleaded that the Writ was delivered to the Sheriff in the common Form; to which it was answered, that it was not necessary to be so pleaded; for if in Truth a Writ be sued out, and he make a Warrant before the Writ comes to his Hands, 'tis well, and the Precedents are both Ways; and of this Opinion was the whole Court.

But now by the Statute *6 Geo. 1. cap. 21. §. 53.* it is enacted, 'That no High Sheriff, Under Sheriff, their Deputies or Agents, shall make out any Warrant before they have in their Custody the Writs upon which such Warrants ought to issue, on Forfeiture of 10 l.

And by the 54th Section of the said Statute, 'Every Warrant to be made out upon any Writ out of the King's Bench, Common Pleas or Exchequer, before Judgment, to arrest any Person, shall have the same Day and Year set down thereon as shall be set down on the Writ itself, under Forfeiture of 10 l. to be paid by the Person who shall fill up or deliver out such Warrant.'

1 *Rol. Abr.* 98.

Attorton v.

Harward.

If a Bailiff Errant takes *ſ. s.* in Execution at the Suit of *ſ. D.* and after he escapes by a Rescue of himself, the Sheriff, if he will, may have an Action upon the Case against the Bailiff for this Escape, because when he takes upon him to be his Bailiff, there is an *Assumpsit* in Law to keep the Prisoners safely, and not to suffer them to escape.

Under Sheriffs, Bailiffs, &c. are looked upon as the High Sheriff's Officers, for whom he shall answer as their (b) Superior, and their Acts are to many Purposes considered as his own.

(b) For this

vide 2 Inst.

382, 466.

9 *Co.* 98.

2 *Jon.* 60.

2 *Lev.* 158.

1 *Vent.* 314.

2 *Mod.* 119.

Noy 69.

Latch 187.

Dalt. Sb. 3.

But though the High Sheriff must answer for his Under Sheriff and other Officers, yet he is not to be punished criminally for their Acts, nor to be imprisoned nor indicted for their Misdemeanors.

1 *Rol. Abr.*

94.

Cro. Eliz. 175.

1 *Leon.* 146.

S. C. Marsh

v. Astry.

And therefore for the personal Torts and Injuries of such Officers they must answer themselves; as if the Demandant in a Writ of Entry *ſur Diſſeiſin* delivers a Writ of Summons to the Under Sheriff of the County, and he summons the Tenant upon the Land accordingly, and notwithstanding does not return the Writ, an Action upon the Case may be brought against the Under Sheriff, if the Plaintiff pleases; for perhaps the Sheriff had no Notice thereof, and it may be the Under Sheriff took the Fees for the Execution of the Writ.

2 *Jon.* 197.

1 *Lev.* 214.

2 *Lev.* 26.

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 Custody.

But although in Law the Custody of the Bailiff be the Custody of the Sheriff, yet the Sheriff upon a Rescue cannot return that such a one was in his Custody, and rescued out of the Custody of his Bailiff, because of the Repugnancy; but he may return that he was rescued out of his own Custody, although he was never in his actual Custody, or that he was rescued out of his Bailiff's Custody.

So an Arrest by the Sheriff's Officer is in Judgment of Law the same as if the Arrest were by the Sheriff in Person, and if such Officer suffer the Party arrested to escape, the Action must be brought against the Sheriff.

But if the Sheriff directs his Warrant to his Bailiff, and afterwards *J. S.* puts in his own Name as special Bailiff, and thereupon arrests the Defendant, who escapes, here *J. S.* shall be only chargeable, and not the Sheriff, because the Defendant was never in the Sheriff's Custody.

5. Of his Jurisdiction over Gaols and Gaolers.

Although all Gaols and Prisons regularly belong to the (a) King, yet the Sheriff shall have the Custody of all Persons taken by Virtue of any Precept or Authority to him directed, notwithstanding any Grant by the King of the Custody of Prisoners to another Person.

(a) Although a Subject may have the Custody or keeping of them. *2 Inst.* 100.—But it is said that none can claim a Prison as a Franchise, unless they have also a Gaol-Delivery. *Salk.* 342. *Farest.* 31. — Cannot be erected by less Authority than by Act of Parliament. *2 Inst.* 705. But *vide* 11 *Ed.* 12 *W.* 3. c. 19. by which Justices of Peace on Presentment of the Grand Jury are empowered to raise Money for that Purpose, and Tit. *Gaol and Gaoler.*

Every County hath two Sorts of Gaols, one for Prisoners by the Sheriff taken for (b) Debt, and this the Sheriff may appoint in any House, or where he pleases; the other is for Breach of the Peace and Matter of the Crown, which is the (c) County Gaol.

shall not be lawful for any Sheriff or Gaoler to lodge Prisoners for Debt and Felons together in one Room; but they shall be kept apart, upon Pain that they that offend against this Act shall forfeit their Office and treble Damages to the Party grieved. (c) By the 1 *Ann.* c. 6. those taken on an Escape Warrant are to be sent to the County Gaol.

Though the Sheriff may remove his Gaol from one (d) Place to another within his Bailiwick, yet he must keep it and his Prisoners within it, and not suffer them to go at large out of the Prison, though he himself attends them.

cannot keep his Prisoners in other Place than where the old Prison is appointed, but the Court of *B. R.* may by Rule appoint it to be kept in any Place in *England*, but then the Marshal is to keep them, and the Extent of the Prison is to be limited by the Rule. *Cro. Car.* 466. 1 *Rol. Abr.* 810.—And that this was the proper Method to be taken where the Prisoners were in Danger of the Infection by the Plague. *Hutt.* 29. *et vide* 19 *Car.* 2. c. 4. for empowering Justices of Peace to remove Prisoners in Case of Infection.

By the 2 *Geo.* 2. cap. 22. §. 1. 'No Sheriff, Bailiff or other Officer shall convey any Person by him arrested, by Virtue of any Process or Warrant, to any Tavern, Alehouse or other Publick Victualling or Drinking-house, or to the House of such Officer, or of any Tenant or Relation of his, without the free Consent of the Person so arrested, nor shall carry any such Person to Prison within 24 Hours from the Time of Arrest.'

But by the 3 *Geo.* 2. cap. 27. §. 6. 'If any Person shall be arrested by Virtue of any Process or Warrant, and shall refuse to be carried to some safe Dwelling-house of his own Appointment, so as such Dwelling-house

‘ house be in a City or Market-Town, if such Person shall be there.
 ‘ arrested, or if out of a City or Market-Town, then within three
 ‘ Miles from the Place where the Arrest shall be made, and so as such
 ‘ House be not the House of the Person arrested, provided it be with-
 ‘ in the the same County and Liberty, it shall be lawful for the Of-
 ‘ ficer to carry the Person so refusing to Gaol by Virtue of such Pro-
 ‘ ceeds.’

Reg. 295.

The Gaoler is but the Sheriff's Servant, whom he may discharge at his Pleasure; and if he refuses to surrender up or quit Possession of the Gaol, the Sheriff may turn him out by Force, as he may any private Person; also they are each of them so far under the Regulation of the Court of King's Bench, that they will compel the Sheriffs to

(a) Where the (a) assign Prisoners, &c. and Gaolers to surrender up Gaols, &c.
 new Sheriff

was not bound to take Delivery of a Prisoner but in the common Gaol of the County. *Poph.* 85. *2 Leon.* 54. *Hard.* 30, 33.

Confirmed by By the 14 *E. 3. cap.* 10. it is enacted, ‘ In the Right of the Gaols,
 19 *H. 7. c.* 10. ‘ which were wont to be in the Ward of the Sheriffs, and annexed
 ‘ to their Bailiwicks, it is assented and accorded that they shall be re-
 ‘ joined 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.’

2 *Lev.* 159. And therefore if a Gaoler, who is the Sheriff's Servant, suffers a
 2 *Jon.* 62. Prisoner to escape, the Action must be brought against the Sheriff, not
 2 *Mod.* 124. against the Gaoler; for an Escape out of the Gaoler's Custody is by
 et vide 5 *Mod.* Intendment of Law an Escape out of the Sheriff's Custody.
 414, 416.

Where it is said in general that Gaolers are liable for Escapes; but the Question being there touching the Escape of a Person committed for a criminal Offence, must be understood of Escapes in those Cases, for which whoever *de facto* occupies the Office of Gaoler, is liable to answer; nor is it material whether his Title to the Office be legal or not. *Hal. P. C.* 114. *2 Rol. Rep.* 145. *2 Hawk. P. C.* 135. et vide *Hard.* 29, 35. That where Actions for Escapes are said to lie against Gaolers, such absolute Gaolers are intended as Writs are directed to.—Yet it hath been holden by my Lord Chief Justice *Holt*, that an Action lies for a voluntary Escape against the Gaoler as well as against the Sheriff, it being in Nature of a Rescue. *2 Salk.* 441. *3 Salk.* 18.

(I) Of the preceding and succeeding Sheriff; and therein of the Acts necessary to be done by each of them.

Dalt. Sh. 18. THE old Sheriff may execute his Office until his Writ of Dis-
 charge be delivered to him; and by the Statute 12 *E. 4. cap.* 1.
 ‘ If any Sheriff execute or return any Writ or Warrant within *Michael-*
 ‘ *mas* Term after the 6th of *November*, and before any Writ of Dis-
 ‘ charge delivered to him, he shall not be damnified by the Statute 23
 ‘ *H. 6. cap.* 8. although he hath occupied the Office before the Days of
 ‘ Return *Crastino Martini*, *Ostabis Martini*, or *Quinden Martini*.’

And by the 17 *E. 4. cap.* 6. ‘ Every old Sheriff shall have Power as
 ‘ well to execute and return every Writ or Warrant, as to execute
 ‘ every other Thing which to the Office pertaineth, during the Terms
 ‘ of *St. Michael* and *St. Hilary*, unless he be lawfully discharged.’

Moor 186,
 364. *St.*
John's Case.

In an Action of false Imprisonment, the Defendant pleaded that he was Sheriff of *W.* and that by Virtue of a *Capias* directed to him he arrested the Plaintiff, &c. the Plaintiff replied that *J. S.* was then

Sheriff;

Sheriff; to which the Defendant rejoined, that he had not Notice of *J. S.*'s Patent, and that no Writ of Discharge was delivered to him; and on Demurrer it was adjudged for the Defendant, and that he continued Sheriff 'till the Writ of Discharge delivered to him, or perfect (a) Notice of the new Patent.

(a) It seems the better

Opinion, that delivering the Writ of Discharge to the Clerk of the County Court, though in the Absence of the Sheriff, is sufficient Notice, because every Person being obliged to give his Attendance there, shall be presumed to be present. *Dyer* 355. *Cromp.* 203. *Dalt. Sb.* 18.

But if the old Sheriff, after he is discharged, shall make his Warrant or Precept to any of his late Bailiffs or Officers to arrest another, and the Officer by Force thereof shall arrest the Party, an Action of false Imprisonment will lie against both the Sheriff and Officer. *Dalt. Sb.* 18.

So where the old Sheriff returned the Proclamation upon an Exigent after that he was discharged of his Office; and it was adjudged that the Outlawry was void, and the Party was discharged. *Dyer* 41. *Dalt. Sb.* 18.

All Writs are by View and by Indenture precisely to be set over by the old Sheriff to the new, and if they have been executed by the old Sheriff, they must be returned by him or in his Name, and (b) indorsed by the new Sheriff; but if there hath been no Execution by the old Sheriff of them, then the Return is to be in the new Sheriff's Name.

2 *Roll. Abr.*

457, 458.

1 *Bull.* 70.

Dalt. Sb. 18.

(b) Thus, *Istud breve prout indorsatur mihi deliberatum*

fuit per R. S. armiger' nuper vic' prox' predecessor' meum in exit' ab officio suo. *Dalt. Sh.* 18.

If the Return of the old Sheriff happen to be erroneous, and that a new Sheriff be chosen, yet the Court may cause the old Sheriff or his Under Sheriff, Clerk or Deputy, to amend the same. *Dalt. Sb.* 19.

The old Sheriff is to deliver over by (c) Indenture all the Prisoners in his Custody charged with their respective Executions, and 'till such Delivery by him they remain in the Custody of the old Sheriff, and he shall be answerable for them.

Cro. Eliz.

365, 366.

Hob. 266.

1 *Bull.* 70.

2 *Leon.* 54.

3 *Co.* 72.

2 *Roll. Abr.* 457. (c) For the Form whereof, *vide Dalt. Sb.* 18.

If the Sheriff dies, and before another is made one in Execution goes at large, (d) this is no Escape, for the Prisoners were in the Custody of the Law 'till a new Sheriff made; but after a new Sheriff is made, he is bound to take Notice of all Executions against any Persons he finds in the Gaol, for there is no Person to make Delivery or give him Notice thereof.

3 *Co.* 72.

Cro. Eliz. 366.

(d) That there is no Remedy but to take him again.

1 *Mod.* 14.

If *J. S.* be in Execution at the Suit of *A.* and *B.* severally, and the Sheriff at the End of his Year delivers him over to the new Sheriff by Indenture, in which Indenture the Execution at the Suit of *A.* only is mentioned, and the Execution at the Suit of *B.* is omitted, this is an Escape, for which an Action lies against the old Sheriff, though *J. S.* continues in Prison; for *eo instante* that the old Sheriff hath delivered his Prisoners to the new, (e) he ceases to have the Custody of them, and he cannot be in the Custody of the new Sheriff at the Suit of *B.* with which he was never charged; and though the Executions are of Record, yet the new Sheriff is not bound to take Notice thereof.

3 *Co.* 71.

Wesley's Case,

adjudged upon a special Verdict.

Popb. 85. *S.C.*

Cro. Eliz.

365. *S.C.*

Moor 688.

S.C. adjudged upon a special Verdict, being

found also that the old Sheriff gave no Notice of this Execution to the new, and affirmed upon a Writ of Error in the Exchequer Chamber; but it is said, that it seemed to the Justices, that Notice by Parol would have been sufficient though the Execution was not mentioned in the Indenture. (e) And the new Sheriff is to be charged with an Escape after. *Cro. Jac.* 380.—But if a Prisoner is omitted out of the Indentures, and so not turned over at all, he remains in the Custody of the old Sheriff. 1 *Sid.* 335. *Noy* 51. 2 *Leon.* 54. 2 *Keb.* 224.

Mich. 6 Geo.
2. in C. B.
Holt v. Green-
law.

It hath been adjudged, that an Assignment by the Under Sheriff is sufficient; and also that an Assignment of the Prisoners, though not by Indenture, shall bind the new Sheriff if he has Notice of the Causes wherewith the Prisoners are charged; for it seems the Form of the Indenture was introduced only for the Conveniency and Security of Sheriffs; and therefore if a Note or Schedule only is made of the Prisoners, with the Causes of their Imprisonment, and this delivered to the new Sheriff, and thereupon he accepts the Custody of the (a) Gaol, they are as effectually turned over as if done by Indenture; *Volenti non fit injuria*; and the new Sheriff can no more pretend Ignorance when the Trust he engages in is declared to him by Deed Poll, than by Indenture.

(a) That the new Sheriff is not bound to take Delivery of a Prisoner but in the common Gaol of the County. *Popb. 85. 2 Leon. 54. Hard 30, 33.*—A Writ for the new Sheriff to compel an Assignment by Indenture from his Predecessor. *Reg. 295.*

Dalt Sb. 19.
Salk. 323.

If upon a *Fi. Fa.* the Sheriff seises Goods, and he returns that Goods to such a Value remain in his Hands *pro defectu emptorum*, and he is removed, yet he and not the new Sheriff is to proceed in the Execution; for Execution being an intire Thing, he who begins must end it; and upon his Neglect a *Distingas nuper vicecomitem* lies, of which there are (b) two Sorts, one to distrain the old Sheriff to sell and bring in the Money, the other to sell and deliver the Money to the new Sheriff, to bring it into Court, which plainly shews his Authority continues by Virtue of the first Writ.

(b) For which *vide Thef. Brev. 90. 34 H. 6. 36. Raf. 164.*—And that the *Distingas*, which commands the new Sheriff to distrain the old one to sell and bring in the Money, is the most usual. *6 Mod. 299.*

Cro. Jac. 73.
Moor 557.
1 Rol Abr.
893, 894.
Aire v. Aden.
But in Yelv.
44. S. C. it is
said to be ad-
judged cont.

And therefore it hath been adjudged, that if the Sheriff on a *Fi. Fa.* seises Goods to the Value of the Debt, and pays Part of the Debt, and is discharged before he hath sold the rest of the Goods or having returned his Writ, that notwithstanding such Discharge, and without any Writ of *Venditioni exponas*, he may sell the Goods remaining in his Hands, and such Sale and Execution shall be good by Force of the Writ of *Fi. Fa.*

but seems to be a Mistake; *et vide Hob. 207. Cro. Eliz. 597. Yelv. 6. Dyer 98. Godb. 276. Cro. Jac. 515. Latch 117. 4 Leon. 20. 2 Saund. 47, 345. 1 Mod. 31.*

Cro. Eliz.
440. Boucher
v. Wiseman.

If a *Fi. Fa.* (before the Statute) had been delivered to the Sheriff 9 Nov. and he had executed it the same Day, and after a Writ of Discharge, dated 6 Nov. had been delivered to the Sheriff the same Day, if it did not appear the Sheriff had Notice of it before the Execution served, the Execution had been good.

By the 3 *Geo. 1. cap. 15. §. 9.* ‘When any Sheriff shall by Process out of the Exchequer extend any Goods, &c. into the Hands of his Majesty, &c. for any Debts due to the Crown, and shall die or be superseded before a *Venditioni exponas* be awarded for Sale, or before he has made actual Sale thereof, and a Writ shall afterwards be awarded to a subsequent Sheriff, who shall make Sale of such Goods, &c. the Barons of the Exchequer if sitting, or if not sitting, they, or any one of them of the Degree of the Coif, shall settle the Fees or Poundage for such Seisure and Sale between such preceding and subsequent Sheriff, with regard to the Trouble each Sheriff had in the Execution of such Process.’

(K) Where more than one Sheriff.

IN *London* and *Middlesex* there are two Sheriffs; the Beginning of which Custom seems to be founded on the Charter of King *John*, who granted the Sheriffwick of *London* and *Middlesex* to the Mayor and Citizens of *London*, at the Farm of 300 *l. per Ann.* so that that being a Grant in Fee of the Sheriffwick to them as a Corporation, they had a Right to name one or more Officers in order to execute the same, and they thought it proper to name two Officers indifferently to execute both Offices, and both of them execute as one Sheriff, though the Writ in *Middlesex* is directed to them as one, *Vic' Com' Middlesex Præcipimus tibi*; in that of *London* it is to both, *Vic' Comitib' London Præcipimus vobis*; and the Reason of this Difference seems to be, that before this Grant of the Sheriffwick to the Corporation, the Corporation nominated to the Crown, and the Crown appointed the Sheriffs for *London*, and the *London* Sheriffs were responsible to the King for the *London* Profits of the Sheriffwick; and that was the Reason why two were appointed, that both might be responsible, and this Nomination was that the Citizens might exhibit to the King responsible Persons; and that seems to be the Reason, that in many of the Corporations that are Cities and Counties, there are two Sheriffs; but when, by the Charter of King *John*, the Sheriffwick of *London* and *Middlesex* was granted to the Citizens as a perpetual Fee-Farm, then they elected their Sheriffs, which before were nominated for *London* only, and the Election of the two was for both Sheriffwicks; but the Directions of the King's Writs were as before, *viz.* in *London* to the two Sheriffs, and in *Middlesex* as if there was only one.

Where there are two Sheriffs, they regularly make but one Officer, and therefore if one of them die, the Office is at End until another is chosen, and the Courts of *Westminster* can award no Procefs to the other.

If one Sheriff of *London* make his Return without his Fellow, this being as no Return at all is not aided by the Statute, which aids insufficient Returns, for the Court takes Notice that one Sheriff there is two Persons.

But though they are considered but as one Officer, yet where in an Information for a Riot committed in *Chester*, it was suggested on the Roll that one of the Defendants was Sheriff, whereupon the *Venire* was prayed and directed to the other Sheriff, and they found guilty; and it was moved in Arrest of Judgment that the *Venire* should be awarded to the Coroner, because both Sheriffs make but one Officer; but in this Case it was adjudged that the *Venire* was well awarded, and that where one Sheriff is challenged the other shall supply the Place, and that the Coroner is not the Person to execute the Procefs of the King's Courts but where the proper Officer is wanting, which cannot be where there is one Sheriff.

against *Player*, the *Venires* were directed to the other Sheriff alone; et

In a Writ of Error to reverse an Outlawry, among other Errors it was assigned that the Direction of the Exigent to the Sheriffs of the City of *Lincoln* was *Quod capias Corpus ejus ita quod Habeas Corpus ejus, &c.* where, they being two Sheriffs, the Writ ought to have been *Capiatis et habeatis; sed non allocatur*, for they both be but one Officer to the Court; and although in the End of the Writ it is *ita quod habeatis ibi hoc breve*, yet there is no Repugnancy, for it is good both Ways.

If

Priv. Lond 5.
272.
3 *Co.* 72. b.
2 *Inst.* 382.
2 *Show.* 262.
Carib. 482.
1 *Leon.* 284.

4 *Mod.* 65.
1 *Show.* 289.

Hob. 70.
Lit. Rep. 129.

4 *Mod.* 65.
1 *Salk.* 152.
The King v.
Warrington.
Carib. 214.
S C. And
there said,
that in the
Cases *Betkel,*
Sheriff of
London, against
Harvey, and
of *Rich,* She-
riff of *London,*
vide *Stil.* 342.

Cro. Jac. 576.
Gargrove v.
Markham.

Cro. Eliz. 625. If there are two Sheriffs of the same Place, and an Action of Escape is brought against them both, if one of them dies, yet the Writ shall not abate; for it being in Nature of a Trespass, and meerly personal, the Party can only have Remedy against the Survivor.

Carth. 145. A Prisoner in *Woodstreet* Compter upon mesne Process on a Plaint levied against him, &c. escaped; whereupon the Plaintiff brought his Action against both Sheriffs of *London*, and upon a Demurrer to the Declaration the Plaintiff had Judgment; and it was resolved, that tho' the Plaint was levied before one Defendant only in his Court, and the Prisoner escaped out of his Compter, yet that both Sheriffs had the Custody of the Prisoners in both Compters, and by Consequence the Action was well maintainable against both.

(L) Of his Duty and Acts as a Judicial Officer.

Vide Jurisdiction of this Court, Tit. Courts.

THE Sheriff hath in many Things a Judicial Authority, and particularly in his Turn, which is the King's Court of Record holden before the Sheriff for the redressing of common Grievances within the County.

Cromp. Jur. 212.

Stamf. 84.

2 Inst. 32.

Dalt. Sb. 25.

2 Hal. Hist.

P. C. 69.

2 Hawk. P. C. 66.

In this Court the Sheriff had antiently a very large and ample Jurisdiction, for he could not only inquire of all capital Offences, as Treasons and Felonies, but likewise issue Process on them and determine the same; but his Power herein is now much restrained by Statute; and 1st, by the Statute of *Magna Charta, cap. 17.* by which it is enacted, 'That no Sheriff, Constable or other Bailiff of the King shall hold Pleas of the Crown.' 2dly, By the Statute of *1 E. 4. cap. 2.* his Power of making out Process upon these Indictments is taken away as well in Case of Indictments of Felony, as other Misdemeanors within his Cognizance; but he is to deliver all such Presentments and Indictments to the Justices of the Peace at their next Sessions, who are to make out Process thereupon, and hear and determine them; but if the original Presentment were not within the Jurisdiction of the Turn, the Justices of Peace ought not to proceed upon such Indictments, though removed before them.

2 Hawk. P. C. 66, 67.

2 Hal. Hist.

P. C. 69.

(a) And therefore cannot take an Inquisition of Rape, because as the Law now stands, it is only Felony by Statute.

2 Hal. Hist.

P. C. 69.

But though the Sheriff by the abovementioned Statutes is restrained from determining in capital Offences, and of issuing Process in such Cases, yet hath he still in his Turn a Judicial Authority, *virtute Officii*, of inquiring and taking Presentments of all capital Offences of a publick Nature, as all Treasons and Felonies at (a) Common Law, Assaults and Batteries, if accompanied with Bloodshed; all Affrays, being *in terrorem populi*; common Grievances, as Breaking of Hedges, Dikes or Walls; all common Nufances, as Annoyances to common Bridges or Highways, Bawdy-houses, &c. and 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.

2 Hawk. P. C. 58.

Also a Sheriff, as Judge of a Court of Record, may in his Turn impose 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 cannot take a Presentment concerning the Freehold, as he cannot hold Plea of Lands; and therefore if a Presentment charge a Person with not repairing a Highway as he ought to do by the Tenure of his Lands, this is to be removed into the King's Bench, and there traversed.

The Sheriff, as he is a principal Conservator of the Peace within his County, may *ex Officio* award Process of the Peace, and take Surety for it; and it seems the better Opinion, that the Security so taken by him is by the Common Law looked on as a Recognizance or Matter of Record, and not as a common Obligation or Matter in *Pais* only; for that it is taken by him by Virtue of the King's Commission, by which he is intrusted with the Custody of the County, and consequently has by it an implied Power of keeping the Peace within such County.

In some Cases the Sheriff hath two Powers, or a double or two-fold Authority; the one as Judge, and the other as an Officer, in the one and the same Business; as in a Writ of Rediversion, in a Writ of Inquiry of Waste, in a *Nativo habendo*, and in a Writ of Admeasurement of Pasture, &c. in these Cases the Writ is as a Commission to the Sheriff, and by Virtue thereof the Sheriff is Judge of the Cause.

(M) Of his Duty and Acts as a Ministerial Officer: And herein,

1. That he is the proper Officer to execute all Writs, except in Case of Partiality.

THE Sheriff is the immediate Officer to the King's Courts, to whom all Writs and Processes are regularly to be directed, and who is to execute the same without Favour, Dread or Corruption, and to which he is sworn.

And as this is an Employment for the Good and Convenience of the Publick, if the Sheriff refuses to receive a Writ, or to execute it, this is an Offence of a publick Nature, for which he may be (a) fined and imprisoned; also such an Injury to the Party grieved for which an Action on the Case lies.

and a Copy of it returned by him, for which he was amerced 30 l. for the Return of the Copy, and 20 l. for the Imbezilment. 5 H. 4. 5. *Dalt. Sb. 202.*

And if any, says *Dalton*, doth fear the Malice, indirect Dealing, or Negligence of the Sheriff, &c. in the Execution of any Writ, they may deliver their Writs in the open County Court, or in any other Place in the County; and may take of the Sheriff or Under Sheriff, being present, a Bill, wherein the Names of the Demandants and Tenants mentioned in the Writ shall be contained, whereto, upon Request made by him which delivered the Writ, the Sheriff or Under Sheriff shall put to their Seal for a Testimony, without any Fee; and if they refuse, others present may put their Seals as Witnesses.

Co. L. 158. a. But though the Sheriff is the proper Officer to whom Process is to be directed, and who is to execute the same, yet if he be partial, that is, such a one as from his Consanguinity or Affinity, his being under the Power of either Party, cannot be presumed indifferent in making a Return of a Jury, in such Case the *Venire* shall be directed to the Coroners, if they are impartial, or to those of them who are so; and in Case all the Coroners are partial or not indifferent, as every Officer who hath any way to do with the Administration of Justice ought to be, then the *Venire* shall be directed to two Elizors named by the Court, and against whom for that Reason no Challenge can be taken.

Mod. Cases
248.

But as the Sheriff is the proper Officer to return Juries, if there be no legal Exception against him the Court cannot slip him, and order another to return a Jury, without the Consent of the Parties, to try an Issue at the *Nisi Prius*; but if there be any lawful Objection to him, and it appears so on Affidavit, then a special Jury may be struck by the Master of the Office without the Consent of the Parties.

Cro. Car.
415, 416.
1 Rol. Abr.
797.

If one that is Sheriff of a County levies a Fine, the Writ of Covenant is to be directed to the Coroners; for though the Sheriff is the proper Minister for the Execution of all Writs, yet where the Writ is brought against himself, and where he with others are Parties to it, to prevent Partiality, which every one is naturally guilty of, to himself, it has been the Practice to direct the Writ to the Coroners.

Moor 547.

In Replevin it appeared that the *Liberate* on a Statute was executed by the Conussee, being himself Sheriff; and this was held erroneous.

2 Vent. 216.

If a Sheriff of a County in a City be in Contempt, the Attachment is to go to the Coroner, and not to the Mayor or chief Officer of the Corporation in such City or Town; and if the Offender be out of his Office, the Attachment shall be directed to the new Sheriff.

2. That he cannot dispute the Authority by which they issue, nor object any Irregularity in them.

Dalt. Sh. 104. Neither the Sheriff nor his Officers are to dispute the Authority of the Court out of which any Writ, Process or Warrant issues, but are at their Peril truly to execute all such Writs, &c. as are directed to them by the King's Judges and Justices, according to the Command of the said Writs, and hereunto they are sworn.

Dyer 60.
9 Co. 68.
2 Bulst. 65.
But now *vide*
Tit. Privilege.

And hence it hath been held, that if a *Capias*, Exigent or Writ of Execution issued against a Peer, and was delivered to the Sheriff, that he was obliged to execute it; and that if any such Writ issued, and the Party was taken thereupon and escaped, an Action lay against the Sheriff.

22 E. 4. 33.
10 Co. 76.
Dalt. Sh. 106.
2 Leon. 84.
Dyer 175.
8 Co. 141.
5 Co. 64.
2 Bulst. 64.
Cro. Jac. 280.
Popb. 203.
2 Saund. 100.
3 Mod. 325.
Garth. 148.

But herein there is an established Distinction mentioned in Variety of Books and Cases, to wit, that when a Court hath Jurisdiction of the Cause, and proceeds *inverso ordine*, or erroneously, there the Officer or Minister of the Court, who executes the Precept, is excusable; for the Rule is, *Quicumque jussu judicis aliquid fecerit non videtur dolo malo fecisse, quia parere necesse est*. But when the Judge hath no Jurisdiction of the Cause, there the Officer is not obliged to obey, and if he does, it is at his Peril, though he do it by Virtue of a Precept directed to him; a void Authority being the same as none at all.

Therefore if a *Formedon* issues out of the Court of King's Bench, or an Appeal out of the Common Pleas, though these are (a) superior Courts, yet not having Jurisdiction in these Matters, the Sheriff is not obliged to execute the Writ.

2 Bull. 64.
Dalt. Sb. 105.
(a) Where in Escape the Plaintiff declared, that

the Sheriff arrested J. S. by Virtue of a *Latitat*, without saying out of what Court it issued; and it was urged, that though the Sheriff could not take Advantage of an erroneous Process, that yet he might of a void Writ. 5 Mod. 413.

If Justices of Peace arraign a Person of Treason in their Sessions, who is convicted and executed, this is Felony as well in the Justices as Sheriff or Officer, who executed their Sentence; but if he had been indicted of a Trespass, found guilty and hanged, though this had been Felony in the Justices, yet it would not be so in the Sheriff, because a Matter in which the Justices had Jurisdiction, and in which they only were to blame in exceeding their Authority.

Dalt. Sb. 107.

In an Action upon the Case in *Banco Regis* against an Officer of the inferior Court for an Escape, if the Plaintiff declares that he brought an Action against J. S. in the said inferior Court (as in *Kingston upon Hull*) upon an Obligation made (a) at *Hallifax in Comitatu Eborum*, and does not alledge this to be within the Jurisdiction of the said inferior Court, and that upon this Judgment was given, and Execution granted, and the Defendant took him in Execution and suffered him to escape, and thereupon he hath brought this Action; this Declaration is not sufficient to charge the Defendant, because it is not alledged that the Obligation was made within the Jurisdiction of the Court; for though the Action be transitory, yet this inferior Court having but a limited Jurisdiction of Things arising within the Jurisdiction, (b) the Proceedings there were *Coram non Judice*, and wholly void, of which the Officer shall take Advantage in this Action upon the Escape.

1 Rol. Abr. 809. *Richardson v. Bernards et vide Noy* 45.
2 Show. 424.
2 Lutw. 1569.
(a) Salk. 202. Said it would have been otherwise if it had not appeared where made. And Lutw. 1567. it is said the Cause of Action lying. *Skin.*

tion, by the Declaration appearing to be out of the Jurisdiction, was the Cause of this Action 51. 2 Mod. 197. 3 Lev. 23. like Point. (b) 4 Inst. 231. 3 Lev. 23, 234.

So if A. declares that he prosecuted one J. S. in the Court of Ely upon a Bond made *Infra Jurisdictionem*, upon which he was in Execution, and that the Defendant suffered him to escape, if the Jury find that there was such a Prosecution, but that the Bond was not made *Infra Jurisdictionem*, the Action does not lie; for all that was done was *Coram non Judice*; and therefore no legal Commitment; and though the Defendant in the Court below pleaded *Non est factum*, yet that could not give the Court any Jurisdiction which it had not originally in the Cause.

2 Mod. 29, 30. *Squibbs v. Hole*, adjudged by three Judges against *Ellis.*

If after the Year a *Capias ad Satisfaciendum* is taken out, and the Defendant thereupon arrested, and after suffered to escape, Debt lies for this Escape (c) though the Process was erroneously awarded; for it was sufficient to arrest him, and the Sheriff may justify in an Action of false Imprisonment, and (d) therefore cannot let him at large.

Cro. Eliz. 188. *Busbe's Case.* *Farell.* 29. *Salk.* 273. S. P. adjudged. (c) That the

Sheriff can take no Advantage of Error in the Process. *Cro. Eliz.* 767, 893. 2 Bull. 258. 8 Co. 142. *Godb.* 27. *Noy* 78. *Cro. Jac.* 280, 289. *Stil.* 232. 3 Mod. 325. *Carib.* 148. — But otherwise if the Arrest was void; as if the Arrest, on which the Escape is supposed, is laid to be out of the County of which the Defendant is Sheriff. *Cro. Eliz.* 877. *et vide Noy* 51. 1 *Brownl.* 79. *Owen* 72. 5 Mod. 413. — If the Judgment for Error is reversed, the Sheriff may plead *Nul tiel Record.* 8 Co. 142. 1 *Saund.* 39. 1 *Lev.* 95. (d) Though the Sheriff may justify the Execution of a *Capias* tested out of Term, yet the Plaintiff shall not take Advantage thereof so as to charge the Sheriff for an Escape. *Farell.* 30. *Salk.* 700. *per Holt* Ch. J.

If one taken upon a Writ of *Excommunicato Capiendo*, upon a Sentence in the Spiritual Court for Non-payment of Money decreed for Tithes and Costs, escapes, an Action will lie against the Sheriff; for

1 Lutw. 121. *Slipper v. Mason*, adjudged.

for though this is founded on a Matter meerly Spiritual, yet the Proceſs iſſues out of a Temporal Court, and is directed to and executed by a Temporal Officer, and the Damages conſequential thereupon Temporal.

1 *Rol. Rep.*

47.

2 *Bull.* 236.

Moor 834.

Barns v. Ca-
rry.

Salk. 700.

Shirley v.

Wright.

If a Commission of Bankruptcy iſſues againſt *A.* who refuſes to be examined, and thereupon he is committed to Priſon, and the Gaoler ſuffers him to eſcape, as the Commiſſioners had ſufficient Authority to commit, an Action lies by the Creditor for the Eſcape.

If one be taken on a *Capias ad Satisfaciendum*, between the Teſte and Return whereof a whole Term intervenes, and the Sheriff ſuffers him to eſcape, an Action lies againſt him; for this Writ was not void, the Party not being prejudiced thereby, for he had no Day in Court, and muſt however lie in Priſon; otherwiſe where taken upon a *Capias ad Reſpondendum*, in which a Term intervenes between the Teſte and Return, for ſuch Writ is void, and by the Intermiſſion the Cauſe is diſcontinued and out of Court, and ſo the Sheriff not chargeable.

(N) How he is to execute ſuch Writs. And herein,

1. That it muſt be without Favour or Oppreſſion, and after ſuch Writ is actually taken out, and before it is returnable.

Dalt. Sb. 109.

THE Sheriff being obliged to execute every Writ and Proceſs iſſuing, and directed to him by lawful Authority, he is likewiſe obliged by the Duty of his Office to execute ſuch Proceſs with the utmoſt Expedition, or as ſoon after he receives it as the Nature of the Thing will admit of; and herein there cannot be a ſurer Rule for him to go by than a ſtriſt Obſervance of what is injoined by the Writ; but as on the one Hand he muſt not ſhew any Favour, nor be guilty of any unreaſonable Delay; ſo on the other Hand he muſt not be guilty of Oppreſſion, nor make uſe of other Force nor greater Violence than the Nature of the Thing requires.

Dalt. Sb. 110.

If the Defendant doth the Thing commanded by the *Præcipe*, yet the Sheriff is to ſerve the Proceſs, and to make Return thereof.

9 *Co.* 69. ²

Dalt. Sb. 110.

Cro. Jac. 485.

A ſworn and known Officer, be he Sheriff, Under Sheriff, Bailiff or Serjeant, need not ſhew his Warrant or Writ when he cometh to ſerve it upon any Man's Perſon or Goods, although the Party demandeth it; but a ſpecial Bailiff muſt ſhew his Warrant if the Party demands it, otherwiſe he need not obey it; alſo ſuch known Officer upon the Arreſt ought to declare the Contents of his Warrant, at whoſe Suit he makes the Arreſt, out of what Court, when returnable; to the End that, if it be upon an Execution, he may pay the Money, and [ſo free his Perſon; or if on meſne Proceſs, that he may put in Bail, or agree with his Adverſary.

Dalt. Sb. 111.

(a) If in Truth

a Writ was

ſued out, and

the Sheriff

had made his

If any Officer do arreſt a Man before that he (a) hath a Warrant, and afterwards doth procure a Warrant, or a Warrant cometh to him to arreſt the Party for the ſame Cauſe, yet the firſt Arreſt was wrong-ful, and the Party grieved may have his Action of falſe Impriſonment,

Warrant before the Writ came to his Hands, this hath been held well. 2 *Lev.* 19. 1 *Saund.* 298.— But now by the 6 *Geo.* 1. *cap.* 21. it is enacted, That no High Sheriff, &c. ſhall make out any Warrant before they have in their Cuſtody the Writs upon which ſuch Warrants ought to iſſue, on Forfeiture of 10 *l.*

And as the Sheriff cannot arrest before the Writ issues, or make his Warrant before it comes to his Hands, it hath also been adjudged that he cannot execute it after the Return, not even the very next Day after, and before the *Quarto die post*.

1 Sid. 229.
Ellis v. Jackson.

2. Of his raising the *Posse Comitatus*.

By the Common Law the Sheriff may raise the *Posse Comitatus* or Power of the County, that is, such a Number of Men as are necessary for his Assistance in the Execution of the King's Writs, Quelling of Riots, Apprehending Traitors, Robbers, &c. and herein every Person above the Age of Fifteen, not aged nor decrepit, is bound to be aiding, and (a) if they refuse to assist, may be punished by Fine and Imprisonment.

Flet. lib. 2. cap. 62.
BRACT. lib. 5. Lamb. 157.
2 Inst. 193.
453.
(a) The Statute 2 H. 5. cap. 8. in-

dicteth both Fine and Imprisonment upon such as shall not aid the Sheriff, they being thereunto required. *Dalt. Sh. 356.*

This Power is not only allowed the Sheriff, but likewise is given to his Bailiff or other Minister of Justice, having the Execution of the King's Writs, and being resisted in endeavouring to execute the same, may lawfully raise such a Force as may effectually enable them to overpower any such Resistance; also a Constable, or even a private Person, may assemble a competent Number of People, in order, with Force, to suppress Rebels or Enemies, or Rioters, and afterwards with such Force actually to suppress them; so a Justice of Peace, who has just Cause to fear a violent Resistance, may raise the *Posse* in order to remove a Force in making an Entry into, or detaining of Lands.

Dalt. Sh. 354.
And. 67.
Popb. 121.
Moor 656.
2 Inst. 193.

But notwithstanding what was allowed and enjoined herein by the Common Law, it was thought necessary by (b) positive Laws to remedy the great Inconveniency which there was in ancient Times by the Resistance given to the Kings's Writs, and therefore the Statute (c) *Westm. 2. cap. 39.* enacts as follows: *Multoties etiam falsum dant responsum mandando, quod non poterunt exequi preceptum regis propter resistenciam potestatis alicujus magnatis. De quo caveat Vic' de caetero, quia hujusmodi responsa multum redundant in dedecus domini regis et coronae suae, et quam cito sub-ballivi sui testificentur quod invenerunt humo'i resistenciam statim omnibus omissis assumpt' secum Posse comitat' sui eat in propria persona sua ad faciend' execution', et si inveniat, &c.*

(b) By *Westm.* 1. cap. 17. if a Distress be impounded in a Castle or Fortres, and detained, the Sheriff or Bailiff taking with him the Power of the Shire, &c. may cause the said Castle or

Fortres to be beaten down. *Dalt. Sh. 354.* (c) The original Commitment for Contempt seems to be derived from this Statute; for since the Sheriff was to commit those who resisted the Process, the Judges that awarded such Process must have the same Authority to vindicate it. Hence, if any one offers any Contempt to this Process, either by Word or Deed, he is subject to commitment during Pleasure, viz. *Aqua non de-liberetur sine speciali precepto domini regis*; so that notwithstanding the Statute of *Magna Charta*, that none are to be imprisoned *Sine judicio parium, vel per legem terrae*, this is one Part of the Law of the Land to commit for Contempts, and confirmed by this Statute.

The Words of this Statute have been construed to extend to Executions only, and not to Writs on mesne Process; and that the Sheriff was not obliged to raise the *Posse Comitatus* where the Party was bailable, for that it cannot be presumed that in such Cases the King's Writ will be disobeyed.

1 Rol. Abr. 807. May v. Proby.
1 Rol. Ref. 388; 440.
and Cro. Jac. 419. S. C.

adjudged, and agreed *per Cur.* that though the Sheriff was not obliged, that yet he may take his *Posse* to serve mesne Process. *Cro. Eliz. 868. Noy 40. Moor 852. 3 Bull. 198. 2 Lev. 144. 3 Lev. 46. S.P.*

Upon a Writ of Seisin the Sheriff returned that he could not deliver Seisin for Resistance, and for that the Sheriff did not take the Power of the County according to the Statute, he was amerced 20 Marks.

Fitz. Execut. 147.
Dalt. Sh. 354.

- Dalt. Sh.* 355. So in a Replevin, if the Sheriff return that the Cattle are in a Fort or Castle, so as he cannot make Deliverance, he shall be amerced.
- Dalt. Sh.* 355. A Man demands the Peace in Chancery against a great Lord, and hath a *Supplicavit* directed to the Sheriff, &c. there, if need be, the Sheriff may take the *Posse* to aid him to arrest such Lord.
- Dalt. Sh.* 355. The Sheriff, if need be, may raise the Power of the County to assist him in the Execution of a Precept of Restitution; and therefore if he make a Return thereto, that he could not make a Restitution by Reason of Resistance, he shall be amerced.
- Lamb.* 157. But though it be the Duty of a Sheriff or other Minister of Justice, having the Execution of the King's Writs, and being resisted in endeavouring to execute the same, to raise such a Power as may effectually enable them to over-power any such Resistance; yet it is said not to be lawful for them to raise a Force for the Execution of a Civil Process unless they find a Resistance, and it is certain that they are highly punishable for using any needless Outrage or Violence therein.
- 3 Inst.* 16r. *2 Inst.* 193. *Hob.* 62, 264. *Vide Tit. Attachment.*

3. Of his breaking open Doors.

- 5 Co.* 91. Regularly the Sheriff cannot in executing a Writ break open the Door of a Dwelling-house; this Privilege, which the Law allows to a Man's Habitation, arises from the great Regard the Law has to every Man's Safety and Quiet, and therefore protects them from those Inconveniencies which must necessarily attend an unlimited Power in the Sheriff and his Officers in this Respect; and hence it is that every Man's House is called his Castle.
- Semain's Case.* *3 Inst.* 162. *Dalt. Sh.* 350. And therefore upon a *Capias*, *Fieri Facias*, or other Process at the Suit of a common Person, the Sheriff after Request to open the Doors, and Denial, cannot (a) break the House of the Defendant, and that in such Case the Sheriff would be a Trespasser, though the Execution would be (b) good.
- 5 Co.* 92. b. *Cro. Eliz.* 909. *Moor* 668. *Yelv.* 28. *March.* 4. *Cro. Car.* 537. *1 Jon.* 430. *1 Bulst.* 46. (a) Cannot open a Latch. *Dalt.* 350.—Where the Door was a little opened to see who was there, and the Bailiffs rushed in with drawn Swords. *Hob.* 62. *et vide Hob.* 263, 264. (b) But it seems to be the modern Practice in some Cases, on Complaint by Affidavit, to discharge such Execution, and to grant an Attachment against the Officer.
- 5 Co.* 91. But notwithstanding this general Rule, yet in all Cases where the King is Party, if the Door be not open, the Sheriff may break the Door of the Party, either to take him, or to execute the Process, if he cannot otherwise enter therein; but before he enters he ought to signify the Cause of his coming, and make Request to have the Door opened.
- 27 Aff.* 35. *12 Co.* 131. *Moor* 606. *Crom.* 170. Upon a *Capias* grounded upon an Indictment for any Crime whatsoever, or upon a *Capias* from the King's Bench or Chancery, to compel a Man to find Sureties for the Peace or good Behaviour, or even upon a Warrant from a Justice of Peace, for such Purpose the Officer, may break open the Door of a Dwelling-house.
- Goult.* 179. *4 Leon.* 41. *Dalt. Sh. cap.* *94. Moor* 609. *Cro. Eliz.* 908. *Yelv.* 28. (a) Though on mesne Process, and at the Suit of the Subject; whatsoever.
- 2 Jon.* 233. So upon the Warrant of a Justice of Peace for the levying of a Forfeiture in Execution of a Judgment or Conviction for it; grounded on any Statute, which gives the whole, or but Part of such Forfeiture, to the King, and authorizes the Justice of Peace to give such Judgment or Conviction for it.

So where a forcible Entry or Detainer is either found by Inquisition *Dalt. Sh. 353.* before Justices of Peace, or appears upon their View.

So upon (a) a Commission of Rebellion out of Chancery, the Sheriff or his Officers, or the Commissioners, may break open the Doors or House to apprehend the Party, whether it be his own House or that of a Stranger, if upon Request such House is refused to be opened. *Dalt. Sh. 353. Crom. 47.*

Contempt, &c. issuing out of Chancery; it is said the Officer cannot break open the Door; but *Quere. Dalt. Sh. 353.*

So in the Execution of a Commission of Bankruptcy, the Commissioners or any Officer deputed by them, may break open the Houses, Chambers, Shops, Warehouses, Doors, Trunks or Chests of the said Bankrupt, wherein the said Bankrupt or any of his Goods or Estate shall be, or reputed to be. *21 Jac. 1. cap. 19. Dalt. Sh. 355.*

By the 3 & 4 Jac. 1. cap. 35. it is enacted, 'That upon any lawful Writ, Warrant or Process awarded to any Sheriff or other Officer for the taking of any Popish Recusant standing (b) excommunicated for such Recusancy, it shall be lawful, if need be, to break open any House.' *(b) Cannot otherwise break open a Door on an*

Excommunicato Capiendo. Cro. Eliz. 747.

Where one, known to have committed a Treason or Felony, or to have given another a dangerous Wound, is pursued either with or without a Warrant by a Constable or private Person, it is lawful to break open Doors in order to apprehend him; but where one lies under a probable Suspicion only, and is not indicted, it seems the better Opinion at this Day, that no one can justify the Breaking open Doors in order to apprehend him. *2 Hawk. P. C. 86. and the Authorities there cited.*

It is said to have been resolved, that where Justices of the Peace are by Virtue of a Statute authorized to require Persons to come before them to take certain Oaths prescribed by such Statute, the Officer cannot lawfully break open the Doors of the Persons who shall be named in any Warrant made in Pursuance of such Statute, in order to be brought before the Justices to take such Oath, because such Warrant is not (c) grounded upon a precedent Offence, neither doth it appear that the Party either is or will be guilty of any. *2 Hawk. P. C. 87.*

Justice of Peace, if not for Felony or Suspicion thereof, the Officer cannot break open the Door. *(c) Upon the ordinary Warrant of a Justice. Bull. 146.*

This Privilege of a Man's House extends only to the (d) Owner, but shall not protect any Person who flies thither, nor the Goods of any Person conveyed thither to prevent a lawful Execution; and therefore if a *Fi. Fa.* be directed to the Sheriff to levy the Goods of A. and it happens that A.'s Goods are in the House of B. if after Request made by the Sheriff to B. to deliver these Goods, he refuses, the Sheriff may well justify the Breaking and Entering his House. *5 Co. 93. a. 1 Sid. 186. (d) That is, for such Person who lies there. Hob. 62.*

In a Writ of Seisin or *Habere Factas Possessionem* in Ejectment, the Sheriff may justify the Breaking open the Door, if he be denied Entrance by the Tenant; for the End of the Writ being to give the Party full and actual Possession, consequently the Sheriff must have all Power necessary for this End; besides, in this Case the Law does not lock upon the House as belonging to the Tenant, but to him who has recovered. *5 Co. in Seimaine's Case.*

Also this Privilege extends to a Man's Dwelling-house or Out-house adjoining thereto; and therefore it hath been adjudged, that the Sheriff on a *Fi. Fa.* may break open the Door of a Barn standing at a Distance from the Dwelling-house, without requesting the Owner to open the Door, in the same Manner as he may enter a Close, &c. *1 Sid. 186. 1 Keb. 698. Penton v. Browne.*

So

So on a *Fi. Fa.* when the Sheriff or his Officers are once in the House, they may break open any (a) Chamber Door or Trunks for the completing the Execution.

¹ *Brownl.* 50.
² *Sbonv.* 87.
Comb. 17,
327.
(a) That this must be after Request and Refusal. *Palm.* 54.

Cro. Jac. 555.
¹ *Rol. Rep.*
132.
Palm. 52.
White v.
Whitshire. So if the Sheriff's Bailiffs enter the House, the Door being open, and the Owner locks them in, the Sheriff may justify Breaking open the Door for the enlarging and setting at Liberty the Bailiffs; for if in this Case he were obliged to stay 'till he could procure a *Homine Replegiando*; it might be highly inconvenient; also it seems, that in this Case the Locking in the Bailiffs is such a Disturbance to the Execution, that the Court will grant an Attachment for it.

¹ *Rol. Rep.*
138.
Palm. 54.
6 Mod. 173. So if one be arrested, and after escapes into his House, the Sheriff may break the Doors to take him, as where one opened his Casement, and the Sheriff took him by the Hand, &c.

Bro. False Imprisonment 6.
Crom. 170. So where an Affray is made in an House in the View or Hearing of a Constable, or where those who have made an Affray in his Presence fly to a House, and are immediately pursued by him, and he is not suffered to enter in order to suppress the Affray, in the first Case, or to apprehend the Affrayers, in either Case he may break open the Doors.

4. Whether he can execute his Writ on a Sunday.

This depends on the Statute 29 *Car. 2. cap. 7. §. 6.* by which it is enacted, 'That no Person 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 and 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.'

⁵ *Mod.* 449.
Carth. 504.
S. C. In the Construction hereof it hath been holden, That a Citation out of the Spiritual Court may be served on a *Sunday*, by fixing the same to the Church Door, and that the general Words of this Statute do not extend to such Process.

Salk. 626.
Parker v. Sir William Moor.
⁶ *Mod.* 95.
S. C. It hath been adjudged, that a Person may be taken on an Escape Warrant on a *Sunday*, because in Nature of fresh Pursuit, which may be on a *Sunday*, and this only in Nature of it, though it be by a new Method; and this is no original Process, but the Party is in still upon the old Commitment continued down.

² *Saund.* 290.
¹ *Vent.* 107.
² *Keb.* 731. That no Indictment can be taken on a *Sunday*; and hence 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*.

¹ *Hawk. P.C.*
86. As this Statute makes all Arrests unlawful, it seems the better Opinion, that the killing an Officer who endeavours to arrest a Person on a *Sunday* is not Murder, though it had been otherwise, had such publick Officer been killed on an ordinary Day.

Salk. 78.
⁵ *Mod.* 95. That the Arrest is void, so that the Party may have an Action of false Imprisonment.

⁶ *Mod.* 95. Also the Court will relieve on Motion, and discharge from such Arrest without putting the Party to his *Audita Querela*.

5. In what Manner he is to do Execution.

The Sheriff in doing Execution must be careful that he observes the Direction of the Writ, which is his Authority, as in executing a *Fi. Fa.* or *Levari Fa.* by the first of which the Goods and Chattels of the Debtor only can be taken in Execution; and though by the latter the Sheriff may not only sell the Goods, but also collect the Debt out of the Profits of the Land, as Corn or Grass growing thereon, yet in neither Case has he Authority to meddle with the Debtor's Lands, so as to sell or deliver such Lands to the Creditor in Satisfaction of his Debt.

And as he has not by these Writs a Power to dispose of the Freehold or Inheritance, hence it hath been adjudged, that the Sheriff cannot deliver a Furnace annexed to a Freehold in Execution, though the Writ gives the Sheriff Authority to levy the Debt upon the Goods and Chattels of the Debtor; and this is indeed a Chattel, yet they do not give the Sheriff any Authority to break or disunite any Thing from the Freehold, which he cannot do unless particularly impowered by Writ.

But it hath been held, that if a Soap-Boiler or other Trader, being an Undertenant, for the Convenience of his Trade puts up Fats, Cop-pers, Tables, Partitions, and paves the Backside, &c. upon a *Fi. Fa.* against him the Sheriff may take them in Execution, in the like Manner as the Lessee himself might have removed them during the Term.

Otherwise where such Trader makes Hearths and Chimney-pieces to compleat the House, and not for the Conveniency of his Trade.

The Sheriff on a *Fi. Fa.* or *Lev. Fa.* cannot sell an Estate for (a) Life, which being a Freehold, can no more be affected by these Writs than any Estate of Inheritance.

the Statute 29 Car. 2. an Estate *pur auter vie* may be sold by the Sheriff on a *Fi. Fa.*

On these Writs the Sheriff may (b) dispose of Leases for Years, which are but Chattels, be they of ever so long Continuance; also upon an *Elegit* the Sheriff may either extend a Term for Years, that is, may deliver a Moiety thereof to the Plaintiff as Part of the Lands and Tenements of the Defendant, or may sell it absolutely as Part of his Personal Estate.

of a House, he cannot turn the Lessee out of Possession, but the Vendee in such Case must bring his Ejectment.

If a Sheriff, reciting that the Defendant hath a Term for Years, sells it by Virtue of a *Fi. Fa.* this Sale is good; for it cannot be intended that the Sheriff should certainly know the Beginning and End of the Term.

But if undertaking to recite it he mistakes, and sells the said Term, it is a void Sale, unless there be general Words, all the Interest, &c. of the Defendant therein.

But a Term cannot be extended without shewing the Certainty thereof, because after the Debt paid the Party is to have his Term again if any Part thereof remains.

Upon an *Elegit* the Sheriff is to impanel a Jury, who are (c) to make Inquiry of all the Goods and Chattels of the Debtor, and to

VOL. IV.

6 A

appraise

Inquest, for the Words of the Statute are *per rationabile pretium et extentum*, which must be found such by the Oaths of twelve Men.

3 Co. 11.
Co. L. 290. 3.
2 Inst. 453.
Plox. d. 441.
Finch 101.
Godb. 290.
Comb. 470.

Owen 70.
1 Rol. Abr. 891.
Off. of Ex 87.

Salk. 368.
per Holt. Ch. Just. at the Nisi Prius.

Salk. 368.
per Holt.

Dalt. Sh. 145.
3 Co. 13.

(a) But it is said, that since Comb. 391.

4 Co. 74.
Dalt. Sh. 137.
8 Co. 171.
2 Inst. 395.
(b) But if a Sheriff on a *Fi. Fa.* sells a Lease or Term

Cro. Eliz. 584.
4 Co. 74.
Palmer's Case.

4 Co. 74. a.

4 Co. 74. a.

(c) It cannot be done by the Sheriff without an

2 Inst. 396. Co. Lit. 389. Dyer 100. 5 Co. 74.

appraise the same, and also to inquire as to his Lands and Tenements; and upon such Inquisition the Sheriff is to deliver all the Goods and Chattels, (except Beasts of the Plow) and a Moiety of the Lands, to the Party, and return his Writ, in order to record his Inquisition in that Court, out of which the *Elegit* issued.

And although the Creditor takes out an *Elegit*, yet if it appears to the Sheriff that there are Goods and Chattels sufficient of the Debtor's executed upon to satisfy the Debt, he ought not to extend the Lands.
 2 *Inst.* 395.—
 But an *Elegit* executed upon Goods only is not a *Fi. Fa.* for a *Fi. Fa.* is executed by Sale by the Sheriff, but the *Elegit* by the Appraisement of the Goods by the Jury, and Delivery to the Party. 1 *Sid.* 184. 1 *Lev.* 92. 1 *Keb.* 105.

Cro. Car. 319. When the Jury have found the Seisin and Value of the Land, the Sheriff, and not the Jury, is to set out and deliver a Moiety thereof (a) If upon an *Elegit* the Sheriff delivereth a Moiety of an House without Metes and Bounds, such Return is ill, and shall be quashed for Incertainty. *Carth.* 453. *per Holt.*

Elegit the Sheriff delivereth a Moiety of an House without Metes and Bounds, such Return is ill, and shall be quashed for Incertainty. *Carth.* 453. *per Holt.*

1 *Lev.* 160.
 1 *Sid.* 239. If the Sheriff on an Inquisition upon an *Elegit* returns the Defendant to have twenty Acres in *Dale*, and twenty Acres in *Sale*, and delivers the twenty Acres in *Sale* for the Moiety of the whole, all is void, for he ought to deliver a Moiety of the twenty Acres in each Vill; and this may be avoided in Evidence in Ejectment brought for the Lands.

Moor 32. *pl.* 104. The Sheriff on an *Elegit* may extend a (b) Rent-Charge; for the Word *Land*, which is made subject to the Execution, includes all Hereditaments extendible; and in this Case the Party may distrain and avow for the Rent though the Tenant never attorned; for the Law creating his Estate, gives him all Means necessary for the Enjoyment of it.
 (b) But not a Rent Seck. *Cro. Eliz.* 656.—
 Nor can the Office of Frazier be extended, for a Man shall not have Execution of that which he cannot assign, though he may of this have an Assise, *ut de libero Tenemento.* *Dyer* 7. *pl.* 10.

(c) *Hob.* 47. Lands in (c) Antient 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; (d) but the Statute of *Westm.* 2. which gives the *Elegit*, extends not to Copyhold Lands, for then the Lord would have Tenant brought in upon him without his Admittance or Consent.
 4 *Inst.* 270.
 2 *Inst.* 397.
Moor 211.
pl. 351.
 1 *Brocwnl.* 234.

(d) 3 *Co.* 9.
Co. Cop. 149.
Salk. 368. If one be Tenant for Years without Impeachment of Waste, and a *Fi. Fa.* comes out against him, the Sheriff cannot cut down and sell Timber; for the Tenant had only a Power so to do, and no Interest, as he hath in standing Corn, which upon a *Fi. Fa.* against him the Sheriff may sell.

Dalt. Sb. 254. Upon the Writs of *Habere Facias Seisnam* and *Possessionem*, the Seisin or Possession is usually performed by the Sheriff by delivering the Party, who recovers, a Twig, Bough, Clod, &c. of the Land, or if it be of an House, by the Delivery of the Ring of the Door, &c.
Bro. Seisin 7,
 14, 30.

But though this Ceremony be used, yet it is held, that in (e) all Cases where the Writ demands Land, Rent or other Thing in certain, the Demandant after Judgment may enter or distrain before any Seisin delivered him by the Sheriff.
Co. Lit. 34. *b.*
 (e) Upon a Recovery of a Reversion, Common, &c.

that lie in Grant, the Recoveror is not in Possession 'till Execution, Entry or Claim. 1 *Co.* 91. *b.* 97. *b.* 106. *b.* *Moor* 141. *Kelw.* 108.

But in (a) Dower, where the Writ demands nothing in certain, the Demandant after Judgment cannot enter or distrain 'till Execution sued, upon which the Sheriff delivers the third Part in certain. So where the Wife of one Tenant in Common demands the third Part of a Moiety, she cannot after Judgment enter 'till the Sheriff hath delivered her the third Part, though it is thereby reduced to no more Certainty than it was.

Co. Lit. 34. b.
(a) In Dower the Writ was *de tertia parte rectoria de D.* and upon that the grand Cape issued, *Cape in manum nostram*

tertiam partem rectorie, by Colour of which the Sheriff took the Tithes severed from the nine Parts, and carried them away with him; and it was agreed by the Justices, that the same is not such a Seizure as is intended by the said Writ, but the Sheriff by Virtue of such Writ ought generally to seize, but leave them where he found them; and the Court was in Opinion to commit the Sheriff for such his Misdemeanor, 1 Leon. 92.

Where the Execution is in the Generality without mentioning any Thing in particular, the Sheriff is to make Execution of the right Thing at his Peril, otherwise he will be a Disseisor, for he is bound to take Notice thereof, and he hath no Warrant from the Court but to make Execution of the right Thing.

1 Rol. Abr. 664.

A. and B. Tenants in Common of a Manor, A. purchases several Freeholds that lay so mixed with the Demesne Lands of the Manor, that they could hardly be distinguished from them; B. brings a Writ of Partition of the Manor only; and it was adjudged that Partition should be made, and a Writ awarded accordingly; upon the Execution of which Writ A. comes to the Sheriff and Inquest, and acquaints them with the Purchase of the Freeholds that are not Parcel of the Manor, and bids them take care how they make Partition of all the Lands within such a Compass, lest they offer Violence to their Consciences, but does not shew them the Freeholds distinctly, nor the Limits of the Manor; which obliged the Sheriff to adjourn to a certain Day; on which one of the Inquest made Default, and thereupon the Sheriff returns a Fine of 40 s. with an Account of the Difficulties they met with, *et alterius propter brevitatem temporis breve illud exequi non potuit*. It was held, that A. ought to shew the Bounds of the several Freeholds that he purchased, or the Number of the Acres; but if no Light or Evidence is given by either Party to the Inquest, and they make Partition *de tanto quantum præsimitur et dignoscitur per præsumptiones*, it is good, for they are under an Obligation to execute the Commands of the Court at their Peril.

Dyer 265. p. 5.
Dalt. Sb 265.

The Sheriff in executing a *Fi. Fa.* or *Levari Fa.* must be careful that the absolute Property of the Goods be in the Debtor; and therefore if the Sheriff takes the Goods of a Stranger, though the Plaintiff assures him they are the Defendant's, he is a Trespasser, for he is obliged at his Peril to take Notice whose the Goods are, and for that Purpose may impanel a Jury to inquire in whom the Property of the Goods is vested; and this it is (b) said shall excuse him in an Action of Trespass.

Kelw. 119.
Bro. Tit. Tresp. p. 99.

(b) Dalt. Sb. 146.

The Sheriff cannot take in Execution Goods pawned or gaged for Debt, nor Goods demised or letten for Years, nor Goods distrained, (c) nor Goods before seized upon an Execution.

Bro. Pledges 28.
Cro. Car. 149.

893. (c) 1 Show. Rep. 174. — Unless such first Execution were by Fraud.

1 Rol. Abr. Farej. 37, 38.

Upon a *Levari Fa.* to levy the yearly Value of 55 l. found by Inquisition on an (d) Outlawry upon a Judgment in Debt, the Beasts of a Stranger *Levant* and *Couchant* on the Land may be taken, for they

1 Salk. 395.
5 Mod. 112.
Carth. 441.
Skin. 617.
are Comb. 434,
469. Brittoff

v. Cole. (d) But where on a *Fi. Fa.* out of the Exchequer for the Queen's Debt, the Sheriff took the Beasts of J. S. being *Levant* and *Couchant* on the Land of the Debtor, and sold them, this in an Action of Trespass was held not to be lawful; but it was held that they might have been distrained for the Queen's Debt. Cro. Eliz. 431. 1 Rol. Abr. 159. et vide Hard. 101.

are the Issues of the Land; and were it otherwise, it would be in the Power of the Party by agifting his Lands to defeat the King of the Benefit of the Outlawry.

Salk. 392. If there are two Coparceners of Goods, and a Judgment is given
1 Show. 173. against one of them, the Sheriff upon a *Fi. Fa.* upon this Judgment
Comb. 217. must seise all, because their Moieties are undivided; for if he seises
Heydon v. but a Moiety, and sells that, the other Coparcener will have a Right
Heydon. to a Moiety of that Moiety; but he must seise the whole, and sell a
 Moiety thereof undivided; so that the Vendee will be Tenant in
 Common with the other Partner.

Cro. Jac. 78. A Person had an Annuity for twenty-one Years granted by Queen
York v. Tavin. *Elizabeth*, payable by her Receiver of her Court of Wards, which
 upon a *Fi. Fa.* upon a Judgment against the Grantee was extended and
 sold; and it was resolved the Extent and Sale was good; for being an
 Annuity certain for Years certain, and payable by the Receiver, it is
 in Nature of a Rent-Charge for twenty-one Years, and is grantable
 over and vendible, and not like an Annuity which chargeth the Person
 only.

3 Co. 12. On a Writ of *Fi. Fa.* the whole Personal Estate is liable to Execution,
(a) Comb. except wearing Apparel; and it hath been held, that *(a)* if the Party
356. per Holt. hath two Gowns the Sheriff may sell one of them.

Cro. Eliz. 504. Upon a Writ of *Fi. Fa.* the Sheriff cannot *(b)* deliver the Goods of
Thomson v. the Defendant to the Plaintiff in Satisfaction of his Debt, but the
Clerk, ad- Goods are to be sold, and the Money in Strictness is to be *(c)* brought
judged. into Court.
Lutw. 589.

S. P.—Where

a Sheriff after a *Fi. Fa.* delivered to him pays the Plaintiff out of his own Money, it is made a Question by
Hobart, whether the Sheriff may levy the Money on the Defendant. *Hob.* 207. *(b)* Though they cannot
 be delivered to the Plaintiff, they may be sold to him. *Comb.* 452.—Admitted to be the Practice to
 make a Bill of Sale of the Goods to the Plaintiff. *Carth.* 419.—But the Sheriff, though he pays the
 Plaintiff out of his own proper Money, yet he cannot keep the Goods to his own Use, for the Authority
 by which he acted was to sell the Goods. *Noy* 107. *1 Lutw.* 589. *(c)* For it is not of Record without.
Godb. 147.—But the Law seems otherwise; for though the Writ be *ita quod habeas, &c.* yet the Sheriff
 may return that he hath paid the Money to the Plaintiff. *2 Show. Rep.* 87. *3 Lev.* 204.

Salk. 320. If two Writs of *Fi. Fa.* bear Teste the same Day, the Sheriff at
(d) By which Common Law, and now since the Statute *(d)* 29 *Car.* 2. is bound to
 it is enacted, execute that which was first delivered to him.
 that no *Fi. Fa.*
 or other Writ

of Execution shall bind the Property of the Goods, but from the Time such Writ shall be delivered to the
 Sheriff, Under Sheriff or Coroner to be executed; and for the Manifestation of the Time, the Sheriffs, &c.
 their Deputies and Agents, upon the Back of the said Writ shall indorse the Day and Year when received.
 —This must be intended as to Strangers who might have a Title to the Goods between the Teste
 of the Writ and Delivery thereof to the Sheriff, but as to the Party himself, his Executors and Administrators,
 the Goods since the Statute, as before, are bound from the Teste. *2 Vent.* 218. *Comb.* 33. *2 Show.* 485.
6 Mod. 225.

Salk. 320. Where since the Statute *A.* delivered a *Fi. Fa.* to the Sheriff at Nine
Smalcomb v. in the Morning, and after at Ten the same Day *B.* delivered another,
Buckingham. desiring him forthwith to execute it, which he did, and sold the Goods,
5 Mod. 376. and after executed *A.*'s *Fi. Fa.* on the same Goods, it was held the first
S. C. Execution was good, and *A.* had Remedy only by Action against the
Comb. 428. Sheriff.
S. C. and

Holt inclined

there should be no Fraction of a Day, and that the Sheriff had his Election, *Carth.* 419. *S. C.* the last
 bearing Teste first; and *per Holt*, where a *Fi. Fa.* is delivered the Sheriff To day and another To-morrow,
 and he executes the last first by making Sale of the Goods, such Sale will stand good, and he who delivered
 the first Writ hath Remedy only by Action against the Sheriff —But if two Writs are delivered the Sheriff
 the same Day, he ought to give Preference to that which was first delivered; but if he executes the last first, the
 Execution cannot be defeated by a subsequent Execution of the first, but the Party concerned in the first is
 put to his Action against the Sheriff.

But if *A.* when he delivered his Writ, had ordered the Sheriff to stay Execution till the next Day, he could have had no Action against the Sheriff. *Salk. 320.*

(O) Of his Duty in admitting Persons to Bail; and therein of Securities taken for Case and Favour.

THIS depends chiefly on the Statute 23 *H. 6. cap. 10.* before which the Sheriff was not obliged to take Bail, unless the Party sued out a Writ of Mainprize; but he might have taken Bail on his own Head, and if he had not the Body ready according to his Return, he was amerced, as he now is if the Plaintiff does not take an Assignment of the Bail-Bond. *Dalt. Sb. 356. et vide Head of Bail.*

This Statute hath been always deemed an excellent Law, as it frees Debtors and secures them from the Oppression of Sheriffs and their Officers, and at the same Time prevents such Officers from admitting Persons to Bail notailable by Law, to the Prejudice of just Creditors; and for this Purpose it is enacted, 'That Sheriffs, Under Sheriffs, and other Officers and Ministers, shall let out of Prison all Persons in their Custody by Force of any Writ, Bill or Warrant, in any Action Personal, or by Cause of Indictment of Trespafs, upon reasonable Surety of Persons having sufficient within the Counties to keep their Days, (Persons in Ward by Redemption, Execution, *Capias Utlagatum* or *Excommunicatum*, Surety of the Peace, and all Persons committed by special Commandment of any Justices except) and no Sheriff nor his Officers shall take any Obligation for any Cause aforesaid, or by Colour of their Office, but only to themselves, nor by any Person which shall be in their Ward by Course of Law, but upon the Name of their Office, and upon Condition written that the said Prisoners shall appear at the Day contained in the Writs, Bill or Warrant; and if any Sheriffs or Officers aforesaid take any Obligation in other Form by Colour of their Office, it shall be void.— And all Sheriffs, &c. who (a) do contrary to this Ordinance, shall lose to the Party grieved his treble Damages, and shall forfeit 40 *l.*' *Plowd. 67; (a) Cro. Eliz. 76, 77.*

On the first Branch of this Statute it hath been adjudged and admitted in Variety of Books and Cases, that the Sheriff is obliged, in such Cases not excepted by the Statute, to admit the Party to Bail, and that if he refuses, an Action lies against him by the Party injured. *Dalt. Sb. 356. and the Authorities infra.*

And as he is obliged to admit the Party to Bail, hence also it hath been adjudged, that if the Sheriff return (b) *Cepi* on mesne Process, *et paratum habeo*, no (c) Action lies against him, nor will the Court grant an Attachment in such Case against the Sheriff where he had bailed the Party, for this he was obliged to do by the Statute; and therefore if he is mistaken in his Sureties, he is not to suffer in his Liberty. So (d) if the Sheriff return *Languidus* where he admitted the Party to Bail, no Action lies against him. *1 Rol. Abr. 93. Cro. Eliz. 852. Noy 39. S. C. Bowles v. Laffels. (b) For the Return in Effect and Construction of*

Law is true. 2 *Mod. 83.* 1 *Mod. 244.* (c) But in this Case the Defendant must not demur to the Declaration, but must plead the Statute. *Moor 428. pl. 596. Cro. Eliz. 400. 2 Keb. 591. 1 Sid. 439. 1 Mod. 57. 1 Vent. 85. 2 Saund. 155.*—or upon Not guilty may give it in Evidence. 1 *Sid. 439. 1 Mod. 58. 1 Vent. 85. (d) Noy 39. Cro. Eliz. 852.*

1 *Rel. Abr.*
807.

But 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 lies against him for the false Return.

1 *Vent.* 85.
1 *Salk.* 99.
6 *Mod.* 122.
2 *Saund.* 59.

The Party, at whose Suit the Arrest was, may either take an Assignment of the Bail-Bond, (which he may now sue in his own Name) or if he dislikes the Security, he may still move to amerce the Sheriff; for the Sheriff having returned a *Cepi Corpus*, it's a Breach of Duty in him not to bring him in according to his Return, for which the Court amerces him as one of their Officers who has been disobedient to their Writ, and because the Disobedience is to the Writ which is returned and filed, the Court amerces him, because it appears on Record he has disobeyed the King's Writ; 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; but if it be in another Term, then there must be a *Habeas Corpus* upon a *Cepi* returned, because the Sheriff might be prepared to have him according to his Writ the first Term; but not being required to have him in Court the second Term, an *Habeas Corpus* is necessary, and the Sheriff on this Writ must return the Body, or a *Languidus*, or a *Mortuus*, or else he will be amerced.

Cro. Eliz. 808.
adjudged in
Sir William
Drury's Case.
Jac. 286.

If a Sheriff takes an Obligation with (a) one Surety only, it is good enough, and not void by the Statute.

10 *Co.* 100. S. C. cited. (a) May take one, two or more, according to his Discretion. *Cro.*

Cro. Eliz. 808.
Sir George
Clifton v.
Web.
2 *And.* 175.
Moor 636.
Cro. Eliz. 862.
Like Point ad-
judged be-
tween *Cotton*
v. Vale.

So in Debt upon an Obligation conditioned for the Appearance of one arrested on a *Capias*, the Defendant pleaded that the Plaintiff took the Obligation from him and a Stranger who had nothing, and who did not inhabit within the County, and pleaded the Statute 23 H. 6. and insisted that for this Cause the Obligation was void; but upon Demurrer to this Plea it was held, that this Statute was made for the Ease of the Party to prevent Oppression, and the Sheriffs insisting upon unreasonable Securities; but that it did not alter the Law as to the Matter of those Securities, which the Sheriff was still at Liberty to take in what Manner he pleased, so that he did not vary from the Manner prescribed by the Statute, or make them oppressive to the Party; and here his Taking the Security in a less strict Manner than he might have insisted upon, can be no Foundation for the Party to make it void.

Cro. Eliz. 862.
That it be
made to him
only by the
Name of his
Office, and

ought to express the Day and Place of the Party's Appearance; and these Circumstances being observed, although it be variant in others, it is not material. *Cro. Jac.* 286. and *Dyer* 119. S. P.

Noy 69.
Turverner's
Case.

An Obligation made to a Deputy of a Bailiff of a Franchise, or to an Under Sheriff's Deputy, is void by the 23 H. 6. for it ought to be in the Name of the Bailiff or Sheriff himself.

Plowd. 67.
Dive v. Ma-
ningham's
Case.

The Condition of an Obligation to save the Sheriff harmless on his admitting Persons to Bail who are notailable by Law, is void by the Common Law.

10 *Co.* 100. b. S. C. cited.

If the Sheriff, for the Ease and Inlargement of a Prisoner, takes a Promise to save him harmless, this is within the Statute, being within the same Mischief, though the Statute speaks only of Bonds; also such Promise is void by the Common Law. 10 Co. 101.

On an Attachment for a Contempt the Sheriff cannot take Bail, and such Contempts are only bailable by the Judges of the Court from whence the Process issued, being in Nature of Executions; but on an Attachment out of Chancery, for want of an Answer, the Sheriff may take bail, being only Attachments of Process; and herein it seems settled, that if the Sheriff take one upon an Attachment in Process, he is to give a Bond of 40 l. Penalty to the Sheriff to appear and answer; but for one taken up in Execution after a Decree, the Sheriff may insist on Security proportionable to the Duty; but in both Cases, on the Register's Certificate that the Party has appeared, the Sheriff is to deliver up the Bond. Mich. 9 Geo. 2.
The King v.
Baskerville,
Sheriff of
Shropshire; et
vide 2 Salk.
608.
Stil. 234.
Abr. Caf. Eq.
351.

An Obligation taken by the Sheriff of one arrested by Virtue of an Attachment under the Privy Seal of the Court of Requests, was held not to be within the Statute; but it was held that such Bond was voidable by Durefs, such Court not having Jurisdiction to issue such Process, and consequently could be no Warrant to the Sheriff to take the Body nor the Obligation; but it was admitted in this Case, that the Sheriff ought to obey the Process out of the Court of Wards and Dutchy Court. Cro. Eliz.
646 Stepney
v. Loyd; et
vide 2 And.
122. S. C.

So if one be arrested in one County, and is carried by the Bailiff into another, where he gives Bond to the Sheriff of the County where the Arrest was, although this is not void within the Statute, yet the Party may avoid it for Durefs; but then he must plead such Durefs, and rely on it. Cro. Eliz.
745. Brown
v. Adams.

A Bond to the Sheriff, that the Party on a *Fi. Fa.* will pay the Money into Court at the Return of the Writ, is not within the Statute, because the Statute extends to Obligations made by Persons in Custody, nor is such Obligation void (a) by the Common Law. 10 Co. 99 b.
Beawfage's
Case.
(a) If one
taken on a

Capias ad Satisfaciendum at the Suit of A. assigns a Mortgage to the Under Sheriff for securing the Money to him at a certain Day, and is thereupon discharged, and after a new Sheriff made he pays the Money to the Under Sheriff, who re assigns the Mortgage, yet this shall not excuse the Escape, for the Sheriff had no Power to take Security, or even the Money. *Lutw.* 588, 599. But for this *vide Cro. Eliz.* 404. *1 Mod.* 194. *2 Jon.* 97. *2 Lev.* 203. *3 Keb.* 748. *2 Show.* 139.

An Obligation taken by the Sheriff *pro solutione pecuniæ debitæ* (b) *Dominæ Regiæ*, on an Extent out of the Exchequer, is not within the Statute. 10 Co. 100. a.
(b) That the
King is not
bound by the
Statute. *Dyer* 119. *5 Co. Whelpdale's Case.*

On an Indictment of Trespafs, in which the Sheriff is obliged by the Statute to admit to Bail, yet if the Bond is taken in (c) another's Name, it is void, as varying from the Form prescribed by the Statute, which requires that it should be in the Sheriff's own Name. 10 Co. 100. b.
(c) If the She-
riff takes Bond
in another's
Name to elude
the Statute, such Bond is void. *2 Mod.* 305.

But where in Debt on an Obligation the Defendant craved Oyer of the Condition, which was, that if another Person (who was arrested at the Suit of the Plaintiff, and for whom the Defendant was now bound) should give Security, as the Plaintiff should approve of, for the Payment of 90 l. to him, or should render his Body to Prison at the Return of the Writ, then the Obligation to be void; this Statute was pleaded, but adjudged not to be within the Statute. 2 Mod. 304,
305. *Hall*
v. Carter.

So if a *Capias* be taken out against the Defendant, and a third Person gives the Plaintiff a Bond that the Defendant shall pay the Money, 2 Jon. 95.
2 Mod. 305;
or cited.

or render himself at the Return of the Writ, 'tis a good Bond, and not within the Statute, because it is not by the Direction of the Officer, but by the Agreement of the Plaintiff; and there is no Law that makes the Agreement of the (a) Parties void; and if the Bond was not taken by such Agreement, it might have been traversed.

(a) The Statute doth not extend to a Bond given to the Plaintiff himself. *Allen* 58.

Hard. 464. Bond taken by the (b) Serjeant at Arms attending the House of Commons not within the Statute, but being for Ease and Favour is void by the Common Law.

(b) Bond taken by the Marshal of the Queen's Bench for the Easement or Delivery of a Prisoner in Execution, is void by the Statute, although he be not named in the Statute. *Cro. Eliz.* 66. 3 *Keb.* 71. S. P. — But a Bond to the Serjeant at Arms attending upon the President and Council of the Marches of Wales is not within the Statute. *Cro. Car.* 309. *Johns v. Stratford.*

2 *Leon.* 119. If A. be taken on a *Capias Satisfaciendum*, and escapes, and is after retaken, and for his Inlargement gives a Bond to the Gaoler, this is within the Statute.

If a *Capias* be awarded against B. and (c) before the Arrest the Sheriff takes an Obligation of him for his Inlargement, this, by special Pleading, may be avoided by Force of the Statute 23 H. 6.

(c) So if after the Return. 1 *Sid.* 301.

1 *Vent.* 237. If the Condition of a Bond be to be a true Prisoner, and (d) to pay so much by the Week for Chamber Rent, this is void by the Statute; but *Hale* said, that a Bond for true Imprisonment is good *prima facie*, but that the Defendant may (e) aver that it was also for Ease and Favour, that the Party shall be a true Prisoner, that he shall pay for his Meat and Drink, this makes the Obligation void. 10 *Co.* 100. b. (e) If the Obligation be for the Payment of Money generally, yet the Defendant may aver that it was for Ease and Favour, in the same Manner as an Obligor may in the Case of Simony or Usury. *Carth.* 301. *Hard.* 464.

Hob. 14. If a Sheriff take a Bond for a Point against Law, and also for a due Debt, the whole Bond is void; for the Letter of the Statute of 23 H. 6. is so; and a Statute is a strict Law; but the Common Law doth divide according to common Reason, and having made that void, that is against Reason, lets the rest stand.

It is now (f) settled, that though the Statute makes such Bonds void, yet are they not *ipso facto* so, but must be avoided by special Pleading.

(f) It was formerly held by *Roll* and *Glin* that it was a general Law, of which the Judges were to take Notice *ex officio*, but since held otherwise. 1 *Lev.* 86.

Allen 58. The Defendant pleaded the Statute of 23 H. 6. and that he was attached and in Custody, and that the Bond was made for his Inlargement, and so not his Deed; whereupon the Plaintiff demurred specially upon the Conclusion of the Plea, which ought to be, Judgment *si actio, &c.* and therefore the Plea naught; and it was so agreed by the Court.

Cro. Eliz. 103. In pleading this Statute the Defendant must recite it truly.

1 *Sid.* 356.

Simony.

SIMONY, so called from *Simon Magus*, is the buying or selling Holy Orders, or some Ecclesiastical Benefice. An Ecclesiastical Benefice in the larger Sense of it, in which it is here used, comprehends not only parochial Benefices, but all Ecclesiastical Dignities, and Promotions. As by this Offence worthy and learned Men are kept out of the Church, and a Door is, to the great Scandal of Religion and Prejudice of Morality, opened to Persons by no Means qualified to discharge the Duties of the sacred Function, it is of the utmost Consequence to Society that it be prevented. With a View to this Canons were anciently made, by which a very strict Oath was enjoined; and it was punished with Deprivation or Disability as the Case required. It has been said that this was no Offence at Common Law; and for this the Case of *Gregory and Oldbury* in *Moor* 564. is relied on. It is indeed there held that a Bond to pay Money on a simoniacal Contract is good, because Simony is no Offence at the Common Law, and such Bond is not made void by any Statute: But by attending to what is said in other Books, the contrary will perhaps appear. In *1 Inst.* 17. *B.* 89 *A.* Simony is spoke of as a Thing so detestable in the Eye of the Common Law, that a Plaintiff in *Quare impedit* could not before the Statute of *Westm.* 2. recover Damages for the Loss of his Presentation, it being considered as a Thing of no Value: Nor could a Guardian in Socage present to an Advowson in the Right of his Heir, because, as he could take nothing for it, he could not bring it to Account. This Doctrine is confirmed in *3 Inst.* 176. and the Book adds, that it is the more odious to the Common Law, because it is frequently accompanied with Perjury, for the Presentee is sworn to commit no Simony. In *Cro. Ch.* 353. *Mackaller* and *Todderick*, it is said that this has by the Law of God and of the Land been always accounted a great Offence. In *Hob.* 167. *Winchcomb* and *Pulleston*, it is laid down that a Bond on a Simoniacal Contract is against Law, because *ex turpi Causa*, and *contra bonos mores*; nay that it is as void as an usurious Bond, which if paid by an Executor it is a *Devastavit*. The same is held in *Cro. Car.* 425. *Byrte* and *Manning*. In *Carth.* 252. *Bartlett* and *Vinor*, such Bonds are said to be void as being against Law, although they are not so declared by the Statute. Other Authorities might be added, but these are surely enough to shew that the better Opinion is, that Simony was an Offence at the Common Law. As neither the Consideration of the Heinousness of the Offence, nor the Provision made against it by the Canon or Common Law, was sufficient to put a Stop to this Mischief, it was at Length restrained under severe Penalties by (a) Statute.

(a) 31 Eliz.
c. 6.

Under this Head it will be proper to consider,

(A) In what this Offence consists.

(B) Of Bonds of Resignation.

1. How far they are good in Law.
2. Of the Power exercised over them by the Court of Chancery.
3. How far the Penalty is saved where the Ordinary refuses to accept a Resignation on such a Bond.
4. Some Objections to those Bonds considered.

(C) Of the Forfeitures, Penalties, and Punishment incurred by this Offence.

1. By the Incumbent.
2. By the Patron.
3. By the Ordinary.

(D) In what Cases and at what Time Advantage may be taken of the Forfeitures and Penalties.

1. By the King.
2. By other Persons.

(E) Of the Jurisdiction of Ecclesiastical Courts in this Offence.

(F) Pleadings in Simony.

(A) In what this Offence consists.

THE Determinations as to what is Simony being founded on the 31 Eliz. cap. 6. it will be proper to recite some Paragraphs of that Statute; and as these do not only contain a Description of the Offence, but direct what Forfeitures and Penalties shall be, and who may take Advantage thereof, it will be as well to give the whole Paragraphs here and refer to them as it may be necessary. As frequent Mention will in handling this Subject be also made of it, I shall subjoin here the Oath against Simony.

By Par. 5. it is enacted, ' That if any Person or Persons, Bodies politick or corporate, shall for any Sum of Money, Reward, Gift, Profit, or Benefit, directly or indirectly, or for, or by Reason of any Promise, Agreement, Grant, Bond, Covenant, or other Assurance of, or for any Sum of Money, Reward, Gift, Profit, or Benefit, directly or indirectly, present or collate any Person to any Benefice with Cure of Souls, Dignity, Prebend, or Living Ecclesiastical, or give or bestow the same for, or in Respect of any such corrupt Cause or Consideration, that then every such Person or Persons, Bodies politick or corporate, shall forfeit the double Value, and the Presentee to be incapable of enjoying the Living.

‘ Presentation, Collation, Gift and Bestowing, and every Admissi-
 on, Investiture, and Induction thereupon shall be utterly void, frus-
 trate, and of none Effect in Law; and that it shall and may be lawful
 for the Queen, her Heirs and Successors to present, collate unto, or give,
 or bestow every such Benefice, Dignity, Prebend, and Living Ecclesiasti-
 cal for that Time or Turn only; and that every Person or Persons, Bod-
 ies politick or corporate, that shall give or take any such Sum of Money,
 Reward, Gift, or Benefit, directly or indirectly, or that shall take or
 make any such Promise, Grant, Bond, Covenant, or other Assurance,
 shall forfeit and lose the double Value of one Year’s Profit of every such
 Benefice, Dignity, Prebend, and Living Ecclesiastical: And the Person
 so corruptly taking, procuring, seeking, or accepting any such Benefice,
 Dignity, Prebend, or Living, shall thereupon, and from thenceforth be
 adjudged a disabled Person in Law to have, or enjoy the same Benefice,
 Dignity, Prebend, or Living Ecclesiastical.’

By *Par. 6.* it is enacted, ‘ That if any Person shall for any Sum of Mo-
 ney, Reward, Gift, Profit, or Commodity whatsoever, directly or indi-
 rectly, other than for lawful and usual Fees, or for or by Reason of any
 Promise, Agreement, Grant, Covenant, Bond, or other Assurance, of or
 for any Sum of Money, Reward, Gift, Profit, or Benefit whatsoever, di-
 rectly or indirectly, admit, institute, install, induct, invest, or place any
 Person in or to any Benefice with Cure of Souls, Dignity, Prebend, or
 Living Ecclesiastical: That then every Person so offending shall forfeit and
 lose the double Value of one Year’s Profit of every such Benefice, Dignity,
 Prebend, and Living Ecclesiastical; and that thereupon immediately from
 and after the Investing, Installation, or Induction thereof had, the same
 Benefice, Dignity, Prebend, and Living Ecclesiastical, shall be effoons
 merely void; and that the Patron or Person, to whom the Advowson,
 Gift, Presentation, or Collation, shall by Law appertain, shall and may
 by Virtue of this Act present or collate unto, give or dispose of the same
 Benefice, Dignity, Prebend, or Living Ecclesiastical in such Sort, and to
 all Intents and Purposes, as if the Party so admitted, instituted, installed,
 invested, inducted, or placed, had been or were naturally dead.’

Every Person
 corruptly in-
 stituting to a
 Benefice, to
 forfeit the dou-
 ble Value; the
 Living to be
 void, and the
 Patron may
 present to it.

By *Par. 7.* it is provided, ‘ That no Title to confer or present by Lapse,
 shall accrue on any Voidance mentioned in this Act, but after six Months
 next after Notice given of such Voidance by the Ordinary to the
 Patron.’

No Lapse can
 be till after six
 Months Notice
 of Living
 being void.

By *Par. 8.* it is enacted, ‘ That if any Incumbent of any Benefice with
 Cure of Souls, shall corruptly resign or exchange the same, or shall cor-
 ruptly take for or in Respect of resigning or exchanging the same, direct-
 ly or indirectly, any Pension, Sum of Money, or Benefit whatsoever: That
 then as well the Giver as the Taker of any such Pension, Sum of
 Money, or other Benefit corruptly, shall lose double the Value of the Sum
 so given, taken, or had.’

The Giver or
 Taker of any
 Money for re-
 signing, or ex-
 changing a
 Benefice, to
 lose double the
 Sum so given
 or taken.

By *Par. 9.* it is provided, ‘ That nothing contained in this Act shall in
 any wise extend to take away or restrain any Punishment, Pain, or Pe-
 nalty limited, prescribed, or inflicted by the Laws Ecclesiastical, for any
 the Offences before in this Act mentioned, but that the same shall re-
 main in Force and may be put in due Execution, as it might be before
 the making of this Act.’

The Penalties
 of the Ecclesi-
 astical Law are
 not to be re-
 strained by this
 Act.

By *Par. 10.* it is enacted, ‘ That if any Person or Persons what-
 soever, shall at any Time receive, or take any Money, Fee, Reward,
 or any other Profit, directly or indirectly, or shall take any Promise,
 Agreement, Covenant, Bond, or other Assurance to receive, or have any

The Taker of
 Money to pro-
 cure or give
 Orders, to
 forfeit forty
 Pounds, and

the Party so ordained to forfeit ten Pounds; and any Living he is presented to within seven Years after it to be
 void, and the Patron may present to it. One Moiety of the Forfeitures by this Act given, to be to the
 Queen, the other Moiety to the Party suing for the same.

‘ Money,

‘ Money, Fee, Reward, or any other Profit, directly or indirectly, either to him or themselves, or to any other of their or any of their Friends, all ordinary and lawful Fees only excepted, for or to procure the ordaining, or making of any Minister or Ministers, or giving of any Orders, or Licence, or Licences to preach: That then every Person and Persons so offending, shall for every such Offence forfeit and lose the Sum of forty Pounds of lawful Money of *England*; and the Party so corruptly ordained, or made Minister, or taking Orders, shall forfeit and lose the Sum of ten Pounds; and if at any Time within seven Years next after such corrupt entering into the Ministry, or receiving of Orders, he shall accept, or take any Benefice, Living, or Promotion Ecclesiastical, that then immediately from and after the Induction, Investing, or Installation thereof, or thereunto had, the same Benefice, Living, and Promotion Ecclesiastical, shall be eftsoons meerly void; and that the Patron, or Person to whom the Advowson, Gift, Presentation, or Collation, shall by Law appertain, may by virtue of this Act present or collate unto, give or dispose of the same Benefice, Living, or Promotion Ecclesiastical in such Sort, to all Intents and Purposes, as if the Party so inducted, invested, or installed had been or were naturally dead; any Law, Ordinance, Qualification, or Dispensation to the contrary notwithstanding. The one Moiety of all the Forfeitures given by this Act shall be to her Majesty, her Heirs and Successors, and the other Moiety to him or them that will sue for the same by Action of Debt, Bill, Plaint, or Information in any of her Majesty’s Courts of Record.’

The Oath against Simony. I *A. B.* Do swear, that I have made no Simoniack-Contract, Payment, or Promise, directly, or indirectly, by my self, or by any other to my Knowledge, or with my Consent, to any Person or Persons whatsoever, for or concerning the procuring, and obtaining of this Ecclesiastical Dignity, Place, Preferment, Office, or Living; (*here that to which the Party is to be admitted, instituted, collated, installed, or confirmed, is to be particularly named*) nor will at any Time hereafter perform, or satisfy any such kind of Payment, Contract, or Promise made by any other without my Knowledge or Consent; so help me God through *Jesus Christ*.

Cro. Car. 331. Barwicker and Mackaller. A Donative is not within the Words of the Statute, yet, as a corrupt Presentation thereto is within the Mischiefe intended to be thereby remedied, it is within the Meaning of it.

Carth. 485. Bishop of St. Davids and Lucy. For the same Reason the corrupt promoting to, or obtaining of a Curacy, has been held to be Simony.

This Offence is more frequently committed when a Church is void; but it may be committed when it is full.

Brownl. 7. If a Contract be when a Church is full, to give a Sum of Money for a Presentation to it, when it shall become void, this is a Simoniack Contract.

Lane 102. Kirchen and Calvert. Noy 25. Winchcomb and Puleston. So the buying when a Church is full with Intent to present a certain Person, and the presenting that Person when the Living becomes void, is Simony.

Noy, 25. Godb. 390. So if one purchases the next Avoidance of a Church, with Intent to present his Son or Kinsman, and does present the Person intended to be presented, this is Simony.

Winch 63. Sheldon and Brett. Noy 25. Hughes 390. So the Purchase of the next Avoidance of a Church, when the Incumbent is sick and near dying, with Intent to present a certain Person, and the presenting him, is Simony.

It has indeed been said, that if a Father, the Incumbent being sick, purchases a Living without the Privity of his Son, it is not Simony, although it be with Design to present the Son, and the Son is after presented; and to this Purpose is the Case of *Smith and Shelborn, Pasch. 41 Eliz. Cro. Eliz. 685.* The Doctrine laid down in this Case has been since contradicted, and particularly in the Case of *Winchcomb and Pulleston, Noy 25. Pasch. 15 Ja.* some Years after: Nor does the Reason given in it, that a Father is bound by Nature to provide for his Son, hold. If the Purchase of a Living when full with Intent to present any certain Person is as has been held within the Statute, how can it be lawful, as the Words of the Statute are general, for a Father to do it? A Parent is by Nature bound to provide for his Son, but this Obligation can never extend to the doing Things prohibited by Law. This way of reasoning would make all Simony lawful; for as every Man is as much if not more bound by the Law of Nature to provide for himself, as his Father is to provide for him, every Man might purchase a Living for himself.

Notwithstanding these Determinations, that if one Person purchased the next Presentation of a Benefice when full, with Design to present a certain Person and did present him, it was Simony, it became a Doubt whether it was so for a Clerk himself to purchase for himself the next Turn in a Living?

To remove this it was enacted, That if any Person shall for Money or Profit, in his own Name, or in the Name of any other Person, procure the next Presentation or Collation to any Benefice, and be presented or collated thereto, it shall be deemed to all Intents and Purposes a simoniacal Contract.

From all these Authorities it appears, that although it be lawful, except in the Cases excepted, to purchase the next Avoidance when a Church is full, there is great Danger of being guilty, at least in *foro Conscientiæ*, of this Offence. It is fit it should be so, else Men would be for ever purchasing for their Sons and Friends, and the almost necessary Consequence of such a Traffick in Livings, would be the filling the Church with very improper Persons.

It is equally Simony where the Presentation is by a Person usurping the Right to present, as if it had been by the Person having a good Right.

So if a Presentation be by one usurping the Right of Patronage, and pending a *Quare impedit* for removing his Clerk, who is after removed, the Living is sold, this is Simony, for the Church was never full of that Clerk; and by this Means the Statute might constantly be eluded, for it would only be getting an Usurper to present while the Living was void, and then selling it.

A corrupt Contract with the Wife of the Patron is simoniacal, although the Patron is not privy to it.

If a Clerk contracts to give Money for being presented to a Church, and is after presented *gratis*, this is Simony.

In this Case the Clerk is an unfit Person, for having at any Time been capable of intending to buy a Living corruptly. It also implies some Defect in him; for the Presumption is, that Persons well qualified will always be preferred, and have therefore no need to purchase. With this agrees *Cro. Eliz. 789.* where Simony is said to be *Voluntas sive Desiderium emendi vel vendendi Spiritualia vel Spiritualibus adherentia.*

This Offence may be by a corrupt Contract between Strangers, even when neither the Patron nor Incumbent is privy to it; for if there be a corrupt Contract, it Matters not by whom it is made: But in this Case the Presentee is not *simoniacus*, and only *simoniace promotus*.

12 Annæ Stat. 2. c. 12. par. 2.
3 Inst. 153.
3 Lev. 115. Walker and Hamersly S. C. 2 Vent. 32.
1 Roll. Rep. 235. Cro. Ja. 385.
Lane 103. Kitchen and Calvert.
Cro. Car. 331. Bawderick and Mackaller. Sid. 329. 3 Lev. 337. Lane 103. Kitchen and Calvert.

- Lane 73. Calvert and Kitchin.* A second Brother, having a Right to present, made a corrupt Contract to present a certain Person; but in order to elude the Statute surrendered the Right of presenting to his elder Brother. He not being privy thereto presented the Person who by the Agreement was to be presented. It was held that the corrupt Contract is Simony, and that its being performed by an Innocent Person makes no Alteration in the Case.
- 3 Lev. 338. Rex and Hide and others.* An Agreement was between *Richards* a Friend of *Boughton's* and *Taylor*, that *Boughton* should present *Hide*, and that *Taylor* should pay *Richards* 20*l.* per Annum for six Years, in case *Hide* so long lived, for the Use of *Boughton*. In *Quare impedit* *Hide* pleaded he had no Notice of the Agreement at or before his Presentation. On Demurrer it was held that the corrupt Contract is enough, and that it was immaterial whether he had Notice or not.
- Cro. Eliz. 788. Baker and Rogers.* If a Stranger, the Church being void, contracts with the Patron for a Grant of the void Turn, and presents a Clerk not privy to the Contract; yet, although the Grant being of a Chose in Action is void, as the Incumbent comes in by a simoniacal Contract, he is not to be considered as an Usurper, but as one *simoniace promotus*.
- Cro. Ja. 533. Booth and Potter.* So where a Father, the Church being void, contracts with the Grantee of the void Turn to permit the Grantor to present his Son, and it is done, this is a simoniacal Promotion.
- Cro. Car. 425. Birt and Manning.* So if a Father, in Consideration of a Clerk's marrying his Daughter, doth covenant with the Father of the Clerk, to procure for him a Presentation to a certain Church when it shall become void, and he is afterwards thereto presented, it is a simoniacal Promotion.
- Ante pag. 469.* These three last Cases may serve to confirm what has been observed, that, in the Case of Simony, it is unlawful for a Father to do what may not be done by a Stranger.
- Noy 142. Baker and Mounford.* If an Agreement be to pay five Pounds per Annum to the Widow of the last Incumbent, or ten Pounds per Annum to his Son so long as he shall be a Student at *Cambridge* and unpreferred, neither of these is Simony.
- 1 Roll. Rep. Carey and Yeo.* A Bond with Condition that the Incumbent shall not be absent eighty Days in a Year from his Living is not simoniacal; this being a lawful Condition.
- Cro. Car. 426. Byrte and Manning.* *A.* covenanted that *B.* his Son should marry *C.* the Daughter of *D.* in Consideration of this Marriage *D.* covenanted to advance 300*l.* for his Daughter's Portion, and *A.* covenanted to settle certain Lands on *B.* and *C.* There were also Covenants on the Part of *A.* for the Value of these Lands, and quiet Enjoyment, and a Covenant on the Part of *D.* to procure a certain Benefice for *B.* on the next Avoidance of it. It was held that this was no simoniacal Contract, it not being in Consideration of the Marriage, but a distinct and independent Covenant without any apparent Consideration, and as not averred to be a simoniacal Contract shall not be so intended.

(B) Of Bonds of Resignation.

A Bond of Resignation is a Bond given by the Person intended to be presented to a Benefice with Condition to resign the same; and is Special or General. The Condition of a Special one is to resign the Benefice in favour of some certain Person, as a Son, Kinsman, or Friend of the Patron, when he shall be capable of taking the same. By a general Bond the Incumbent is bound to resign on the Request of the Patron.

1. How far such Bonds are good in Law.

A Bond with Condition to resign within three Months after being request-
ed, to the Intent that the Patron might present his Son when he should be
capable, was held good; and the Judgment was affirmed in the Exchequer
Chamber; for that a Man may without any Colour of Simony bind himself
for good Reasons, as if he takes a second Benefice, or if he be non-resident,
or that the Patron may present his Son, to resign: But if the Condition
had been to let the Patron have a Lease of the Glebe or Tithes, or to pay a
Sum of Money, it had been simoniacal.

The Doctrine laid down in *Jones and Lawrance*, which was in the Case of
a special Bond, was not many Years after extended to that of a general
Bond, and the Judgment in this last was also affirmed in the Exchequer
Chamber.

The Authority of these two Cases having been repeatedly recognised,
at Length it was considered as a Point settled, that a general Bond of Resig-
nation is good, and the Court refused to let the Validity of it be called in
Question.

So in a late Case, Mr. Serjeant *Draper* being about to argue against the
Validity of such a Bond, he was stopped by the Court.

Cro. Ja. 238.
Jones and
Lawrance.

Cro. Car. 180.
Babington and
Wood.

Str. 227.
Peele and the
Countess of
Carlisle.

M. S. Rep.
Trin. 27 G. 2.
Wynham and
Bower.

2. Of the Power exercised over such Bonds by the Court of
Chancery.

If a Bond of Resignation, which ought only to be made use of to keep
the Incumbent to Residence or good Behaviour, be made an improper Use
of, the Court of Chancery will interpose.

A perpetual Injunction was granted against such a Bond, because it ap-
peared on hearing the Cause, that the Patron had made Use of it to prevent
the Incumbent from demanding his Tithes.

A Bill being brought to be relieved against a Judgment obtained on a
Bond to resign upon Request, it appeared to have been offered to the Incum-
bent, that if he would give 700*l.* he should not be sued upon it. Satisfac-
tion was ordered to be entered upon the Judgment, and a perpetual In-
junction was granted. A new Bond of Resignation in Penalty of 200*l.* a
much less Sum was indeed decreed; but no Action was to be brought on it
without Leave of the Court: And the Lord Keeper said he did not know
that such Bonds were used before the Statute; that they had been since al-
lowed only to preserve the Benefice for the Patron himself, or some Child or
Friend of his, or to prevent Non-residence or a vicious Course of Life in an
Incumbent; and that though a Bond be to resign generally, he would not
allow it to be put in Suit unless some such Reason was shewn for requiring a
Resignation, because a Door would be thereby opened for Simony.

On a Bill to be relieved against a Judgment on such a Bond, the De-
fendant proved Misbehaviour, and it was for that Reason dismissed.

So a Bond to resign on Request shall not be made use of to turn out
the Incumbent, unless there be Non-residence or gross Misbehaviour;
and if any other Use be made of it, the Court will grant an In-
junction.

From some of these Cases and particularly the last which was *Pasch*,
5 G. there is Reason to conclude that general Bonds of Resignation were
not then held good in Equity: But later Determinations shew that they
now are.

A Bond

Chan. Prec.
513.
2 *Chan. Rep.*
399.

1 *Vern. 411.*
Durston and
Sands.

Eq. Cases Abr.
86. *Hilliard*
and Stapleton.

Eq. Caf. Abr.
228. *Hodgson*
and Thornton.

Chan. Prec.
513. *Hawkins*
and Turner.

Str. 227. A Bond to resign generally has been often held good in the Court of
Peele and Chancery.
Countess of

Carlisle.

Str. 534. *Peele and*
Capel.

Capel, on presenting *Peele* to a Living, took a Bond to resign when the Patron's Nephew for whom it was intended should be of Age. At his coming of Age it was agreed that, instead of resigning, he should continue to hold the Living on paying the Nephew 30*l. per Annum*. After paying this seven Years *Peele* refused to pay it any longer. The Bond being hereupon put in Suit, *Peele* brings his Bill to have an Injunction, and to have the Money repaid. An Injunction was granted, not as was said on Account of the Invalidity of the Bond, for that was held to be good, but because an ill Use had been made of it. As to the Money which had been paid on this simoniacal Contract, *Peele* was left to his Remedy at Law for it.

3. How far the Penalty is saved where the Ordinary will not accept a Resignation on such a Bond.

However it may be now settled, that such Bonds are good both in Law and Equity; a Question has arisen, and is not perhaps settled by judicial Determinations, whether the Ordinary is obliged to accept a Resignation on such a Bond?

Waisf. Com.
Inc. 24.

It is in the Power of the Ordinary to discourage the Use of such Bonds, for he may refuse to accept a Resignation made by the Constraint of one of them.

2 Chan. Rep.
398. Durston
and Sands.

The Bishop refused to accept a Resignation on such a Bond, and ordered the Incumbent to continue to serve the Cure, declaring that he would never countenance such unjust Practices.

Chan. Prec.
513. Hawkins
and Turner.

An Ordinary is not obliged to accept a Resignation on such a Bond, unless there be just Cause to turn the Incumbent out of the Benefice.

Marquis of
Rockingham
and Griffith,
Easter 27
G. 2.

In a late Case a Grant was to a Clerk of the two First of three Livings which should fall, provided he was capable when they did fall of holding them. In order to make himself capable of taking one of these Benefices, *Griffith* the Clerk tendered a Resignation of another Benefice to the Ordinary, but he refused to accept it. One of the Questions made in this Case was, whether the Ordinary was obliged to accept this Resignation? It was insisted by Mr. *Henly* on one Side, that no Case could be adduced to shew, that the Ordinary can arbitrarily refuse to accept a Resignation of a Benefice. Mr. Attorney *Murray* who was on the other Side contented himself, as to this Objection, with saying, that the plainest Points having scarce ever been called in Question are supported by the fewest Authorities. No Decree was made as to this Point; but Lord *Hardwick* intimated it once or twice so strongly to be his Opinion, that the Ordinary ought to have accepted the Resignation, that he did afterwards accept it. What fell from these great Men on this Occasion, is enough to render the Doctrine of the two last Cases suspicious: For if these are Law some Notice would undoubtedly have been taken of them. This was not indeed in the Case of a Resignation Bond; but it was perhaps a stronger Case; for if the Ordinary cannot refuse where as here a Clerk would resign merely to take another Benefice, it would be strange to hold he may refuse a Resignation made at the Request of a Patron, in Consequence of an Agreement with him, which it has been again and again determined both at Law and in Equity, he has a Right to make.

Whatever Doubt may still remain, as to the Ordinary's being obliged to accept a Resignation on such a Bond, these two Things have, as will presently appear, been determined; that the Patron cannot present again till he has accepted it; and that whether he does or not the Obligor is liable to the Penalty of the Bond, if he undertakes as is usually done for the Acceptance of the Ordinary.

If a Presentation be made before the Bishop accepts the Resignation of the last Incumbent, it is void.

Cases in the Time of Queen Anne 276.

Riley and Adams. Noy 147. Cro. Ja. 198.

If the Obligor binds himself to resign a Benefice, it is upon him to procure the Ordinary's Acceptance of his Resignation.

Lutw. 693. Studholme and Morrison.

To an Action upon a Bond, with Condition so to resign on Request that the Patron may present again, it was pleaded that the Ordinary would not accept the Defendant's Resignation. On a Demurrer this Plea was held bad; and *Per Cur'*, it should have been averred that the Ordinary accepted the Resignation, for his Acceptance being, as is laid down *Cro. Ja. 198.* necessary to compleat the Resignation, it was the Duty of the Obligor, who undertook to resign, to procure this. So if one undertakes to enfeoff another, he undertakes to make Livery as incident thereto. The Bishop as to the Obligee is a Stranger, and if an Obligor undertakes for the Act of a Stranger, he is at his Peril, as is held *1 Saund. 215.* to procure it.

M. S. Reports, Hilar. 28G.2. Hefot and Gray.

4. Some Objections to these Bonds considered.

The Result of the whole is, that Bonds of Resignation are good in Law, and that Equity will restrain all improper Use of them. It is not always true, but is so much oftener than superficial and hasty Thinkers imagine, that the Law, and particularly that Part of it which is deduced from judicial Determinations, is founded in solid Reason; and it may perhaps be shewn that it is so in the present Case. The attempting this will at least be excusable, because some great and good Men have expressed their Dislike of these Bonds.

The general Objection is, that divers Mischiefs may ensue from such Bonds, for that a corrupt Patron may in many Instances make an ill use of them. Some other Answer might perhaps be given to this general Objection; but the Common one, however trite it be, is as good as any, that there is no concluding against the Use of any Thing because there is a Possibility of its being abused. If any Abuses of them can be discovered, Redress may be had: If not, they should be ranked amongst those Things which, being out of the Reach of human Knowledge, cannot be provided against by human Laws.

The Principal of the particular Objections is, that which is reported to have fallen from (a) Holt Chief Justice. This is, that a Resignation Bond comes as near Simony as possible; it being easy to procure a round Sum of Money thereby. By making the Penalty of the Bond adequate to the Value of the Benefice, and agreeing privately that the Money shall be paid, it would without Doubt be an oblique Way of selling it, and more than come near, for it would be down-right Simony. If there was no other Way, or not as easy a one; to do the same Thing, this Objection would be insurmountable; but if there is, it can never be of much Importance to stop this up. The same Clerk, whose Conscience would allow him to do this, might as well advance the Money agreed upon at first, or, if that did not suit him, give an absolute Bond to pay the Money at a future Time. As the same Crime might still be committed, and with as much Secrecy, what good End would it answer to prohibit such Bonds, which, as is allowed by all, may be made

(a) Comb. 394. Savain and Carter.

use of by a Patron to punish Neglect of Duty or immoral Conduct in the Incumbent, and for other good Purposes?

Another Objection is, that, when the Patron takes a general Bond of Resignation, it is only a Presentation during Pleasure. Be it so, and I will suppose, which is the utmost that can be supposed, that it is not taken with Design to awe the Incumbent into greater Care in the Discharge of his Duty, but to let some Friend or Relation afterwards into the Benefice. It by no Means necessarily follows that the Church, which is the grand Thing to be guarded against, will therefore be filled with an unfit Person. If the Successor, which may be the Case, is better qualified for the Office, the Interest of Religion will be advanced by the Exchange. If he be not so well qualified, it is a Misfortune; but it is such a one as, in the present Circumstance of Things, cannot be entirely prevented. While the Right of Patronage, or I might have said, while human Nature continues as it is, there will be Mistakes in Judgment, and Patrons will be induced by Partiality to judge too well of the Abilities of a Relation or Friend; but it makes no Difference, whether either of these happens when the Beneficè is at first void or at any given Time after; or if there be any, it is in favour of the Practice, for the Mischief is, for so long at least as the first Incumbent holds the Living, thereby postponed.

(C) Of the Forfeitures, Disabilities, and Punishment incurred by this Offence.

1. By the Incumbent.

THE Person promoted in pursuance of a corrupt Contract, is either *simoniacus* or *simoniace promotus*. In the former Case, being party or privy to it, he is liable to suffer more: But in the latter Case, although quite a Stranger to the Contract, he is in a certain Degree involved in the Consequences of it. The Design as in many other Cases is, that, if a Sense of what becomes themselves, and of the Duty they owe the Publick, will not restrain Men from being guilty of an Offence so pregnant of Mischiefs, a Regard to those whom they mean to serve may do it.

Cro. Eliz. 789. The *simoniacus* forfeits all the Preferment he has in the Church; but the *simoniace promotus* only that to which he is presented in Consequence of a corrupt Contract.

Baker and Rogers.
Lane 103.
3 *Inft.* 154.

In like Manner the *simoniacus* shall forfeit double the Value of one Year's Profit of the Benefice he is presented to: But the *simoniace promotus* is not liable to any Forfeiture on this Account.

31 *Eliz. c.* 6.
par. 5.
3 *Inft.* 154.

The double Value, which is by this Statute forfeited, is to be the double Value of what the Benefice can be let for, and not the double Value as valued in the King's Books.

Marcb 84.

Neither the *simoniacus* nor the *simoniace promotus* can sue for Tithes, the Right to them being by the corrupt Contract taken away.

12 *Co.* 100.
2 *Roll. Rep.*
465.

It was heretofore determined, that although one *simoniace promotus* shall be deprived, he is not disabled from being presented again to the same Benefice.

These Resolutions seem to be warranted by the Words of the Statute: 31 Eliz. c. 6. But it has been since held that the *simoniace promotus* shall never be capable of taking the same Benefice again; and the Distinction taken is, that the *simoniace promotus* can take any other Church Preferment, whereas the *simoniacus* not only loses all he has but is disabled from ever taking any more.

par 5.
Cro. Ja. 385.
Cro. Ja. 533.
Booth and
Potter.
Cro. Eliz. 789.
Baker and
Rogers.

If an Incumbent takes a Sum of Money for the Resigning or Exchanging any Benefice with Cure of Souls, he is to forfeit double the Value of the Money so taken.

31 Eliz. c. 6.
par. 8.

Every Person corruptly obtaining Orders, although he is not privy to the giving the Money for the procuring such Orders, is liable to forfeit ten Pounds, and all the Preferment he accepts within seven Years after his being so ordained.

31 Eliz. c. 6.
par. 10.

The Disabilities incurred by this Offence cannot be dispensed with by *Non obstante*, for when any Thing is for the good of the Church or State prohibited by Statute, the King's Subjects have an Interest in it, and the King can no more dispense with it than he can with the common Law; but where a Thing is prohibited, and a Penalty given to the King, or to the King and an Informer, the King may dispense with the Penalty.

3 Inst. 154.
2 Hawk. 396.

Simony is not pardoned by a general Pardon.

Sid. 170.

Besides these Forfeitures and Disabilities, the *simoniacus*, provided he has taken the Oath against Simony, is also liable to be indicted and punished as in other Cases of Perjury.

Dr. Watson does indeed make a Question, whether since the Use of this Oath is not taken away? It is by that Statute enacted,

13 Ch. 2. c. 2. Comp. Incumb.
188.

That it shall not be lawful for any Archbishop, Bishop, Vicar general, Chancellor, Commissary, or any other Spiritual or Ecclesiastical Judge, Officer, or Minister, or any other Person having or exercising Spiritual or Ecclesiastical Jurisdiction, to tender or administer the Oath usually called the Oath *ex Officio*, or any other Oath whereby such Person may be charged, or compelled to confess, or accuse, or to purge him or herself of any criminal Matter, whereby he or she may be liable to any punishment or Censure; any Thing in this Statute, or any Law, Custom, or Usage heretofore to the contrary hereof in any wise notwithstanding. The generality of the Words, *any other Oath*, being tied up by the subsequent Words to Oaths in certain Cases, the only Thing to be considered is, whether the Oath against Simony is an Oath by which a Person is charged, or compelled to confess, or accuse, or to purge himself of any criminal Matter? No one can by this Oath confess himself guilty, or accuse himself of any Thing. So far from it, it is a Denial in the most express Terms and most solemn Manner of his having been guilty of this Offence. Nor can any one by this Oath purge himself of any Crime; for at the Time of taking it he does not stand charged with any. Upon the whole this Oath does not seem to be either within the Words, or Purview of that Statute; but if any little Doubt remained, an Ordinary, it being positively enjoined by the fortieth Canon, should not think of dispensing with it unless it was clearly prohibited by this Statute.

2. By the Patron.

If a Patron is guilty of this Offence, he forfeits the Right of presenting for the next Turn, and also the double Value of one Year's Profit of the Benefice.

31 Eliz. c. 6.
par. 5.

But if *A.* has the Right of Presentation, and *B.* that of Nomination, and only one of them is guilty of Simony, the Right of the other shall not be thereby prejudiced, nor shall he be subject to any Forfeiture.

Lane 74.
Calvert and
Kitchen.

- 31 *Inst.* 153. So if an Usurper presents simoniacally, this shall not give the Crown a Right to present for the next Turn, for it would be unreasonable to take away the Right of the true Patron who has been guilty of no Offence.
- 31 *Eliz.* c. 6. par. 8. The Patron, who gives a Sum of Money for the resigning or exchanging any Benefice, is to forfeit double the Value of the Money so given.

3. By the Ordinary.

- 31 *Eliz.* c. 6. par. 5. If an Ordinary shall corruptly institute, &c. to any Benefice with Cure of Souls, or other ecclesiastical Preferment, he is to forfeit the double Value of one Year's Profit of the said Benefice.
- 31 *Eliz.* c. 6. par. 8. So if he takes any Money for accepting the Resignation of a Benefice, he is to forfeit double the Value of the Money so taken.
- 31 *Eliz.* c. 6. par. 10. So if he takes any Reward for the conferring Orders, or the granting a Licence to preach, he is to forfeit forty Pounds.
- 31 *Eliz.* c. 6. par. 9. Besides being liable to the Forfeitures, Penalties, and Punishment already mentioned, there is a Proviso in the Statute, that Persons guilty of this Offence shall also be subject to such Punishment, Pains, and Penalties, to which they were before subject by the Laws Ecclesiastical.

(D) In what Cases and at what Time Advantage may be taken of the Forfeitures and Penalties.

1. By the King.

- 31 *Eliz.* c. 6. par. 5. **W**HEREVER the Patron is guilty of this Offence, the King may present to the next Turn of the Benefice.
- 3 *Inst.* 153. The simoniacal Presentation of an Usurper does not however give the Crown a Right of presenting, for it would be unreasonable to take away the Right of the true Patron who is in no Fault.
- Hob.* 167. *Winchcomb* and *Pulleston*. If there has been an actual Presentation on a simoniacal Contract, the King may present, although the Incumbent has neither been instituted nor inducted.
- Cro. Ja.* 385. *King and Bishop of Norwich* and others. But wherever an Incumbent is instituted and inducted, the King cannot take Advantage of the simoniacal Contract until he be removed by *Quare impedit*; for although he is in *de facto* only, and not *de jure*, the Church is full till he is removed in a judicial Way.
- Noy* 25. *Winchcomb* and *Pulleston*. A Clerk, who had been promoted simoniacally, continued Incumbent till his Death above thirty Years after, yet it was held that the King might present, for that the Church having never been full *de jure*, his Turn was preserved.
- Lut-w.* 1090. *King and Bishop of Chichester* and others. A Church being void, *A.* agreed to give *B.* a Sum of Money for procuring *C.* the Patron for that Turn, to present *D.* The Money was paid, and *D.* being presented enjoyed the Living till his Death. Afterwards *E.* to whom the Right of presenting for the next Turn belonged, presented *F.* In *Quare impedit* there was Judgment for the King, although neither *E.* nor *F.* was privy to the simoniacal Contract between *A.* and *B.*
- 1 *W. & Ma.* c. 16. Not many Years after it was enacted, and it is probable that the Hardship of this last Case might give Occasion thereto, that the Offence of Simony shall not in Pleading, or Evidence be made use of, after the Death

of the Person simoniacally promoted, to the Prejudice of any Person not privy thereto, unless there be, in the Life of the Person so promoted, a Conviction at Common Law or in some Ecclesiastical Court.

By the same Statute it is declared, that every Lease made by a Person simoniacally promoted for a valuable Consideration, to any Person who had no Notice of the simoniacal Contract, shall be good.

One Moiety of all the Forfeitures mentioned in the Statute is given to the Queen, her Heirs and Successors. 31 Eliz. c. 6. par. 10.

2. By other Persons.

Wherever a Living becomes void by Simony, and the Patron who has Right to present does not present within six Months, the Ordinary may as in other Cases of Lapse present; but he shall not do this till six Months are expired after Notice is given by him to the Patron of the Avoidance of the Benefice. 31 Eliz. c. 6. par. 7.

This Provision in the Statute is agreeable to the Canon Law, by which Lapse cannot run against the Patron till Notice is given him by the Ordinary that the Church is void. Dyer 293.

But if two claim the Right of Presentation to a void benefice, and the Ordinary is not named in a *Quare impedit* brought to determine the Right, it shall, if the Judgment be not obtained within six Months, lapse to the Ordinary, for he is here in no Fault. 2 Roll. Abr. 365. Abbot of York and Bishop of Norwich.

Although a Living becomes void by Simony, and the Patron not being privy to it has a Right to present, yet he cannot, as the King may, take Advantage thereof, so as to present another Clerk, unless the Person simoniacally promoted has been inducted. 31 Eliz. c. 6. par. 6. par. 10.

By the Judgment in *Quare impedit* the Incumbent is so removed, that the Patron who recovers may present, although there be no Sentence of Deprivation: But the Clerk, against whom the Judgment is obtained, continues Incumbent *de facto* till such Presentation is made. 1 Roll. Rep. 62.

One Moiety of all the Forfeitures mentioned in the Statute is given to any Person who will sue for the same. 31 Eliz. c. 6. par. 10.

(E) Of the Jurisdiction of Ecclesiastical Courts in this Offence.

SOME have been of Opinion, and amongst these is the learned Author of the Codex, that only Spiritual Courts had before the Statute Jurisdiction in this Offence. If, as it has been already observed, Simony was a Crime at the Common Law, there can be little Room to doubt of its having been punishable in the Temporal Courts. It may be true in fact, that it was for the most part or altogether proceeded against in the Ecclesiastical Courts. As the Interest of Religion is by this Offence struck at in a more remarkable Manner, this is not greatly to be wondered at; and the less if it be considered that, in Times antecedent to the Statute, Spiritual Courts did in some Cases, where there was a concurrent Jurisdiction, encroach upon, and in others entirely swallow up, the Power of the Temporal. If then it cannot, at this Distance of Time, be made appear that the latter did exercise Jurisdiction in this Case, it by no Means necessarily follows that they had none. (a) Cod. 839. (b) Ante page 465.

- 31 *Eliz. c. 6.* By the Statute a Power is reserved to the Spiritual Courts of inflicting such Punishments, Pains, and Penalties, in all the Cases therein mentioned, as by the Laws Ecclesiastical could before the making thereof be inflicted.
- Cro. Eliz. 788.* Agreeably hereto it has been determined, that the Sentence of the Spiritual Court in Simony, it being a Matter properly triable there, is to be taken to be true, although it does in its Consequence divest the Incumbent of his Freehold.
- Comb. 73.* So if a Man is acquitted of the Charge of Simony in a Temporal Court, the Spiritual may re-examine the Matter.
- Boyle and Boyle.*
- Cro. Eliz. 642.* To a Suit for Tithes a Prohibition was brought, and it was insisted, that the Incumbent being a Simoniack had no Right to them: But a Consultation was awarded, because, as the Court said, Simony may be more aptly tried in the Spiritual Court.
- Risby and Wentworth.*
- 2 *Bulstr. 182.* But where the Title to the Benefice is in Question, a Prohibition lies to a Suit instituted in the Spiritual Court for Simony; for that Court can only proceed *pro salute Animæ.*
- Sir William Bowyer and the High Commission Court.*

(F) Pleadings in Simony.

- THE Possession of a Benefice, to which an Incumbent is simoniacally promoted, may be recovered by an Assise of *Darrein Presentment*, or by a Writ of *Quare impedit*. The last is usually preferred, because, besides its being a shorter Way of proceeding, not only the Right of Presentation but that of Advowson also is thereby recovered.
- Vaugh. 57.* It is not enough to alledge in the Declaration that the Plaintiff, or the Person under whom he claims, was seised of the Advowson, but a Presentation must be alledged by him or some Person under whom he claims; for, unless a past Presentation is thus connected with the Right, it does not appear that the Right of Presentation is now in the Plaintiff.
- King and Bishop of Worcester and others.*
- 2 *Lutw. 1090.* The Declaration is good, although there be no recital of the Statute in it: But it was formerly done, and it is as well to recite it.
- Cro. Eliz. 788.* Nor is there any Danger in doing this, for a Misrecital of the Statute in pleading is not fatal.
- Baker and Rogers.*
- Comb. 108.* In *Quare impedit* it was insisted that it is not enough to aver that the Incumbent is a Simoniack. To this *Holt* Chief Justice agreed, and added that, as the Word *Simony* is not in the Statute, some particular simoniacal Act which brings him within it must be shewn.
- Lowe.*
- Cro. Car. 425.* A simoniacal Contract must in pleading be averred and shewn specially, else it shall not be so intended.
- Byrte and Manning.*
- 2 *Show. 3.* But the particular Sum of Money paid need not be averred in pleading.
- King and Johnson.*
- At the Common Law the Patron must be named in the Writ, for the Incumbent could not alledge any Thing which concerned the Right of Patronage, and it would be unreasonable to name him alone, who could not defend the Right of Patronage: But, as he is by the 25 *Edw. 3. c. 7.* enabled to plead his Patron's Right in Defence of his Incumbency, it is now necessary to name the Patron, unless the Right of Inheritance is to be affected by the Judgment.
- 7 *Co. 25. Hall's Case.* Agreeably hereto it is now settled, that where the Inheritance of a Patron can be divested by the Judgment he must be named in the Writ; and it
- Cro. Ja. 650.*
- 3 *Lev. 16.* is

is usual to name the Ordinary also, for the sake of preventing a Lapse *pendente lite*.

It has however been held that no Incumbent can plead his Patron's Right, *March 159.* without shewing that he is Parson Imparsoned of the Presentation of his Patron. *Palmer and Rudd.*

An Incumbent is not Parson Imparsoned as against the King, unless he be admitted, instituted, and inducted; but Admission and Institution will make him so as against any other Person. *7 Co. 26. Hall's Case.*

At the Common Law the Ordinary could only plead, that he claims nothing but as Ordinary, but, by the Statute of *25 Ed. 3. c. 7.* he may now plead a Title in himself by Lapse, or that the Right of Patronage is in him.

The Obligor of a Bond on a simoniacal Contract may, for necessity's sake, aver against the Condition of his own Bond. *Carth. 301. Fodey and Hains.*

The Sentence of a Spiritual Court in Simony need not be set out *in hoc verba*, but may be pleaded briefly. *Cro. Eliz. 788. Baker and Rogers.*

Where the general Issue is pleaded in *Quare impedit* it amounts to a Confession of the Right of Patronage, and only defends the Wrong with which the Defendant is charged; and the Plaintiff has his Option to pray immediately a Writ to the Ordinary, or he may go on to recover Damages for the Disturbance. *Hob. 162. Rolt and another and the Bishop of Litchfield.*

Slander.

SLANDER is the Publishing Words in writing, or by speaking, of any Person, by Reason of which he becomes liable to suffer some corporal Punishment, or sustains some Damage.

It is no Excuse, at least in *foro Conscientiæ*, that the Thing charged is true. The Law does indeed, in Compassion to Mens Infirmities, allow it to be a Justification, in an Action for Words spoke, for as to written Scandal it admits of none, if the Matter of the Slander is true: Yet it is very unbecoming a Man, and much more so a Christian, to be guilty of this Offence. If a Person has done any Thing which the Law prohibits, he is liable to answer for it judicially; but it can answer no good End for private Persons to brand him with it, and there is a Degree of Cruelty as well as Inhumanity in so doing. To rally a Man for some Foible or small Failing, if it be done with Humour and in a friendly Way, may do him Service; but the publishing even any of these, which can serve only to lessen him in the Esteem of his Neighbours, or make him the Object of Ridicule, should be abstained from; for, although it may not amount to Slander in the legal Notion of that Word, it must create ill Blood between the Parties.

This Offence was ever held in great Detestation; but Slander in Writing has at all times, and with good Reason, been punished in a more exemplary Manner: For it is, having a greater Tendency to provoke Men to Breaches of the Peace, Quarrels, and Murthers, of much more dangerous Consequence to Society. Words, which are frequently the Effect of sudden Passion, may soon be buried in Oblivion; but that which is committed to Writing, besides that the Author is actuated by deliberate Malice, is spread further, and the Slander is for the most part so lasting as to be scarce ever forgiven.

For written Scandal the Party injured may proceed against the Author by Indictment or Information, it being considered as a publick Offence; and he may also proceed by an Action upon the Case for the private Damage thereby sustained, or, if the Defamation be meerly spiritual, by a Suit in the ecclesiastical Court.

Peers and the great Men of the Realm, besides these Ways of Redress, have another, by an Action of *Scandalum Magnatum*, which is peculiar to themselves.

If the Slander is by Words spoke, there is in general no other Remedy than by an Action on the Case, or a Suit in the Spiritual Court; yet even this may in certain Cases be proceeded against criminally. For Instance, if it be a Slander of the State, as the saying the Coin is abased by Authority, or any other Thing whereby the State may be prejudiced, is, or if it be a Slander which it more particularly concerns the Publick to prevent, as the speaking any Thing scandalous to a Justice of Peace in the actual Execution of his Office is, it may be proceeded against by Indictment or Information.

The criminal Way of proceeding against Persons guilty of this Offence having been treated of under the Titles *Indictment*, *Information*, and *Libel*, and the Method of proceeding by Action of *Scandalum Magnatum* under

der its proper Title, it only remains to consider that Sort of Slander for which the Remedy is by an Action upon the Case, or by a Suit in the Spiritual Court.

For the better understanding whereof it will be proper to consider,

(A) Where an Action upon the Case does in general lie.

(B) Of Words that are actionable in themselves,

1. Such as import the Charge of a Crime,

1. Treason.
2. Murder.
3. Perjury.
4. Forgery.
5. Theft.
6. Other Crimes.

2. Such as charge the having a contagious Distemper.

3. Such as slander a Title.

4. Such as are spoken of Persons in Office,

1. Of Judicial Officers.
2. Of other Officers.

5. Such as are a disgrace in a Profession or Trade.

1. To a Divine.
2. To a Physician or Surgeon.
3. To a Counsellor or Attorney.
4. To other Artists.
5. To a Tradesman.

(C) Of Words which become actionable by reason of the special Damage received from them.

(D) Certain Circumstances which are to be regarded in the speaking of Words in themselves actionable.

1. The Time when spoke.
2. The Place where.
3. The Language they are spoke in.
4. The Occasion of speaking them.
5. The Design of the Speaker.

(E) Of Slander in a Course of Justice.

(F) Of Words spoken in the past or future Tense.

(G) In what Sense Words in themselves actionable must be affirmative.

(H) Of the Certainty required in them.

(I) Where the want of Certainty is supplied.

1. By the apparent Intention of the Speaker.
2. By Averment.

(K) In what Cases uncertain Words are to be construed in mitiori sensu.

(L) Where they are not to be so construed.

(M) Of adjective Words.

(N) Of Words which import only an Intent to do an act.

(O) Of Words in the Disjunctive.

(P) Of repugnant Words.

(Q) Of repeating Words which another has been heard to say.

(R) Of subsequent Words.

1. Where they are explanatory.
2. Where they are accumulative.

(S) Of Pleadings in Slander.

1. In general.
2. Where an Averment must be.
3. Of the Colloquium.
4. Of the Use of the Innuendo.
5. What is a Justification of Words.

(T) In what kind of Slander the Spiritual Court has Jurisdiction.

(U) Where a Prohibition will lie.

1. If actionable Words are coupled with such as are a mere Spiritual Defamation.
2. Where any Temporal Damage is received from them.
3. Where the Offence charged is not punishable in the Ecclesiastical Court.

(A) Where an Action upon the Case does in general lie.

AN Action upon the Case lies for the publishing any Words, by reason of which the Person of whom they are published does in fact receive Damage; but it is not always necessary to shew the Damage received. The Distinction is, that where the natural Consequence of the Words is a Damage; as if they import the Charge of being guilty of a Crime, or of having some contagious Distemper; or if the Title to an Estate is by them brought

brought into Question; or if they are a Disgrace in an Office, Profession, or Trade, they are in themselves actionable: But in other Cases the Party, who brings an Action, must alledge the special Damage received from them.

It makes no Difference whether the Slander is published in Writing or Print, or by Speaking; for, although the Party injured may, where it is in Writing or Print, it being a publick Offence, proceed in a criminal Way against the Author of it, he is not thereby precluded from obtaining Satisfaction by Action for the private Injury to himself.

Writing slanderous Words of any Person in a private Letter to a third Person, is such a Publication as this Action will lie for.

If the Words are a meer Spiritual Defamation, no Action lies; for only the Spiritual Courts have Jurisdiction in this Case.

But wherever any Temporal Damage is received from Words, which in general are no more than a meer Spiritual Defamation, or if such Words are coupled with others which are actionable, a Prohibition lies for the whole Words to the Ecclesiastical Courts. It would be vexatious if Proceedings could be in both Temporal and Spiritual Courts; and as none but the former can make the injured Party Satisfaction for the Damage sustained, the Proceedings in the latter being *pro salute animæ* only, it is very reasonable that he should be confined to an Action in them.

(B) Of Words that are in themselves actionable.

I. Such as import the Charge of a Crime.

AS the greatest Injury which can be done any Person is the falsely charging him with a Crime, for which he may be brought into Danger of suffering Death, or some corporal Punishment, Words that do this have always, and with the highest Reason, stood first in the List of those which are in themselves actionable.

i. Treason.

An Action lies for these Words, *Thou art a Rebel, and not the Queen's Friend.*

So it does for saying of *J. S.* *He is an Enemy to the State*; for these are a great Slander, if not a charge of Treason.

So it is actionable to say of any Person, he did Treason in the *Low Countries*; because he may be tried and punished in *England* for a Treason committed there.

These Words, *He is a Jacobite, and is for bringing in the Prince of Wales and Popery to the destroying our Nation*, are said to be actionable; because they are a charge of evil Principles.

In another Report of the same Case, these Words are held to be actionable if of a Person in Office; but it is not determined whether they are so or not, when spoken of a private Person.

The

8 Mod. 283. The Doctrine however in *Salkeld* seems to be Law; for in a subsequent
 Fry and Corne. Case it was held, that an Action lies for the following Words, which are
 not so strong, spoken of any Person, *He has the Pretender's Picture in his
 Room, and I saw him drink his Health. And he said he had a Right to the
 Crown.*

2. Murder.

1 Roll. Abr. 77. An Action lies for saying to *J. N. thou hast killed a Man*; for although
 Cooper and no particular Man is named, it is a great Slander.
 Smith.

Cro. Ja. 423. So it does for saying *you have killed the Servant of J. S. or you have stole
 Cooper and the Horse of J. S.* although it is not shewn that *J. S.* had a Servant or a
 Smith. Horse; for till the contrary is shewn this shall be intended.

1 Roll. Abr. 77.

1 Ventr. 117. It was heretofore held, that no Action would lie for Words importing
 Phillips and a charge of Murder, without an Averment that the Person said to be killed
 Kingston. was dead; but the later and better Opinion is, that the Party shall be in-
 tended to be dead, unless the contrary appears in the Pleadings.

Cro. Ja. 489.
 Sid. 53.

Cro. Eliz. 569,
 823.

3. Perjury.

4 Co. 15. No Action lies for saying of *J. S. he is forsworn*, unless it is said to be
 Stanhope and in some judicial Proceeding; but it does for saying of him *he is perjured*;
 Blith. for this shall be intended to mean that he is forsworn in a judicial Pro-
 2 Bulstr. 150. ceeding.
 3 Inst. 166.

Cro. Eliz. 609. Ecclesiastical Courts are not mentioned in the 5th of *Eliz.* against Per-
 Shaw and jury; yet it has been held, that an Action lies for saying a Man is forsworn
 Thompson. in an Ecclesiastical Court.

3 Lev. 166. So an Action lies for saying of *J. S. he was forsworn before a Justice of
 Gruneth and Peace*; for this, if not within the Words, is certainly within the Purview
 Derry. of that Statute.

1 Roll. Abr. 39. An Action will also lie for Words that import a charge of Perjury
 Pruer and although it be not a Perjury within the Statute; for Perjury always was and
 Moadman. still is an Offence indictable and punishable at the Common Law.

3 Inst. 164.

1 Roll. Abr. 39. But no Action lies for saying of a Man *he has forsworn himself in Leake
 Larve and Court*, without shewing that this is such a Court as could compel the taking
 Bennet. an Oath.

3 Inst. 166.

1 Roll. Abr. 69. Nor does an Action lie for saying to *J. S. thou wast forsworn before the
 Keble and Bishop of Norwich*; because it does not appear that it is before him in his
 Page. Court, and it shall not be so intended.

1 Roll. Abr. 70. These Words, *He hath delivered false Evidence and Untruths in his Answer
 Mitchell and to a Bill of J. S. in Chancery*, are not actionable; for, as many Things in
 Brown. a Bill of Chancery are not material to the Point in Question, it is no Per-
 3 Inst. 167. jury if such are not truly answered.

4 Co. 16.

Weaver and So no Action lies for saying of *J. S. that he is detected of Perjury*; for
 Cariden. an honest Man may be detected although he is not convicted; and it may
 Cro. Car. 268. be said of every Man, against whom a Bill of Indictment is preferred for any
 Crime, that he is detected of that Crime.

1 Roll. Abr. 51.

Harris and It is said that an Action does not lie for Words importing a charge of
 Dixon, Pasch. Subornation of Perjury, unless it be averred that a Perjury was committed;
 3 Ja. for the hiring a Man to commit a Perjury is no Offence, unless a Perjury is
 in Fact committed.

But from a Report of the same Case, for it is probably the same although reported as of a different Year, in another Book, it appears to have been held, that such Words, which are a great Imputation, are actionable, although it be not alledged that a Perjury was committed.

The Doctrine last mentioned was confirmed by a Case some Years after, where it was held that an Action lies for saying of A. *that he gave 10l. to B. for forswearing himself in Chancery*; and the Book adds, that it shall be intended there was a Subornation of Perjury.

4. Forgery.

All Words are actionable which import the Charge of such a Forgery, as is within any of the Statutes against this Offence.

An Action also lies for charging a Man with Forgery, although it is not said to be of such a Record, Deed, Writing, or Instrument, as is within any of the Statutes; for Forgery is an Offence indictable, and punishable at Common Law.

But no Action lies for saying of J. S. *he hath forged the Hand of J. N.* these Words being too general; for, unless it had been said to what Deed or Instrument, this is no Offence under any of the Statutes or at Common Law.

5. Theft.

An Action lies as well for calling a Man a Thief generally, as it does for charging him with being guilty of a particular Robbery or Larceny.

But as the taking away any Thing annexed to a Freehold is not, unless by particular Statutes declared so to be, a Larceny, no Action lies for Words which charge the Stealing of such a Thing.

Agreeably hereto it has been determined, that it is not actionable to say of J. S. *he stole the Shutters of my Windows*; but if the Words had been, *he stole the Shutters off my Windows*, an Action would have lain.

So, according to the old Cases, no Action lies for Words which import a charge of stealing Corn, or Trees growing, or Lead fixed to a House, or any other Thing which is annexed to the Freehold, because these Offences are only Trespasses.

It is indeed now actionable to charge a Man with having been guilty of cutting down Trees, or stealing Lead annexed to a Freehold. This, which is occasioned by Statutes made for punishing these Offences since such Cases were determined, does not impeach their Authority; for the Principle on which they are founded still remains.

But it has been held, that for these Words, *You are a Thief of every Thing*, an Action lies; because, as these Words include every Thing which can be stolen, they must intend a stealing of that which it is Felony to steal.

It was formerly held that no Action lies for saying *I charge J. S. with Felony for taking Money out of my Pocket*; because it does not necessarily imply a felonious Taking.

So for these Words, *You are a Pickpocket, you picked my Pocket of my Money*, it was held that no Action lies; for, as it does not appear to be a-felonious Taking, it may be a Trespass only.

But in a later Case it is laid down, that an Action will lie for the Words, *I charge J. S. with Felony in taking my Money out of my Pocket*, because it shall be intended a felonious Taking; and the Case of *Mason and Thompson*, and *Purcell*,

on the Authority of which this last and some other Cases had probably been determined, was denied to be Law.

- ¹ Roll. Abr. 43. An Action likewise lies for any Words which amount to no more than a charge of Petty Larceny: For, besides that the Party guilty of this Offence incurs the Forfeiture of all his Goods, he is liable to be whipped, or to suffer other corporal Punishment.

6. Other Crimes.

- ⁴ Co. 20. It is actionable to say of J. S. *he did burn a Barn with Corn in it, or a Barn that was Parcel of a Mansion-house*; the burning of such a Barn being a Felony.

- ^{Cro. Ja. 300.} An Action lies for saying these Words of J. N. *he harboured his Son knowing him to be a Romish Priest*: For this is Felony.

²⁷ Eliz. c. 2.

- ² Ventr. 265. No Action lies however for saying of any Person, except he is in some Office, that *he is a Papist*; but it does for saying *he goes to Mass*, for this makes him liable to the Punishment of the Statute.

^{Walden and Mitchell.}

²³ Eliz. c. 4.

- ¹ Roll. Abr. 68. Heretofore no Action lay for these Words, *Thou hast received stolen Goods knowing them to be stolen*; because such Receiver was not an Accessary, unless he had also aided or comforted the Thief.

^{Cro. Eliz. 880.}

- ³ W. & M. c. 9. But there can be no Doubt of such Words being now actionable; for Receivers of stolen Goods, knowing them to be stolen, are since declared to be Accessaries after the Fact, and made liable to Transportation for seven Years.

⁴ G. c. 11.

- ⁹ G. 2. c. 5. The Books abound with Cases of Actions for Words that charge the being guilty of such Acts of Conjuraton, Witchcraft and Dealing with evil or wicked Spirits, as came within the Meaning of the ¹ Ja. c. 11.

These Offences being now put an End to by the Repeal of that Statute, such Actions would also have been at an End; but to remove all Doubt, it is expressly provided by the repealing Statute, that no Suit shall be commenced against any Person for the charging another with any of these Offences.

- ⁴ Co. 17. It was heretofore laid down that it is actionable to say of a Woman *She has had a Bastard*.

But that Case has since been denied to be, as to this Point, Law; and it has been held that no Action lies for these Words, except it be averred that

- ¹ Roll. Abr. 38. such Bastard has been chargeable to some Parish; for unless it has been so, the Mother of it is not liable to the Punishment of Imprisonment ordained by the Statute.

- ^{Cro. Car. 436.} So, where such Child has not been chargeable to any Parish, no Action lies for saying of J. S. *he is the reputed Father of a Bastard Child*; the Father, as well as the Mother, being exempt till that is the Case from the Punishment of the Statute.

- ¹ Roll. Abr. 37. An Action does not in general lie for calling a Woman *Whore*, this being a mere Spiritual Defamation: But it lies in *London*, where Whores are by the Custom liable to be carted.

- ¹ Lutw. 1042. It has been held, that no Words tantamount to the calling Whore are within the Custom; and that no Action lies except the express Word *Whore* is made use of.

But this Case is not now Law; it having been since laid down, that an Action lies in *London* for calling a Woman *Strumpet*.

- ¹ Roll. Abr. 36. So it has been held, that in *London* it is actionable to call a Woman's Husband *Cuckold*; for, as this amounts to the calling her *Whore*, it is within the Custom.

¹ Str. 555. Cook and Wingfield.

¹ Str. 471. Vi-cars and Worth.

¹ Ib. 545.

It is not actionable to call a Woman *Bawd*, except in *London*, where Bawds are liable by the Custom to suffer corporal Punishment.

Cro. Car. 229.
Hollinghead's
Case.
Ib. 261.

But it is actionable to charge any Person, in any Place, with keeping a Bawdy-house; because this is an Offence punishable in the Temporal Courts.

1 Roll. Abr. 44.
Turnam and
Thorn.
Cro. Car. 229,
261.

An Action lies for saying of a Brewer *his Beer is unwholsome*; for a Brewer that sells unwholsome Beer is punishable; and it shall be intended to mean such Beer as he sells.

1 Roll. Abr. 62;
Lee and
Stradwick.

It is actionable, to charge a Person with being guilty of any Crime, of which he has on a Trial been acquitted.

Ozwen 150;
Cuddington
and Wilkins.

So, in another Report of the same Case, an Action is held to lie for charging a Man with having been guilty of a Crime, of which he has been convicted, and afterwards pardoned; for the Pardon takes away the Guilt as well as Punishment.

Hob. 81. Cud-
dington and
Wilkins.

It is reported to have been held, that no Action lies for the Words, *Thou art a Reqrator*; because this Offence does not make the Party guilty of it liable to loss of Life or Limb.

2 Show. 32;
Scoble and
Lee.

It is also laid down that these Words, *Thou hast stolen my Lord Shaftsbury's Deer*, are not actionable; because the Punishment for this Offence is only Imprisonment. And *per Holt Ch. J.* no Words are actionable unless by reason of the Charge imported in them the Party becomes liable to suffer some infamous Punishment, for he may be fined and imprisoned in a mere Trespafs.

Salk. 696.
Turner and
Ogden.
3 Anne.

The first of these Cases is not Law, or at least not so in the Latitude there laid down; for by the *5 Edw. 6. c. 14.* a Reqrator is liable to be set in the Pillory for the third Offence; and, as will presently appear, it is contrary to the Tenor of many Cases, of equally good Authority with this, to say, that only Words importing a Crime which may be punished with the loss of Life or Limb, are actionable.

The latter Case must, one would think, be mistaken by the Reporter; for by a Statute many Years antecedent to it, it was ordained, that any Person guilty of this Offence, should in Default of paying a Penalty of 20*l.* be set in the Pillory.

3 W. & M.
c. 10.

But taking the Punishment of this Offence at the Time of this Determination to have been only Imprisonment, this Case does by no Means coincide with the Principle on which Actions upon the Case for Words importing the charge of a Crime are founded. This is that such Words are actionable in themselves, without shewing any special Damage, because they do imply a Damage; and surely the charging a Person with a Crime for which he may be imprisoned, is doing him such an Injury as he ought to have Satisfaction for.

It is also contrary to what is laid down in the following Cases, and in many others which might be adduced.

An Action lies for any Words that import the Charge of a Crime for which a Person may be indicted.

Freem. 46;
Mayne and
Diggie.

So it does for Words charging a Woman with being the Mother of a Bastard Child, if such Child has been chargeable to any Parish; because she is in this Case liable to suffer the Punishment of Imprisonment.

Salk. 694;
696.
1 Roll. Abr. 33;
18 Eliz. c. 3.

So it is held to be actionable to speak any Words, by reason of which the Person of whom they are spoke may be imprisoned.

2 Ventr. 266.
Walden and
Mitchell.

- 4 Co. 15. No Action lies for the Words *Rogue, Villain, or Varlet*; for these and such like Words are considered as Words of heat.
Stanhope and Elib.
Sir. 304.
- Cro. Ja. 427.* So none lies for saying of *J. S. he is a cozening Knave.*
Brunkard and Segar.
- 1 *Roll. Abr. 43.* So none lies for calling any Person a *scurvy Fellow.*
Fisher and Atkinson.
- 1 *Roll. Abr. 43.* But an Action lies for saying of *J. N. he is a Rogue of Record*; for he cannot be a Rogue of Record unless he has been convicted upon Record.
Allesly and Marwidit.

2. Such as charge the having a contagious Distemper.

Man being formed for Society, and standing in almost constant Need of the Advice, Comfort, and Assistance of his fellow Creatures, it is highly reasonable that Words, which charge any one with labouring under a contagious Distemper, should be in themselves actionable; because all prudent People will avoid the Company of such a Person.

It makes no Difference whether the Distemper is owing to the Visitation of God, Accident, or the Indiscretion of the Party therewith afflicted; for in every of these Cases the being avoided, from whence the legal Notion of Damage arises, is the Consequence.

- Cro. Ja. 144.* An Action lies for these Words spoken of *J. S. he is a Leper.*
Taylor and Perkins. 1 Roll. Abr. 44.

- 1 *Roll. Abr. 43.* It is also actionable to say of *J. N. he has the great Pox.*
Milner and Reeve.

- 12 *Mod. 248.* So an Action lies for calling a Woman *pockey Whore.*
Whitfield and Powell. Ib. 242.

3. Such as slander a Title.

Since it is almost as great an Injury to prevent, or deprive a Man of the Means of living comfortably, as it is to rob him of Life itself, Words, by reason of which any Person may be hindred from having an Estate, or his Title to it brought into Question, are in themselves actionable.

- Cro. Car. 469.* The Word *Bastard* is not in itself actionable, but an Action lies for calling the Heir apparent to one possessed of a real Estate *Bastard*, for it may be the Occasion of his being disinherited.
Humbries and Hanfield.
 1 *Roll. Abr. 37. pl. 21.*

- Cro. Ja. 213.* So an Action lies for calling a fourth reputed Son of one that is in Possession of an Estate-tail *Bastard*; for, although there is in this Case only a remote Possibility of inheriting, yet he may be thereby injured.
Vaughan and Ellis.

- 1 *Roll. Abr. 37. pl. 16.* So it is actionable to call *J. S. who is in Possession of Lands by Descent, a Bastard.*

- 4 Co. 18. *Garard and Dickenson.* If *J. N. is in Possession of an Estate, an Action lies for saying he has no Right to such Estate.*

- 2 *Leon. 111.* *A. being in Treaty with B. for the Sale of the Manor of C. D. said to Williams and Linford, E. A. is worth nothing, and do you think the Manor of D. is his? it is but a Contract between his Broker Thomas and him.* It was in this Case insisted that the Words are not actionable, because not spoke to the Person who was about purchasing the Manor: But they were held to be so; and

by Wray J. If a Title is slandered, it matters not to whom the Words are spoke.

No Action lies for Words whereby a Title to Land is slandered, provided the Speaker, at the same Time, says that he has himself a Right to such Land; for if it did, no Person could be safe who lays claim to an Estate of which another is in Possession.

So if J. S. makes Title to Land under a forged Deed, no Action lies, unless it be shewn that he knew the Deed under which he claims to be forged.

But although no Action lies for Words by which a Man asserts his own Right to an Estate in the Possession of another, it does for Words which assert that the Right to such Estate is in a Stranger.

No Action however lies, even where the Right of a Stranger is asserted to Land in another's Possession, unless some special Damage is received from the Loss of Sale, or otherways.

4. Such as are spoken of Persons in Office.

As all Words spoken of any Person who is in the Enjoyment of an Office of Honour, Profit or Trust, which import a charge of Unfitness to discharge the Duty of the same, must be prejudicial to such Person; these have, and with good Reason, been always held in themselves actionable.

In Offices of Profit, Words which import a charge of Inability are as well actionable as those which imply want of Integrity; but if it be an Office of Honour only, no Action lies unless the Import of the Charge is a want of Integrity.

But wherever Words, in themselves not actionable, become so by being spoken of a Person in Office, it must appear from the Words themselves, or from the Pleadings, that they were spoken in a Colloquium concerning his Office; for the very Foundation of the Action is its being a Disgrace in Office.

1. Of Judicial Officers.

An Action lies for these Words, *My Lord Chief Baron cannot bear of one Ear.*

The Words *Common Barretor* are not always actionable in themselves, but if spoken of a Justice of Peace an Action lies for them.

So it does for the Words, *He is a corrupt Man.*

So it does for the Words, *He is no true Subject.*

So it does for the Words, *He is a false Justice.*

So it does for the Words, *He is a half-eared Justice, he will bear but one Side.*

- Cro. Car.* 14. So it does for the Words, *I have often been with him for Justice, but Iham and never could have Justice at his Hands, but always Injustice.*
York.
- Cro. Ja.* 240. So it does for the Words, *He did for Malice pervert the Law to serve Beaumont and his own Turn.*
Hastings.
- 1 Roll. Abr.* 48. So it does for the Words, *He is a debauched Man, and not fit to be a Hammond and Kingsmill. Justice of Peace.*
- 4 Rep.* 16. So it does for the Words, *He bideth Felonies, and is not worthy to be a Cro. Ja.* 167. *Justice of Peace.*
- 8 Mod.* 270. So it does for the Words *Rogue, Rascal, Villain, or Liar*, which if Aston and Blagrave. spoken of other Persons would be considered as Words of Heat and not action-
Ld. Raym. 1369. able.
- Salk.* 695. But no Action lies for saying of a Justice of Peace, *He is an Ass, a Fool, How and a Coxcomb, or a Beetle-headed Justice*; because these Words import only Prinn. want of Ability.
Ib. 698.
- Cro. Eliz.* 306. So no Action lies for saying of a Justice of Peace, *He is a Bloodsucker*; Hilliard and Constable. for it cannot be intended what Blood he sucked.
- Cro. Ja.* 305. If it be said of the Plaintiff, who had pronounced a Sentence as Judge Caesar and of the Court of Admiralty, *that the said Sentence was given by the Plaintiff Courtney. corruptly*; these Words are actionable, although it be not averred that there was at the Time of speaking them a Colloquium of his Office, for it appears from the Words themselves that there was such a Colloquium.
- 1 Leo.* 280. So these Words of a Justice of Peace, *He is a forsworn Justice*, are Carne and Ofgood. actionable, without alledging a Conversation concerning his Office; for they appear plainly to have been spoken in such a Conversation.
- Str.* 420, 1158. Wherever an Action will lie for Words of a Justice of Peace that relate Comb. 46, 65, to his Office, the Speaker may also be proceeded against for the same 66. Words, provided they be spoke to him while he is in the actual Execution of his Office, by Indictment or Information; and in some Cases Words that are not actionable are indictable.

2. Of other Officers.

- Hob.* 140. An Action lies for these Words spoken of any Person in Office, *He is a Thornton and common Barretor*; although the same Words of all Persons are not in them- Jobson. selves actionable.
1 Roll. Abr. 59.
- 1 Roll. Abr.* 57. So it does for the Words, *He is a corrupt Man.*
57. Bishop of Coventry and Wortly. Cro. Ja. 65.
- 1 Roll. Abr.* 56. It is actionable to say of a Commissioner for examining Witnesses in a Moor and Cause in the Court of Chancery, *He hath taken Bribes to Favour one of the Foster. Parties.*
- 1 Roll. Abr.* 57. So it is to say of such a Commissioner, *He hath altered the Depositions Parker and that were taken.*
Large.
- 1 Roll. Abr.* 58. If it be said of a Churchwarden, *He hath cheated the Parish*, an Action Strode and lies; for such Words are a Disgrace in an Office of Trust.
Holmes.
Cro. Eliz. 358.

These Words of a Steward of a Court, *He hath wronged me in his Court, and hath not performed his Office according to Law*, are actionable; a charge of great Misbehaviour in Office being imported by them. 1 Roll. Abr. 56. Forwell and Cowe.

The Words *cozening Knave* are not in themselves actionable; but if it be said of a Bailiff, or any Servant, who is to account for Money received, *He is a cozening Knave, to the Person who employs and confides in him*, an Action lies; for they amount to a Slander in an Office of Trust. Cro. Car. 480. Seaman and Bigge.

5. Such as are a Disgrace in a Profession or Trade.

Words, in themselves not actionable, become so whenever any Person is thereby disgraced in his Profession, or Trade; for, although it may be sometimes difficult to prove the special Damage received from them, nothing is more clear than that such Words have a direct and certain Tendency to injure the Person of whom they are spoken.

But in all Actions for Words of this Kind, it must appear from the Words themselves, or from the Pleadings, that there was, at the Time of speaking them, a Conversation concerning such Profession, or Trade. 2 Saund. 307. Str. 696. 1169.

Cro. Ja. 557. Salk. 694.

1. To a Divine.

It is actionable to say of a Clergymen, *He is a drunkard*; because he is for this Offence liable to be deprived of his Preferment. All. 63. Dodd and Robinson.

So it is if it be said, *He preacheth nothing but Lies and Malice in the Pulpit*. 3 Lev. 17. Cranden and Walden. 1 Roll. Abr. 58.

So it is where the Words are, *He is a Rogue and a Dog, and will never be good till he is three Foot under Ground, I had rather my Son should make Hay on a Sunday than go to hear Nash preach*. Comb. 253. Pocock and Nash.

So it is if these Words are spoke, *He is an old Rogue, and a contemptible Fellow, and hated and despised by every Body*. Str. 946. Musgrave and Bovey.

2. To a Physician or Surgeon.

It has been determined in the Case of a Barrister, that, if he brings an Action for Words which import a slander in his Profession, it must be averred that he was at the Time of speaking them a practising Lawyer; and it seems reasonable, although there has been perhaps no Determination in that Point, that the same Thing should be done in the Case of a Physician: For unless he was a practising Physician, he could not be injured by the Words.

An Action lies for saying of a Doctor of Physick, *He is no Scholar*, without alledging that when the Words were spoke there was a Colloquium of his Profession; because no one can be a good Physician unless he is a Scholar. 1 Roll. Abr. 54. Carwry and Chickley. Cro. Car. 270.

So it does if it be said, *He is an Empirick and Mcuntebank*; it being apparent from the Words themselves, that they were spoke of him in his Profession. 1 Roll. Abr. 54. Goddard and Hafsfoot.

So it does for these Words, *He is a Quacksalver*. 1 Roll. Abr. 54. Allen and Eaton.

Cro. Eliz. 620. It has been held, that no Action lies for saying of a Physician, *He hath killed a Patient with Physick*, unless it be said that it was done knowingly, and willingly; for he may mistake a Case, and undesignedly give Medicines that are improper.

The Reason upon which this Determination is grounded is not very apparent; for it is certainly a Disgrace to a Physician, and must hurt his Practice, to have it believed that a Patient died by taking improper Medicines prescribed by him; and by comparing it with some later Cases, it seems clear that such Words, which imply at least Ignorance in the Art he professes, are actionable.

Win. 40. *Auditor Curl's Case, Mich.* 20 *Ja.* It is laid down, that an Action lies as well for Words which imply the want of Science in a Man of a Profession, as it does for those which imply the want of Fidelity.

Hell. 69. *Watson and Vanderlaab, Mich.* 3 *Car.* So an Action lies for saying of a Surgeon who had *J. S.* under his Care, *He killed J. S.* although it be not averred that he did it knowingly or voluntarily.

11 Mod. 221. So it does if it be said of an Apothecary, *He killed a Patient with his Physick.*
Tutler and Alwin, Pasch. 8 *Anne.*

Hetty 175. No Action lies for these Words of a Surgeon, *He poisoned the Wound of Surgo's Case.* *J. S.* for it might be proper, in order to cure it, so to do.

1 And. 268. But if it be said of a Surgeon, *He poisoned the Wound of his Patient for Gain of Money*, these Words are actionable.

3. To a Counsellor or Attorney.

2 Ventr. 28. Wherever a Barrister brings an Action for Words which are a Disgrace in his Profession, he must aver that he was, when the Words were spoke, a practising Lawyer; for if he was not he could receive no Damage from them.
King and Lake.
Styles 231.

Poph. 207. A Barrister must also aver himself to be *homo conciliarius & eruditus in Lege*; it not being sufficient to aver that he is *homo eruditus in Lege*.
Cary's Case.

Co. Entr. 22. An Action lies for saying of a Barrister, *He deceived his Client, and revealed the Secrets of his Cause.*
Snag and Gray.

1 Roll. Abr. 57.

2 Ventr. 28. So it does for these Words, *He will give you vexatious Council, and then King and Lake.* *He will milk your Purse, and fill his own Pocket.*

1 Roll. Abr. 54. So it does if the Words are, *He is no Lawyer, he cannot make a Lease, Banks and Allen.* *they are Fools that go to him for Law.*

Cro. Car. 382. So it does if it be said, *He is a Duncce, and will get nothing by his Profession.*
Peard and Johns.

1 Roll. Abr. 55.

1 Lev. 297. It is actionable to say of an Attorney, *He cannot read a Declaration.*
Powell and Jones.

Sid. 327. *Baker and Morfue.* So it is if the Words are, *He has no more Law than Mr. C.'s Bull, or no more Law than a Goose.*

Cro. Eliz. 589. So it is if it be said, *He will overthrow his Client's Cause.*
Martyn and Burling.

4 Co. 16. So it is if these Words are spoke, *He is well known to be a corrupt Man, and to deal corruptly.*
Byrchley's Case.

So it is where it is said, *He is a Cheat.*

Heil. 167. *All-*
ston and Moor. 1 *Roll. Abr.* 53.

So it is to say *He is a Rogue.*

1 *Roll. Abr.*
52. *Sharw and Wakeman.*

So it is where the Words are, *He is a common Barretor.*

Cro. Eliz. 171.
Proud and Howe. *Hob.* 140.

So it is if it be said, *He is a Knave.*

1 *Roll. Abr.*
52. *Nicbolls and Webb.* 1 *Freem.* 277.

So it is where these Words are spoke, *He is an Extortioner, and one told me he cozened him of ten Pound in a Bill of Cofts;* for it is contrary to his Oath as an Attorney to be guilty of male Practice.

1 *Roll. Abr.* 55.
Stanly and
Boswell.

So it is if it be said, *He stirreth up Suits, and once promised me, that if he did not recover in a Cause for me, he would take no Charges of me;* because stirring up Suits is a Badge of Barratry, and to undertake a Suit no Purchase no Pay is unlawful Maintenance.

1 *Roll. Abr.* 54.
Smith and
Andrews.
Hob. 117.

So it is to say, *He is a Rogue for taking your Money, and has done nothing for it, he is no Attorney at Law, and dares not appear before a Judge, what signifies going to him, he is only an Attorney's Clerk, and a Rogue, he is no Attorney.*

Str. 1138.
Hardwick and
Chandler.

No Action lies for saying of an Attorney, *He is a common maintainer of Suits;* for it is his Duty to maintain his Clients Causes.

Hob. 117.
Boxe and
Barnaby.
1 *Roll. Abr.* 55.

So none lies if it be said *he made false Writings;* because this, it not being the Business of an Attorney to make Writings, is no slander to him.

Win. 40. *Auditor Curl's*
Case.
Ib. 90.

4. To other Artifts.

It is actionable to say of a Midwife, *Many have perished for her want of Skill.*

Cro. Car. 211.
Howes's Case.

A. said to *B.* who intended to send his Son to be under the Care of *C.* a Schoolmaster, *Put not your Son to him, for he will come away as great a Dunc as he went.* It was held that these Words are actionable.

Heil 71. *Wat-*
son and Van-
derlafe.

If it be said of a Land-Surveyor, *He is a cheating Knave,* an Action lies; for, as this is a Business where Skill is required and of which all are not Judges, such Words must tend to prevent his being employed.

Cro Ja. 504.
Blunden and
Fu?ace.

5. To a Tradesman.

In general it is true, that where an Action is brought for Words spoken of a Tradesman, which would not have been actionable if spoken of one not in Trade, it must be averred that they were spoken in a Conversation concerning his Trade.

Salk 694.
Savage and
Robery.
2 *Saund.* 307.
Latch 114.
1 *Lev.* 115.

250. 2 *Lev.* 62. *Str.* 696, 1169. *Ld. Raym.* 1417.

But for these Words of a Tradesman, *Have a Care of him, do not deal with him, he is a cheat, he has cheated all the Farmers at E. and now he is come to cheat at F.* an Action lies, without an Averment that they were spoken in a Conversation concerning his Trade; for it is apparent from the Words themselves that this was the Case.

2 *Lev.* 62.
Reeve and
Holgate.

- Ld. Raym. 1480. *Stanton and Smith.* So it does where it is said of a Tradesman, *He is a sorry pitiful Fellow, and compounded his Debts*, without alledging that there was, at the Time of speaking them, a Colloquium of his Trade; for these Words must greatly lessen the Credit of a Tradesman, and be very prejudicial to him.
- Str. 898. *Harman and Delany.* In an Action upon the Case for a Libel the Plaintiff declared that he was a Gunsmith, and that, it having been inserted in the *Craftsman* that he had the Honour to present the Prince of *Wales* with a Gun two Feet six Inches long which would shoot as far as one a Foot longer, and to kiss his Royal Highness's Hand on being appointed his Gunsmith, the Defendant, with Intent to scandalize him in his Trade, published an Advertisement in these Words, "Whereas there was an Account in the *Craftsman* of *John Harman*, Gunsmith, making Guns two Feet six Inches long "to exceed any made by others of a Foot longer, (with whom it is supposed he is in Fee), this is to advise all Gentlemen to be cautious, the said Gunsmith not daring to engage with any Artist in Town, nor ever did make such an Experiment, (except out of a Leather Gun) as any Gentleman may be satisfied of at the *Cross Guns* in *Long-Acre*." It was held that an Action lay for this Advertisement.
- Cro. Car. 282. *Collis and Malin.* If a Tradesman brings an Action for Words spoken of him in his Trade, it must appear from the Pleadings that he was in Trade at the Time of the speaking them; for it is no slander to call a Man who is no Trader a Bankrupt, because he is not thereby hurt in his Credit.
- Cro. Car. 31. *Cro. Ja. 222. Tutbill and Milton.* In an Action for Words of a Tradesman, which were laid to be spoken on the first Day of *May*, it was alledged, that for five Years preceding the first Day of *May* the Plaintiff had exercised the Trade of a Draper. It was objected in Error, that it ought to have been alledged that he exercised the Trade on the Day the Words were spoke: But *per Cur'*, It is well enough, for it shall be intended that he did.
- 1 Lev. 115. *Terry and Hooper.* If Words are spoken of a Limeburner an Action lies; for wherever Words are a slander to a Man in his Trade, it is not material of how low a Kind the Trade is.
- Cro. Car. 585. *Squire and Johns.* An Action lies for saying of any Tradesman who gets his Living by buying and selling, *he is a Bankrupt*.
- Cro. Car. 31. *Crumpe and Barne.* It also lies where a Shoemaker, or any Man of a handicraft Trade, who buys Materials and after having them manufactured sells them again, is called a Bankrupt; notwithstanding that in this Case the Gain arises in Part from manual Labour.
- Cro. Eliz. 268. *Sid. 299. Emmerfon's Case.* A Tradesman who brings an Action for being called *a Bankrupt* must aver, in the Words of the Statute, that he is one who gets his Living by buying and selling; for it is not sufficient to aver that he gets *diversa Lucra* by buying and selling.
- 1 Bullstr. 40. *Str. 762. Stanton and Smith.* An Action lies for these Words of a Tradesman, *You are a pitiful Fellow, and a Rogue, and compounded your Debts*; for they amount to the calling him a Bankrupt.
- Ld. Raym. 1480. *Comb. 292. Hooker and Tucker.* All Words, as well as the Word *Bankrupt*, by reason of which a Tradesman may lose his Credit are actionable; because nothing is so valuable to him as this is.
- Carth. 330. *1 Roll. Abr. 59. Porte and Cook.* An Action lies for saying of a Tradesman, *He is not a Man to be trusted*.
- 1 Roll. Abr. 60. *Smith and Rookes.* So it does if the Words are, *He is not able to pay his Debts*.
- Comb. 292.

An Action lies for the Word *cheat* if spoke generally of a Tradesman in a Conversation concerning his Trade: For the Law is very tender of the Credit of Tradesmen. *Salk.* 694. *Ld. Raym.* 1417. *1 Lev.* 115, 250. *2 Lev.* 62. *2 Saund.* 307. *Str.* 696, 1169.

But if the particular Act of cheating is expressed, as if these Words are said of *J. S.* *He cheated J. N. in the Sale of Barley*, no Action lies, unless it be alledged that *J. S.* gained his Living by buying and selling Barley; for if he did not he is not injured by these Words. *1 Roll. Abr.* 62. *Bray* and *Haynes.* *Cro. Eliz.* 171.

If it be said of a Blacksmith, *He cheated J. S. in a Tire of Wheels*, these Words are not actionable; for it might be in the Price and not in the Making of the Tire; and although it is a slander to say the Goods of a Manufacturer are ill made, it is not to say he sells them too dear. *1 Roll. Abr.* 55. *Ticknell* and *Snelling.*

An Action was brought by a Carpenter for these Words, *He has charged J. S. for forty Days Work, and received the Money for the Work that might have been done in ten Days, and he is a Rogue for his Pains*: But after a Verdict for the Plaintiff Judgment was arrested. *Str.* 797. *Lancaster* and *French.*

An Action however lies for these Words of *J. N.* a Goldsmith, *He sold a Copper Chain for a Gold one*; because this is a Fraud in the usual Course of his Dealing. *1 Roll. Abr.* 62. *Peck's Case.*

So it does if it be said of a Leatherfeller, *He sold Lamb-skins for Skamois-skins*. *1 Roll. Abr.* 63. *Fairbank* and *Mason.*

(C) Of Words which become actionable by reason of the special Damage received from them.

ALL Words, not in themselves actionable, become so if any Damage is received by reason of the Publishing them; but the special Damage, which is in this Case the sole Ground of the Action, must be set out.

This being so, it is easy to see that, wherever there is any Doubt whether the Words are in themselves actionable, the most prudent Way is, if the Case will warrant it, to alledge the special Damage.

If the Words are, *I will give my Mare a Peck of Malt, and let her drink, and she shall piss as good Beer as J. S. a Brewer brews*, and it be averred that by reason of the speaking these Words *J. S.* lost some Customers, no Action lies; for as these Words, which plainly appear to be spoke in a jocular Way, are not actionable in themselves the special Damage should have been set out, it not being sufficient to alledge Damage in to general a way. *1 Roll. Abr.* 58. *Fenn* and *Dixie.*

It is not actionable to say of every Person, *He is an Heretick, or he is ex-communicated*; but if either of these Sets of Words are spoken of a Clergyman, and it be averred that by reason thereof he lost a certain Benefice to which he was about to be presented, an Action lies. *4 Co.* 17. *a.*

No Action lies for saying of a single Woman, *J. S. did get her with Child, or she had a Child by J. S.* for this is only a charge of Incontinence, and amounts to no more than a mere spiritual Defamation; but if it be alledged that, by reason of these Words, the Person of whom they were spoke lost a Marriage it does. *4 Co.* 17. *Davies* and *Gardiner.* *Cro. Ja.* 162.

An Action lies for saying of a Woman, *She is a bursten bellied Quean, and her Guts hang down to her Garters*; if it be shewn that by reason thereof she lost a Marriage. *Lit. Rep.* 193. *Bridge* and *Langford.*

Cro. Ja. 323. If it be said of *J. S.* *he is a Whoremaster, for he lay with Brown's Wife,* and had to do with her against a Chair, no Action lies; but if it be alledged that, by reason of these Words, he lost a Marriage it does; for the Loss of Marriage is as great to a Man as to a Woman.

Matthew and Crofs.
1 Roll. Abr. 35.
pl. 10.
Cro. Car. 269.
Latch 218.

Cro. Eliz 787. But wherever an Action is brought for Words, by reason of which a Loss of Marriage ensues, it must be alledged that a Treaty of Marriage was on Foot with some particular Person, and that it was thereby broke of.

Cro. Ja. 422.
Lutw. 1296.
Latch 218.

1 Roll. Abr. 36. It was found by a special Verdict; that the Defendant had preferred a Libel in the Spiritual Court against the Plaintiff, in which she charged him with coming often to her in the Night, under the Pretence of being a Suitor to her for Marriage, and lying with her, and getting her with Child. It was also found, that she afterwards falsely and injuriously, at the Quarter-Sessions, charged him with being the Father of a Child begotten upon her Body, by reason whereof all Persons of good Credit, who had the Fear of God before their Eyes, did from that Time and still do refuse to suffer any of their Daughters, or Relations, to be joined with him in lawful Wedlock. The Court was of Opinion that no Action lay, because it was not found by the Verdict that he lost any particular Marriage; for the charge, that all Persons of Credit refused to let him marry into their Families, is too general.

1 Lev 261. In an Action for these Words of a single Woman, *She was with Child by Barnes and Studd.* *J. S.* It was alledged that by reason thereof she incurred the Displeasure of her Parents, and was in Danger of being turned out of Doors. It was held that no Action lies, there being here no Loss of Marriage.

In this last Case, the Case of *Medhurst and Balam*, *1 Roll. Abr.* 35. where an Action had been held to lie for saying of a single Woman, *She is with Child, and hath taken Physick for it*, by reason of which Words she lost her Reputation and the Friendship of her Neighbours, was denied to be law.

(D) Certain Circumstances Which are to be regarded in the speaking Words in themselves actionable.

1. The Time when spoke.

AS the same Words are not always understood in the same Sense, some which were once actionable may not now be so; and on the other Hand an Action may now lie for others, which might formerly have been spoke with Impunity.

The Consequence to an Agent of doing the same Thing may, at least in the Eye of human Law, which in punishing any Action considers only how far Society is thereby prejudiced, at different Periods of Time be very different. An Act of Witchcraft, heretofore a capital Offence, is by a late Statute declared to be no Offence at all; and many Things are at this Day Felonies, which were formerly no more than Trespases. It follows that all Actions, for Words which import the charge of a Crime, depend entirely upon the State of the Law as to that Crime at the Time they were spoken.

The present Sense and Import of Words is not only to be considered in such Actions: But the Rule of construing Words in themselves actionable, which prevails at the Time of speaking them, must also be attended to.

In ancient Times Actions upon the Case for Words were very rare, being scarce ever brought except the Slander was great and of dangerous Consequence. 4 Co. 15. Stanhope and Blitt.

Afterwards, the Malice of Men encreasing, such Actions became so numerous, that the Judges, in Conformity to a very sensible Maxim, *Malitiæ hominum est obviandum*, carried the Rule of construing them *in mitiori sensu* very far. 8 Mod. 24. Button and Heyward. 4 Co. 15. b. Ld. Raym. 959.

As the Mischief was nevertheless found to continue, it was at length declared by a Statute, that wherever Words are in themselves actionable the Plaintiff, unless the Jury give him Damages to the Amount of forty Shillings, shall recover no more Costs than Damages. 21 Ja. c. 16.

Soon after this Statute Actions upon the Case for Words began visibly to decline; for, as the Judges for some Time adhered to the Rule of Learning as much as possible against them, the injured Party, instead of having Satisfaction, was frequently put to the great Expence of paying his own Costs.

This being perceived, such a Licentiousness both in Speaking and Writing prevailed, that it became necessary for the Judges, in Conformity to the same Maxim on which the contrary Practice had been established, to countenance these Actions. 8 Mod. 24. Button and Heyward. Ld. Raym. 959.

Of late Years the Practice has been to depart a good deal from the Rule of construing Words *in mitiori sensu*; and, till some stop is put to that Corruption of Principles and Dissoluteness of Manners, which has diffused itself through all Ranks of People, it will perhaps be proper that it should continue.

2. The Place where.

As some Words have a local Signification, such are in themselves actionable if spoke where this is understood, which in another Place would not be so.

If it be said of a Barrister, *He is a Daffidown-Dilly*; these Words being spoke in the North, where the Word *Daffidown-Dilly* means *an Ambidexter*, are actionable. Cart. 214. Annison and Blotfeld.

So are the Words, *Thou hast strained a Mare*, if spoke in a County where the Word *strained* signifies *carnally knew*. Cro. Eliz. 259. Coles and Haviland.

So an Action lies for these Words, *Thou art a bealer of Felons*, if spoke in some Western Parts; because they are understood to mean *a concealer of Felons*. Hob. 126. Anon.

So it does for saying of a Man in certain Northern Counties, *He is main-sworn*; for this Word there signifies *perjured*. Hob. 126. Slater and Franks.

There is no need to explain the Meaning of these Words of local Signification by Averment, or Innuendo; for the Judge, before whom the Cause is tried, is presumed to understand the Meaning of all *English* Words, or he may learn it from the Witnesses. 1 Roll. Abr. 86. pl. 1. Cro. Eliz. 250.

3. The Language they are spoke in.

1 Roll. Abr. 74. Words in themselves actionable are not so when spoke in a Language not understood by any hearer; for they can be no slander, unless they are understood by some Person who hears them.
Jones and Dancks. Hob. 191.

Cro. Eliz. 855. But if the Meaning of the Words is understood by the Hearer, an Action lies although they are spoke in a foreign Language; for the Consequence is equally bad to the Party injured, as if they had been *English* Words.
Price and Jenkins. Ib. 496.

1 Roll. Abr. 59. If slanderous Words are spoke in the *French* Language, an Action lies for them.
Delaporte and Cook.

Hob. 126. So it does for calling a Man *Idoner*, which is a *Welsh* Word, and means *being guilty of Perjury*.

1 Roll. Abr. 86. pl. 5. It is not necessary to explain in the Pleadings what Words spoke in a foreign Language mean in *English*; for it is the Duty of the Judge, who tries the Cause, to receive Information as to this from those that know their Signification.
Hob. 191.

4. The Occasion of speaking them.

4 Co. 13, 14. The Occasion of speaking Words in themselves actionable is much to be regarded; for *sensus Verborum sumendus ex causa dicendi*.

Cro. Ja. 90. A Barrister may in pleading his Client's Cause speak Words for which, if spoke on another Occasion, an Action would lie; for it is his Duty to enforce every Thing he is informed of which is material for his Client, and an Action would lie against him for not pursuing his Instructions: But if he speaks any Thing slanderous which is not material to the Issue he is liable to an Action.

In the Report of this Case, *1 Roll. Abr. 87.* it is said, that where an Advocate says what is proper for his Client in Mitigation of Damages, it is excusable although it be not precisely material to the Point in Issue; and this Doctrine is confirmed by *Hugh's Case, Hob. 328. Pasch. 18 Ja.*

Styles 462. Another Case subsequent to both these goes still farther. In this it is laid down, that no Action lies against a Counsellor for speaking scandalous Words in defending his Client's Cause; for it is his Duty to speak for his Client, and it shall be intended that he spoke according to his Instructions.
Wood and Gunston, Mich. 7 Car. 2.

Cro. Ja. 91. If a Parson in preaching recites a Story from a Book, by reason of which some Person is slandered, unless it appears to be done maliciously, no Action lies.
Greenwood's Case. 1 Roll. Abr. 87.

5. The Design of the Speaker.

Words in themselves actionable are not so, when it appears manifestly that the Speaker had no Intention to injure the Person of whom they were spoke.

1 Lev. 82. It was held that no Action lies for these Words, *I have heard J. S. was hanged for stealing a Horse*; because it appeared at the Trial that they were spoke out of concern, and not with an Intent to slander.
Crawford and Middleton.

Cro. Eliz. 297. So if *A.* says to *B.* *You are forsworn*, and *B.* replies, *Do you say I am perjured?* and *A.* answers, *Yes*, no Action lies; for this Answer is rather drawn from *A.* than spoke with design.
Livermore and Martin.

So if the Words are, *I will give my Mare a Quarter of a Peck of Malt, and let her drink, and she shall piss as good Beer as J. S. a Brewer brews,* no Action lies; for they plainly appear to be spoke in a jocosse Way. 1 Roll. Abr. 58. Fenn and Dixie.

(E) Of Slander in a Course of Justice.

TO prevent Mens being deterred, by the Fear of Actions, from speaking on all Occasions what Justice requires, Words, in themselves actionable, are not so when published in a Course of Justice. As these are however usually upon Oath, an Indictment may if they are false be for the Perjury.

No Action lies for a Complaint in a Course of Justice, although it would for saying the same Thing on any extrajudicial Occasion. Cro. Eliz. 247. Buckley and Wood.

So no Action lies for slanderous Words contained in a Bill of Indictment; but it does for publishing the Contents of the Bill. 3 Leon. 138. Have and Meller. 4 Co. 14. Cro. Eliz. 247. 1 Saund. 132.

If *A.* says to *B.* *I charge you with Felony,* an Action lies; but if *A.* charges *B.* with Felony before a Justice of Peace it does not; for if it did Thieves would often escape for want of being prosecuted. 1 Roll. Abr. 43. Busy and Child. Hob. 82. Cro. Eliz. 248.

So if *J. S.* exhibits Articles of the Peace against *J. N.* and *J. N.* being in Court says, in the Hearing of the whole Court, *There is not a Word of Truth in those Articles, and I will prove it by forty Witnesses,* no Action lies, although these Words amount to a charge of Perjury, because they are said by *J. N.* in Defence of himself. 1 Roll. Abr. 33. Moulton and Clapham.

An Action does not lie against a Witness for slander in his Evidence, this being in a Course of Justice. Cro. Eliz. 230. Buckley and Wood.

But if a Witness speaks slanderous Words which are not material to the Point in Issue, he is liable to an Action. Cro. Eliz. 248.

If a Bailiff, having a Warrant to arrest *J. S.* on a Writ issuing out of the Court of Chancery, makes an Affidavit that he did arrest him, and that he rescued himself, and *J. S.* is thereupon committed to the Fleet; although this Affidavit was false no Action lies, because it was in a Course of Justice. 1 Roll. Abr. 43. Aier and Redgvoit. 4 Co. 14.

So if *J. S.* has given in a Petition to the House of Commons in which Slander is contained, and after delivers printed Copies of the same to the Members of that House, no Action lies; for it is agreeable to the Order and Course of Parliament to deliver such Petitions. 1 Saund. 133. Lake and King.

So no Action lies for a charge in Articles of the Peace exhibited against any Person, notwithstanding that the Charge is false, and he is by reason thereof put to the Trouble and Expence of entering into a Recognisance for keeping the Peace. 4 Co. 14. Cutler and Dixie. 4 Co. 15.

A. libels in the Spiritual Court against *B.* for Defamation, and produces *C.* as a Witness. Hereupon *B.* makes an Allegation in Writing, as the Course of that Court is, that *C.* who was perjured in a Cause between *E.* and *F.* at the Assizes at *G.* ought not to be received as a Witness. Although this Allegation is false, yet, as the Court had Jurisdiction in the original Matter, *C.* shall not have an Action against *B.* for, if he might, it would prevent the Detection of bad Witnesses. 1 Roll. Abr. 33. Westover and Dabbinet.

But if *J. S.* had heretofore, when that Court was in Being, charged *J. N.* with Felony or Piracy by a Bill in the Star-Chamber, an Action would have lain; because, as that Court had no Jurisdiction in such Offences, 4 Co. 14. Buckley and Wood.

fences, this could not with Propriety be called a Proceeding in a Course of Justice.

1 Roll. Abr.
111, 112.
Ante Vol. 1.
61.

From these Authorities it appears that no Action lies for the mere Falsity of a Charge in a judicial Way: But, if it be accompanied with Malice, an Action upon the Case in the Nature of a Writ of Conspiracy lies; and it is highly reasonable it should, else bad Men, under the specious Pretence of furthering Justice, would have it in their Power to publish with Impunity the vilest Slanders.

(F) Of Words spoke in the past or future Tense.

IT is in general requisite to the making Words actionable that they should be spoke in the present Tense; but an Action does sometimes lie where they are in the past or future. The Distinction seems to be, that where the Party, injured by the Charge imported by them, will receive the same or nearly the same Damage from Words spoke in the past or future, as if they had been in the present Tense, they are actionable; but where the Consequence of the Thing charged is at an End, or may never happen, they are not so.

1 Roll. Abr. 39.
Rayner and
Grimstone.

It is actionable to say of J. S. *He was perjured, or he hath committed Perjury*; for a Man may at any Distance of Time be prosecuted for Perjury.

1 Roll. Rep.
427. Sidnam
and Mayo.
1 Roll. Abr. 49.

So it is to say of any Person, *I think in my Conscience if he may have his Will he will kill the King*; for such Words may be the Occasion of a Man's Ruin.

Latch 114.
Hill's Case.
1 Roll. Abr. 49.

So it does for saying of a Tradesman, *He will within two Days become a Bankrupt*; for it may ruin his Credit.

Str. 1189.
Taylor and
Hall.
1 Roll. Abr. 48.

But no Action lies for saying a Man *has had the Pox*; for it is probable he is cured, and then none will avoid his Company.

1 Roll. Abr. 48.
Hammond and
Kingmill.

So none lies for saying of a Justice of Peace, *He was a debauched Man, and was not fit to be a Justice of Peace*; for he might formerly have been debauched and unfit, but may not be so now.

(G) In what Sense Words in themselves actionable must be affirmative.

THE Charge imported by Words must, in order to make them actionable in themselves, be affirmative; but it is not necessary that it be directly so; for if they amount, in any indirect Manner, to an affirmative Charge an Action lies for them.

Cro. Eliz. 348.
Smith and
Wisdome.

An Action lies for saying of J. S. *I think or I dreamed he committed a certain Felony*; for J. S. may by reason of this charge be arrested on Suspicion of Felony.

So it does for these Words, *I think in my Conscience if J. S. might have his Will be would kill the King.*

Cro. Car. 407.
Sidnam and Mayo.
1 *Roll. Abr.* 49.

So it does for these Words spoke by *A.* to *B.* *If you had had your Deserts you had been hanged for Felony*; for, although a Condition is annexed, they amount to a charge of Felony.

Brownl. 3.
Harris and *Adams.*

But if *A.* says to *B.* *Thou deservest to be hanged, or thou hast done that for which thou deservest to be hanged,* no Action lies; for here is not, as in the foregoing Case, a charge of a Fact, it being only a general Declaration of the Opinion which *A.* entertains of *B.*

1 *Roll. Abr.* 43.
Hake and *Moulton.*
Ib. pl 5.

So these Words of a Woman are actionable, *She had a Child, and if she hath not a Child she hath made it away*; for they import an indirect Charge of Murder.

Cro. Eliz. 639.
Redstone and *Pomfreit.*
1 *Lev.* 261.

If it be said, *You are as great a Rogue as J. S. who stole Quilts,* an Action lies; for, notwithstanding that these are comparative Words, they amount to an affirmative Charge that the Person of whom they are spoke did steal Quilts.

Com. 267.
Upton and *Fold.*

So it does for saying to *J. N.* *You are as arrant a Thief as any in England.*

Cro. Ja. 687.
Foster and *Browning.*

So it does if the Words are, *As sure as God governs the World, and King James this Kingdom, J. N. hath committed Treason.*

Sid. 53. *Dacy* and *Clinch.*

So it does for these Words, *J. S. says I am a perjured Rogue, he is perjured as well as I.*

1 *Lev.* 65.
Orton and *Fuller.*

It is in general true that Slander must be express, and cannot be implied.

Cro. Ja. 317.
Leycroft and *Dunker.*

But if the Words are, *I know what I am, and I know what Snell is, I never buggered a Mare,* an Action lies; for the Implication is here so strong as to amount to an affirmative Charge of Buggery.

2 *Lev.* 150.
So *Snell* and *Webb.*
Irig.

So if it be said to the Plaintiff, *You are a Rascal, you have forgot since you lived in Black Bull-yard, there you could procure Broad Money for Gold, and clip it when you had done, and then the Shears could go,* these Words are actionable.

Ld. Raym.
1185. *Speed* and *Parry.*
Salk. 697.

These Words do not indeed contain a direct Charge of Clipping, but they imply a charge of having been guilty of it; for a bare Power to have done it was the same in any other Place as in *Black Bull-yard.*

If it be said, *When wilt thou bring home the nine Sheep thou stolest from J. N?* these Words are actionable; for although spoke interrogatively they amount to an affirmative Charge.

1 *Roll. Abr.* 48.
Hunt and *Thimblethorp.*
Cro. Ja. 568.

So an Action lies for saying, *Did you hear that J. S. is guilty of Treason?*

12 *Co.* 134.
Earl of Northampton's Case.

If *A.* the Wife of *B.* be asked by *C.* *Why will you hang D?* and she says, *for breaking our House in the Night, and stealing our Goods,* these Words are actionable; for, notwithstanding that it is by way of Answer to a Question, here is an affirmative Charge.

1 *Roll. Abr.* 50.
Haywood and *Naylor.*

An Action lies for saying *I will prove, or I make no Doubt to prove that J. S. has committed a certain Felony*; for this, though indirectly spoke, is a more vehement Affirmation than to say he has committed it.

1 *Roll. Abr.* 50.
Webb and *Poor.*
Cro. Eliz. 569.

So it lies for saying to *A.* *Go tell B. he is a Thief.*

1 *Roll. Abr.* 80.
Hendey's Case.

So it does for these Words, *You brought Fire to set the House which was burnt on Fire.*

Hutton 123.
Glafter and *Heliar.*

- ¹ Roll. Abr. 50. It is actionable to say of a Man, *He was whipped for stealing Sheep*; for these Words are tantamount to the affirming he was convicted of that Crime.
- ^{Hob. 177.} It has been held that no Action lies for saying of *J. S. He is in Gaol for Horse stealing*; since it may be the Case of a Man who is innocent to be suspected and imprisoned.
- ^{Steward and Bishop, Trin. 14 Ja.}
- ^{1 Lev. 82.} But in a much later Case these Words, *I will bring J. S. to gaol for stealing a Mare*, were held to be actionable, as containing an indirect Charge of Felony; and the preceding Case was denied to be Law.
- ^{Middlton, Mich. 14 Car. 2.}
- ^{1 Roll. Abr. 75.} If *A.* says to *B.* *One of us two are perjured, and it is not I*; these Words are as much actionable as if *A.* had said to *B.* *you are perjured*.
- ^{Coe and Chambers.}
- ^{1 Roll. Abr. 50.} An action lies for these Words, *We will have them stand in the Pillory, Pell and Fel- and have their Ears for Perjury*; for they amount to an Affirmation that the Persons of whom they are spoke have been guilty of Perjury.
- ^{1 Roll. Abr. 41.} So it does for saying of *J. S. He gave ten Pound to A. for forswearing Ewer's Case. himself in Chancery*; it being tantamount to a charge of Subornation of Perjury.

(H) Of the Certainty required in them.

- I**T is in general necessary to the making Words actionable in themselves, that the Charge contained in them be certain, and that the Person of whom they are spoken be described with Certainty.
- ^{1 Roll. Abr. 69.} It is not actionable to say of a Man, *He is no true Subject of the King*; for the Word *true* is of uncertain Signification, and none is so true a Subject as he ought to be.
- ^{Smith and Turner.}
- ^{1 Roll. Abr. 69.} So to call a Man rebel is not; for a Commission of Rebellion may have issued against him from the Court of Chancery.
- ^{Redstone's Case.}
- ^{1 Roll. Abr. 70.} No Action lies for saying of *J. S. He has stolen Furze*; for it may mean Furze growing and is then only a Trespass.
- ^{Gibbert's Case.}
- ^{15 Car. 2. c. 2.} But the Person who cuts Furze having by a Statute since this Case been made liable to the Punishment of Whipping, an Action would now certainly lie for these Words.
- ^{1 Roll. Abr. 40.} If it be said of a Man, *He did forswear me forty Shillings worth of Tithes in Canterbury Court*, no Action lies; it being uncertain what Court is meant, and whether it was a Court having Jurisdiction of Tithes.
- ^{Bray and Patridge.}
- ^{Cro. Eliz. 888.} So no Action lies for saying, *Thou gettest thy living by swearing and forswearing*; for, as a Man may be intitled to the Fines set on Perjury, this does not necessarily imply a charge of Perjury.
- ^{Stanhope's Case.}
- ^{1 Roll. Abr. 42.} So if *A.* says to *B.* *Thou art forsworn, and didst take a false Oath at the Assizes at Hertford*, no Action lies; for it might be in a private House and not in Court.
- ^{Prichard and Smith.}
- ^{Cro. Eliz. 500.} So none lies for saying of *J. S. He hath delivered untruths upon Oath in his Answer to a Bill in Chancery*, the Charge being too uncertain; for, as many Things in the Bill might not be material to the Matter in Question, it is no Perjury if these are not truly answered.
- ^{Brown and Michell.}
- ^{3 Leon. 231.} So no Action lies for saying to any Person, *Thou hast forged my Hand*, unless it be said *to what*; for these Words being too general are uncertain.
- ^{Ca. 313.}

So for saying to *J. S.* *Thou hast committed Burglary in breaking his House* 1 Roll. Abr. 71.
and taking his Goods, no Action lies; it being uncertain, as no Person is Brown and
St. John. named, whose House and Goods are meant.

If three Men have given Evidence at a Trial, and *J. S.* says to them, 1 Roll. Abr. 81.
One of you three is perjured, neither of them shall have an Action against Brown's Case.
J. S. it being uncertain of whom these Words are spoke.

So if it be said, *One of my Brothers is perjured*, no Action lies by reason Cro. Ja. 107.
of the apparent Uncertainty which of the Brothers is meant. Wiseman and
Wiseman.

(I) Where the Want of Certainty is supplied.

1. By the apparent Intention of the Speaker.

HOWEVER Certainty in the Words in themselves may, in general,
be necessary to make them actionable, yet if, from the Whole of them
taken together, or the Circumstances which attend the speaking them, it is
apparent that a certain charge and a certain Person are intended by the
Speaker they are so.

If it be said of a Woman, *She lay with a Weaver in a Ditch, and his* 1 Roll. Abr. 66.
Breeches were down, and they were at it, these Words are actionable; for the Roote and
Molyn. obvious Meaning is that he had carnal Knowledge of her Body.

So an Action lies for these Words of a Woman, *She is a Whore, and hath* Cro. Ja. 430.
had the Pox, and hath Holes one may turn his Finger in, Mr. Ring the Apo- Miller's Case.
thecary gave her a Drink for it, take heed how you drink with her; the Great 1 Roll. Abr. 66.
Pox being here apparently intended.

So it does for saying to *J. S.* *Thou art a pockey Rogue, and the Pox* 1 Roll. Abr. 67.
haunts thee twice a Year; because no other than the Great Pox, which affects Prekington's
Case. those infected with it more remarkably in the Spring and Fall, can here be
meant.

On a Motion in Arrest of Judgment for these Words spoken of a Bar- Cro Car. 382.
rister, *He is a Dunce, and will get little by the Law*, it was insisted that Peard and
Johns. although Dunce signifies a Man of slow Parts such a one may have solid 1 Roll. Abr. 55.
Judgment, and that the other Words mean only that he will not give him-
self the Trouble to practise the Law: But they were held to be actionable;
for that Words are to be taken in their usual Sense; that Dunce in common
Understanding means one of dull Capacity, and not fit to be a Lawyer;
and that the other Words plainly intend that he will deserve to get little by
the Law.

It was objected in Arrest of Judgment, that these Words, *Thou art a* Str. 142.
Thief of every Thing, are not actionable; because, as the stealing of some Morgan and
Williams. Things, as Fruit growing on Trees, is not Felony, a Man cannot be a
Thief of every Thing: But they were held to be so; and *per Cur*, it must
be intended to mean he was a Thief of every Thing he could be a Thief of.

So although no Action lies for saying of *J. S.* *He is forsworn*, yet it 2 Bull. 150.
does for saying *he is perjured*; for this shall be intended to mean a false Croford and
Blisse. Oath in a Court of Justice.

If it be alledged that in a Conversation between the Plaintiff and Defen- 1 Roll. Abr. 85.
dant the Defendant said *Thou art a Thief*, an Action lies without averring Bishop and
Fitzherbert. that the Words were spoke of or to the Plaintiff; for as they were spoke in
a Conversation between the Plaintiff and Defendant, it cannot but be in-
tended that they were spoke to the Plaintiff.

2. By Averment.

The want of Certainty in the Words themselves may also be supplied by Averment; for as the Maxim is, *Certum est quod certum reddi potest*.

Cro. Ja. 107. Wilman and Wiseman.
1 Roll. Abr. 79. If these Words are spoke, *My Brother is perjured*, a Brother of the Speaker may have an Action for them, with an Averment that they were spoke of him, although it be not averred that the Speaker had no other Brother, for it shall not be intended that he had. In this Case the true Distinction was taken, *viz.* that where the Words are in themselves apparently uncertain, as if it had been said *one of my Brothers is perjured*, no Averment can cure this; but, if as in the present Case some certain Person is intended, it may be ascertained by Averment who this is.

1 Roll. Abr. 76. Potter and Loveday. So for these Words, *That perjured Rogue and Villain Potter*; any one of the Name of *Potter*, it being averred that they were spoke in a Conversation concerning him, may have an Action for them.

1 Roll. Abr. 83. Nelson and Smith. So if the Words are, *Captain Nelson is a Thief*, an Action lies for *Robert Nelson*, if it be averred that there was at the Time of speaking them a Colloquium concerning him, and that the Words were spoke of him; nor is it necessary to aver that he is a Captain, or usually called so, it being sufficiently ascertained of whom the Words were spoke.

1 Roll. Abr. 75. Foxcroft and Lacy. So if a Conversation be concerning six Defendants to a Bill in Chancery, and it is said, *These Defendants are those who helped to murder J. S.* every one of them, although no one is particularly named, may have an Action, with an Averment that at the Time of speaking the Words there was such a Conversation, and that he is one of the Defendants.

Cro. Ja. 557. Fleetwood and Curle.
1 Roll. Abr. 57. So if in speaking of *J. S.* one of the King's Receivers, it is said, *Mr. Deceiver has deceived the King*, these Words, if it be averred that there was a Colloquium of *J. S.* and that he was one of the King's Receivers, are actionable: And indeed if such an Evasion, as calling him *Mr. Deceiver* instead of *Mr. Receiver*, was suffered to excuse Slander would often go unpunished.

1 Roll. Abr. 81. Aylb and Gerijsb. So for these Words, *He that goeth before thee is perjured*, an Action lies; it being averred that only the Plaintiff was going before the Defendant at the Time the Words were spoke.

Cro. Ja. 444. Brown and Lowe.
1 Roll. Abr. 79. So if it be said by *J. S.* to *J. N.* *Thy Master Brown hath robbed me*, one of the Name of *Brown*, if it be averred that the Words were spoke of him, shall have an Action for them, although it is not averred that he was the Master of whom the Words were spoke; for it shall not be intended that *J. N.* had more than one Master of that Name.

Cro. Ja. 241. Beaumont and Hastings.
1 Roll. Abr. 80. Cro. Ja. 673. In many of these Cases a Colloquium is laid, and it was once held that, where it does not appear from the Words themselves of whom they were spoke, the Person who brings an Action for them must aver that they were spoke in a Conversation concerning him: But it is now settled, that an Averment of the Words being spoke of the Plaintiff is sufficient, without alledging that at the Time of speaking them there was a Colloquium of him.

(K) In what Cases uncertain Words are to be construed in mitiori sensu.

WHEREVER Words will fairly bear a Sense that is actionable and one that is not so, they are, in Compassion to Mens Infirmities, to be taken in the latter Sense. This Rule, of construing doubtful Words in *mitiori sensu*, does not only coincide with the general Tenderness of the Law, but it is also authorized by two express Maxims thereof.

*Benignior sensus in generalibus & dubiis præferendus.
Verba sunt accipienda in mitiori sensu.*

If it be said of *J. N.* *He hath poisoned J. S.* Innuendo *quendam J. S.* *ad-tunc defunctum*, no Action lies. The *ad-tunc* here can relate only to the Time of the Declaration, and it not being averred that *J. S.* was dead at the Time of speaking the Words, this shall not be intended; for a Man may be poisoned and survive it. Cro. Ja. 343. Jacob and Mills. 1 Roll. Abr. 77. Hob. 6.

So these Words, *Sir Thomes Holt struck his Cook on the Head with a Cleaver, and cleaved his Head, the one Part lay on one Shoulder and another Part on the other*, were held not actionable, because it was not averred that the Cook was killed; for such Wounds are not necessarily mortal. Cro. Ja. 184. Holt and Ast-grigg. 1 Roll. Abr. 77.

So for these Words spoke of *J. S.* *He did burn my Barn*, no Action lies; for, by taking these Words in the milder Sense, they may well mean a Barn which had no Corn in it, nor was Parcel of a Mansion-house. 4 Co. 20. Barham's Case.

So no Action lies for saying *Thou art a Corn-stealer, and hast stolen my Corn off my Land*; for it may mean Corn growing, and then is only a Trespass. Cro. Ja. 673. Smith and Ward. 1 Roll. Abr. 70.

So no Action lies for these Words of an Innkeeper, *He is a Maintainer of Thieves, and keepeth none but Thieves in his House*; because it is not said he did it knowing them to be Thieves, and it is in that Case no Offence. Cro. Eliz. 746. Ball and Bridges.

So none lies for saying of a Justice of Peace, *He is a Bloodsucker*; it being uncertain what Blood is meant. Cro. Eliz. 306. Hilliard and Constable.

So for saying of a Tradesman, *He hath deceived me in a Reckoning, and his Debt-Book which he keepeth in his Shop is a false Debt-Book, I will make him ashamed of his Calling*, no Action lies; for the Debt-Book might have been kept, as is often the Case, by a Servant, and the Matter might not be privy to the Overcharge if there was any. 1 Roll. Abr. 62. Brooks and Clark.

(L) Where they are not to be so construed.

BUT however agreeable it may be to the Rules of Law, that Words should be construed in *mitiori sensu*, yet this is only to be done where the natural Import of them is doubtful; for, if in common Parlance or common Understanding Words are slanderous, a forced Construction shall not, in order to make them bear a Sense which is not so, be put upon them. 1 Roll. Abr. 71. Gardiner and Spurdance. Skin. 364. Somers and House. 10 Mod. 196.

If it be said to a Woman, *Thou hast poisoned thy Husband*, these Words, with an Averment that her Husband is dead, are actionable; for, although it is possible she might give him Poison by Mistake, or that he might not die Cro. Ja. 438. Gardener and Spurdance. 1 Roll. Abr. 71.

die of it, or that he might live a Year and Day after it, these are forced Constructions, the obvious Import of these Words being that it was a voluntary poisoning of which he died.

1 Roll. Abr. 72. Gardiner and Spurdance. So if these Words are spoke to *J. N. Thou hast killed J. S.* an Action lies; for, although it might be as an Executioner or by Accident, the more natural Import of these Words is that it was a felonious Killing.

Cro. Car. 510. Ceely and Hoskins. So an Action lies for saying of *J. S. He is a Murderer*, although it is not said whom he murdered; for it is too foreign an Intendment, unless this be shewn in the Pleadings, that these Words mean a murderer of Hares only.

Cro. Ja. 158. Harris and Dixon. So it does for saying to *J. N. You have hired J. S. to commit Perjury before my Lord of Winchester*; for these Words, although it be not alledged that a Perjury was committed, nor that the Bishop of *Winchester* was a Person before whom it could be committed, shall be taken in the worst Sense.

Cro. Ja. 166. Lo and Spurdance. Cro. Ja. 674. So if these Words are spoke to *J. S. You have stolen my Wood*, an Action lies; for it cannot without a forced Construction be taken to be Wood growing. With this agrees the Verse, *Arbor dum crescit lignum dum crescere nescit.*

Cro. Car. 277. Laurance and Woodward. 1 Roll. Abr. 74. So these Words if spoke to *J. S. Thou didst violently upon the Highway take my Purse from me, and four Shillings and two Pence in it; and didst threaten to cut me off in the midst, but I was forced to run away to save my Life*, are actionable; for, although it is not said that *J. S.* robbed him, or that he took his Purse feloniously, these Words amount in common Understanding to the Description of a Robbery.

Cro. Ja. 162. Morrison and Cade. So an Action lies for saying of a Woman, *I have had the Use of her Body*; for it shall not be intended that these Words mean the Use of her Body as a Physician, or that she did some bodily Labour for the Speaker, &c. but as they mean in common Parlance, that he had carnal Copulation with her.

1 Roll. Abr. 66. pl. 14. So these Words of a Woman, *She is a lewd Woman of her Body, and has the Pox*, are actionable; for thereby the Great Pox is plainly intended.

4 Co. 15. Stanhope and Blith. 8 Mod. 24. Button and Heyward. 6 Mod. 23. But however it may appear from these Cases, that a very foreign Intendment was not even formerly allowed in the Construction of slanderous Words, yet the Rule of construing them *in mitiori sensu* was, and with good Reason, carried very far: But of late Years it has been found necessary, and the Practice has been, to countenance Actions for Words.

Ld. Raym. 959. Ante 497.

Hutt. 38. Mason and Thompson. 2 Lev. 51. 2 Ventr. 213. It has been heretofore held that no Action lies for these Words, *I charge J. S. with Felony for taking Money out of my Pocket*, because these Words do not necessarily imply a felonious Taking.

Ld. Raym. 959. Baker and Pierce. 6 Mod. 23. But in a modern Case it is laid down that an Action would lie for the Words, *I charge J. S. with Felony in taking my Money out of my Pocket*, for it shall be intended to mean a felonious Taking; and *per Holt Ch. J.* "It is not worth while to be very learned as to this Point; for, wherever Words tend to slander a Man and to take away his Reputation, I shall be for supporting Actions for them for the Preservation of Peace. I remember a Story told by Mr. Justice *Twisden*, of a Man who had brought an Action for scandalous Words spoken of him, and the Plaintiff, being in Court when the Rule for arresting the Judgment in this Action was made absolute, declared in Court that, if he had thought he should not have recovered in his Action, he would have cut the Defendant's Throat."

Str. 1130. Rivers and Lite. So these Words, *You did shut up my Sister and murder her, and I will prove it*, were, notwithstanding a long String of old Cases to the contrary, held to be actionable on a Writ of Error in the King's Bench, and the Judgment of the Common Pleas was affirmed.

(M) Of adjective Words.

IF Words are merely adjective, and import only the Charge of an Inclination to do an Act, they are not in general actionable in themselves; but wherever such Words are spoken of a Man in his Profession, Office, or Trade, or imply an Act done, they are so.

An Action does not always lie for the Words *seditions or thievish Knave*; *Cro. Ja. 204.* but it does for saying of a Clergyman *he has made a seditious Sermon.* *Powell and Hutchins.*
4 Co. 19. *Cro. Ja. 600.*

So an Action lies for saying of a Tradesman, *He is in a breaking Condition*; for Credit is of such Importance to Men in Trade, that the saying any Thing whereby it may be affected is a very great Injury to them. *Styles 425. Walkenden and Haycock.*

So if these Words are spoke of a Tradesman, *He is a bankrupt Knave,* or *he is a bankruptly Knave,* an Action lies. *4 Co. 19. Bittridge's Case. Sid. 103. 1 Lev. 90.*

So if it be said, *I do accuse J. S. of poisoning his Aunt,* these Words altho' adjective are actionable; for they imply the Act of poisoning to have been done. *1 Roll. Abr. 49. pl. 6. Sid. 373.*

So an Action lies for these Words, *He was whipped about Taunton Castle for stealing Sheep*; for it is not only thereby imported that there was the Act of Sheep-stealing, but also that the Party was convicted of it. *1 Roll. Abr. 50. Churley and Hill.*

So it lies for saying, *Thou art a buggering Rogue, and I could hang thee*; for these Words imply an Act. *Sid. 373. Collier and Burrel.*

In this last Case a Distinction is taken between Words merely adjective as *thievish,* and Participles as *thieving.* The former are held not to be actionable, because they import only an Inclination; but the latter are held to imply an Act done and therefore to be actionable.

Agreeably hereto the Words *murdering Rogue* have been held actionable; but the Words *murderous Queen* have been held not to be so. *Cro. Car. 318. Green and Lincoln. 1 Roll. Abr. 47. Pett's Case.*

The Distinction however between Words merely adjective and Participles has not always, even in the old Cases, been adhered to; for it has been held that an Action lies for the Words *traiterous Knave* or *traitorly Knave.* *Cro. Eliz. 171. Ward and Thorn. Sid. 103. 1 Lev. 90.*

In a very late Case these Words, *Thou art a pitiful Sheep-stealing Fellow,* were on a Motion, in the King's Bench, in arrest of Judgment held to be actionable, because a charge of Felony is thereby imported; and *per Curiam*, the same Nicety is not as heretofore observed in the construing Words, for the Rule now adhered to, by all the Courts, is to understand them in their usual and obvious Sense. *MS. Rep. Hil. 29 G. 2. Gardiner and Atwater.*

(N) Of Words Which import only an Intent to do an act.

IF it is in the Power of every Man, by a proper Exertion of his Faculties, to correct vicious Habits, it is much more so to prevent the acquiring them; for although he may not be always able intirely to suppress evil Thoughts and criminal Intentions, he certainly is to abstain from the carrying them into act. For this Reason Words which imply only a naked Intention are not actionable; but where they imply a criminal Act done, even if it is not the principal one intended to be done, they are so.

4 Co. 16.
Eaton and
Allen.

It is laid down, and said to have been determined on great Deliberation, that no Action lies for Words which only import the charge of a Purpose or Intent to commit a Crime.

1 Roll. Abr. 51.
Lock and Lock.

So no Action lies for saying of J. S. *He keepeth Men to rob me*; here being only a naked Intention implied.

1 Roll. Abr. 51.
Pott's Case.

So none lies for these Words spoke to J. N. *You would have killed me*.

1 Roll. Abr. 51.
Scot and Hill-
liers.

But if the Words are, *She would have cut her Husband's Throat, and did attempt to do it*, an Action lies; for, the Attempt being an act, these are a great Slander.

Ld. Raym.
1185. Speed
and Parry.
Salk. 695.

So it does for saying to A. B. *You are a Rascal and a Villain, you have forgot since you lived in Black Bull-yard, there you could procure Broad Money for Gold, and clip it when you had done, and then the Shears could go*; for where the Power to do any Thing is by the Words confined to a particular Place, they imply that the Thing was done, the Power being the same in all Places.

Cro. Eliz. 710.
Leverage and
Smith.

So these Words spoken of J. N. are actionable, *He would have robbed the House of J. S. if J. D. would have consented unto it, he persuaded J. D. unto it, and told him he would bring him where he should have Money enough*; for the Persuasion is an act.

1 Roll. Abr. 50.
Lock and Lock.

So are these Words, *J. N. lay in wait on Shooter's Hill to rob J. S.* for here is an act; and it is also implied that the principal Act would have been perpetrated if J. S. had been met with.

(O) Of Words in the Disjunctive.

WHEREVER the Words published of any Person are in the Disjunctive, and Part of them are not actionable in themselves, no Action lies.

Cro. Eliz. 780.
Griffith's Case.

If it is said to J. S. *Thou hast stolen my Mare; or didst consent to the stealing of her*, no Action lies; because the latter Words are not actionable.

Cro. Ja. 530.
Sparham and
Pye.

So where these Words were spoke, Sparham *did steal a Mare, or else Godwin is forsworn*; it was held, notwithstanding an Averment that Godwin had sworn no such Thing, that these Words do not import a charge sufficiently direct and affirmative to make them actionable. The Book does not indeed say that the Judgment was founded on their being in the Disjunctive; but that seems to be the best Reason for it.

But wherever Words which are not in themselves actionable are connected by a copulative with others that are so, an Action lies.

If these Words are spoken of *J. N. He did steal, and cozened seven Quarters of my Barley*, they are actionable; notwithstanding that the Words, *be cozened seven Quarters of my Barley*, would not alone have been so. *Win. 45, 102. Crompton and Philpot.*

(P) Of repugnant Words.

AS the Ground of this Action is the Damage received by the Person of whom the Slander is published, it follows that wherever there is in the Words themselves, or from what appears on the Record, such a Repugnancy that no Damage can ensue by reason thereof no Action lies.

It was formerly held that if a Feme Covert says to *J. S. You have stolen my Goods*, these Words are not actionable; because these Words, as a Feme Covert who has no Goods can be robbed of none, are in themselves repugnant. *1 Roll. Abr. 74. b. pl. 1.*

So where a Husband said to a Woman, *Thou hast bewitched my Wife's Milk*, it was held that no Action lies; for a Feme Covert can have no Milk of Kine; nay, the Case goes so far as to lay down that even the Milk of her Breasts is not her own. *Cro. Ja. 600. Martin and his Wife and Stradling.*

It was not amiss to mention these two Cases as Instances to illustrate Part of the Rule as to repugnant Words: But it is doubtful whether they are now Law; for it is held, in a Case in the same Book and Page as the last, that such Words as these in common Understanding amount to a charge of stealing the Husband's Goods; and further that if Words import a charge of Felony, it is immaterial whose the Goods were. *Cro. Ja. 600. Stamp and White.*

In an Action for Words which import a charge of Murder, if it appears by the Plaintiff's Declaration, that the Person whom he is said to have killed is living no Action lies. The Reason given is, that it can be no scandal to say a Man has killed, nor he can never be prosecuted for killing, a Person who is not dead. *4 Co. 16. Snagg and Gee.*

In another Case subsequent to this it was held upon a Writ of Error in the Exchequer Chamber that no Action lies for these Words, *Thou hast killed the Servant of J. S.* unless it be alledged that some Servant of *J. S.* is dead. *Cro. Ja. 331. Barton and Bell.*

But by later Cases it is now settled, that Words importing a charge of having killed any Person are actionable, without averring that the Person is dead, unless it appears from the Words themselves or the Record that he is not dead. *1 Vent. 117. Pbillips and Kingston. Cro. Ja. 489. Sid. 53. Cro. Eliz. 569. 823.*

This Distinction is founded in good Reason, there being in the one Case an apparent Repugnancy, in the other only a possible one.

(Q) Of repeating Words which another has been heard to say.

IT has been held that no Action lies for speaking Words which the Speaker has heard another say, provided that the Person heard to speak them is named, unless it be alledged that that other Person had not spoke such Words. *1 Roll. Abr. 64. Meags and Griffn.*

Cro. Ja. 162. If it is said by *A.* that *B.* reported that he has had the Use of the Body of *C.* no Action lies for *C.* against *A.* without an Averment that *B.* had made no such Report.

Cro. Ja. 406. So if these Words are spoke by *J. S. Pierse* did say that *Lewis* did say, that there is no Prince in England, in an Action, brought by *Lewis*, it must be averred that *Pierse* never spake such Words.

1 Roll. Rep.

444.

3 Lev. 171.

M.S. Rep. Hil.

29 G. 2. Gar-

diner and At-

scater.

But in a late Case, upon a Motion in Arrest of Judgment, these Words, *Thou art a pitiful Sheep-stealing Fellow, and Farmer Parker told me so*, were held to be actionable, although it was not alledged that *Farmer Parker* did not tell the Speaker so; and by *Dennison* Justice, *Rider Ch. J.* being absent, as these Words which import a charge of Felony are actionable, it is not material whether *Farmer Parker* told him so or not.

(R) Of subsequent Words.

1. Where they are explanatory.

AS the Intention of a Speaker is to be collected from the whole of his Words, it must often happen that the Sense of Part of them, which would have been actionable in themselves, is so changed by subsequent Words as not to be so.

When this is the Case the subsequent Words are, in the Language of the Books, said to be explanatory.

4 Co. 19.
Brittridge's
Case.

If the Words are, *Master Brittridge is a perjured old Knave, and that is to be proved by a Stake parting the Land of J. S. and J. D.* no Action lies for them; for, although the precedent Words would have been actionable, their Meaning is so explained, by the subsequent ones, as to make it evident that a judicial Perjury was not intended.

4 Co. 19.
Brittridge's
Case.

So for these Words spoke to *J. S. Thou art a Thief, for thou hast stolen my Apples out of my Orchard*, no Action lies; for by the latter Words this appears to be no charge of Felony.

1 Roll. Abr. 51.
Wilk's Case.

So none lies if it be said to *J. N. Thou art a Thief, for thou tookest my Beasts by reason of an Execution, and I will hang thee*; for, however the Speaker might be mistaken as to the Nature of this Offence, it appears from the latter Words that here could be only a Trespass.

Cro. Ja. 674.
Smith and
Ward.

So for saying to *A. B. Thou art a Thief, and hast stolen my Evidence*, no Action lies; it appearing from the whole Words to be no Felony.

Cro. Ja. 666.
Ridges and
Mills.

So if *J. S.* says to *J. N. Thou hast ravished a Woman, and I will make thee stand in a white Sheet*, these Words are not actionable; for from the latter Words it is plain that only Fornication, or Adultery, is meant by the Speaker.

2. Where they are accumulative.

On the other Hand subsequent Words may render Words actionable, which in themselves would not have been so.

When this happens the subsequent Words are said to be accumulative.

1 Roll. Abr. 43.
Allesley and
Marvdit.

No Action lies for saying to *J. S. You are a Rogue*: But if the Words are, *You are a Rogue of Record*, it does; for the latter Words amount to a charge of his having been convicted of some Crime.

So although no Action lies for these Words spoke to *J. N. Thou art a Rebel*, if the Words are *Thou art a Rebel, and all that keep thee Company are Rebels, and thou art not the Queen's Friend*, it does; for the latter Words shew what kind of Rebel the Speaker intended.

So no Action lies if it is said to *A. B. Thou art forsworn*, but it does for saying *Thou art forsworn, and I will set thee on the Pillory*; for from the latter Words it appears to be such a forswearing as *A. B.* may be set on the Pillory for.

So if these Words are spoke to *J. S. Thou art a clipper, and thy Neck shall pay for it*, an Action lies; for the latter Words plainly shew that a clipper of Money is intended.

It was formerly held that for these Words spoke to any Person, *Thou art a Thief, for thou hast stolen a Tree*, no Action lay, because the Word *for* was explanatory, and only shewed the reason of calling Thief; but that for these Words, *Thou art a Thief, and hast stolen a Tree*, an Action did lie, because the Word *and*, which makes two distinct Sentences of the Words, is accumulative, or at least does not explain or take off the Force of the former Words which are actionable.

But afterwards, where it was said to *J. S. Thou art a Thief, and hast stolen twenty Load of Furze*, it was held that no Action lies; because the Words *and* and *for* when thus used do, according to the common Sense and Acceptance of them, mean the same Thing.

Since the Case of *Clerk and Gilbert* the Cases have been uniform in adhering to the Doctrine therein laid down; that the Words *and* and *for* are both explanatory.

(S) Of Pleadings in Slander

1. In general.

IF two have spoke Words for which an Action lies, the Action against them must be several; for, as the Speaking of one is not the Speaking of the other, they cannot be charged jointly in an Action.

Nor can two who are slandered by the same Words join in an Action against the Publisher of them; but each must bring a separate Action.

But if these Words are spoke of *J. S. He did steal, and cozened seven Quarters of my Barley*, an Action lies; notwithstanding that the Word *cozened*, which is not actionable, is joined with the Word *steal* which is so.

It is declared by the Statute of Limitations, that all Actions upon the Case for Words shall be brought within two Years after the publishing them: But it has been held that in some Cases of Slander this Statute is no Bar.

In an Action for Words the Plaintiff declared *for certain false and scandalous Words of which the Tenor follows*, and then the Declaration recites some Words. It was held on a Motion in arrest of Judgment that the Action did not lie, because, as the express Words are not set out, some which would perhaps have rendered the rest not actionable might be omitted. It is indeed in many Cases sufficient to plead a Deed or Record by way of Recital,

Recital, for in such Cases the Recital may be compared with the Deed or Record; but, if there is any Mistake in thus reciting Words, no Recourse is to be had to any Thing by which it may be set right.

3 Lev. 338. It was alledged that the Defendant spoke certain Words, and then the
Cotteril and Declaration went on *cumque etiam postea* the Defendant spoke other Words.
Matthews. A Verdict being found for the Plaintiff and entire Damages given, it was
2 Lev. 193. insisted upon, in a Motion to arrest the Judgment, that, as the latter Words
are not by reason of the *cumque etiam* sufficiently affirmative and only by
way of Recital, the Plaintiff ought not to recover. Several Cases were cited
where, in Trespass and Battery, the Judgment had been arrested, because
it had only been alledged *cum* the Defendant committed such a Trespass or
such a Battery. *Sed per Cur.* this being an Action upon the Case, and the
first Words being laid positively, the latter shall be intended to be so. Be-
sides, *cumque etiam* shall here be intended to mean the same as *porro* more-
over: For so these Words are explained in divers Dictionaries, and in that
Sense they are used by several Classick Authors.

Dyer 75. Bru- If the Words found by the Verdict are not precisely the same as those
gis and Warne- laid in the Declaration, yet if they agree in Substance an Action lies.
ford.

1 Roll. Rep. 427. Cro. Ja. 407.

Cro. Ja. 407. In an Action for these Words, *If Sir John Sydenham might have his*
Sydenham and *Will he would kill the King*, the Defendant pleaded that he spoke other
Mayo. Words, *absque hoc* that he spoke the Words laid. The Jury found specially
1 Roll. Rep. that he spoke these Words, *I think in my Conscience, if Sir John Sydenham*
427. *might have his Will, he would kill the King*; and the Question was if the Va-
Dyer 75. riance between the Words laid and the Words found was fatal? The Court
of King's Bench were of Opinion that, as the Words laid were actionable,
and the Force of them not taken off but rather augmented by the others
which are also found, it was not; and their Judgment for the Plaintiff was
upon a Writ of Error brought in the Exchequer Chamber affirmed.

Cro. Ja. 215. *J. N.* brought an Action for these Words thus laid, *You have murdered*
Pritchard and *J. S. innuendo J. S. modo defunctum*; and Judgment was for the Plaintiff.
Hawkins. Upon a Writ of Error in the Exchequer Chamber it was reversed; because,
Cro. Ja. 343. as the Words *modo defunctum* can only relate to the Time of the Declaration,
1 Roll. Abr. 77. and it is not averred that *J. S.* was dead at the Time the Words are laid to
Hob. 6. be spoke, there was no Ground of Action when the suit was commenced.

Styl. 392. In an Indictment it must be laid that the Defendant spoke the Words
Anon. charged *falso & malitiose*, because that has been the usual Form; but neither
of these Technical Words is necessary in a Declaration in this Action.

1 Keb. 273. Upon a Motion in Arrest of Judgment it was objected to a Declaration,
Motley and that it only alledged that the Defendant spoke *hec facta falsa verba*, whereas
Slaney. it ought to have alledged *quod fecte & falso dixit*: But it was held to be
well enough.

Noy 35. Mer- A Writ of Error being brought, upon a Judgment in an Action for
cer and Sparks. Words, it was assigned for Error that the Words were not laid to be
Ow. 51. spoke maliciously: *Sed per Cur.* this is no Error, for such Words are in
themselves malicious.

Cro. Eliz. 861. It is sufficient to alledge in a Declaration that the Defendant spoke the
Taylor and Words *palam & publice*; for the Words *palam & publice* imply that it
How. was *in presentia et auditu aliorum*.

2 Lev. 193. Where two Sets of Words are declared for, and only the first are laid to
Mors and be spoken *in presentia & auditu quamplurimorum*; the *presentia & auditu*
Thacker. *quamplurimorum* of the first shall go to the second.

Cro. Eliz. 486. If the Declaration alleges that the Words were spoken *in presentia*
Hall and *diversorum* it is well enough, although it is not alledged to be *in auditu*;
Hennesly. for, as the Words were spoken *in presentia*, it shall be intended they were
Noy 57. spoken *in auditu diversorum*.

As the Sense of Words is to be collected from the Consideration of the Whole of them, and all the Circumstances which attended the speaking of them, if any of these are omitted in the Declaration of the Plaintiff, the Defendant may, in pleading, avail himself of such of them as he thinks it material for him to shew.

In an Action for calling the Plaintiff a *perjured Man*, the Defendant pleaded in his Justification that the Plaintiff was *perjured* in a certain Cause, and Judgment was for him. Another Action being brought by the Plaintiff for the same Words, the Defendant pleaded this Judgment, and it was held to be a good Plea.

After a Judgment for the Defendant in an Action for these Words, *He is a rascally Alderman, a factious Alderman, a Lamponer*, a second Action was brought for the same Words, with an Averment that the Word *Lamponer* means *Libeller*. Upon a Demurrer to a Plea, in which the former Judgment was pleaded in Bar, it was insisted that by this Explanation of the Word *Lamponer* it becomes a different Action. *Sed per Cur.* As the Plaintiff has been once barred in an Action for the same Words, he shall never intitle himself to another Action by any Explanation of one of those Words.

If the Words as laid in the Declaration are not actionable, no additional ones in a Replication can make them so; for no Rejoinder can be to Words in a Replication, which were not contained in the Declaration or Plea.

It is in general very dangerous for a Defendant to demur in an Action upon the Case for Words; for he may, after taking the Chance of trying the Fact, avail himself of any Matter of Law in Arrest of Judgment, which would have been good upon a Demurrer.

2. Where an Averment must be.

In all Cases, where there is not in the Words themselves a sufficient Ground of Action, the want of this must be cured by Averment, otherwise no Action lies.

It was heretofore doubted whether the want of Certainty in the Words themselves, as to the Person of whom the Words for which an Action is brought were spoke, could be supplied by any Averment without the Help of a Colloquium: But it seems to be now settled, that an Averment that the Words were spoken of the Plaintiff is sufficient, although it is not alleged that there was, at the Time of speaking them, a Colloquium concerning him.

Wherever there is an apparent Uncertainty in the Words themselves no Averment can cure this; but, wherever a certain Person is intended, it may by Averment be ascertained who this is.

If three Men have given Evidence at a Trial, and *J. S.* says to them, *One of you three is perjured*, no Action lies; for there is in these Words such an apparent Uncertainty as cannot be cured by Averment.

But if a Conversation be concerning six Defendants to a Bill in Chancery, and it is said by *J. S.* *These Defendants are those who helped to murder J. S.* every one of them, although no one is particularly named, may have an Action, with an Averment that he is one of the Defendants concerning whom such Conversation was had.

So if these Words are spoke, *That perjured Rogue and Villain Potter*, any one of the Name of *Potter*, if it is averred that they were spoken in a Conversation concerning him, may maintain an Action for them.

It has been held that if the Person, of whom the Words are spoken, is in any one Respect well ascertained, there is no need to remove by Averment every other Doubt, as to this Point, to which the Words may be liable.

¹ Roll. Abr. 80. If it be said to *J. S.* *Go tell thy Landlord Hendey he is a Thief*, an Action *Hendey's Case*, lies for one whose Name is *Hendey*, with an Averment that the Words were ^{Mich. 10 Ja.} spoke of him, nor is it necessary for him to aver that he is the Landlord of *J. S.*

^{Cro. Ja. 444.} So if these Words are spoke by *J. S.* to *J. N.* *Thy Master Brown hath* ^{Brown and} *robbed me*, one of the Name of *Brown*, if it be averred that these Words ^{Low, Mich.} were spoken of him, shall have an Action for them, although there is no ^{15 Ja.} Averment that he was the Master of whom the Words were spoke; for it ^{1 Roll. Abr. 79.} shall not be intended that *J. N.* had more Masters than one of that Name.

The Doctrine of these two Cases, which corresponds with what is laid down in *Wiseman* and *Wiseman*, *Cro. Ja. 107. Hil. 3 Ja.* is shaken by some subsequent Cases.

^{Cro. Car. 443.} In one of these it is held that, if these Words are spoke to *J. S.* *Thy* ^{Slocumb's Case,} *Brother is perjured*, it is not enough for the Party who brings an Action to ^{Hil. 11 Car.} aver that they were spoken of him, but he must also aver that he is the Brother of *J. S.*

^{1 Roll. Abr. 84.} In another Case it is laid down that, if it is said to *J. N.* *Your Son J. N.* ^{Johnson and} *stole my Hens*, an Action brought by *J. N.* the Younger, with an Aver- ^{Dyer, Mich.} ment that the Words were spoken of him, does not lie, because it is not ^{15 Car.} likewise averred that he is the Son of *J. N.* to whom the Words were spoke.

But in a still later Case the former, which seems to be the better Opinion, is confirmed.

^{1 Roll. Abr. 85.} It was in this held that, if these Words are spoke, *Captain Nelson is a* ^{Nelson and} *Thief*, an Action lies for *Robert Nelson*, with an Averment that they were ^{Smith, Trin.} spoken in a Conversation concerning him, although it is not averred that he ^{22 Car.} is a Captain, or usually called so.

^{Cro. Ja. 187.} No Action lies for these Words spoken of *J. S.* *He is as great a Thief as* ^{Foster and} *any in England*, unless it be averred that there is a Thief in *England*. ^{Browning.} ^{Hutt. 73.}

^{Cro. Ja. 331.} So none lies, if it be said to *J. N.* *You are as bad as your Wife when she* ^{Radcliff and} *stole my Cushion*, without an Averment that the Felony here alluded to was ^{Michael.} committed.

^{Com. 267. Up-} So none lies for saying to *J. S.* *You are as great a Rogue as J. N. who* ^{ton and Pin-} *stole Quilts*, except it is averred that *J. N.* did steal Quilts. ^{fold.}

^{Sid. 53. Day} But if these Words are spoke to *J. N.* *As sure as God governs the World,* ^{and Clinch.} *or King James this Kingdom, you are a Thief*, an Action lies without averring that God governs the World, or King *James* this Kingdom; for Things so apparent as these are need not be shewn.

^{1 Lev. 65.} So where the Defendant had spoke these Words, *J. S. says I am a per-* ^{Orton and} *jured Rogue, he is a perjured Rogue as well as I*, *J. S.* shall have an Action ^{Fuller.} although it is not averred that the Defendant was a perjured Rogue: For the Words *as well as I* amount to a Confession of his having been so.

^{Comb. 247.} So if it be said of *J. N.* *He robbed the Hockley Butcher*, there is no ^{Smith and} Necessity to aver, in an Action brought by *J. N.* that there was a ^{Williams.} *Hockley* Butcher, for the Words themselves imply that there was one.

^{1 Roll. Abr.} It is not necessary to aver, what the Meaning of Words spoken in a ^{86. pl. 5.} foreign Language is in *English*; for it is the Duty of the Judge, before ^{Hob. 126, 191.} whom the Cause is tried, to inform himself of this from those who understand the Language.

^{1 Roll. Abr.} So where *English* Words have a local Signification, it need not be averred ^{86. pl. 1.} what this is; for the Judges are presumed to be constant of the Meaning ^{Hob. 126.} of all *English* Words, or they may learn it from the Witnesses.

3. Of the Colloquium.

The Colloquium is a Conversation which was had concerning the Plaintiff, or something that is made Part of the Case, at the Time the Words, for which an Action is brought, were spoke by the Defendant.

The want of this is in some Cases, where there is proper Averment, dispensed with; but in many Cases an Action does not lie without alledging a Colloquium.

1 Roll. Abr. 80. Cro. Ja. 673. Cro. Car. 378.

No Action lies for Words spoken of a Person in Office, unless it be averred, that at the Time of speaking the Words there was a Colloquium of his Office; for the Disgrace in Office is here the sole Ground of the Action.

So none lies for Words of a Man of a Profession, unless a Colloquium of his Profession is laid.

So it is not actionable to say of a Tradesman, *He is a Cheat*, unless these Words are alledged to be spoke of him in a Conversation concerning his Trade.

5 Mod. 398. Savage and Robery. 2 Saund. 307. Salk. 694. Ld. Raym. 1417. Str. 696.

But if it appears from the Words themselves, that they do relate to the Office, Profession, or Trade, of the Person of whom they are spoke, it is not necessary to alledge a Colloquium.

If it be said of *J. S.* a Physician, *He is no Scholar*, an Action lies, although no Colloquium is laid of his Profession; for, as no Man can be a good Physician unless he is a Scholar, these Words necessarily imply a slander in his Profession.

So it does for these Words of a Tradesman, *Have a care of him, do not deal with him, he is a Cheat, he has cheated all the Farmers at E. and now he is come to cheat at F.* it being apparent from the Words themselves that they do relate to his Trade.

So these Words, if spoke of a Man in Trade, *He is a sorry pitiful Fellow, and compounded his Debts*, are actionable without alledging a Colloquium; for such Words must greatly lessen the Credit of a Tradesman, and be very prejudicial to him.

If it is alledged that the Colloquium was at a certain Place, and that the Defendant spoke the Words laid, it is well enough, although it is not averred that he spoke them then there; for it shall be intended that they were spoke where the Colloquium was.

It is sufficient to aver that the Words, for which the Action is brought, were spoke of the Plaintiff in a Colloquium with *J. S.* it not being necessary to aver that they were spoken in a Conversation concerning the Plaintiff.

4. Of the Use of the Innuendo.

Nothing, which would otherways have been doubtful, can be reduced to Certainty by an *Innuendo*; for the Use of this, which means no more than the Word *aforsaid*, is to point out what was before well ascertained.

So little Regard is, in an Action upon the Case for Slander, paid to Words which only come in under an *Innuendo*, that no Issue can be taken upon such Words.

If it is alledged that *one of the Servants of J. S.* (innuendo *J. N. a Servant of J. S.*) is a Thief, no Action lies; for, as it is not averred that these Words

Words were spoken of *J. N.* it shall not be collected from the *Innuendo* that he was the Person intended.

4 Co. 20. So for these Words of *J. N.* *He did burn my Barn*, (innuendo a *Barn with Corn in it*) no Action lies; because these Words taken in the milder Sense, it not being Felony to burn a Barn that has no Corn in it, unless it is Parcel of a Mansion-house, would not be actionable, and the *Innuendo* shall not make them so.

1 Roll. Abr. 82. pl. 1. So no Action lies for saying of *J. S.* *He hath forsworn himself*, (innuendo *before the Justice of Assize*); for these Words are not actionable in themselves, and what is supposed by the *Innuendo* could not have been collected from them.

1 Roll. Abr. 83. So where these Words were spoke to *J. N.* *Tbou* (innuendo *the Plaintiff*) *art a Thief*, no Action lies; for the want of Averment that they were spoken of the Plaintiff shall not be supplied by an *Innuendo*.

Burgels and Reeves. But on the other Hand, as the *Innuendo* shall not supply any Defect in the Words themselves, or the want of Averment, no Repugnancy therein contained shall vitiate, if the Words would without the Help of an *Innuendo* have been actionable.

Cro. Eliz. 609. An Action was brought for these Words spoken of *J. S.* *He was perjured in his Answer in the Star-Chamber* (innuendo *in a certain Bill exhibited there by the Plaintiff*). It is impossible that what is contained in this *Innuendo* can be true, because, as a Man is not sworn to such a Bill, he cannot be perjured in exhibiting it; yet it was held that this Action did lie: *Et per Cur'*, As these Words are in themselves actionable without it, the *Innuendo*, being repugnant, is void, and ought not to be regarded.

5. What is a Justification of Words.

In the Case of Slander for Words spoke, the Law, which considers that these may and frequently do proceed from sudden Passion, allows the Truth of the Charge imported by them to be pleaded in Justification.

1 Roll. Abr. 87. If an Action is brought for calling the Plaintiff a *Thief*, the Defendant may plead in his Justification that the Plaintiff has been guilty of a Theft.

Bro. Action of the Case 104. So if the Words, for which an Action is brought are, *J. S. is a perjured Man*, the Defendant may justify by pleading that *J. S.* was perjured in a certain Cause.

But however the Tenderness of the Law may admit it to be a Justification of Words spoke, that the Charge therein contained is true, it admits of no such Justification in the Case of written Slander.

Ante Vol. 3. In an Action for publishing a Libel, upon Mr. *Branley* Recorder of 495. *Rex* and *Warwick*, it was agreed by the whole Court, that, where Slander is in *Roberts, Mich.* Writing, the Truth of the Charge therein contained can no more be justified in an Action upon the Case, brought by the injured Person, than in a criminal Prosecution at the Suit of the Crown.

Hob. 81. *Cuddington and Wilkins.* In an Action for these Words spoken of the Plaintiff, *He is a Thief*, the Defendant pleaded that he had been guilty of stealing something. It was replied that after the Felony, and before the Speaking of the Words, the Plaintiff had been pardoned by a general Pardon. Upon a Demurrer this Replication was held to be good; because the Guilt as well as Punishment is taken away by the Pardon. It was also laid down, that it makes no Difference, in such a Case, whether it was a general Pardon or a special one, of which the Defendant might perhaps be ignorant; for that he is at his Peril to take care how he speaks Words which are slanderous.

Raym. 23. *Harris's Case.* But where the Plaintiff to a Plea of Justification replies a general Pardon, it is incumbent upon him to shew, that he is not within any of the Exceptions therein contained.

An Action being brought for these Words, *He stole Plate out of my Chamber*, the Defendant pleaded that he had lost Plate out of his Chamber, and that, suspecting the Plaintiff to have stolen it, he had spoke the Words. This Plea was upon a Demurrer held to be ill; *Et per Cur^o*, Suspicion is not a sufficient Justification for the speaking such Words.

Common Fame will justify the arresting a Person on Suspicion of having committed a Felony, and charging him in a judicial Way with being guilty of it: But common Fame is no good Justification for such a Charge in an extrajudicial Way.

The precise Words, and the whole of them, as laid in the Plaintiff's Declaration, must be confessed and justified by the Defendant's Plea, otherwise it is no good Justification.

If an Action is brought for these Words of the Plaintiff, *He is a Traitor*, it is not a sufficient Answer, for the Defendant to plead that he only spoke the following Words, *Such Things Traitors do*, or any other Words than the very Words laid in the Declaration.

So if the Plaintiff declares that, whereas she was of good Fame and Reputation, the Defendant spoke the following Words of her, *She is a common Whore*, and the Defendant alledges by way of Justification that, at the Time of speaking the Words, she was not of good Fame or Reputation, this Plea is ill; for it is no Answer to the Charge contained in the Words, and only goes to what is laid by way of Inducement, which required no Answer.

So if a Declaration charges the speaking certain Words of the Plaintiff, it is not a good Justification, for the Defendant to alledge that he heard another speak the Words *que est eadem*; for the precise Charge ought to be justified; and besides it can never be the same Thing to speak Words and to hear them spoke.

So if these Words are laid to be spoke of J. S. *He is a Thief, and hath stolen 20 l. or 40 l.* and the Defendant pleads that the Plaintiff did steal two Pullets; this is no good Justification, it being no Answer to the Charge.

So where in an Action for these Words, *Thou hast played the Thief, for thou hast stolen my Cloth and half a Yard of Velvet*, the Defendant justified the speaking the following Words, *Thou hast stolen Part of the Velvet delivered to you*; this Justification was held to be ill, because it only goes to Part of the Words laid in the Plaintiff's Declaration.

So if the Words, for which an Action is brought, charge a Tradesman with being a Bankrupt upon the first Day of April 17 Ja. and the Defendant pleads that the Plaintiff became a Bankrupt upon the first Day of April 15 Ja. and that therefore he spoke the Words, this Plea is not a good Bar; because it is not alledged that the Plaintiff continued a Bankrupt till the Time of speaking the Words, for he might afterwards recover his Credit in Trade.

But although it is not a good Justification unless all the precise Words, in the Declaration of the Plaintiff, are justified, yet the Defendant is not confined to do this only; for, if any other Words were spoke at the same Time, or if any Circumstances attended the speaking them, by which the Force of those laid would be taken away, he may in pleading avail him thereof.

In an Action for saying to the Plaintiff, *You are a murderer*, the Defendant alledged that, in a Conversation with the Plaintiff concerning poaching, the Plaintiff confessed he had killed a great Number of Hares, and that thereupon the Defendant said to him, *You are a murderer*, (innuendo a murderer of Hares). This Plea, which confesses and justifies the Words, was held to be a good Justification; for it would be unreasonable, where this is done, to put the Defendant to the general Issue.

Besides that slanderous Words, published by speaking, may always be justified if the Charge contained in them is true, they may in certain Cases be justified where it is not so.

Cro. Eliz. 230, Any Words which import the Charge of a Crime may, notwithstanding
248. the Falsity of them, be published, if they are published in a Course of
Hob. 82. Justice.
Hutt. 113.
1 *Roll. Abr.* 43. 4 *Co.* 14. b. 15. a. *Ante* 499.

Cro. Ja. 90. So a Barrister may justify the speaking Words, in pleading his Client's
Brook and Cause, that are both false and slanderous, for which if spoken on another
Mountague. Occasion an Action would lie.
1 *Roll. Abr.* 87.
Styles 462.
Ante 498.

Cro. Eliz. 230. So a Witness may justify the speaking Slander, although it is false, in
Buckley and giving his Evidence, this being done for the Furtherance of Justice.
Wood.

Cro. Ja. 91. So if a Parson, without any Intent to slander, recites a Story in his
Greenwood's Sermon which is false as well as slanderous, the doing this may be justified.
Case.
1 *Roll. Abr.* 87.

It is unnecessary to mention all the particular Instances, where the Fal-
sity of slanderous Words does not impede the Justification of them; for
4 *Co.* 13. b. it may in general be observed, that the Defendant, in order to explain or
14. a. 19. b. take off the Force of the Words laid in the Plaintiff's Declaration, may in
Cro. Car. 510. his Justification shew any other Words which were spoken at the same
1 *Lev.* 82. Time, or any Circumstance which attended the speaking them.

Str. 1200. Heretofore the Truth of the Charge contained in the Words was allowed
Underwood to be given in Evidence, in Mitigation of Damages, on a Plea of Not
and *Parks.* guilty: But at a Meeting of all the Judges, upon a Case in the Court of
Common Pleas, it was agreed not to allow this to be done for the Time to-
come; because, unless the Truth of the Words is pleaded by way of Justi-
fication, the Plaintiff cannot come prepared to defend himself as to that
Point.

(T) In What kind of Slander the Spiritual Court has Jurisdiction.

ALTHOUGH no Action upon the Case for Words lies, unless the Words are in themselves actionable, or some special Damage is received from them, yet the Party of whom they are published is not in all other Cases without Redress; for, wherever Words amount to a Spiritual Defamation, a Suit may be for them in the Ecclesiastical Courts.

But no Words are considered as a Spiritual Defamation, unless they contain a charge of some Offence which is punishable in the Ecclesiastical Courts.
Salk. 692. *Coxiter* and
Parsons. 2 *Lev.* 49. 2 *Roll. Abr.* 296. *Sid.* 393. *Salk.* 548. *Str.* 946.

4 *Co.* 20. a. It follows that, if no Suit lies in the Spiritual Courts for the Offence
8 *Mod.* 115. charged, none lies in those Courts for Words which charge the Offence.
11 *Mod.* 140,
208.

4 *Co.* 17. a. A Suit may be in the Ecclesiastical Courts for saying of *J. S.* He is an
Cro. Ja. 787. Heretick; this Offence being punishable there.

It has been held, that a Suit may be in the Spiritual Courts for saying of a Clergyman, *He preacheth nothing but Lies and Malice*; because this, which is a slander to an Ecclesiastick in the Discharge of his Duty, is fit to be tried there.

In a subsequent Case, where a Libel was in a Spiritual Court for these Words spoken of a Clergyman, *He is an impudent ignorant Blockhead, his Spiritual Advice is not fit to be followed, he is not fit to administer the Sacrament*, it was insisted upon, in shewing Cause against a Rule for a Prohibition, that these Words reflected upon him in his Profession, and the Authority of the preceding Case was relied upon. *Sed per Holt Ch. J.* These Words do indeed reflect upon a Clergyman in his Profession, but they do not charge him with any Thing that is punishable in the Spiritual Courts; and a Prohibition was granted.

A Suit may be in the Spiritual Courts for saying of *J. S. He is a Pander*; for this, which is a Word of known Signification, is a Spiritual Defamation.

So it may for saying of a Woman, *She is a Bawd*; because a Bawd is punishable in the Ecclesiastical Courts.

So it may for these Words spoken of *J. N. He is an Adulterer*; for the Offence of Adultery is punishable in the Spiritual Courts.

So it may for saying of *J. S. He is a Whoremaster*; Fornication being punishable in the Ecclesiastical Courts.

In some old Cases it is held, that to say of a Woman *She is a Whore* is no Spiritual Defamation; for that, unless she is at the same Time charged with some Act of Incontinence, these Words are to be considered as only Words of heat.

But in the Case of *Mellet and Herbert*, which is said to have been determined on a View of all the Precedents, it is laid down, that a Suit may be in the Spiritual Courts for calling a Woman *Whore*.

A few Years after it was again determined, and upon great Consideration after two Arguments at the Bar, that if these Words are spoke of a Woman, *She is a Whore*, it is a Spiritual Defamation, and that, as such Words make her liable to suffer publick Penance for Incontinence, they ought not to be considered as Words of heat only.

The Doctrine of the two last Cases has been frequently recognised, and it is now settled, that the calling a Woman *Whore* is a Defamation, for which a Suit may be in the Ecclesiastical Courts.

A Suit may likewise be in the Spiritual Courts for any other Words, which are tantamount to the calling a Woman *Whore*, as well as for the express Word *Whore*.

If it is said of *J. S. He is a Cuckold*, he cannot bring a Suit in an Ecclesiastical Court for these Words, unless his Wife joins in it; for only she is thereby defamed.

But if these Words are spoke of a married Man, *He is a Whore*, the Husband may alone have a Suit in a Spiritual Court; for these Words imply his consenting, or at least his being privy, to the Adultery of his Wife.

The Wife may sue in an Ecclesiastical Court without the Husband, although he cannot without her, for any Words which import a charge of her having been guilty of Adultery; because she alone is liable to do publick Penance for this Offence.

3 *Lev.* 119. It has been held that if *A.* says to *B.* the Son of *C.* *You are a Son of Vincent and a Whore*, the Son or Mother may either of them have a Suit in a Spiritual Court for these Words.

11 *Mod.* 113. But in a subsequent Case it was determined, that only the Mother can *Hoskins and Lec.* bring a Suit, in an Ecclesiastical Court, for Words spoken of her Son, which amount to the calling him *a Bastard*; because such Words are not defamatory to the Son.

(U) Where a Prohibition Will lie.

1. If actionable Words are coupled with such as are a mere Spiritual Defamation.

4 *Co.* 20. **A**S the Jurisdiction of Spiritual Courts extends only to such Words as *Palmer and Thorpe.* are a mere Spiritual Defamation, wherever any, for which an Action upon the Case would lie, are coupled with these, a Prohibition lies for the *Fitzb. N. B.* whole Words. It would be vexatious, and therefore the injured Party is *53.* not allowed to proceed in both Spiritual and Temporal Courts for Words *Comb.* 391. spoken at the same Time; and if he means to have Satisfaction for the *Carth.* 213. Damage received from them, this is no where to be had but in the latter, the Proceedings in the former being *pro salute anime* only.

12 *Mod.* 248. If a Suit is instituted in a Spiritual Court for these Words spoken of a *Whitfield and Porwell.* Woman, *She is a pockey Whore*, a Prohibition lies; for as the Words *Ib.* 242. amount to a charge of her having the *Great Pox* as well as being *a Whore*, an Action will lie for them.

Sid. 404. *Mellet and Herbert.* So a Prohibition lies to a Suit for saying of a Woman, *She is a Whore and a Thief.*

2 *Roll. Abr.* 295. *Ld. Raym.* 809.

Salk. 552. So it does if it is said of a Woman, *She is a Whore, and keeps a Galizard and Rigault.* *Bawdy-house.*

2 *Roll. Abr.* Although only such Words as are a mere Spiritual Defamation are contained in the Libel exhibited in a Spiritual Court, yet if it is suggested to a Temporal Court that other Words, for which an Action will lie, were spoken with these a Prohibition lies. *295. Butler and Bartlett.*

2. Where any Temporal Damage is received from them.

A Prohibition also lies, wherever it is disclosed to a Temporal Court, having Power to grant the Writ of Prohibition, that the Defamation, which would otherways have been determinable in the Spiritual Court, is mixed with something for which an Action upon the Case will lie.

4 *Co.* 20. **A**S Servant of the Abbot of *St. Albans* had, pursuant to Directions given *Palmer and Thorpe.* him by his Master, prevailed upon a married Woman to come to him at his Chambers. As soon as the Abbot was alone with her, he began to find fault with the Meaness of her Dress. The Woman replied, that her Dress was as good as her Husband could afford to buy her. Upon this he told her, well knowing what Women set their Hearts upon, that, if she would submit to his Will, she should go as well dressed as any Woman in the Parish. As she would not comply with his Proposal, he, after some Attempts to lie with her by Force, which did not succeed, locked her up

in his Apartment, hoping at another Time to accomplish his Design. The Husband, being informed of all this, talked publickly of the Abbot's Behaviour to his Wife, and threatned to bring an Action at Law for the false Imprisonment of her. Hereupon the Abbot, intending to add Oppression to the Injury already done the Husband, sued the poor Man in the Spiritual Court for saying he had follicited his Wife's Chastity. This whole Matter being disclosed to the Court a Prohibition was granted; the Court being of Opinion that, as the Defamation was in this Case mixed with the Assault upon and Imprisonment of the Wife, for which an Action would lie, it was not proper, although no Action was in fact brought, to be tried in the Spiritual Court.

A Prohibition lies to a Suit in a Spiritual Court for calling a Woman *Whore*, who has a Right to enjoy an Estate she is in the Possession of so long as she lives Chast; for, as she may by Reason thereof be brought into Danger of losing the same, an Action would lie.

So if a Suit be for saying of a Woman, in *London*, *She is a Whore*, or *She is a Bawd*, a Prohibition lies; because, as by the Custom of that City a Whore or Bawd is liable to be carted, an Action lies for these Words.

It was formerly held, that no Prohibition lies to a Suit in an Ecclesiastical Court for any Words, spoken of a Woman in *London*, which amount to a Charge of Incontinence; for that only the express Word *Whore* is within the Custom.

But it has been since determined that the Word *Strumpet* is within the Custom, and that a Prohibition lies to a Suit for these Words spoken of a Woman, *She is a Strumpet*.

So a Prohibition lies to a Suit for calling a Woman's Husband *Cuckold* in *London*; for, as this is tantamount to the calling her *Whore*, it is within the Custom.

So if a Suit be for saying of *J. S.* a Clergyman *He is an Heretick*, by reason of which he loses some Benefice he was about to be presented to, a Prohibition lies; for the Loss of the Benefice is a temporal Damage.

So a Prohibition lies to a Suit for saying of a Woman *She had a Bastard* by *J. S.* if on the Account of those Words she loses a Marriage with *J. N.* because the proper Way of having Satisfaction for the Loss of Marriage is by an Action.

So it does to a Suit for saying of *J. S.* *He is a Whoremaster*, by reason of which Words he loses a Marriage with *A. D.* for the Loss of Marriage is as great to a Man as to a Woman

422. *Latch* 118. *Cro. Car.* 269.

But if a Suit has been in a Spiritual Court for a mere Spiritual Defamation, and the Defendant, who has agreed to commute the Punishment, to which he was sentenced, by paying a Sum of Money to the Party injured by the Words, refuses to do this, no Prohibition lies to a Suit instituted in that Court for compelling him to pay the Money agreed upon.

3. Where the Offence charged is not punishable in the Ecclesiastical Court.

As only such Words, for the Statute *de circumspete agatis* mentions no others, as import the Charge of an Offence which is punishable in the Spiritual Court, amount to a Spiritual Defamation, a Prohibition lies whenever an Ecclesiastical Court entertains a Suit for any Words that do not amount to this. The Prohibition is in this Case founded upon that general Power, which the King's superior Temporal Courts have, to restrain all other Courts,

Spiritual as well as Temporal, from proceeding in a Matter that is not within their Jurisdiction.

- 2 Lev. 49.
Newman and Ringerby. If a Suit is entertained in a Spiritual Court for saying of a Minister *He is a Fool, an Ass, or a Goose*, a Prohibition lies; these being Words of Heat and not punishable in that Court.
- Salk 692.
Coxiter and Parsons. So if a Suit is for these Words spoken of a Clergyman, *He is a Dunce and a Blockhead, I wonder the Bishop would ordain such a Fellow, he deserves to have his Gown pulled over his Ears*, a Prohibition lies; for a Parson is no more punishable in that Court, because he is a *Dunce and a Blockhead*, than another Man. It being insisted upon in this Case that a Minister may be deprived for want of Learning, Roll. Ch. J. answered, if that is the Plaintiff's Case, he must bring an Action at Law, Deprivation being a Temporal Damage.
- 11 Mod. 140.
208. So where a Suit was for speaking these Words to a Clergyman, *You are an old Rogue and a Rascal and a contemptible Fellow, and hated and despised by every Body*, a Prohibition was granted; for these Words are no Spiritual Defamation.
- Str. 946. Mufgrave and Eovey. So a Prohibition lies to a Suit for saying of J. S. *He is a Knave*, because these Words do not make him liable to any Ecclesiastical Censure.
- Salk. 548.
Hawkins's Case.
2 Roll. Abr. 296.
Sid. 293. So these Words spoken of J. N. *He is as great a Rogue as ever was hanged, and deserves hanging more than Doctor Pims*, were held to be no Spiritual Defamation, and a Prohibition went to a Suit instituted for them.
- 11 Mod. 112.
Hofkins and Lee. So a Prohibition lies to a Suit for calling any Person *Drunkard*; because Drunkenness is not conusable in a Spiritual Court.
- 2 Roll. Abr. 296. Haynes and Poynter. So where a Suit was for the Word *Quean* spoken of a Woman, a Prohibition went; for it is not well known what is intended by the Word *Quean*, and it is besides only a Word of anger.
- 2 Roll. Abr. 296. Blackbarw and Stevens.

Smuggling.

SMUGGLING is the clandestine bringing on Shore, or carrying from the Shore, any Goods, Wares or Merchandizes, contrary to Law.

This Offence is productive of various Mischiefs to Society. The publick Revenue is thereby lessened; the fair Trader injured; the Nation impoverished; rival and perhaps hostile States enriched; and the Persons guilty of this Offence, being hardened by a Course of Disobedience to and Defiance of Law, become at last so abandoned and daring, as not to hesitate at committing the greatest Outrages.

It must be the Wish, and ought to be the Endeavour, of all the Friends to *Britain*, that many of the present high Duties should be lowered. This would be an immense Benefit to Trade in general; and it would, by removing in Part the Temptation, put some Stop to the Practice of Smuggling, which all the severe and sanguinary Laws made against it have been scarce found to do. In the mean Time it is not only their Duty, but it highly concerns all Men of Property, and every Lover of Peace and Order, to co-operate in discountenancing this Offence, and carrying the Laws made against it into Execution.

Under this Title it may be proper to give an Account,

(A) Of the Customs in general.

(B) Of the Origin of the Customs.

(C) Of the ancient State of the Customs.

1. Of the Duties upon Wool, Wool-fells, and Leather.
2. Of the Duty of Tonnage.
3. Of that of Poundage.

(D) Of the present State of the Customs.

1. Of the Duty of Tonnage.
2. Of that of Poundage.
3. Of the Duties to which Aliens are liable.

(E) Of prohibited Goods.

(F) Of the Penalties and Forfeitures incurred by Persons guilty of this Offence or illicit Practices which have a natural Tendency thereto.

1. From Ships at Sea.
2. By the Shipping or unshipping Goods at any Port, Member or Wharf, not lawfully appointed for these Purposes.
3. From Ships in Port inwards Bound.
4. To Ships in Port outwards Bound.
5. From or to coasting Vessels in Port.
6. In the Case of Certificate and prohibited Goods.
7. In divers other Cases.

(G) Of the corporal Punishments to which Persons guilty of this Offence or Practices thereto tending are liable.

1. Imprisonment.
2. Whipping.
3. Transportation.
4. Death.

(A) Of the Customs in general.

AS one and that the most considerable Part of this Offence consists in the clandestinely bringing on Shore, or carrying from the Shore, Goods, Wares or Merchandizes, without paying the Customs or Duties, which by Law ought to be paid on the Importation or Exportation of the same, it cannot be improper to premise some Account of the Customs.

Under the Word *Customs*, both according to its ancient and modern Signification, is comprized every Duty which is to be paid at a Port, upon the Account of importing or exporting any Goods, Wares or Merchandizes.

Such Duties were perhaps at first imposed, for the enabling the Crown to make and maintain commodious and safe Ports and Harbours, and to keep up a Fleet for the Protection of the Ships of Merchants against Enemies and Pirates. As these Services were of a permanent Nature, it was fit that the Duties appropriated for defraying the Expence of them should be so also; and it appears from the Practice of early Times that this was the Case. The first (a) Grant of any Custom now extant was made to the King and his Heirs; and before this Grant mention is made of (b) ancient Customs as being due and having been constantly paid. It may also be concluded from the Fact of their having been paid for a Series of Years, without any new Demand of the Crown or Grant from the People, that the Imposition of ancient Duties was for a Continuance. From the Length of Time these had been paid, in which they differed from other Aids, that being paid on the Occasion of some Emergency ceased therewith, they perhaps obtained the Name of customary Payments, or *Customs*, and all Duties collected at a Port on Goods imported or exported have been since so called.

(a) *Rot. Pat.*
m. 3 *E.* 1.
m. 1. *u.* 1.
Rot. Fin. 3 *E.*
 1. *m.* 24.
 2 *Infl.* 59.
 (b) *Mag. Ch.*
c. 30. 5 *H.* 3.
β. 5. *f.* 6.

(B) Of the Origin of the Customs.

IT has been a much altercated Question, whether a Power of imposing Customs was heretofore vested in the Crown, or whether this Power was always vested in Parliament?

The Maintainers of the former Opinion distinguish between Subsidies and Customs. The former it is said were always assessed by Parliament; but it is insisted that the latter are due to the Crown, of common Right, for Leave given to export or import any Commodities; for the Interest the King has in the Sea as being Guardian thereof, and Maintainer of its Ports and Harbours; and for the Protection given, by his Ships, to the Ships of Merchants against Enemies and Pirates.

The following Authorities have also been relied upon in Support of this Doctrine.

A Patent having been granted by *Edw. 6.* to a Merchant Alien, that he might import or export Goods to a certain Degree, paying to the King, his Heirs and Successors, so much and no more as an *English* Merchant was to pay, it was the Opinion of all the Justices, in the Exchequer Chamber, that this Patent remained good for the old Customs, wherein the King had an Inheritance by his Prerogative; and was only void as to the Subsidy upon Goods customable, which by the Statute of Tonnage and other Statutes are granted for his Life only.

A Question arising if a new Imposition laid by Queen *Mary* upon Clothes was legal? the Judges being consulted were of Opinion, that *English* Merchants do not pay, by the common Law, any Custom for any Wares or Merchandizes, except Wool, Wool-fells, and Leather.

A Judgment was given in the Exchequer, in an Information, against *German Ciol*, for a Duty of forty Shillings per Ton, set by Queen *Mary* upon all Wines of the Growth of *France*, brought into this Realm.

The Executors of *Smith*, a Customer, were charged in an Information for Money received by their Testator, on account of an Imposition of three Shillings and four Pence, set by Queen *Elizabeth* under her Privy Signet, upon every hundred Weight of Allom made in the Pope's Dominions; and Judgment was given against them.

In an Information against *John Bale*, for a Duty laid by the Crown upon Currans imported, Judgment was for the King.

Writs were issued for charging Ports, Towns, Cities, and Counties respectively, to provide certain Ships for his Majesty's Service, and Process went against particular Persons who refused to pay the Sums charged upon them, by way of Contribution to this Service. A *Scire facias* being issued upon such a Writ against *John Hampden* Esq; he appeared and demurred to the Proceedings upon it. After divers solemn Arguments, in the Exchequer Chamber, it was agreed by the Majority of the twelve Judges, that he should be charged with the Sum so assessed upon him. The main Grounds and Reasons for this Judgment were, that when the whole Kingdom is in Danger, the King might, by Writs under the Great Seal, command all the Subjects of this his Kingdom, at their Charge, to provide and furnish such a Number of Ships, with Men, Victuals and Provisions, and for such a Time as he shall think it necessary for the Safety of the Kingdom; and that by Law the King might in Case of Refractoriness compel the doing thereof; and that the King is the sole Judge both of the Danger, and when and how the same is to be prevented.

It is certainly very proper for many Reasons that Merchants should pay Customs, but it by no Means follows, that these should be imposed at the Discretion, or arbitrary Will, for whatever seeming Difference there may be there is no real one betwixt these two Things, of the reigning

Prince. The King may with as much Propriety be said to be Guardian of the Land as of the Sea; and if so, there is as much Reason for him to impose Taxes, at his Pleasure, for the Defence of the one as of the other. A Power to do this would, besides making a Parliament in a great Measure useless, make all Property insecure; for it would then depend entirely upon the Will of one Man, how much of this every other Man should be suffered to enjoy.

If the Circumstances of the Times, when some of the Judgments cited were given, be considered, they will be found to have but little Weight; and it is notorious, that no one Thing contributed so much to the Troubles which soon after arose, and at Length ended in the Death of the unfortunate Prince then on the Throne, as the last in favour of Ship-money did.

Instead however of merely defending the contrary Opinion, and being contented with repelling the Force of these Authorities, it is better in so constitutional a Point to act offensively, and endeavour to show, by Authorities of much greater Weight as well as more ancient, that by the *English* Constitution the Right of imposing Customs was originally in Parliament.

But before I attempt to do this, I shall take Notice of a Mistake as to this Point of Lord Chief Justice *Coke's*, by which a very great Man seems to have been misled.

Vaugh 161. After mentioning some Cases, in which it had been held, that certain Customs were due at the common Law and not originally granted by Parliament, *Vaughan* Chief Justice adds, "this was in those several Reigns the Opinion of all the Judges of the Times, whence we may learn how fallible even the Opinion of all the Judges is, when the Matter to be resolved must be cleared by Searchers not common, and depends not upon Things vulgarly known by Readers of the Year Books; for since these Opinions it is known, that these Customs, called the *Antique Custumæ*, were granted to King *Edward* the First in the third Year of his Reign as a new Thing, and were no Duty belonging to the Crown at common Law."

Rot. Pat.
m. 3 E. 1.
m. 1. n. 1.
Rot. Fin. 3 E.
1. m. 24.
2 Inst. 59. He goes on to cite a Patent of *Edward*, the First, which runs thus, *Cum prelati, Magnates, et tota communitas Mercatorum regni nostri nobis concesserint quandam novam Consuetudinem de Lanis, Pellibus, et Coriis tam in Anglia, quam in Hibernia, et Wallia, regnum nostrum excuntibus, in perpetuum Nobis et heredibus nostris capiendam, sicut in forma inde provisã et communiter concessa plenius continetur.* From the Date of this Patent he observes, that the Grant alluded to must have been by the Statute of First *Westminster*, because no other Statute had been made in the Reign of this Prince antecedent to the Time it is dated. In order to account for its not being now a Part of that Statute, he supposes that the Grant was annexed thereto by way of Rider, and afterwards casually lost from the Roll. Having thus ascertained the Time of this Grant, he concludes that the Customs upon Wool, Woolfells, and Leather, called from their great Antiquity *Antique Custumæ*, were not due at the common Law, but were granted by the Statute of First *Westminster*.

By comparing what is here said with *2 Inst. 59.* it will evidently appear, that the Opinion of *Vaughan* was too hastily formed from *Coke's* Comment upon this Patent. It is scarce possible to be otherways, for a Man of his sound Judgment, and acute discernment must, upon the least looking into the Matter, have seen that these Customs existed long before.

Magn. Ch.
c. 30. It is plain from *Magna Charta* that some Customs were then due, and such as are therein called Old ones.

1 H. 3. ft. 5.
f. 6. The very Words, *quandam Novam Consuetudinem de Lanis, pellibus, et Coriis*, in that Patent, imply that there was before an old Custom upon these very Things; and by the Statute *de Scaccario* the Manner of accounting by the Collectors of the Customs upon Wool is ascertained.

This false Foundation being removed, the next Business is to attempt the Discovery of that true and solid one upon which the Position contended for, that the Origin of Customs was with the Consent of Parliament, is built.

But in Order to trace out the Origin of Customs, which are Taxes of a particular Kind, it will be necessary to consider the Origin of Taxes in general.

In that very ancient Record, *de modo tenendi Parliamentum tempore Regis 2 Inft. 533. Edw. Filii Etbelredi*, are these Words, *debent auxilia peti in pleno Parlamento.*

As the Saxon Laws were by this Prince Edward, surnamed the Confessor, collected into a Body, it is very probable that this Method of granting Aids in full Parliament was agreeable to ancient Practice.

In the Laws of this same Prince, which were after confirmed by William the Conqueror, are these Words, *Debet etiam Rex omnia rite facere in Regno, et per judicium procerum regni.* Lamb. de Prisc. Angl. Leg. 142. Leg. Edw. 17. Tit. De regis Officio.

If all Things ought to be done by the King rightly in the Kingdom, and with the Approbation of the great Men of the Realm, surely a Thing of so much Consequence as the imposing of Taxes ought to be so done.

Upon the Conquest of England, which happened soon after the Death of Edward the Confessor, Feudal Tenures were introduced. The Fifty-second Law of William the First, the Terms of which are absolutely feudal, runs thus. *Statuimus ut omnes Liberi Homines fœdere et sacramento affirmant, quod infra et extra universum regnum Angliæ, quod olim vocabatur regnum Britannia, Willielmo Regi suo Domino fideles esse volunt, terras et honores illius fidelitate ubique servare cum eo, et contra inimicos et alienas defendere.* Lamb. de Prisc. Angl. Leg. 170. Leg. Gul. 52.

However this Prince might think it prudent to set up a Claim of another Sort to the English Crown, it has usually been understood that his best Title was founded in Conquest. If this was so, the Concurrence of Parliament in this Introduction of the feudal Law proves strongly, that by the Constitution then established no change which affected Property could be made without it; for if a Power to make any had been in the reigning Prince, it would in all Probability have been exercised at this Juncture.

It may be objected that, although the Constitution did not allow the reigning Prince to make so great an Alteration in Property as was done by introducing the feudal Law, it does not necessarily follow that he had not the Power to make some lesser Alterations therein, by the imposing of Taxes without Assent of Parliament. If this Law stood single, the Objection, which has Weight in it, would deserve a very particular Consideration; but it is not now necessary to give an Answer thereto, the Objection itself being entirely removed by the Fifty-fifth Law of this Prince.

The Words of this are, *Volumus etiam ac firmiter præcipimus et concedimus, ut omnes liberi homines, totius Monarchiæ regni nostri prædicti habeant, et teneant terras suas, et possessiones suas bene et in pace, liberas ab omni exactione injusta, et ab omni TALLAGIO, ita quod nihil ab eis exigatur vel capiatur, nisi servitium suum liberum, quod De jure nobis facere debent et facere tenentur, et prout Statutum est eis, et illis a Nobis datum et concessum jure hæreditario in perpetuum per Commune Concilium totius regni nostri prædicti.* Lamb. de Prisc. Angl. Leg. 170. Leg. Gul. 55.

As the Words *per commune concilium* are not therein, it has been doubted by some if the Parliament did concur in the Fifty-second Law just now mentioned. It is plain from this last Law that one Introductive of the feudal Law had been consented to by Parliament, and as no other except the Fifty-second by which this was introduced is now extant, the Probability is that it was done by that. But it makes no Difference whether the feudal Law was introduced by the Fifty-second Law or some other made in this Prince's Reign; for if it was done by any one to which the Parliament consented, it is enough for the present Purpose, which is only to show that it was not done without such Consent.

By

By this Law it is also declared, that nothing should be demanded or taken from the People, except such Services as of Right appertained to feudal Tenure, and particularly that they should be free from all unjust Exaction and from all *Tallage*.

(a) *Spelm Gloss.* The Word (a) *Tallage*, which is derived from the *French* Word *Tailler* to cut of Part of a Thing, is so general a Word, that it includes all Subsidies, Taxes, and Impositions whatsoever. Now is it to be imagined, that, unless the People had by their Constitution a Right to be free from the Demand of Taxes of every kind, this should be granted them by a Conqueror? Such a Prince may, for the Sake of making himself secure, think it proper to confirm their ancient Privileges to his Subjects; but it is scarce to be hoped that he should confer any new ones upon them.

Cust. de Norm. By the Introduction of feudal Tenures inferior Lords, and the King as supreme Lord, acquired a Right to some Aids incident thereto. These were an Aid for making the Lord's eldest Son a Knight, another for the Marriage of his eldest Daughter, and a Third for the Ransom of his Person when taken Prisoner.

Mad. Hist. Not content with these, inferior Lords took of their Tenants an Aid to enable them to pay their Fines to the King, and another to enable them to pay their Debts; nay it became a Question in the Reign of *Henry* the Second, whether Lords might not demand an Aid whenever they engaged in any Military Expedition?

Mad. Hist. While inferior Lords thus oppressed their Tenants, under the Pretext of demanding Aids, the King in his Turn required from them divers Aids to which they were not liable by Tenure. This was at Length carried to such a Pitch that the King did, upon the Occasion of any War, assess what Sum he pleased upon every Knight's Fee. These Exactions gave such universal Dissatisfaction, and became so intolerable, that the People in the Reign of *John* flew to Arms, and, being successful against that Prince, compelled him to sign the Great Charter.

Matt. Paris By a Clause in this, the People were restored to the Privilege of not being taxed without Consent of Parliament, which they had enjoyed under their *Saxon* Monarchs, and which, except as to the Aids incidental to feudal Tenure, had been recognized by the Conqueror. It runs thus. *Nullum Scutagium vel Auxilium ponam in regno nostro nisi per Commune Concilium regni nostri, nisi ad Corpus nostrum redimendum, et ad primogenitum filium nostrum militem faciendum, et ad filiam primogenitam semel maritandam, et ad hæc non fiet nisi rationabile Auxilium; et ad habendum commune Concilium regni de Auxilio Assidendo, aliter quam in tribus Casibus prædictis, summoneri faciemus Archiepiscopos, &c.*

Westminster, By this Clause even the Aids incident to Tenure were to be reasonable, and by the Statute of First *Westminster* two of these were ascertained. The Third for the Ransom of the King's or Lord's Person was in its Nature so uncertain, that no Price for this could be settled. The ascertaining as far as it could be done of these Aids, in which the King had clearly a Right of Inheritance as supreme Lord, shews how contrary it was to the Genius of the *English* Constitution, to have any Thing of this Kind depend on the arbitrary Will of the reigning Prince.

Under the Pretence that this Charter was extorted from *John*, while he was under Duress, no regard was paid to it by him, or his Son *Henry* the Third; and in the Charter made in the Reign of this last Prince this Clause was omitted. During the Reign of *Henry*, and for some Part of that of *Edward* the First his Successor, the Method of assessing Aids at the arbitrary Will of the Prince was revived: But it occasioned so much Discontent, that in the Twenty-fifth Year of his Reign he confirmed the Charter of his Father, and added some Chapters, which effectually supplied the Place of the Clause that had been omitted.

By

By one Chapter in this it is declared, "that no Aids, Tasks or Prises, *Conf. Chart.*
 " shall henceforth, upon any Occasion, be set or collected but with the com- ²⁵ *E. 1. c. 6.*
 " mon Assent of the whole Realm, and for the common Good thereof, save
 " and except the ancient Aids and Prises due and accustomed."

By another after reciting, that divers People of the Realm had before ⁶ 5.
 Time given Aids, towards the Wars and other Businesses, of their own good
 Will, it is declared, "that the same shall not be drawn into a Custom."

It is probable that this recital was more calculated to throw a Veil over
 some late Transactions, than to represent the real Truth of the Case; but
 however this was, it concludes either Way against the Power of the Crown
 to demand such Aids.

Not many Years after this Prince imposed a Tallage upon Cities, Towns ² *Inst. 532.*
 and Boroughs, without the Assent of Parliament. The Pretence for so do-
 ing seems to have been, that the Exemption from Aids, Tasks and Prizes,
 extended only to real Estates; for a Demand having, about the same
 Time, been made of an Aid from all Freeholders possessed of twenty
 Pounds a Year, they refused to pay it, because it had not, as was required
 by the last mentioned Statute, been granted in Parliament. The Pay-
 ment of this Tallage, and Demand of this Aid, occasioned great Murmur-
 ings and Discontents amongst the People. To prevent the ill Consequences
 thereof, and to quiet their Minds for the Future, the Statute *de Tallagio non*
concedendo was made in the Thirty-fourth Year of his Reign.

By this it was declared, "that no Tallage or Aid shall be imposed or le- ³⁴ *Edw. 1.*
 " vied, by us or our Heirs, in our Realm, without the good Will and As- ^{4.} *c. 1.*
 " sent of the Archbishops, Bishops, Earls, Barons, Knights, Burgeffes,
 " and other Freemen of the Land." No Words can be fuller, more abso-
 lute, or more explicit, than these are; but it ought in particular to be re-
 membered that the Word *Tallage*, besides being the most comprehensive
 Word that could have been made Use of, is the very Word used in the
 Fifty-fifth Law of *William the First*.

Upon the whole it appears almost beyond Doubt, that the various Strug-
 gles of the People were not to amend the Constitution in this Point; but
 to deliver themselves from the Encroachments made at different Times there-
 in. They obtained no more from *John* when he was in their Power; they
 obtained no more at any Time since; they obtained no more at this Time;
 than not to be taxed without the Assent of Parliament. This they had a
 Right to, for it was Part of the Constitution, and had by the Conqueror,
 when in the Plenitude of his Power, been allowed so to be.

If this is so, that the Origin of all Taxes ought by the Constitution to
 be with the Assent of Parliament, it follows that there never could have
 been in the Crown a Power of imposing Customs, which are one Species of
 Taxes. Besides the general Reasons, which hold for the People's having re-
 served to themselves, by their Original Compact, the Privilege of not being
 taxed in any Case without the Assent of Parliament, there are some parti-
 cular ones for their having done it in this. As nothing is of more Conse-
 quence to any People, and more especially to the Inhabitants of an Island,
 than the Promotion of foreign Trade, it highly concerned them to take Care
 that this should not be loaded with improper or excessive Duties. If as it
 has been (a) observed, the Practice of the most early Times was to impose ^(a) *Ante 524.*
 them for a Continuance, it was more necessary that Customs should be well
 considered of in Parliament, before they were imposed, than that other
 Taxes which were to last but a short Time should.

It was not only fit, for these and other Reasons, that the People should
 at all Times have reserved to themselves this Privilege: But there is a Cir-
 cumstance which strongly evinces that they in fact did so. This is, that the
 Right of imposing Customs was given up even by some Princes, who asserted
 a Claim to that of imposing other Taxes.

When *Henry* the Third signed the Great Charter, it is plain from its being therein omitted, that he would not agree to the Clause that *John* had agreed to, by which no Aids, except those due by Tenure, were to be imposed without the Assent of Parliament. It is however provided by this

(a) *Magn. Ch.*
c. 30.

Charter (a) "that all Merchants, if they were not openly prohibited before, shall have their safe and sure Conduct, to depart out of *England*, to come into *England*, to tarry in, and go through *England*, as well by Land or by Water, to buy and sell without any Manner of evil Tolts, by the old and rightful Customs."

It seems pretty clear that by evil Tolts, as here opposed to old and rightful Customs, is meant Duties not imposed by Parliament; but if any Doubt remained as to the Meaning of these Words it is removed by a subsequent Statute.

25 *Ed. 1.*
§. 1. c. 7.

The Words of this are "and for so much as the greater Part of the Commonalty of the Realm find themselves sore grieved with the evil Tolt of Wool, that is to say, of forty Pence for every Sack of Wool, and have made Petition to us to release the same, we at their Requests have clearly released it, and have granted that we shall not take such Things without their common Assent and good Will, saving to us and our Heirs the Customs of Wools, Wool-fells, and Leather, before granted by the Commonalty aforesaid."

In the printed Statutes the Words *quarante soudz*, in this Statute, are translated forty Shillings. This does not seem to be a just Translation, and it is very improbable so large a Duty should at that Time have been imposed upon Wool. The Quantity of middling Wool, equal to what was anciently called a Sack, is not at this Day worth above nine Pounds; and if the Difference between the present comparative Value of Money and the Value of it at that Time be considered, it will be found that such a Duty was then the whole Worth or nearly so of a Sack of Wool.

If from these two Statutes considered together, it appears that, by evil Tolts, such as are imposed without the Assent of Parliament are intended, it follows that *Henry* the Third, who would not give up the Right of imposing other Aids, has by the Great Charter admitted, that no Customs are rightful except they are imposed with such Assent.

Ante 526.

From a Patent of *Edward* the First, it is evident, that a Grant of a new Custom upon Wools, Wool-fells, and Leather had been made to this Prince in Parliament.

25 *Ed. 1.*
c. 6.

It was more than twenty Years after the Date of this Patent, before he gave up by the Statute called *Confirmatio Chbartarum* the Right of imposing Aids; and in the mean Time it is certain that he did in fact exercise it. Can any other good Reason be assigned for his accepting a Grant, which amounted to a Confession that without it he could not have imposed this Custom, so many Years before he gave up the Right of imposing Aids, than his being persuaded that he had not so good a Right to impose Customs, as he had to impose other Aids?

Whether what has been said is sufficient, to show that the Origin of Customs was with Assent of Parliament, must be submitted to the Readers Judgment; but this is certain, that if the People had not before the Privilege of being exempt from all Customs not so assented to, this was fully

(b) 25 *Ed. 1.*
(c) 34 *Ed. 1.*
§. 4.

granted them by the two Statutes of *Edward* the First, (b) called *Confirmatio Chbartarum*, and (c) *De Tallagio non concedendo*.

It is not necessary, to the present Question, to show by how many subsequent Statutes this Privilege has been confirmed: But I shall just mention what happened in the Reign of *Edward* the Third; because it was an Instance of laudable Jealousy in the People, and will at all Times be worthy of Imitation.

4 *Inft.* 29.

About this Time a great Part of the Wool grown in *England* was manufactured into Cloth. Hereupon a Question arose, whether a Custom, in

Pro-

Proportion to the Quantity of Wool therein used, should be paid upon the Exportation of such Woollen Cloth? It was resolved that, as the Wool was by the Labour of Man changed into another Sort of Merchandize, none ought to be paid; and therewith the King, as it appeareth by the Records in the Exchequer, held himself satisfied.

It appears from the *Original. De Scaccario*, that by a Statute, not in print, made in the Twenty-first Year of this Prince's Reign, a Custom was granted him upon Woollen Cloth exported; and the Reason of granting it is said to be, *Quia Jam magna pars Lanæ regni nostri in eodem regno pannificatur, de qua Custuma aliqua non est soluta, per quod proficuum quod De Custumis et subsidiis Lanarum, si extra regnum ducerentur, percipere debemus, multum diminuitur, &c.*

The Remark of *Coke* Chief Justice upon these Transactions is a very proper one. "If in any Case the King might, by his Prerogative, have set an Imposition, he might have set one in this, for that, as it appeareth by the Record, by making of Cloth the King lost his Customs of Wool."

(C) Of the ancient State of the Customs.

1. The Customs of Wool, Wool-fells, and Leather.

IT does not appear, from any Records now extant, at what Time they were first imposed, but it seems clear that the Customs on Wool, Wool-fells, and Leather, are the most ancient of all the Customs; for no mention is made in the Records of the most early Times of any other.

The Statute *De Scaccario*, in directing how Collectors of the Customs shall account, does indeed say they shall account for every other Charge in a Ship whereof Custom is due; but nothing is therein particularly mentioned but Wool.

From a Patent of *Edward* the First it appears that a Grant was made in the third Year of his Reign, to him and his Heirs, of a Custom *De sacco Lanæ dimid. Marc. De 300 pellibus dimid. Marc. et de lasto corii xiii. s. iii. d.*

Some Years after the Merchant Strangers, in Consideration of some Privileges and Immunities, granted to this Prince and his Heirs *de quolibet sacco Lanæ 40 d. de incremento ultra custumam antiquam dimid. Marc. quæ prius fuerit persoluta, et sic pro lasto Coriorum dimid. Marc. et de trecentis pellibus lanatis 40 d. ultra certum illud, quod et antiqua Custuma fuerit, prius datum.*

As this Charter speaks only of these Commodities being, at the Time it was made, liable to the Custom granted to this Prince in the third Year of his Reign, it may very well be concluded, that all the old Customs upon them ceased from the Time of that Grant.

From this Time the Distinction met with in the Books of *Antiqua Custuma* and *Nova Custuma* seems also to have begun, that granted before to this Prince being called *Antiqua Custuma*, and this now granted by the Merchant Strangers *Custuma Nova*; and sometimes one is called *Magna Custuma*, the other *Parva Custuma*.

In the Time of *Edward* the Third the Woollen Manufactures were so established in *England*, that great Part of the Wool grown was made into Cloth. In order to make amends to the Crown for the Loss of Custom of Wool, hereby sustained, a Duty was granted upon Woollen Clothes exported.

3 *E. 4. c. 1.* The Duties upon Wool and Wool-fells, after having been often varied,
 4 *E. 4. c. 1.* are now at End; the Exportation of them being prohibited by divers
 14 *E. 4. c. 3.*
 13 & 14 *C. Statutes.*
 2. *c. 18. 7* &
 8 *W. 3. c. 28. 9* & 10 *W. 3. c. 40.*

1 *Eliz. c. 10.* The Exportation of Leather was once also prohibited. Liberty has indeed
 12 *C. 2. c. 4.* been since given to export it; but instead of reviving the old Duty it was
f. 10. made subject to the general Duty of Poundage.

11 & 12 *W. 3. c. 20.* The Duty upon Woollen Cloths, after having undergone various Changes,
 was likewise in the Reign of *William* the Third entirely taken off, and with
 this all these ancient Duties ended.

(2) Of the Duty of Tonnage.

2 *Inf. 59.* The Duty upon Wines imported is also very ancient, for as long ago
Rot. Pat. as the Reign of *Henry* the Third it was accounted for, by the King's Butler,
 40 *H. 3.* under the Name of Prifage.

Flet. lib. 2. For this Duty the Practice anciently was to take two Tuns of Wine from
c. 22. Rot. every Ship having twenty Tuns or more on Board, one before the Mast the
Parl. 28 E. 1. other behind it, paying twenty Shillings for each Ton; and it was called
Rot. Pat. 40 *H. 3.* *certa prisfa* and *recta prisfa*.

2 *Bulfr. 254.*
Davis 8. b. 4 Inf. 30.

4 *Inf. 30.* This Duty, because the Wine was taken for the King's Use, was called
 and still retains the Name of Prifage.

Chart. Merc. By the *Charta Mercatoria* Merchant Strangers granted a Duty of two Shil-
 31 *E. 1.* lings *per* Ton, to the King and his Heirs, for Wines imported by them:
 7. 44. But they were to be exempt from the Duty of Prifage to which the *English*
 2 *Bulfr. 254.* Merchants still continued liable.
 2 *Inf. 30.*

4 *Inf. 30.* This Duty paid by the Merchant Strangers, from its being received by the
 6 *Geo. 1. c. 12.* King's Butler, obtained the Name of Butlerage, and has ever since been so
f. 8. called.

4 *Inf. 32.* In the sixth Year of the Reign of *Richard* the Second, a Duty of two
Dav. 11. a. Shillings *per* Ton upon all Wines imported was granted to that Prince, but
 it was only to continue for two Years.

The Duty hereby granted was called Tonnage, and all Duties since
 imposed upon Wines have been so called.

2 *Inf. 32.* It appears from divers Records that the Duty of Tonnage was afterwards
 sometimes one Shilling and six Pence *per* Ton; sometimes two Shillings;
 and sometimes three Shillings; and that it was not granted for Life, but
 for a particular Occasion, or for one or more Years, and Conditions as to the
 Application of it were frequently annexed to the Grant.

Rot. Parl. In the third Year of *Henry* the Fifth a Duty of three Shillings *per* Ton
 3 *H. 5. n. 50.* was granted during his Life.

31 *H. 6. c. 8.* After the Death of this Prince the Custom of granting the Duty of
 Tonnage for a few Years only was revived, it not being granted to
 his Successor *Henry* the Sixth for Life till the Thirty-first Year of his
 Reign.

Rot. Parl. It was afterwards granted to *Edward* the Fourth, *Henry* the Seventh,
 4 *E. 4.* *Henry* the Eighth, *Queen Mary*, *Queen Elizabeth*, and *James* the First, for
 12 *E. 4. c. 3.* their respective Lives, and to all of them except *Edward* the Fourth, in the
Rot. Parl. first Year of their several Reigns.
 1 *H. 7.*

Rot. Parl.
 1 *H. 8. 6 H. 8. c. 14.* 1 *E. 6. c. 13.* 1 *Mar. c. 18.* 1 *Eliz. c. 19.* 1 *J. 4. c. 33.*

No Duty of Tonnage was granted to *Charles* the First till the sixteenth Year of his Reign; and it was then only granted for very short Spaces of Time. 16 C. 1. c. 8.
12, 22, 25,
29, 31, 36.

3. Of that of Poundage.

The Duty of Poundage is so called from its being paid at the Rate of so much in the Pound.

The first Account we have of this is a Duty of three Pence in the Pound, granted to *Edward* the First, upon the Goods of all Merchant Strangers imported. Rot. Chart.
31 E. 1. n. 44.
27 E. 3. f. 2.
c. 26.
2 Inst. 59.

In the Forty-seventh Year of the Reign of *Edward* the Third another Duty was imposed of six Pence in the Pound. This was to be paid for all Goods exported and imported, except Wools, Wool-fells, Leather, and Wines; and *English* Merchants as well as Merchant Strangers were made subject to it. 4 Inst. 32.
Rot. Parl.
47 E. 3. n. 14.
Dav. 10. b.

In the fourteenth Year of the Reign of *Richard* the Second this Duty was raised to one Shilling in the Pound; but it was three Years after reduced again to six Pence. Rot. Parl.
14 R. 2. n. 12.
17 R. 2. n. 12.

It was raised to eight Pence in the second Year of the Reign of *Henry* the Fourth; and in the fourth Year of this Prince's Reign to one Shilling. Rot. Parl.
2 H. 4. n. 9.
4 H. 4. n. 28.

From this Time to the ninth Year of *William* the Third it continued at one Shilling in the Pound. 4 Inst. 32.
12 C. 2. c. 4.

Ever since the sixth Year of the Reign of *Richard* the Second, except in a very few Instances, this Duty has been comprized in the same Grant with that of Tonnage; and has been granted in the same Manner, upon Condition, for Years, or for Life, as that was. Rot. Parl.
6 R. 2. n. 13.
4 Inst. 32.

Heretofore Credit was given to a Merchant's Papers for the Value of his Goods that were subject to this Duty; nor was he obliged to swear to this, unless he neglected to produce a Bill of Lading. 27 E. 3. f. 2.
c. 26.

Frauds being afterwards discovered, a Power was given to the Officers of the Customs to open and measure Goods, in order to come at the true Value; but no Oath was still enjoined. 12 E. 4. c. 3.

This Practice of our Ancestors in not having recourse to an Oath in Cases of the Customs, where Knowledge of the Thing could in any other way be come at, is surely worthy of Imitation. Many considerate Men have long been of Opinion, that the introducing so many Custom-house Oaths has not been of any Use even to prevent Frauds in the Revenue; for that, although a few may be conscientious on such Occasions, more is lost by relying upon Oaths, and of Course not examining so strictly, than is thereby saved. If this be so, it is high Time that many of them should be laid aside; for nothing has perhaps so much contributed to take off that reverential Awe which ought to be had for an Oath, and consequently to open the Sluices of Perjury that have so deluged this Land, as these have.

The Method of ascertaining the Value of Goods, subject to this Duty, by a Book of Rates was practised in the Time of *James* the First, and in some of the preceding Reigns 4 Inst. 33.

(D) Of the present State of the Customs.

UNDER this Head no more is intended, than to give a general Account of the present State of the Customs. To give a particular Account of the various Duties, imposed by divers Statutes on the different Sorts of Goods, would be tedious, unentertaining, and foreign to the Design of this Work. It would too be unnecessary; for this has been already done with great Care and Accuracy by Mr. *Crouch* and Mr. *Saxby*: In whose Books, professedly wrote upon the Subject, such as desire to have a complete View of any Branch of this Part of the Revenue will meet with Satisfaction.

Much the greatest Part of the Duties, at this Day payable, are comprized under the Denomination of Tonnage or Poundage.

Very soon after the Restoration the Practice of granting a Subsidy of these Duties to the Crown for Life was revived; and has been ever since continued.

9 *W. 3. c. 23.*
1 *G. 2. st. 1.*
c. 1. In Process of Time divers other Subsidies of Tonnage and Poundage were granted: But, of all that are now paid, only that called the further Subsidy, which was first granted in the Reign of *William* the Third, is granted to his present Majesty for Life, the rest being appropriated to other Purposes.

By the 6 *Anne, c. 26. par. 17.* It is enacted, “ that all and every Act of Parliament made in *England*, and in force there, touching and concerning any Custom or Subsidies there, which are not contrary to, or inconsistent with, the Articles of the Union of the two Kingdoms of *England* and *Scotland*, or any of them, shall extend to *Scotland*.”

1. Of the Duty of Tonnage.

The ancient Duty of Prifage upon Wines imported by *English* Merchants still continues.

Hard. 477. It has been often held in the Court of Exchequer, for the Sake of preventing Frauds in this Duty, that single Prifage shall be paid for nine Ton and a Half of Wine, and double Prifage for nineteen Ton, although *Stricti Juris* none was to be paid for less than ten Ton. Where only nine Ton has been imported, Prifage has been rarely allowed without a Proof of Fraud; and where less than nine Ton it is never paid.

Hard. 301. By a Charter granted to the City of *London* in the first Year of the Reign of *Edward* the Third, the Citizens are exempted from the Duty of Prifage. The Words of it are *et quod de Vinis Ipsorum Civium nulla Prifage fiat per aliquem Ministrum nostrum vel heredum Nostrorum seu alterius, contra eorum voluntatem; viz. de uno Dolo ante Malum et alio dolo retro Malum, nec aliquo alio Modo, sed inde perpetuo sint Quieti.*

Hard. 310,
311. Waller
and Travers. But the Construction of this Charter has been, that the Exception extends only to such Citizens as are Inhabitants of that City, and to such Wines as are imported in the Port of *London*, except a Ship is by Strefs of Weather driven into any other Port.

Heretofore the Duty of Tonnage upon all Wines imported was the same: But in all the modern Acts this is different upon Wines of different Sorts; and there is in general a much larger Duty paid in the Port of *London* than in the out Ports.

The different Subsidies of Tonnage upon Wine are, from the Time or Manner of their being granted, thus distinguished.

That granted by the 12 *C. c. 4.* is called the old Subsidy.

That granted by the 9 & 10 *W. 3. c. 23.* is called the further Subsidy.

That granted by the 2 *Anne*, c. 9. is called the one third Subsidy.

That granted by the 3 *Anne*, c. 5. is called the two thirds Subsidy.

That granted by the 18 *G.* 2. c. 9. is called the Subsidy of one thousand seven hundred and forty-four.

Every one of these Subsidies was at first granted for a Time; but the several Acts, by which they were imposed, have been from Time to Time continued; and are all now in force.

Besides all these Subsidies, to which Wines in general are liable, other Duties are imposed on divers Sorts of Wines by particular Acts of Parliament.

Before the Restoration only Wines were liable to this Duty; but since that Time divers other Liquors are, by particular Acts of Parliament, made subject to a Duty of Tonnage.

By 12 *C.* 2. c. 4. *par.* 15. It is provided "that the Prifage of Wines, or Prize Wines, shall not be charged with the Payment of any Custom, Subsidy, or Sum of Money, imposed upon Wines by this Act." Prifage Wines exempt from Duties.

But by 1 *Ja.* 2. c. 3. *par.* 6. It is enacted "that no Merchant shall be charged with any Duty, imposed by this Act, for the Prifage of Wine he imports; but that it shall be received, and taken, from the Person who hath or enjoyeth the Benefit of the said Prifage Wine." Prifage Wines made liable to Duty.

As the 9 & 10 *W.* 3. c. 23. by which another Subsidy was granted upon Wines, is quite silent as to Prifage Wines, the Construction thereupon has been, that such are chargeable with the Duty of Tonnage imposed by this Statute.

In an Action of *Assumpsit* for 500 Pounds received to the Plaintiff's Use, it *Salk.* 617. was found by a special Verdict, that the Defendant claimed the Duty of Prifage of all Wines imported under a Grant from *Charles* the First, and that by virtue of this Grant, he was to hold the said Prifage discharged of all Aids and Taxes; and the Question made was, whether the Grantee should be subject to the Subsidy of Tonnage imposed by the 9 & 10 *W.* 3? After Judgment for the Grantee, a Writ of Error was brought in the Exchequer Chamber. It was insisted for the Grantee, that this was an ancient Royal Revenue; that if the Crown now held it the Queen could not pay a Duty out of her own Prifage; and that the Grantee, who claimed under the Crown, ought to have the same Exemption, and the rather because it was granted with an Immunity from Aids and Taxes. On the other Side it was admitted, that no Duty could have been paid, if Prifage had remained in the Crown, by reason of the Unity of Possession, it being absurd that the Queen should be chargeable with a Duty to herself: But it was said that the Duty revives, when Prifage comes to a Subject who may pay the Duty to the Crown; and that the Clause of Immunity could only extend to the Tonnage then in Being, and not to what might be granted in a future Reign. By *Trevor* and seven other Judges it was resolved, that immediately upon Importation this Duty of Tonnage attached upon the Wine; and that the Grantee receives whatever Part he takes for Prifage charged with the Duty: And the Judgment was reversed. Paul and Shaw.

2. Of the Duty of Poundage.

By the 12 *C.* 2. c. 4. *par.* 1. It is enacted "that a Subsidy called Poundage, that is to say, of all Manner of Goods and Merchandizes of every Merchant, Natural born Subject, Denizen and Alien, to be carried out of this Realm, or any your Majesty's Dominions to the same belonging, or to be brought into the same, by way of Merchandize, of the Value of every twenty Shillings of the same Goods and Merchandizes, according to the several and particular Rates and Values of the same Goods and Merchandizes, as the same are particularly and respectively rated" The old Subsidy on Goods exported and imported.

“ rated and valued in a Book of Rates herein after mentioned, and referred
 “ unto, twelve Pence, and so after that Rate, except and foreprized, out of
 “ this Grant of Subsidy of Poundage, all Manner of Woollen Cloths, made
 “ or wrought or to be made or wrought within this Realm of *England*,
 “ commonly called old Draperies, and all Wines before limited to pay
 “ Subsidies of Tonnage, and all Manner of Fish, *English* taken and brought
 “ by *English* Bottoms into this Realm, and all Manner of fresh Fish and
 “ Bestial that shall come into this your Realm, and all other Goods and
 “ Merchandizes which in the said Book of Rates are mentioned to be
 “ Custom free.”

Duties to be
 paid as rated
 in a Book of
 Rates.

By *par.* 6. It is enacted, “ that the Rates intended by this Act shall be
 “ the Rates mentioned and expressed in one Book of Rates, intituled, *the*
 “ *Rates of Merchandize, as they are rated and agreed on by the Commons*
 “ *House of Parliament, set down and expressed in this Book, to be paid according*
 “ *to the Tenor of the Act of Tonnage and Poundage, and subscribed with the*
 “ *Hand of Sir Harbottle Grimstone, Bart. Speaker of the House of Commons,*
 “ which said Book of Rates composed and agreed upon by your Majesty’s
 “ said Commons, and also every Article, Rule, and Clause, therein con-
 “ tained, shall be and remain as effectual to all Intents and Purposes as if
 “ the same were included particularly in the Body of this present Act.”

The Value of
 Goods not ra-
 ted to be as-
 certained by
 Oath of the
 Importer.

In this Book of Rates composed according to these Directions, it is pro-
 vided “ that if there shall happen to be brought in or carried out of this
 “ Realm, any Goods liable to the Payment of Customs or Subsidies, which
 “ either are omitted in this Book, or are not now used to be brought in
 “ or carried out, or by reason of the great Diversity of the Value of some
 “ Goods could not be rated; that in such Case, every Customer or Collector
 “ for the Time being, shall levy the said Custom and Subsidy of Poundage,
 “ according to the Value or Price of such Goods, to be affirmed upon the
 “ Oath of the Merchant in the Prefence of the Customer, Collector,
 “ Comptroller and Surveyor, or any two of them.”

The further
 Subsidy on
 Goods im-
 ported.

By the 9 & 10 *W.* 3. c. 23. *par.* 4. It is enacted “ that one further
 “ Subsidy called Poundage, that is to say, of all Manner of Goods and
 “ Merchandizes of every Merchant, Natural born Subject, Denizen or
 “ Alien, to be imported or brought into this Realm, or any of his Ma-
 “ jesty’s Dominions to the same belonging, by way of Merchandize, of the
 “ Value of every twenty Shillings of the same Goods and Merchandizes,
 “ according to the several and particular Rates and Values of the same
 “ Goods and Merchandizes, as the same are particularly and respectively
 “ rated and valued in the Book of Rates referred to by the 12 *C.* 2. c. 4.
 “ and so after that Rate; and if there shall happen to be brought into
 “ this Realm any Goods liable to the Payment of Subsidy by this Act
 “ granted, which are not particularly rated in the said Book of Rates, every
 “ Customer or Collector for the Time being shall levy the Subsidy by this
 “ Act granted, according to the Value or Price of such Goods, to be af-
 “ firmed upon the Oath of the Merchant.”

Excepted
 Goods.

In this Act besides all the Things excepted in the 12 *C.* 2. c. 4. all
 Goods and Merchandizes used in dying are excepted; and by *par.* 5. it is
 enacted “ that all Drugs, chargeable by this Act, which shall be imported
 “ directly from the Place of their Growth in *English* built Shipping, and
 “ all Spicery, except Pepper, which shall be imported directly from the
 “ Place of its Growth in *English* built Shipping, shall be rated to pay by
 “ this Act one third Part of what is charged in the said Book of Rates and
 “ no more; and that this Act shall not extend to charge Linen or wrought
 “ Silks imported, with the additional Duty of one Moiety of the Rate
 “ mentioned in the said Book of Rates; or to charge Tobacco of the *En-*
 “ *glish* Plantations with the additional Duty of one Penny *per* Pound, over and
 “ above the Subsidy mentioned in the said Book of Rates.”

By

By the 2 *Anne*, c. 9. *par.* 1. It is enacted, “ that one other Subsidy, called Poundage, of all Manner of Goods and Merchandizes to be imported or brought into this Realm, or any of her Majesty’s Dominions to the same belonging, by way of Merchandize, that is to say, one third Part of such or the like several and respective Duties, as by an Act of the ninth Year of the Reign of *William* the Third are imposed, or payable, for or upon the same Goods and Merchandizes respectively, except the said Goods and other Merchandizes as by the said Act are exempted from the Payment of the Subsidy thereby granted.”

The one third Subsidy on Goods imported.

By the 3d of *Anne*, c. 5. *par.* 1. It is enacted, “ that one other Subsidy, called Poundage, of all Manner of Goods and Merchandizes to be imported or brought into this Realm, or any of her Majesty’s Dominions to the same belonging, by way of Merchandize, that is to say, two third Parts of such or the like several and respective Duties, as by the Act of the ninth Year of the Reign of *William* the Third were granted, and are payable for and upon the same Goods and Merchandizes respectively, except Tobacco and such Currans as shall be imported in *English* built Shipping, navigated according to the Laws now in Force, and Sugar from the *English* Plantations, and such Goods and other Merchandizes as by the said Act are exempted from the Payment of the Subsidy thereby granted.”

The two thirds Subsidy on Goods imported.

Besides that no Goods, Wares, or Merchandizes exported, were made liable to any of the Subsidies imposed by these Acts, except the old Subsidy, and some liable to this had been by divers Acts exempted therefrom, it is enacted by the 8 *G.* 1. c. 15. *par.* 7. “ that, for the further Encouragement of the *British* Manufactures, from and after the Twenty-fifth Day of *March* one thousand seven hundred and twenty-two, the several and respective Subsidies and other Duties whatsoever, payable to his Majesty, his Heirs or Successors, by any Law now in force, upon the Exportation of any Goods or Merchandizes of the Product or Manufacture of *Great Britain* shall cease, determine, and be no longer due or payable for so much of the said Goods or Manufactures as shall from thenceforth be exported.”

All Duties on the Exportation of Goods of *British* Product or Manufacture to cease.

But by *par.* 8. It is provided, “ that this Act or any Thing herein contained shall not extend, or be construed to extend, to determine, alter or lessen, the several or respective Subsidies of Poundage, or other Duties, payable upon the Exportation of Allom, Lead, Lead Ore, Tin, Leather tanned, Copperas, Coals, Wool, Cards, white Woollen Cloths, *Lapis Calaminaris*, Skins of all Sorts, Glew, Coney Hair or Wool, Hares Wool, Hairs of all Sorts, Horses, and Litharge of Lead, any Thing herein contained to the contrary notwithstanding.”

Some Goods exported to which this Act is not to extend.

By the 11 *G.* 1. c. 7. After reciting, that it had been provided in the Book of Rates referred to by an Act of the twelfth Year of the Reign of King *Charles* the Second, that if there should be brought into this Realm any Goods liable to the Payment of Custom or Subsidy, which either were omitted in the said Book, or were not then used to be brought in, or by reason of the great Diversity of the Value of some Goods could not be rated; that in such Case every Customer or Collector for the Time being should levy the Subsidy of Poundage granted by that Act, according to the Value and Price of such Goods, to be affirmed upon the Oath of the Merchant in the Presence of the Customer, Collector, Comptroller and Surveyor, or any two of them, and that in all the subsequent Acts, by which a Subsidy of Poundage or Duties upon particular Goods had been imposed, the like Provision as to all Goods thereto liable, not rated in the said Book of Rates, was made; and that it had been found by Experience, that the Value of the several Sorts of Goods, usually imported and not rated in the said Book of Rates, which are sworn to or affirmed by the Importers, according to which the said Subsidies and other Duties are to be paid, have been

The Provisions for rating Goods *ad Valorem* according to the Oath of the Importer repealed.

very unequal, some Persons greatly undervaluing the same, to the Detriment of the Revenue, and Discouragement of the fair Traders, it is enacted; “ that the several Provisions and Clauses, contained in the said recited Acts and Book of Rates before mentioned, for ascertaining the Value of Goods or Merchandizes imported according to the Oaths or Affirmations of the Importers, so far as the same relate to the particular Goods and Merchandizes mentioned, and expressed, in a certain Book of Rates herein after mentioned and referred unto, shall, from and after the Twenty-fifth Day of *March* one thousand seven hundred and twenty-five, be and are hereby repealed and made void.”

Old Subsidy before paid *ad Valorem* to be ascertained by an additional Book of Rates. By *par. 2.* It is enacted, “ that in lieu of the said former Rates and Duties *ad Valorem* repealed by this Act, there shall be payable and paid for the said old Subsidy, the several Rates and Duties mentioned and expressed in one Book of Rates, intituled, *An additional Book of Rates of Goods and Merchandizes usually imported, and not particularly rated in the Book of Rates, referred to in the Act of Tonnage and Poundage made in the twelfth Year of the Reign of King Charles the Second, with Rules, Orders, and Regulations signed by the Right Honourable Spencer Compton, Esq; Speaker of the Honourable House of Commons,* the said Rates and Duties to be paid upon Importation of the said Goods and Merchandizes respectively, into any Port or Place within this Kingdom, and so in Proportion for any greater or lesser Quantity; which said last mentioned Book of Rates, composed and agreed upon by your Majesty’s said Commons, and every Article, Rule, and Clause therein contained, shall be and remain, during the Continuance of the said Act of Tonnage and Poundage, of full force, and shall be put in Execution as fully and effectually, to all Intents and Purposes, as if the same were particularly inserted in this present Act.”

The other Subsidies and Duties before paid *ad Valorem* to be ascertained by this additional Book of Rates. By *par. 3.* It is enacted, “ that in all Cases where any of the said Goods or Merchandizes, mentioned in the said Book of Rates, are by Law subject or liable to any of the Subsidies or Duties, according to the respective Values set thereon for the said old Subsidy, or in Proportion thereto, the same shall be paid proportionally according to the particular Value set thereon, in the said Book of Rates last mentioned, for the old Subsidy aforesaid, and not according to the Oath or Affirmation of the Importer; any Thing in the respective Acts which granted the said Duties, or in any other Act, to the contrary notwithstanding.”

The Value of Goods unrated in either Book of Rates to be ascertained by Oath of the Importer. By *par. 7.* After reciting, that it may happen, that several Goods and Merchandizes may be imported, which are omitted to be rated in either of the said Books of Rates, it is enacted, “ that in such Case, the Value and Price of such Goods, and Merchandizes, shall be ascertained by the Oath or Affirmation of the Merchant, in the Presence of the Customer, Collector, Comptroller, and Surveyor, or any two of them, and the old Subsidy, or other Duties which are payable in Proportion to the said old Subsidy, shall be paid according to such Value and Price.”

If Goods paying *ad Valorem* are undervalued they may be taken for the Use of the Crown. By *par. 8.* It is enacted, “ that, for the better preventing Frauds to the Revenue, and that all Merchants may be upon a more equal Foot in Trade, it shall and may be lawful for the Collector and Comptroller, or other proper Officers of the Customs, to open, view, and examine such Goods and Merchandizes paying Duty *ad Valorem*, and compare the same with the Value and Price thereof so sworn to or affirmed; and if upon such View and Examination, it shall appear that such Goods and Merchandizes are not valued, by such Oath or Affirmation, according to the true Value and Price thereof, according to the true Intent or Meaning of this or any other Act or Acts of Parliament, that then, and in such Case, the Importer or Proprietor shall, on Demand made in writing by the Customer, or Collector, and Comptroller of the Port, where such Goods and Merchandizes are entered, deliver, or cause to be delivered, all

“ all such Goods and Merchandizes into his Majesty’s Warehouse, at the
 “ Port of Importation, for the Benefit of the Crown; and upon such Deli-
 “ very, the Customer or Collector of such Port, with the Privity of the
 “ Comptroller, shall, out of any Money in his Hands, arising by Customs
 “ or other Duties belonging to the Crown, pay to such Importer or Pro-
 “ prietor the Value of such Goods or Merchandizes, so sworn to or af-
 “ firmed for the said old Subsidy as aforesaid, together with an Addition of
 “ the Customs and other Duties paid for such Goods, and of ten Pounds
 “ *per Centum* over and above the Value thereof, taking a Receipt for the
 “ same from such Importer or Proprietor in full Satisfaction for the said
 “ Goods, as if they had been regularly sold; and the respective Commis-
 “ sioners of the Customs shall cause the said Goods to be fairly and pub-
 “ licly sold for the best Advantage, and out of the Produce thereof the
 “ Money, so paid or advanced as aforesaid, shall be repaid to such Col-
 “ lector, to be replaced to such Funds from whence he borrowed the same,
 “ and the Overplus, if any, shall be paid into his Majesty’s Exchequer to-
 “ wards the Sinking Fund; any Law, Custom, or Usage to the contrary
 “ in any wise notwithstanding.”

By the 21 G. 2. c. 2. *par. 1.* It is enacted, “ that, over and above all The Subsidy of 1747, on Goods im-ported.
 “ Subsidies of Tonnage and Poundage, and over and above all additional
 “ Duties, Impositions, and other Duties whatsoever, by any other Act or
 “ Acts of Parliament, or otherwise howsoever already due and payable,
 “ or which ought to be paid to his Majesty, his Heirs or Successors, for
 “ or upon any Goods or Merchandizes which, from and after the first
 “ Day of *March* which shall be in the Year of our Lord one thousand seven
 “ hundred and forty-seven, shall be imported or brought into the Kingdom
 “ of *Great Britain*, one further Subsidy of Poundage, of twelve Pence in the
 “ Pound, shall be paid to his Majesty, his Heirs and Successors, upon all
 “ Manner of Goods and Merchandizes, to be imported or brought into
 “ this Realm, or any of his Majesty’s Dominions to the same belonging,
 “ by the Importer of such Goods or Merchandizes, before the Landing
 “ thereof, according to the several particular Rates and Values of the same
 “ Goods and Merchandizes, as the same are now particularly and respective-
 “ ly rated and valued, in the respective Books of Rates referred to by the
 “ Acts of the twelfth Year of the Reign of King *Charles* the Second, and
 “ the eleventh Year of the Reign of his late Majesty or by any other Act
 “ or Acts of Parliament; or which do now pay any Duty *ad Valorem*.”

By *par. 4.* It is provided, “ that nothing in this Act contained shall ex-
 “ tend, or be construed to extend, to any Goods or Merchandizes, which
 “ were or are now allowed, by the said Act of the twelfth Year of the Reign
 “ of King *Charles* the Second, or any other Act or Acts of Parliament, to
 “ be imported Duty free, nor to any prohibited Goods or Merchandizes
 “ which may be imported by the united *East India* Company.”

Many Sorts of Goods, Wares and Merchandizes, besides being subject to
 all these Subsidies of Poundage, are also liable to particular Duties imposed
 by divers Acts of Parliament.

Goods coming, or brought into this Realm, as Wreck are not liable to
 any Custom, because they are not brought into the Kingdom by any of the
 King’s natural born Subjects, nor by any Stranger, but by the Wind and
 Sea; for such Goods want a Proprietor until the Law appoints one.

Vaugh. 166,
 167, 168.
Shepherd and
Gosnold.
 12 C. 2. c. 4.
 J. 1.

In Trover for 14 Shirts, a Night Gown and Cap, a Case was made for
 the Opinion of the Court. It was stated that the Plaintiff arrived at *Dover*
 from *France*, and brought the Goods with him as his own wearing Apparel,
 and not as Merchandize, or for Sale; and that the Defendant seized them
 for Nonpayment of Duty. Upon arguing this Matter the Court inclined
 strongly for the Plaintiff; but a further Argument was ordered. At another
 Day the Attorney General came into Court, and said, that it being stated with
 negative

Str. 943.
Chapman and
Lamb.

negative Words, that the Goods were not imported as Merchandize, it was too hard for him to maintain, but if it had stood only upon the Words that he did not bring them in for Sale, he would have contested it.

3. Of the Duties to which Aliens are liable.

Aliens are subject to some Duties, which are not paid by Natural born Subjects, or Persons naturalized by Act of Parliament.

By the 11 *H. 7. c. 14.* It is enacted, “ that all Merchant Strangers, and
“ others that be made Denizens by the King’s Letters Patent, or otherwise,
“ shall pay such Customs and Subsidies, for their Goods and Merchandize
“ inwards and outwards, as they should have paid if such Letters Patents
“ had never been made.”

The Practice of imposing extraordinary Duties upon Aliens is very ancient.

Rot. Chart. By the *Charta Mercatoria* Aliens were to pay a higher Duty upon Wools,
31 *E. 1. n. 44.* Wool-fells, and Leather, than Natural born Subjects; and they were also
27 *E. 3. c. 26.* to pay a Duty of three Pence in the Pound for all other Goods except Wines,
2 *Infl. 59.* from which these last were exempted.

12 *E. 4. c. 3.* In the Reign of *Edward* the Third, the Subsidy of Tonnage was to be six Shillings *per* Ton on the Wines of Aliens, whereas that of *English* Merchants was only Half that Sum; and the Subsidy of Poundage was two Shillings upon their Goods, while these last paid only one Shilling in the Pound.

Ante 531. The Duties upon Wool, Wool-fells, and Leather, paid by Aliens being heretofore, to distinguish them from the larger ones paid by *English* Merchants, called *parvæ Custumæ*, all extraordinary Duties at this Day paid by Aliens are accounted for by the Name of petty Customs.

12 *C. 2. c. 4.* By the Act granting the old Subsidy, Aliens are to pay upon some Sorts of
f. 1. Wines one third, upon others one fourth, and upon others one fifth more Duty than is paid by *English* Merchants.

By *par. 1.* of the same Act it was enacted, “ that of every twenty Shil-
“ lings Value of any of the Native Commodities of this Realm, or Manu-
“ factures wrought of any such Commodities, to be carried out of this
“ Realm by every Merchant Alien, according to the Value thereof in the
“ Book of Rates herein after referred to expressed, twelve Pence in the Pound
“ shall be paid over and above the Subsidy of twelve Pence in the Pound
“ to be paid by *English* Merchants.

By the said Book of Rates, *Art. 12.* it is ordered, “ that the Merchant
“ Strangers, who according to the Rates and Values in this Book contained
“ do pay double Subsidy for Lead, Tynn, and Woollen Cloth, shall also
“ pay double Custom for Native Manufactures of Wool or Part Wool;
“ and the said Strangers are to pay for all other Goods as well inwards as
“ outwards, rated to the Subsidy of Poundage, three Pence in the Pound,
“ or any other Duty payable by *Charta Mercatoria*, besides the said
“ Subsidy.

As the Duty of two Shillings *per* Ton, called Butlerage is payable by *Charta Mercatoria* for all Wines of Merchant Strangers imported, it is, although not therein expressly mentioned, continued by this Article.

But by the 25 *C. 2. c. 6. par. 1.* It is enacted, “ that so much and such
“ Clauses only of the said Statute, of the twelfth Year of our Sovereign
“ Lord the King that now is, and of the twelfth Article of the said
“ Book of Rates, and of *Charta Mercatoria* therein mentioned, and all
“ other Clauses contained in any other Act or Statutes of this Realm
“ whatsoever, as do any ways concern any Custom or Subsidy upon any
“ of the Native Commodities of this Kingdom, except Coals, or Manu-
“ factures wrought or made in this Kingdom, or Town of *Berwick upon*
“ *Tweed,*

“ *Tweed*, to be exported out of this Realm, payable by any Merchant Alien
 “ made Denizen, or other Stranger or Alien, over and above the Custom
 “ and Subsidy payable by his Majesty’s Natural born Subjects, and no more,
 “ be hereby repealed.”

The same extraordinary Duties of Tonnage are imposed upon Aliens by 9 & 10 W. 3.
 the Acts granting the further Subsidy, the one third Subsidy, and two thirds
 Subsidy, as were imposed by the Act granting the old Subsidy; but they
 are only to pay the same Duty of Poundage as Natural born Subjects.

By the 12 C. 2. c. 18. par. 9. It is enacted, “ that, for preventing the
 “ great Frauds daily used in colouring and concealing of Aliens Goods, all
 “ Wines of the Growth of *France* or *Germany*, which shall be imported
 “ into *England*, *Ireland*, *Wales*, or Town of *Berwick upon Tweed*, in any
 “ other Ship or Vessel than which doth truly and without Fraud belong to
 “ *England*, *Ireland*, *Wales*, or Town of *Berwick upon Tweed*, and is navi-
 “ gated with the Mariners thereof as in this Act is before directed, and all
 “ Sorts of Masts, Timber or Boards, as also all foreign Salt, Pitch, Tar,
 “ Rosin, Hemp, Flax, Raisins, Figs, Prunes, Olive Oils, all Sorts of
 “ Corn or Grain, Sugar, Pot Ashes, Spirits, commonly called Brandy
 “ Wine or *Aqua Vite*, Wines of the Growth of *Spain*, the Islands of
 “ the *Canaries* or *Portugal*, *Madera* or Western Islands; and all the Goods
 “ of the Growth, Production, or Manufacture of *Muscovy* or *Russia*, which
 “ shall be imported into any the Places aforesaid, in any other than such
 “ shipping and so navigated; and all Currans and *Turky* Commodities which
 “ shall be imported into any the Places aforesaid, in any other than *English*
 “ built Ships and navigated as aforesaid, shall be deemed Aliens Goods and
 “ pay all Strangers Customs and Duties.”

Divers Goods,
 if not import-
 ed in *English*
 Ships, pay
 Alien Duties.

By par. 10. It is enacted, “ that, for the preventing all Frauds which
 “ may be used in colouring or buying foreign Ships, no foreign built
 “ Ship or Vessel whatsoever shall be deemed or pass as a Ship to *England*,
 “ *Ireland*, *Wales*, or the Town of *Berwick upon Tweed*, or any of them be-
 “ longing, or enjoy the Privilege of such Ship or Vessel, until such Time as
 “ he or they claiming the said Ship or Vessel to be theirs, shall make ap-
 “ pear to the chief Officer or Officers of the Customs, in the Port next to
 “ the Place of his or their Abode, that he or they are not Aliens, and
 “ shall have taken an Oath before such chief Officer or Officers, who are
 “ hereby authorized to administer the same, that such Ship or Vessel was
 “ *bona fide*, and without Fraud, by him or them bought for a valuable Consi-
 “ deration, expressing the same, as also the Time, Place and Persons from
 “ whom it was bought, and who are his Part Owners, if he have any,
 “ all which Part Owners shall be liable to take the same Oath, before the
 “ chief Officer or Officers of the Customs, in the Port next to the Place of
 “ his or their Abode; and that no Foreigner directly or indirectly hath
 “ any Part, Interest, or Share therein, and that upon such Oath he or they
 “ shall receive a Certificate, under the Hand and Seal of the said chief Of-
 “ ficer or Officers, whereby such Ship or Vessel may for the future pass and
 “ be deemed as a Ship belonging to the said Port, and enjoy the Privileges
 “ of such Ship or Vessel.”

Every Foreign
 Ship unless
 sold *bona fide*
 to pay Alien
 Duties.

Soon after by the 13 & 14 C. 2. c. 11. par. 6. It was enacted, “ that, for
 “ the better encrease of Shipping and Navigation, the Collectors, and other
 “ Officers of his Majesty’s Customs, in all the Ports of *England*, shall make a
 “ true and perfect List, attested under their Hands, of all foreign built Ships
 “ belonging to their respective Ports, for which Certificates have been made
 “ according to the Directions of an Act, passed in the twelfth Year of the
 “ Reign of King *Charles* the Second, intituled, *An Act for the encreasing*
 “ *and encouraging of Shipping and Navigation*, and transmit the same into his
 “ Majesty’s Court of Exchequer, on or before the Month of *December* in the
 “ Year of our Lord one thousand six hundred and sixty-two, there to re-
 “ main upon Record: And that no foreign Ship, that is to say, not built
 Vol. IV. 6 Y “ in

All foreign
 built Ships al-
 though sold
 made liable to
 Alien Duties.

“ in any of his Majesty’s Dominions of *Asia*, *Africa*, or *America*, or other
 “ than such as shall *bona fide* be bought, before the first Day of *October* one
 “ thousand six hundred and sixty-two next ensuing, and expressly named in
 “ the said List, shall enjoy the Privilege of a Ship belonging to *England*
 “ or *Ireland*, although owned or manned by *English*, except only such Ships
 “ as shall be taken at Sea by Letters of Mark or Reprisal, and Condemna-
 “ tion made in the Court of Admiralty as lawful Prize, but all such Ships shall
 “ be deemed as Aliens Ships, and be liable to all Duties that Aliens Ships
 “ are liable to by virtue of the said Act for the increasing and encouraging
 “ of Shipping and Navigation.”

(E) Of prohibited Goods.

AS this Offence consists also in the clandestinely bringing on Shore, or carrying from the Shore, any Goods, Wares, or Merchandizes, which are by Law prohibited to be so brought on Shore or carried from the Shore, it will be proper to give a general Account of the Goods that are so prohibited.

The Exportation of some Goods, as for Instance Wool, is prohibited entirely.

In like Manner the Importation of foreign Embroidery, and divers other Goods, is entirely prohibited.

The suffering foreign Manufactures to be worn in this Kingdom must, by exhausting the Treasure thereof, and depriving the Poor of Employment, be very detrimental; but it may be for the Benefit of Trade to suffer such to be imported, provided that they be again exported. Upon this Principle divers Manufactures of *Persia*, *China*, or *East India* are allowed to be imported; but it is by Law ordained, that they shall be deposited in such Warehouses as are approved of by the proper Officers of the Customs, and that none of them shall be taken thereout, until sufficient Security is given, that the same shall be exported to foreign Parts, and not landed again in this Kingdom.

For the Encouragement of Trade and Navigation, the Person exporting foreign Goods is, in many Cases, intitled to a Drawback of Part of the Duties paid on the Importation of the same.

As one of the Requisites, necessary to the entitling an Exporter of foreign Goods to this Drawback, is a Certificate from the proper Officer of the Customs, of the due Entry of such Goods, and Payment, or giving Security for the Payment of the Duties on Importation, such Goods are called Certificate Goods.

So great Improvements have been made in Agriculture, that the Corn, usually produced in this Kingdom, is more than sufficient for the Use of the Inhabitants. It follows that the Exportation of Corn must, in general, be vastly advantagious to the whole Nation, as well as to the Land Owners. To promote this, and that it may be sent to foreign Markets as cheap as the Corn of other Countries, it has by the Legislature been thought proper, to allow a Bounty on the Exportation of divers Sorts of Grain, when they do not exceed certain Prices.

In many Cases, for the Sake of encouraging domestick Manufactures, an Allowance or Præmium is granted on the Exportation thereof. This is not only done when they are made of foreign Materials, that have paid Duties on Importation, as in the Case of wrought Silks, but also when they are made of native Materials, as Starch and some other Manufactures are.

In

In all these Instances, and in every other, where any Allowance, Bounty, Præmium or Drawback is paid, or any Debenture made out for the Payment of either of them, upon the Shipping of any Goods, Wares, or Merchandizes for Exportation, the relanding of the same is, in order to prevent the Loss which the Revenue would thereby sustain, and the Injury which would be done to fair Traders, prohibited; and a Bond is usually entered into by the Exporter, with Condition that they shall be carried into Parts beyond the Seas, and not landed again in this Kingdom.

(F) **Of the Penalties and Forfeitures incurred by Persons guilty of this Offence or illicit Practices which have a natural Tendency thereto.**

AS the Act of Smuggling is not complete unless some Goods, Wares, or Merchandizes, are clandestinely brought on Shore or carried from the Shore contrary to Law, a Person may be guilty of many Practices, which have a direct Tendency thereto, without being guilty of this Offence.

For the Sake of preventing, or putting a Stop to, these Practices Penalties, Forfeitures, and Punishments, are inflicted by divers Statutes; and indeed it would be to no Purpose, in such a Case as this, to make Provisions against the End, without providing at the same Time against the Means of accomplishing it.

In treating of the Penalties and Forfeitures, to which Persons guilty of this Offence, or illicit Practices that have a natural Tendency thereto, are liable, it is not meant to describe the various ones, which are by Law inflicted in the Case of every particular Sort of Goods. This would be going into a very large Field; and it will sufficiently answer the present Design, to give an Account of Penalties and Forfeitures in general Cases.

The Rule adhered to, by most of the Acts of Parliament, in disposing of the Money arising by Penalties and Forfeitures, for Offences against the Laws concerning the Customs, is, that one Moiety thereof shall be to the Use of his Majesty his Heirs and Successors, the other to the Use of such Person or Persons who shall seize, inform, sue, or prosecute for the same, by Action, Bill, Complaint, or Information, in any of the Courts of Record at *Westminster*, or in the Court of Exchequer in *Scotland*: But in some Cases, the Application of these is otherways directed in the Acts of Parliament by which they are ordained.

1. **From Ships at Sea.**

By the 5 G. I. c. 11. par. 8. After reciting, that divers Ships and Vessels, of the Burthen of fifty Tons or under, laden with customable and prohibited Goods, pretending to be bound for foreign Parts, do frequently lie hovering on the Coasts of this Kingdom, with Intention to run the same privately on Shore as Opportunity offers, to the great Diminution and Loss of the Revenue, and Ruin of fair Traders; and by Reason of the said Vessels so hovering, frequent Opportunities are found for carrying on the clandestine Trade of exporting Wool, and other Staple Commodities of this Kingdom prohibited to be exported, it is enacted, "that where any Ship

No Ship of fifty Tons or under to hover upon the Coasts.

" or

“ or Vessel, of the Burthen of fifty Tons or under, laden with customable
 “ or prohibited Goods, shall be found hovering upon the Coasts of this
 “ Kingdom, within the Limits of any Port, and not proceeding on her
 “ Voyage to foreign Parts, or to some other Port of this Kingdom, Wind
 “ and Weather permitting, it shall be lawful for any Officer of his Majesty’s
 “ Customs to go on Board every such Ship or Vessel, and to take an Ac-
 “ count of the Lading, and to demand and take Security from the Master,
 “ or other Person having the Charge of such Ship or Vessel, by his Bond, to
 “ be entered into to his Majesty, his Heirs and Successors, in such Sum as
 “ shall be Treble the Value of the foreign Goods then on Board, with
 “ Condition that such Ship or Vessel, as soon as Wind and Weather and
 “ the State and Condition of such Ship or Vessel doth permit, shall proceed
 “ regularly on her Voyage, and land such foreign Goods at some foreign
 “ Port or Ports; and if such Master, or other Person having the Charge
 “ of such Ship or Vessel, shall refuse to enter into such Bond, or having
 “ entered into it shall not proceed regularly on her Voyage, as soon as
 “ Wind and Weather and the State and Condition of such Ship or Vessel shall
 “ permit, unless suffered to make a longer Stay, by the Collector or other
 “ principal Officer of the Port where such Ship or Vessel shall be, not ex-
 “ ceeding twenty Days, then and in either of the said Cases, all the foreign
 “ Goods so on Board shall and may, by any Officer of the Customs, by the
 “ Direction of the Collector or other principal Officer, be brought on Shore
 “ and secured, and in case the said Goods are customable, the Customs and
 “ other Duties shall be paid for the same; and if Wool, or any prohibited
 “ Goods, or any Goods liable to Forfeiture, are found on Board such
 “ Ship or Vessel, the same are hereby declared subject to Forfeiture, and
 “ the Officers of the Customs may prosecute the same, as also the Ship or
 “ Vessel, in case she shall be liable to Condemnation.”

By *par. 11.* So much of this Act, as relates to the hovering of Ships or Vessels of fifty Tons or under, was to have Continuance for three Years, from the Twenty-fifth Day of *March* one thousand seven hundred and nineteen, and from thence to the End of the then next Session of Parliament, and no longer.

But it has been from Time to Time continued, and by the 27 *G. 2. c. 18. par. 4.* is continued to the Twenty-ninth Day of *September* one thousand seven hundred and sixty, and from thence to the End of the then next Session of Parliament.

No Ship of fifty Tons or under to hover within two Leagues of the Shore. By 6 *G. 1. c. 21. par. 31.* After reciting, that, by an Act of the last Session of Parliament, a Remedy was provided against Ships or Vessels, of fifty Tons or under, which lie hovering on the Coast within the Limits of the Ports of this Kingdom, and whereas such Ships or Vessels, to elude the Intent of that Law, do lie at Anchor, or hover on the Coast as near the said Limits as may be, it is enacted, “ that if any Ship or Vessel, of the Burthen
 “ of fifty Tons or under, being in Part or fully laden with Brandy, shall
 “ be found at Anchor, or hovering within two Leagues of the Shore,
 “ and not proceeding on her Voyage, Wind and Weather permitting, it
 “ shall and may be lawful to and for the Commander of any of his Ma-
 “ jesty’s Ships of War, Frigates, or armed Sloops, appointed for the Guard
 “ of the Coasts, or to and for the Commander of any Yacht, Smack,
 “ Sloop, or other Boat, in the Service of his Majesty’s Customs, or to and
 “ for any Officer of his Majesty’s Customs, to compel the Master, or other
 “ Person having the Charge of such Ship or Vessel, to come into Port;
 “ and it is hereby declared, that such Master or other Person as aforesaid,
 “ as likewise such Ship or Vessel, and the Brandy wherewith such Ship
 “ or Vessel is laden in Part or in Whole, shall be subject to the same Rules,
 “ Regulations, Penalties, and Forfeitures, as such Cargoes, Ships or Vessels,
 “ and the Masters or others taking Charge thereof, which hover within
 “ the Limits of any Port of this Kingdom, are by the said Act subject unto.”

By *par.* 33. It is enacted, "that, for the preventing Disputes that may arise concerning the Admeasurement of Ships hovering on the Coast, the following Rule shall be observed therein, that is to say, take the Length of the Keel within Board, so much as she treads on the Ground, and the Breadth within Board by the Midship Beam, from Plank to Plank, and Half the Breadth for the Depth, then multiply the Length by the Breadth, and that Product by the Depth, and divide the whole by Ninety-four, the Quotient shall give the true Contents of the Tonnage; according to which Rule, the Tonnage of all such Ships or Vessels shall be measured and ascertained, any Law, Custom or Usage to the contrary in any wise notwithstanding."

The Rule for
ascertaining
the Tonnage
of a Ship.

By 9 G. 2. c. 35. *par.* 23. After reciting, that foreign Goods are frequently taken out of Ships at Sea, without the Limits of any Port, with Intent to be fraudulently landed in this Kingdom, it is enacted, "that if any foreign Goods shall, by any Ship, Boat or Vessel whatsoever, be taken in at Sea, or put out of any Ship or Vessel whatsoever, within the Distance of four Leagues from any of the Coasts of this Kingdom, whether the same be within or without the Limits of any of the Ports thereof, without Payment of the Customs, or other Duties payable for the same, unless in Case of Necessity, or for some other lawful Reason, of which the Master, or other Person having Charge of such Ship, Vessel, or Boat, so taking in the same, shall give immediate Notice to, and make Proof before, the chief Officer of the Customs of the first Port of this Kingdom where he shall arrive, such Goods shall be forfeited; and the Master, or other Person having Charge of such Ship, Vessel, or Boat, so taking in the same, and all Persons who shall be aiding, assisting, or otherwise concerned in the unshipping or receiving the said Goods, shall forfeit treble the Value thereof; and the Ships, Boats, and Vessels, into which the said Goods shall be taken, shall be forfeited, any Ship, Boat, or Vessel, so to be forfeited, not exceeding the Burthen of one hundred Tons; and the Master, Purser, or other Person having Charge of such Ship or Vessel, out of which such Goods shall be taken, unless in Case of Necessity, or for other lawful Reason, of which Notice shall be given and Proof made as aforesaid, shall also forfeit treble the Value of the Goods so unshipped."

Foreign Goods
not to be taken
in or put out of
a Ship at Sea
if within four
Leagues of the
Coasts.

By the 5 G. 1. c. 11. *par.* 3. it is enacted, "that in Case any foreign Goods, Wares, or Merchandizes, shall by any Collier, fisher Boat, or other coasting Vessel, or Boat, be taken in at Sea, or out of any Ship or Vessel whatsoever, in order to be landed, or put into any other Ship, Vessel, or Boat, within the Limits of any Port, without Payment of the Customs, and other Duties payable for the same, such Goods, Wares and Merchandizes, shall be forfeited; and the Master of such Collier, fisher Boat, or other coasting Vessel or Boat, shall forfeit treble the Value of such Goods, unless in Case of Necessity, of which such Master shall immediately give Notice to, and make Proof before, the chief Officers of the Customs of the first Port of this Kingdom where he shall arrive; and the Master, Purser, or other Person taking Charge of such Ship or Vessel, out of which such Goods shall be taken at Sea, unless in Case of Necessity as aforesaid, shall forfeit treble the Value of such Goods so unshipped."

Foreign Goods
not to be taken
in at Sea by
coasting Vessels.

By *par.* 11. So much of this Act, as relates to the taking in of foreign Goods at Sea, was to have Continuance for three Years, from the Twenty-fifth Day of *March* one thousand seven hundred and nineteen, and from thence to the End of the then next Session of Parliament, and no longer.

But it has been from Time to Time continued, and by the 27 G. 2. c. 18. *par.* 4. is continued to the Twenty-ninth Day of *September* one thousand seven hundred and sixty, and from thence to the End of the then next Session of Parliament.

2. By the Shipping or unshipping Goods at any Port, Member or Wharf, not lawfully appointed for these Purposes.

Goods to be shipped and unshipped only in the great Ports.

Other Ports, Members and Wharfs, may be appointed in England.

Heretofore Goods could only be shipped and unshipped in the great Ports, for by 4 H. 4. c. 20. it was enacted, “ that all Manner of Merchandize, “ entering into the Realm of *England*, or going out of the same, shall be “ charged and discharged in the great Ports of the Sea, and not in Creeks “ or small Arrivals, upon pain to forfeit all the Merchandize so charged or “ discharged to our Lord the King, except Vessels arriving in such little “ Creeks and Arrivals, by Coertion of Tempest of the Sea.”

The great Ports of *England*, which are at other Times called the ancient or head Ports, are *London, Ipswich, Yarmouth, Lynn, Boston, Hull, Newcastle, Berwick, Carlisle, Chester, Milford, Cardiff, Gloucester, Bristol, Bridgewater, Plymouth, Exeter, Poole, Southampton, Chichester, and Sandwich.*

But by the 13 & 14 Car. 2. c. 11. par. 14. After reciting, that whereas by an Act of Parliament, of the first Year of Queen *Elizabeth*, it is ordained, that no Goods shall be shipped on Board, or discharged from, any Ship or Vessel, but from or upon some such open Place, Key or Wharf, except the Port of *Hull*, as her Highness her Heirs and Successors should therefore appoint, by virtue of her Highnesses Commission, within the Port of *London*, and in all Ports, Creeks, Havens and Roads; and whereas, notwithstanding the said Act, there are some Ports, Creeks, and Places, where Customers, Collectors, Comptrollers, and Searchers, and their Servants, had then Time out of Mind been resident, to which no such Commissions were sent, nor any Place, Key, or Wharf appointed, as by the said Act is directed; and whereas also, since that Time, by reason of the Alteration of Rivers, Streams, Channels and Sands, some Places then appointed are become unfit, and others more convenient, for the discharging and shipping of Goods, Wares, and Merchandize; it is enacted, “ that the King’s Majesty “ may from Time to Time, by his Highnesses Commission or Commissions “ out of his Court of Exchequer, appoint all such further Places, Ports, “ Members and Creeks, except the Town of *Hull*, as shall be lawful for the “ Landing and discharging, Lading or Shipping, of any Goods within “ the Kingdom of *England*, Dominion of *Wales*, or Town and Port of “ *Berwick upon Tweed*, and to what ancient and head Ports respectively such “ Places, Members and Creeks, shall appertain; and where any such Member, Place, or Creek, shall so as aforesaid be appointed, the Customer, “ Collector, Comptroller and Searcher, of the head Port shall, by themselves or their sufficient Deputy or Deputies, Servant or Servants, reside “ and inhabit, for the entering, clearing and passing Shipping, and discharging of Ships, Goods and Merchandize: And, by virtue of the aforesaid Commission or Commissions, may likewise set down and appoint the “ Extents and Limits of every Port, Haven, or Creek, within his Majesty’s “ Kingdom of *England*, Dominion of *Wales*, and Town and Port of *Berwick*, whereby the Extents, Limits and Privileges, of every Port, Haven “ or Creek, may be ascertained and known; and it shall not be lawful for “ any Person whatsoever to lade or put, or to cause to be laden or put, “ from any Key, Wharf or other Place on the Land, into any Ship, Vessel, Lighter, Boat or Bottom, any Goods, Wares, or Merchandize “ whatsoever, Fish taken by his Majesty’s Subjects, Sea Coal, Stone and “ Bestials only excepted, to be transported into any Place of the Parts beyond the Seas, or carried by Land into the Realm of *Scotland*; or to discharge or lay on Land, or to cause to be discharged or laid on Land, “ out of any Boat, Lighter, Ship, Vessel or Bottom, being not in Leak “ or Wreck, any Goods, Wares, or Merchandize whatsoever, Fish taken “ by

“ by his Majesty’s Subjects, Bestials and Salt only excepted, to be brought
 “ from any of the Parts beyond the Sea, or by Land from the Realm of
 “ *Scotland*, but only upon such open Place, Key or Wharf, as his Majesty
 “ shall from Time to Time, by virtue of such Commission or Commis-
 “ sions as aforesaid, appoint in the Port of *London* and the Members and
 “ Liberties thereof, or in any other Port, Place, Member or Creek, within
 “ the Kingdom of *England*, Dominion of *Wales*, and Town and Port of
 “ *Berwick*, without special Leave first had from the Commissioners and Of-
 “ ficers of his Majesty’s Customs, upon the Penalty of the Forfeiture of
 “ all such Goods, Wares and Merchandize.”

By 6 *Ann. c. 26. par. 18.* It is enacted, “ that, for the better and more New Ports,
 “ effectual ascertaining the Ports, Members, Creeks, and Havens in *Scot-* Members and
 “ *land*, where goods have been or may be exported and imported, and Wharfs may
 “ the several Keys, Wharfs, and other Places, where the same may be be appointed
 “ put on Board any Vessel for Transportation, or be unladen upon Impor- in Scotland.
 “ tation, the Queen’s Majesty, her Heirs and Successors, shall and may
 “ from Time to Time, by Commission or Commissions out of the Court
 “ of Exchequer in *Scotland*, appoint all such further Places, Ports, Mem-
 “ bers, and Creeks in *Scotland*, as shall be lawful for the Landing and
 “ discharging, lading or shipping, of any Goods, Wares, or Merchandizes in
 “ *Scotland*, and to what ancient and head Ports respectively such Places,
 “ Members and Creeks, shall respectively appertain; after which Appoint-
 “ ment so made, the said Ports, Members and Creeks, so appointed,
 “ shall be subject to and under such Regulations, as the like Ports, Mem-
 “ bers and Creeks, appointed in *England* for Exportation or Importation
 “ there, are or ought to be by the Laws of *England*.”

3. From Ships in Port inwards Bound.

By the 13 & 14 *C. 2. c. 11. par. 2.* It is enacted, “ that no Ship or An Entry to
 “ Vessel, arriving from the Parts beyond the Seas, shall be above three be made of the
 “ Days coming, from *Gravesend*, to the Place of her Discharge within the Cargoe of every
 “ River of *Thames*, without touching or staying at any Wharf, Key, or Ship as soon
 “ Place adjoining to either Shore, between *Gravesend* and *Chesters Key*, un- as convenient-
 “ less apparently hindred by contrary Winds, Draught of Water, or other ly can be after
 “ just Impediment, to be allowed by such Person or Persons as are or shall her Arrival.
 “ be appointed for managing the Customs, the Collectors inwards, or other
 “ principal Officers of the Customs; and then or before the Master, or
 “ Purser, of such Ship or Vessel shall make a just and true Entry, upon
 “ Oath, of the Burthen, Contents, and Lading of every such Ship and Vessel,
 “ with the particular Marks, Numbers, Qualities and Contents, of every
 “ Parcel of Goods therein laden, to the best of his Knowledge; also where
 “ and in what Port she took in her Lading, of what Country built, how
 “ manned, who was Master during the Voyage, and who are Owners there-
 “ of; and in all Outports or Members to come directly up to the Place
 “ of unlading, as the Condition of the Port requires and will admit, and
 “ make Entries as aforesaid, upon the Penalty of the Forfeiture of one
 “ hundred Pounds.”

By *par. 3.* It is enacted, “ that no Captain, Master, Purser, or other An Account to
 “ Person taking Charge of a Ship, or Vessel of War, wherein any Goods, be given of all
 “ Wares, or Merchandizes shall be brought from the Parts beyond the Seas, Merchandize
 “ or out of the Realm of *Scotland*, shall put on Board any Lighter, Boat or imported in
 “ Bottom, or lay on Land, or suffer to be put into any Lighter, Boat or Ships of War.
 “ Bottom, or to be laid on land, out of any Ship or Vessel as aforesaid,
 “ any Goods, Wares, or Merchandizes whatsoever, before such Captain,
 “ Master, Purser, or other Person taking Charge of the Ship, or Merchants
 “ Goods, for that Voyage as aforesaid, shall have signified in Writing, under
 “ his

“ his Hand, unto the Person or Persons which are or shall be appointed for
 “ managing the Customs, the Customer, or Collector and Comptroller
 “ inwards, of the Port where he arriveth, the Names of every Merchant,
 “ or Lader of any Goods on Board the said Ship or Vessel, together with
 “ the Number and Marks, and the Quantity and Quality, of every Parcel
 “ of Goods, to the best of his Knowledge, and shall have answered, upon
 “ his corporal Oath, to such Questions concerning such Goods, as shall be
 “ publickly administered to him in the open Custom-house, by such Per-
 “ son or Persons which are or shall be appointed for the managing of the
 “ Customs, Customer, or Collector and Comptroller, or their Deputies,
 “ and shall be liable to all Searches, and other Rules, which Merchant Ships
 “ are subject unto by the Usage of his Majesty’s Custom-house, Victualling
 “ Bills and entering excepted, upon Pain to forfeit one hundred Pounds.”

An Officer of
 any of his
 Majesty’s
 Ships taking
 Goods on
 Board for Im-
 portation to
 be cashiered.

The Provisions made by this Clause are now at an End, it having been
 enacted by the 22 G. 2. c. 33. par. 2. art. 18. “ that if any Captain,
 “ Commander, or other Officer, of any of his Majesty’s Ships or Vessels,
 “ shall receive on Board, or permit to be received on Board, such Ship or
 “ Vessel any Goods or Merchandize, other than for the sole Use of the
 “ Ship or Vessel, except Gold, Silver, or Jewels, and except the Goods
 “ and Merchandizes belonging to any Merchant, or other Ship or Vessel,
 “ which may be shipwrecked or in imminent Danger of being shipwrecked,
 “ either on the high Seas, or in any Creek, Port or Harbour, in order to
 “ the preserving them for their proper Owners, and except such Goods or
 “ Merchandizes as he shall, at any Time, be ordered to take and receive on
 “ Board by Order of the Lord High Admiral of *Great Britain*, or the
 “ Commissioners for executing the Office of Lord High Admiral for the
 “ Time being, every Person so offending, being convicted thereof by the
 “ Sentence of the Court Martial, shall be cashiered, and be for ever after-
 “ wards rendered incapable to serve in any Place or Office in the Naval
 “ Service of his Majesty, his Heirs and Successors.”

Further Pe-
 nalty on an
 Officer of one
 of his Ma-
 jesty’s Ships
 taking Goods
 on Board for
 Importation.

And by par. 24. after reciting, that, by an Act for the more effectual
 suppressing of Piracy, it is amongst other Things enacted, that the said
 Captain, Commander, or other Officer of the said Ship or Vessel of War,
 and all and every the Owners and Proprietors of such Goods and Merchand-
 izes, put on Board such Ship or Vessel of War as aforesaid, shall lose, for-
 feit and pay the Value of all and every such Goods and Merchandizes, so put
 on Board as aforesaid, it is enacted, “ that if any Captain, Commander,
 “ or other Officer, of any of his Majesty’s Ships or Vessels, shall receive on
 “ Board, or permit or suffer to be received on Board, such Ship or Vessel
 “ any Goods or Merchandizes, contrary to the true Intent and Meaning of
 “ the eighteenth Article in this Act before mentioned, and hereby enacted,
 “ every such Captain, Commander, or other Officer, shall, for every such
 “ Offence, over and above any Punishment inflicted by this Act, forfeit and
 “ pay the Value of all and every such Goods and Merchandizes, so received,
 “ or permitted or suffered to be received, on Board as aforesaid, or the Sum
 “ of five hundred Pounds of lawful Money of *Great Britain*, at the Election
 “ of the Informer, or Person who shall sue for the same, so that no more
 “ than one of these Penalties or Forfeitures shall be sued for, or recovered,
 “ by virtue of this, and the said in Part recited Act, or either of them,
 “ against the same Person for one and the same Offence.”

No Goods to
 be imported in
 Vessels ap-
 pointed to
 carry Letters
 or Pacquets.

By 13 & 14 C. 2. c. 11. par. 22. it is enacted, “ that no Ship, Ves-
 “ sel or Boat, appointed and employed ordinarily for the Carriage of Let-
 “ ters and Pacquets, shall, unless it be in such Cases as shall be allowed by
 “ the Person or Persons which are or shall be appointed to manage his Ma-
 “ jesty’s Customs, Customer, or Collector and Comptroller, import any
 “ Goods and Merchandizes from the Parts beyond the Seas, upon the Pe-
 “ nalty of the Forfeiture of one hundred Pounds, to be paid by the
 “ Master of the said Vessel or Boat, with the Loss of his Place; and all

“ Goods and Merchandize that shall be found on Board any such Ship, Vessel, or other Boat, shall be forfeited.”

By *par.* 4. It is enacted, “ that the Person or Persons which are or shall be appointed for managing the Customs, and the Officers of the Customs, and their Deputies, are hereby authorized and enabled to go and enter on Board any Ship or Vessel, as well Ships of War as Merchant Ships, inwards bound, and from thence to bring on Shore, into his Majesty’s Storehouse, all small Parcels of fine Goods, or other Goods, which shall be found in Cabbins, Chests, Trunks, or other small Package, or in any private or secret Place, in or out of the Hold of the Ship or Vessel, which may occasion a just Suspicion that they were intended to be fraudulently carried away, and all other Sorts of Goods whatsoever, for which the Duties of Tonnage or Poundage were not paid, or compounded for, within twenty Days after the first Entry of the Ship, to be put and remain in the Storehouse aforesaid, until his Majesty’s Duties thereupon be justly satisfied, unless the Person or Persons which are or shall be appointed for managing the Customs, and Officers of the Customs, shall see just Cause to allow a longer Time; and that the said Person or Persons which are or shall be appointed for the managing of the Customs, and the Officers of the Customs, and their Deputies, may freely stay and remain on Board, until all the Goods are delivered and discharged out of the said Ship or Vessel: and if any Master, Purser, or Boatswain, or other taking Charge in any Ship or Vessel, or any other Person whatsoever, shall suffer any Truffs, Bale, Pack, Fardel, Cask, or other Package, to be opened on Board the said Ship or Vessel, and the Goods therein to be imbezilled, carried away, or put into any other Form or Package, after the Ship comes into the Port of her Discharge, in every such Case the said Master, Purser, Boatswain, or others, shall forfeit the Sum of one hundred Pounds.”

Officers may go on Board Ships inwards bound, and remain there till they are cleared. Package of Goods not to be altered.

This Act could only extend to the Duties of Tonnage and Poundage imposed by 12 C. 2. c. 4. and such other Duties as were payable at the Time it was made; but it may be once for all observed, that, whenever a subsequent Act of Parliament is made, for imposing a further Duty of Tonnage or Poundage in general, or a further Duty upon any particular Sort of Merchandize, it is constantly provided, that all the Clauses, Powers, Directions, Penalties, Forfeitures, Matters, and Things whatsoever, contained in any Law or Statute then in Force, for the raising, levying, securing, collecting, answering, and paying the former Duties, shall be applied, practised, and put in Execution, for raising, levying, securing, collecting, answering and paying, the Duty by such Act granted, as fully and effectually, and to all Intents and Purposes, as if all and every the said Clauses, Powers, Directions, Penalties, and Forfeitures, were particularly repeated, and again enacted in the Body of such Act.

4 W. & M. c. 5. f. 4.
9 & 10 W. 3. c. 23. f. 7.
8 G. c. 15. f. 12.
21 G. 2. c. 2. f. 3. and many other Acts.

By the 12 C. 2. c. 4. *par.* 2. It is enacted, “ that if any Goods or Merchandize shall be brought from the Parts beyond the Seas, into any Port, Place, or Creek of this Realm, or other your Majesty’s Dominions, and unshipped, to be laid on Land, the Subsidy, Customs, and other Duties due, or to be due, for the same, not being paid or lawfully tendered to the Collector thereof, or his Deputy, nor agreed with for the same in the Custom-house, according to the true Intent and Meaning of this Act, all the said Goods and Merchandizes whatsoever shall be forfeited.”

No Goods to be unshipped till the Duties are paid.

By 13 & 14 C. 2. c. 11. *par.* 7. It is enacted “ that if any Goods or Merchandize shall be laden, or taken, from and out of any Ship, or Vessel, coming in and arriving from foreign Parts, into any Bark, Hoy, Lighter, Barge, Boat, or Wherry, without a Warrant, and the Presence of one or more Officers of the Customs, such Bark, Hoy, Lighter, Barge, Boat, or Wherry, shall be forfeited, and the Master, Purser, Boatswain, or other Mariner of any Ship inwards bound, knowing and consenting thereunto, shall forfeit the Value of the Goods so unshipped.”

No Goods to be unshipped without a Warrant, and the Presence of an Officer.

- The Goods and the treble Value thereof forfeited for unshipping uncustomed or prohibited Goods. By the 8 *Anne*, c. 7. s. 17. It is enacted, "that if any Sort of Goods whatsoever, liable to the Payment of Duties, shall be unshipped, with Intention to be laid on Land, Customs and other Duties not being first paid or secured, or if any prohibited Goods whatsoever shall be imported into any Part of *Great Britain*, then not only the said uncustomed and prohibited Goods shall be forfeited, but also the Persons, who shall be assisting, or otherwise concerned, in the unshipping the said uncustomed or prohibited Goods, shall forfeit treble the Value thereof, together with the Vessels and Boats made use of for landing the aforesaid Goods."
- No Goods to be landed but in the Presence of an Officer. By the 13 & 14 C. 2. c. 11. par. 7. It is enacted, "that if any Wharfinger or Keeper of any Wharf, Crane or Key, or their Servants, or any of them, shall take up or land, or knowingly suffer to be taken up or landed, at any of their said Wharfs, Cranes or Keys, any Goods, Wares, or Merchandizes prohibited, or whereof any Custom, Subsidy or other Duties are due and payable, without the Presence of some of the Officers of the Customs thereunto appointed, or at the Hours and Times not appointed by Law, except in the port of *Hull*, as in the Statute of the first Year of Queen *Elizabeth* Chapter the Eleventh is excepted, all and every such Wharfinger, and Keeper of such Wharf, Crane or Key, shall forfeit the Sum of one hundred Pounds."
- At what Hours in the Day Goods may be landed. By 1 *Eliz.* c. 11. par. 2. It is enacted, "that it shall not be lawful, for any Person or Persons whatsoever, to take up, discharge, and lay on Land, or cause or procure to be taken up or discharged, out of any Lighter, Ship, Crayer, Vessel, or Bottom, not being in a Leak or Wreck, and laid upon Land, any Goods, Wares, or Merchandizes whatsoever, Fish taken by any of your Highnesses Subjects, and Salt only excepted, to be brought from any the Parts beyond the Seas, or the Realm of *Scotland*, but only in the Day Light, that is to say, from the first of *March* until the last of *September*, betwixt Sun-rising and Sun-setting, and from the last of *September* until the first Day of *March*, between the Hours of seven in the Morning and four in the Afternoon, upon Pain of Forfeiture of all such Goods, Wares, and Merchandizes."
- All Goods to be measured, weighed, and numbered, as soon as landed. By 13 & 14 C. 2. par. 21. It is enacted, "that all foreign Goods or Merchandizes, which, by the Person or Persons which are or shall be appointed for the managing the Customs, and the Customer, Collector and Comptroller, shall be permitted to be landed and taken up by Bills at Sight, Bills at View or Sufferance, shall be landed at the most convenient Keys or Wharfs, where the said Person or Persons, Customer, or Collector or Comptroller shall appoint, and not elsewhere, and there, or in his Majesty's Storehouse, at the Election of the said Person or Persons and Officers, shall be measured, weighed and numbered, by and in the Presence of the Officers to be thereunto particularly appointed; which said Officers so appointed shall perfect the Entry, and thereunto subscribe their Names, and the next Day following shall give Account, and make Report, of every respective Entry so perfected, to the Person or Persons or Officers aforesaid, without reasonable Cause to be allowed by the said Person or Persons or Officers, or, in default thereof, shall forfeit the Sum of one hundred Pounds."
- The Penalty where Goods concealed are found after a Ship is cleared. By par. 5. It is enacted, "that if, after the clearing of any Ship or Vessel, by the Person or Persons which are or shall be appointed for managing the Customs, or any their Deputies, and discharging the Watchmen or Tidemen from attending thereon, there shall be found, on Board such Ship or Vessel, any Goods, Wares or Merchandizes, which have been concealed from the Knowledge of the said Person or Persons which are or shall be appointed for the managing of the Customs, and for which the Custom, Subsidy, and other Duties, due upon the Importation thereof, have not been paid, then the Master, Purser, or other Person taking Charge

“ Charge of such Ship or Vessel, shall forfeit the Sum of one hundred Pounds.”

By the 5 G. 1. c. 11. par. 4. After reciting, that in Ships from foreign Parts Goods are often found, at clearing such Ships, concealed in false Bulk-heads, between the Linings and false Knees, or in concealed Lockers, in order to their being landed without Payment of Duties, so that it is almost impossible for Officers of the Customs to discover them without having some previous Information, it is enacted, “ that all Goods not reported, and found after clearing the Ship by the proper Officer or Officers of the Customs, shall be liable to Forfeiture.”

Goods not reported found after clearing forfeited.

By par. 11. So much of this Act, as relates to Goods not reported and found after clearing the Ship, was to have Continuance for three Years, from the Twenty-fifth Day of *March* one thousand seven hundred and nineteen, and from thence to the End of the then next Session of Parliament.

But it has been from Time to Time continued, and by the 27 G. 2. c. 18. par. 4. is continued to the Twenty-ninth Day of *September* one thousand seven hundred and sixty, and from thence to the End of the then next Session of Parliament.

By the 9 G. 2. c. 35. par. 27. After reciting, that in Ships from foreign Parts Goods are often concealed, in false Bulk-heads, between the Linings and false Knees, or in concealed Lockers, or in the Ballast, or false Package and other Places, which the Officers cannot easily find out or discover, in order to their being landed without Payment of Duties, and such Goods are not liable by Law to Forfeiture, unless the same are found after clearing the Ship by the proper Officer or Officers of the Customs, it is enacted, “ that all Goods which shall be found concealed as aforesaid, or concealed in any other Place, on Board any Ship or Vessel, at any Time after the Master thereof shall have made his Report at the Customhouse, and which shall not be comprized or mentioned in the said Report, shall and may be seized and prosecuted by any Officer or Officers of the Customs; and the Master, Purser, or other Person having the Charge or Command of such Ship or Vessel, in case it can be made appear that he was any ways consenting or privy to such Fraud or Concealment, shall forfeit treble the Value of the Goods so found.”

Goods found concealed after the Master's Report forfeited and the Master to forfeit the treble Value.

4. To Ships in Port outwards Bound.

By the 13 & 14 C. 2. c. 11. par. 3. It is enacted, “ that no Captain, Master, Purser, or any other Person taking Charge of any Ship or Vessel, bound for the Parts beyond the Seas, or into the Kingdom of *Scotland*, whether the same Ship or Vessel shall have Commission from, or belong unto, the King's Majesty that now is, his Heirs or Successors, or shall belong to, or have Commission from, any foreign Prince or State, or otherwise, shall take in, or suffer to be taken into or laden aboard any such Ship or Vessel, any *English* Goods, Wares or Merchandize, to be exported into the Parts beyond the Sea, or into the Kingdom of *Scotland*, until such Captain, Master, Purser, or other Person aforesaid, shall have entered such Ship or Ships in the Book of the Commissioners, Customer, or Collector and Comptroller outwards, of such Port where he shall load or take in Goods, together with the Name of such Captain or Master, the Burthen of such Ship or Vessel, the Number of Guns and Ammunition she carries, and to what Port or Place she intends to pass or sail; and before he or they shall depart, with his or their Ship or Vessel, out of such Port or Place, shall bring and deliver, unto the Person or Persons which are or shall be appointed for managing the Customs, the Customer, or Collector

No *English* Goods to be shipped till the Ship is entered, and an Entry to be made of all Goods put on Board a Ship outwards bound.

“ Collector and Comptroller, of such Port or Place, a Content in Writing, under his or their Hands, of the Names of every Merchant, and other Person or Persons, that shall have laden, or put on Board any such Ship or Vessel, any Goods or Merchandize, together with the Marks and Numbers of such Goods and Merchandize, and shall likewise publickly in the open Customhouse, upon his corporal Oath, to the best of his Knowledge, have answered to such Question or Questions, as shall be demanded of him by the said Person or Persons which are or shall be appointed for managing the Customs, the Customer, or Collector and Comptroller, or their Deputies, concerning such Goods and Merchandize, as shall be aboard such Ship or Vessel, upon pain of Forfeiture of one hundred Pounds.”

Ships of War not to take Goods on Board for Exportation. *Ante* 548.

The Provisions in this Clause, as to Officers of Ships or Vessels belonging to his Majesty, are now at an End; for all such Officers are absolutely prohibited, from taking any Goods or Merchandize except Gold, Silver, and Jewels, on Board for Exportation.

Vessels appointed to carry Letters or Pacquets not to export Goods.

By the 13 & 14 C. 2. c. 11. *par.* 22. It is enacted, “ that no Ship, Vessel or Boat, appointed, and ordinarily employed for the Carriage of Letters and Pacquets, shall, unless it be in such Cases as shall be allowed by the Person or Persons which are or shall be appointed for the managing of the Customs, Customer, or Collector and Comptroller, export any Goods or Merchandize into the Parts beyond the Seas, upon the Penalty of the Forfeiture of one hundred Pounds, to be paid by the Master of the said Vessel or Boat, with the Loss of his Place; and all Goods and Merchandize that shall be found on Board any such Ship, Vessel or Boat, shall be forfeited.”

Officers may search Ships outwards bound.

By *par.* 4. It is enacted, “ that the Person or Persons which are or shall be appointed for the managing the Customs, and Officers of his Majesty’s Customs, and their Deputies, are hereby authorized and enabled, to go and enter on Board any Ship or Vessel outwards bound, as well Ships of War as Merchant Ships, and from thence to bring on Shore all Goods prohibited or uncustomed, except Jewels.”

At what Hours in the Day Goods may be carried from a Wharf.

By the 1 *Eliz.* c. 11. *par.* 2. It is enacted, “ that it shall not be lawful, to or for any Person or Persons whatsoever, to lade or put, or cause to be laden or put, off from any Wharf, Key, or other Place on the Land, into any Ship, Vessel, Crayer, Lighter, or Bottom, any Goods, Wares, or Merchandizes whatsoever, Fish taken by your Highnesses Subjects only excepted, to be transported into any Place of the Parts beyond the Seas, or into the Realm of *Scotland*, but only in the Day Light, that is to say, from the first of *March* until the last of *September*, between Sun-rising and Sun-setting, and from the last of *September* until the first of *March*, between the Hours of seven in the Morning and four in the Afternoon, upon Pain of Forfeiture of all such Goods, Wares, and Merchandizes.”

No Goods to be carried from a Wharf but in the Presence of an Officer.

By the 13 & 14 C. 2. c. 11. *par.* 7. It is enacted, “ that if any Wharfinger, or Keeper of any Wharf, Crane or Key, or their Servants, or any of them, shall ship off, or suffer to be Water born, at or from any of their said Wharfs, Cranes or Keys, any Goods, Wares, or Merchandizes prohibited, or whereof any Custom, Subsidy, or other Duties, are due and payable, without the Presence of some of the Officers of the Customs thereunto appointed, or at Hours and Times not appointed by Law, except in the Port of *Hull*, as in the Statute of the first Year of *Queen Elizabeth* Chapter the Eleventh is excepted, all and every such Wharfinger and Keeper of such Wharf, Crane or Key, shall forfeit the Sum of one hundred Pounds.”

By the same *Par.* it is enacted, “that if any Goods or Merchandize shall be laden, or taken in from the Shore, into any Bark, Hoy, Lighter, Barge, Wherry or Boat, to be carried on Board any Ship or Vessel outwards bound for the Parts beyond the Seas, without a Warrant, and the Presence of one or more Officers of the Customs, such Bark, Hoy, Lighter, Barge, Wherry or Boat, shall be forfeited.”

No Goods to be shipped without a Warrant, and the Presence of an Officer.

By the 12 *C. 2. c. 4. par. 3.* It is enacted, “that if any Goods or Merchandize shall be shipped, or put into any Boat or Vessel, to the Intent to be carried into the Parts beyond the Seas, the Subsidy, Custom, and other Duties due or to be due for the same, not paid or lawfully tendered to the Collector thereof or his Deputy, nor agreed with for the same in the Customhouse, according to the true Intent and Meaning of this Act, all the said Goods and Merchandizes whatsoever shall be forfeited.”

No Goods to be shipped till the Duties are paid.

By the 12 *G. 1. c. 28. par. 18.* After reciting, that great Quantities of Goods and Merchandizes, on which considerable Duties are due and payable to his Majesty, and divers Sorts of Goods prohibited to be exported, are by evil disposed Persons frequently shipped for Parts beyond the Seas, without the Presence of the proper Officer of the Customs, to the great Prejudice of the Revenue and all fair Traders, it is enacted, “that if any such Goods or Merchandizes shall be shipped for Parts beyond the Seas, without a Warrant, or without the Presence of an Officer of the Customs appointed for that Purpose, all such Goods and Merchandizes, or the Value thereof, shall be forfeited.”

All Goods shipped without the Presence of an Officer forfeited.

By the 13 & 14 *C. 2. c. 11. par. 9.* It is enacted, “that if any Goods, Wares or Merchandize, for which the Duties of Subsidy or Custom are due and payable, shall be secretly conveyed on Board any Ship or Vessel, before the Custom and Subsidy thereof be duly answered and paid, and shall escape the Discovery thereof by the Officers of the Customs or others, and be carried into the Parts beyond the Seas, in such Case the Owners or Proprietors of such Goods, Wares or Merchandizes, or other Person or Persons, who shall have so shipped, or caused the same to be so shipped and transported, shall forfeit the double Value of the Goods, computed according to the Book of Rates, except for Coal which, so secretly exported as aforesaid, shall pay double the Custom and Duty due and payable for the same.”

The double Value of Goods secretly exported to be forfeited.

5. From or by coasting Vessels in Port.

Coasting Vessels are not only subject to such general Rules and Regulations as other Ships inwards and outwards bound are; but they are also subject to some particular ones.

By the 13 & 14 *C. 2. c. 11. par. 7.* It is enacted, “that if any Goods, Wares, or Merchandizes, shall be shipped, or put on Board, to be carried forth to the open Sea, from any Port, Creek or Member, in the Kingdom of *England*, Dominion of *Wales*, or Port and Town of *Berwick*, to be landed at any other Place of this Realm, without a Suffrance or Warrant first had and obtained, from the Person or Persons which are or shall be appointed for the managing the Customs, and Officers of the Customs, all such Wares and Merchandizes shall be forfeited.”

No Goods to be shipped to be carried coastwise without a Suffrance.

By the same *par.* It is enacted, “that the Master of every Ship or Vessel, that shall lade or take in any Goods, Wares or Merchandizes, in any Port, Member or Creek, within the Kingdom of *England*, Dominion of *Wales*, or Town and Port of *Berwick*, to be landed or discharged in some other Port, Member or Creek, of this Realm, shall before the Ship or Vessel be removed or carried out of the Port, where he shall take in his Lading, take out a Cocquet or Cocquets, and become bound to the King’s Majesty with good Security, in the Value of the

Goods entered to be carried coastwise not to be carried beyond the Seas.

- “ Goods, Wares, and Merchandizes aforesaid, for Delivery and Discharge thereof in the Place or Port for which the same shall be entered, or in some other Port or Place within this Realm, and, the Dangers and Accidents of the Seas excepted, to return a Certificate, within six Months after the Date of such Cocquet or Cocquets, under the Hands and Seals of his Majesty’s Officers, signed also by the Person or some one of the Persons which are or shall be appointed for managing the Customs, or their Deputy or Deputies, in every the respective Ports, Members or Creeks, where the same shall be landed and discharged, to his Majesty’s Officers of the Customs, to whom such Security hath been given as aforesaid, that such Goods, Wares, and Merchandizes, were there landed and discharged accordingly, upon the Penalty of the Forfeiture of the Bond and Security aforesaid.”
- Penalty on Officers making a false Certificate. By *par. 8.* It is enacted, “ that if any Officer of any Port, Member or Creek, shall grant or make any false Certificate of any Goods or Merchandizes, which should have been landed out of any Ship or Vessel, such Officer shall forfeit the Sum of fifty Pounds, and shall moreover lose his Employment, and be incapable of serving his Majesty in any Place or Trutt concerning his Customs.”
- Penalty of falsifying a Cocquet or Certificate. By the same *par.* It is enacted, “ that if any Person whatsoever shall counterfeit, raise or falsify, any Cocquet, Certificate or Return, Tranfire, Let-pafs, or any other Customhouse Warrant, he shall forfeit one hundred Pounds; and the Cocquet, Certificate or return, shall be invalid and of none Effect.”
- Foreign Goods not to be carried coastwise except the same are certified. By the 9 G. 1. c. 21. *par. 8.* After reciving, that Frauds are many Times committed, under the Pretence of carrying foreign Goods or Merchandizes coastwise, by Masters of coasting Vessels, who take in such Goods at some Place other than the Port from whence it was certified, to the Prejudice of the Revenue and the Encouragement of the fowl Traders, it is enacted, “ that if any foreign Goods or Merchandizes shall be taken on Board any coasting Vessel, in any Port or Place of this Kingdom, other than the Port or Place from whence such Goods shall be certified, the said Goods, and double the Value thereof, shall be forfeited, and the Master of the said Vessel shall forfeit the Value of the said Goods.”
- Officers may search coasting Vessels within the Limits of any Port. By the 9 G. 2. c. 35. *par. 29.* It is enacted, “ that it shall and may be lawful to and for any Officer or Officers of the Customs, producing his or their Warrant or Deputation, or Warrants or Deputations, if required, to go on Board and enter into any coasting Ship or Vessel, which shall be within the Limits of any of the Ports of this Kingdom, and to rummage and search the Cabbin, and all other Parts, of all such coasting Ships or Vessels, for prohibited and uncustomed Goods, and such Officer and Officers is and are hereby authorized and impowered to stay and remain on Board all such Ships and Vessels, during the whole Time that the same shall continue within the Limits of any such Port as aforesaid; and, if any Person or Persons whatsoever shall obstruct, oppose, molest, lett, or hinder, any Officer or Officers of the Customs, in going and remaining on Board any such coasting Ship or Vessel, or in the entering and searching the Cabbin, or any other Part thereof, every such Person or Persons shall for every such Offence forfeit the Sum of one hundred Pounds.”
- Goods not to be landed from coasting Vessels but in the Prefence of an Officer. By the 8 G. 1. c. 18. *par. 18.* After reciving, that foreign Goods are frequently taken in at Sea by Masters of coasting Vessels, who privately land the same, to the Prejudice of the Revenue, and the Encouragement of the fowl Traders, it is enacted, “ that if any Goods brought, or coming, into any Port within the Kingdom of *Great Britain*, from any other Port within the said Kingdom, by Coast Cocquet, Tranfire, Let-pafs, or Certificate, in any Ship or Vessel, shall be unshipped, to be landed or put on Shore, before such Cocquet, Tranfire, Let-pafs, or Certificate shall be delivered to the Customer, or Collector and Comptroller, of the “ Port

“ Port or Place of her Arrival, and Warrant of Sufferance made and given
 “ from such Customer, Collector and Comptroller, for the landing and dis-
 “ charging thereof, the Master, Purser, Boatswain, or other Mariner
 “ taking Charge of such Ship or Vessel, out of which the Goods shall be
 “ landed or put on Shore, knowing and consenting thereunto, shall forfeit
 “ the Value of the Goods so unshipped; and if any Goods of foreign
 “ Growth, Production, or Manufacture, coming coastwise as aforesaid,
 “ shall be landed without the Presence of an Officer of the Customs, such
 “ foreign Goods, or the Value thereof, shall be forfeited, any Law, Custom,
 “ or Usage to the contrary notwithstanding.”

By *par. 27.* This Act was to have Continuance for two Years, from the
 Twenty-fifth Day of *March* one thousand seven hundred and twenty-two,
 and from thence to the End of the then next Session of Parliament.

But it has been continued from Time to Time, and by the *27 G. 2. c. 18.*
par. 5. is continued, except the Clauses obliging all Ships and Vessels to
 perform Quarentine, to the Twenty-ninth Day of *September* one thousand
 seven hundred and sixty, and from thence to the End of the next Session
 of Parliament.

6. In the Case of Certificate and prohibited Goods.

By the *12 G. 1. c. 28. par. 17.* It is enacted, “ that, for the better pre-
 “ venting Frauds, in the entring for Exportation of any Goods whereon there
 “ is a Drawback, Bounty, or Præmium, or of Goods prohibited to be
 “ worn or used here, to the Prejudice of the Revenue, it shall and may be
 “ lawful to and for any Searcher, or other proper Officer of the Customs,
 “ after the Entry of any of the said Goods, and before and after the ship-
 “ ping thereof, to open and strictly examine any Bale, Chest, Truss or other
 “ Package, to see if the Goods are right entered; and if on such Examina-
 “ tion the same shall be found to be right entered, the Searcher or other
 “ Officer shall, at his own Charge, cause the same to be repacked, which
 “ Charge shall be allowed to such Officer by the Commissioners of the Cus-
 “ toms if they think it reasonable: But in Case the Officer shall, on Exami-
 “ nation, find such Goods to be less in Quantity or Value than is expressed
 “ in the Exporter’s Indorsement upon his Entry, or any that shall be entered
 “ under a wrong Denomination, whereby his Majesty would have been de-
 “ frauded, all such Goods may be seized and shall be forfeited, and the
 “ Owner or Merchant shall lose the Benefit of receiving the Drawback or
 “ Bounty for such Goods, and the Value thereof.”

By the *8 Anne, c. 13. par. 16.* After reciting, that it hath been found
 by Experience, that great Quantities of foreign Goods, after they have been
 shipped for Exportation, have been privately relanded; and that the Rem-
 edies already provided by Law have not been sufficient, to obviate a Practice
 so very prejudicial to the Revenue and all fair Traders, it is enacted, “ that
 “ if any foreign Goods contained or specified in any Certificate, whereupon
 “ any Drawback is to be made, or whereupon any Debenture is to be made
 “ forth for any such Drawback, shall not be really and *bona fide* shipped
 “ and exported, the Danger of the Seas and Enemies excepted, or shall be
 “ landed again in any Part of *Great Britain*, unless in Case of Distress to
 “ save the Goods from perishing, which shall be presently made known
 “ to the Person or Persons which are or shall be appointed to manage
 “ the Customs, or principal Officers of the Port, then not only such Cer-
 “ tificate Goods shall be forfeited, but also the Person or Persons, being
 “ the Exporters or any others, who shall bring back, or cause or procure
 “ such Certificate Goods, or any Part of them, to be relanded in any Part
 “ of *Great Britain*, or be assisting or otherwise concerned in unshipping the
 “ same, or by whose Privity, Knowledge, or Direction, the said Goods or
 “ any

All Goods in-
 titled to a
 Drawback or
 Bounty, and
 all prohibited
 Goods, may be
 examined to
 see if right en-
 tered.

All Certificate
 Goods reland-
 ed, and the
 double Value
 of the Draw-
 back thereof,
 to be forfeited.

“ any Part thereof shall be so relanded, shall forfeit double the Amount
 “ of the said Drawback for such Goods, together with the Vessels or Boats
 “ made use of in the landing or conveying the same.”

Further Pen-
 nalty on re-
 landing pro-
 hibited or
 Certificate
 Goods.

By the 5 G. c. 11. *par.* 6. After reciting, that the Remedies provided by
 Law, to prevent the relanding Goods prohibited to be worn in this King-
 dom, and foreign Goods shipped out for Parts beyond the Seas, have been
 insufficient to put a Stop thereto, it is enacted, “ that if any such Goods
 “ shall be unshipped or put on Shore, unless in Case of Distress to save the
 “ Ship from perishing, or in the Presence of an Officer of the Customs, the
 “ said Goods shall be forfeited; and if the Master, Purser, or other Per-
 “ son taking Care of any Ship, wherein the said Goods shall be laden, shall
 “ suffer or permit any of the said Goods to be landed or unshipped, unless
 “ as aforesaid, the said Master, Purser, or other Person taking Care of such
 “ Ship, shall forfeit the Value of the Goods so unshipped or landed.”

Package of
 Certificate
 and prohibi-
 ted Goods not
 to be opened
 in Port.

And by *par.* 7. After reciting, that Persons concerned in carrying on such
 fraudulent Practices, do frequently cause the Package of such Goods to be
 opened on Board the Ship, during the Time she continues in Port, whereby
 they have a better Opportunity to reland the said Goods, it is enacted,
 “ that if the Package of any such Goods shall, with the Privity or Consent
 “ of the Master, Purser, or other Person taking Care of such Ship or Vef-
 “ sel, be opened on Board any Ship or Vessel, or put into any other Form
 “ or Package, during the Time the said Ship or Vessel remains in Port,
 “ without Leave of one or more of the principal Officers of the Port, the
 “ said Master, Purser, or other Person taking Care of such Ship or Vef-
 “ sel, shall forfeit one hundred Pounds.”

By *par.* 11. Both these Clauses are only to have Continuance for three
 Years, from the twenty-fifth Day of *March* one thousand seven hundred and
 nineteen, and from thence to the End of the then next Session of Parliament.

But they have been since continued from Time to Time, and by the 27
 G. 2. c. 18. *par.* 4. are continued to the twenty-ninth Day of *September* one
 thousand seven hundred and sixty, and from thence to the End of the then
 next Session of Parliament.

It may in general be observed, that in the Case of Manufactures prohibi-
 ted to be worn, and in other Cases where there is a Drawback, Bounty,
 or Præmium, on the Exportation of any Goods or Manufactures, a Bond is
 directed to be taken, with Condition for the Exporting of such Goods or
 Manufactures, and that the same shall not be relanded in any Part of *Great*
Britain. Wherever this is the Case, besides all other Penalties and Forfeit-
 ures, the Penalty of such Bond is forfeited, if such Goods and Manufactures
 are relanded.

7. In divers other Cases.

Penalty on
 giving or ta-
 king a Bribe
 for Conni-
 vance at a
 false Entry.

By *par.* 19. It is enacted, “ that if any of the Officers, or Persons ap-
 “ pointed to manage the Customs, Searchers, Waiters, or other Person or
 “ Persons whatsoever, deputed and appointed by or under them or any of
 “ them, or any other Authority whatsoever, and employed in or about the
 “ Affairs of the Customs and Subsidies, shall directly or indirectly take or
 “ receive any Bribe, Recompence, or Reward, in any Kind whatsoever,
 “ to connive at any false Entry of any Goods or Merchandize, whereby the
 “ King’s Majesty, his Heirs, or Successors, shall be defrauded or hindered
 “ in or of his Customs or Subsidies, or other Sums of Money, or Goods,
 “ prohibited to be exported or imported, be suffered to pass by Way of
 “ Importation or Exportation, the Person or Persons so offending shall for-
 “ feit the Sum of one hundred Pounds, and be for ever afterwards inca-
 “ pable of any Office or Employment under the King’s Majesty, his Heirs
 “ and Successors, or any Authority derived from them; as also the Mer-
 “ chant, Mariner, or other Person or Persons whatsoever, who shall give
 “ or

“ or pay any such Bribe, Recompence, or Reward, as aforefaid, fhall forfeit the Sum of fifty Pounds.”

By the 9 *G. 2. c. 35. par. 24.* It is enacted, “ that if any Perfon or Persons whatfoever fhall offer any Bribe, Recompence, or Reward whatfoever, to any Officer or Officers of the Customs, to connive at or permit any customable, or prohibited Goods, to be run on Shore, or to connive at any falfe or fhort Entry of any fuch Goods, or to do any other Act whereby his Majefty might be defrauded in his Revenue, every fuch Perfon and Persons fhall, for every fuch Offence, whether the fame Offer fhall be accepted or not, forfeit the Sum of fifty Pounds.”

Penalty on offering a Bribe to an Officer of the Customs.

By the 8 *G. 1. c. 18. par. 3.* After reciting, that many Frauds are committed, to the Prejudice of the Revenue, in the clandestine Running of Goods imported, and in the relanding of Certificate Goods, as well as in exporting Wool, and the Coin of this Kingdom, by Watermen and others in Boats, Wherries, Pinnaces, Barges, and Gallies, which are fometimes rowed with fix, eight, or twelve Oars, built on Purpose for the Smuggling Trade, and, in Cafe of their being purfued by the Officers, do make their Escape, which may alfo be a Means of bringing in the Infection, it is enacted, “ that if any Boat, Wherry, Pinnace, Barge, or Gally, rowing, or made or built to row, with more than four Oars, fhall be found upon the Water, or in any Bargehoufe, Workhoufe, Shed, or other Place, within any of the Counties of *Middlefex, Surrey, Kent, or Effex*, or in the River *Thames*, either above or below *London Bridge*, or within the Limits of the Ports of *London, Sandwich, or Ipswich*, or the Members or Creeks to them or either of them refpectively belonging, fuch Boat, Wherry, Pinnace, Barge, or Galley, with all her Tackle and Furniture, or the Value thereof, fhall be forfeited, and fhall and may be feized by any Officer or Officers of the Customs; and the Owner or Owners thereof, and any Perfon ufing or rowing in fuch Boat, Wherry, Pinnace, Barge, or Galley, fhall alfo forfeit the Sum of forty Pound.”

Boats not to be rowed with more than four Oars.

But by *par. 4.* It is provided, “ that this Act fhall not extend, or be conftrued to extend, to any Barge or Galley belonging to, or to belong to, his Majefty, or the Royal Family, or any of them, or to any Long-Boat, Yawl, or Pinnace, belonging to, and ufed in the Service of, any Merchant Ship, or Veffel, or to fuch Boat, Wherry, Pinnace, Barge, or Galley, as fhall be licensed by the Lord High Admiral, or Commissioners for executing the Office of Lord High Admiral, or the major Part of the fame Commissioners for the Time being.”

Some Boats of more than four Oars excepted.

By the 4 *W. & M. c. 15. f. 14.* After reciting, that it is found by Experience, that great Quantities of Goods are daily imported from foreign Parts, in a fraudulent and clandestine Manner, without paying the Customs and Duties due and payable to their Majefties, and the fame hath of late been much increafed and promoted by ill Men, who, notwithstanding the Laws already made, do undertake as Infurers, or otherwife, to deliver fuch Goods fo clandestinely imported, at their Charge and Hazard, into the Houfes, Warehoufes, and Poffeffions, of the Owners thereof, it is enacted, “ that all and every Perfon or Persons whatfoever, who, by way of Infurance or otherwife, fhall undertake or agree to deliver any Goods or Merchandizes, to be imported from Parts beyond the Seas, at any Port or Place within this Kingdom of *England, Dominion of Wales, or Town of Berwick*, without paying the Customs due and payable for the fame at fuch Importation, or any prohibited Goods whatfoever, or, in purfuance of fuch Agreement, fhall deliver, or caufe or procure to be delivered, any prohibited Goods, or fhall deliver, or caufe or procure to be delivered, any Goods or Merchandizes whatfoever, without paying fuch Customs and Duties as aforefaid, knowing thereof, and all and every their Aiders, Abettors, and Affiftants, fhall, for every fuch Offence, forfeit the Sum

A Penalty upon Infurers for the Delivery of foreign Goods without paying the Customs, or of prohibited Goods.

- “ of five hundred Pounds, over and above all other Forfeitures to which they are already liable by any Act already in Force.”
- A Penalty also upon the Person so insured. “ And by *par. 15.* It is enacted, “ that all and every Person or Persons whatsoever, who shall agree to pay any Sum or Sums of Money for the insuring, or conveying, any Goods or Merchandizes that shall be so imported, without paying the Customs and Duties due and payable at the Importation thereof, or of any prohibited Goods whatsoever, or shall receive or take such prohibited Goods into his or their House or Warehouse, or other Place on Land, or such other Goods, before such Customs or Duties are paid, knowing thereof, shall, for every such Offence, forfeit the like Sum of five hundred Pounds.”
- Persons carrying Goods prohibited, or clandestinely imported, to forfeit treble the Value. “ By the 9 G. 2. c. 35. *par. 21.* It is enacted, “ that all Watermen, Carriers, Porters, or other Persons whatsoever, employed in carrying any Goods, Wares, or Merchandizes, prohibited, run, or clandestinely imported, upon whom, or in whose Custody, the same shall be found or seized, knowing the same Goods to be prohibited, or to have been clandestinely run or imported without Payment of the Customs, and who shall be thereof lawfully convicted, upon his, her, or their Appearance, or Default, upon the Oath or Oaths of one or more credible Witnesses or Witnesses, or by the Confession of the Party before one or more Justice or Justices of the Peace of the County, Division, or Liberty, where such Offence shall be committed, or the Offender found, which Oath such Justice or Justices are hereby required to administer, shall forfeit treble the Value of all such Goods.”
- Penalty upon all Persons receiving Goods clandestinely imported. “ By the 8 G. 1. c. 18. *par. 10.* It is enacted, “ that if any Person or Persons shall receive or buy any Goods, Wares, or Merchandizes, clandestinely run or imported, before the same shall have been legally condemned, knowing the same to be so clandestinely run or imported, and shall be thereof lawfully convicted, upon his, her or their Appearance, or Default, upon the Oath or Oaths of one or more credible Witnesses or Witnesses, or by the Confession of the Party, before one or more Justice or Justices of the Peace of the County, Division, or Liberty, where such Offence shall be committed, or the Offender found, which Oath such Justice or Justices of the Peace are hereby required to administer, the Person so convicted shall forfeit the Sum of twenty Pounds.”
- By *par. 27.* This Clause was to have Continuance for the Space of two Years, from the twenty-fifth Day of *March* one thousand seven hundred and twenty-two, and from thence to the End of the then next Session of Parliament, and no longer.
- But it has been from Time to Time continued, and by the 27 G. 2. c. 18. *par. 5.* is continued till the Twenty-ninth Day of *September* one thousand seven hundred and sixty, and from thence to the End of the then next Session of Parliament.
- Concealers of run or prohibited Goods, to forfeit the said Goods, and treble the Value thereof. “ By 11 G. 1. c. 30. *par. 16.* It is enacted, “ that if any Person or Persons whatsoever, shall knowingly harbour, keep, or conceal, or shall knowingly permit or suffer to be harboured, kept, or concealed, any prohibited Goods, or any run Goods, Wares, or Merchandizes whatsoever, which are liable to any Duty or Duties of the Customs, the Party or Parties offending therein, whether he, she, or they, have or have not, or do or do not claim or pretend to have, any Property or Interest in such Goods, Wares, or Merchandizes, so harboured, kept, or concealed, shall, for every such Offence, forfeit such Goods, Wares, and Merchandizes, and treble the Value thereof.”
- Penalty upon Persons selling prohibited Goods, or Goods run, or pretended to be. “ By *par. 18 & 19* it is enacted, “ that if any Person or Persons whatsoever, shall offer, or expose, to Sale any prohibited Goods, Wares, or Merchandizes whatsoever, or any which actually have been, or shall, by the Party or Parties offering or exposing the same to Sale, be pretended to have been run, all such Goods, Wares, and Merchandizes, together “ with

“ with the Package whatsoever including and containing the same, shall be
 “ forfeited, and shall or may be seized by the Party or Parties to whom the
 “ same shall be so offered or exposed to Sale; and the Person or Persons,
 “ so offering or exposing such prohibited or run Goods, Wares, and Mer-
 “ chandizes to Sale, shall also forfeit the treble Value thereof.”

By *par. 20 & 21*. It is enacted, “ that all prohibited or run Goods, Wares, or Merchandizes whatsoever, so, or as such, bought by any Person or Persons whatsoever, together with the Package containing the same shall be forfeited, and shall or may be seized, and taken from the Buyer or Buyers thereof, by the Seller or Sellers thereof; and the Person or Persons who shall buy any such prohibited or run Goods, Wares or Merchandizes, or which by the Seller, at the Time of selling thereof, shall be pretended to be either prohibited or run, shall also forfeit treble the Value thereof.”

Penalty upon
Persons buy-
ing such
Goods.

But by *par. 21*. It is declared, “ that it is not meant or intended by this Act, that as well the Party or Parties buying, as also the Party or Parties selling, or offering or exposing to Sale, such Goods, Wares, or Merchandizes as aforesaid, shall, in any Case or Cases, both and each of them respectively forfeit, or be prosecuted, for the treble Value of one and the same identical Parcel or Parcels of such Goods, Wares or Merchandizes, but that the Party or Parties, whether Buyer or Seller of, or offering or exposing to Sale, such Goods, Wares or Merchandizes, who with Effect shall first prosecute the other of the said Parties for such the treble Value of such Goods, Wares or Merchandizes, shall, in every such Case or Cases, be and is hereby declared discharged, and acquitted of and from the like Forfeiture, or being prosecuted, for or on Account of the treble Value of such Goods, Wares and Merchandizes, for and on Account whereof the other Party or Parties shall be prosecuted with Effect.”

The treble
Value not to
be forfeited by
both Buyer
and Seller.

By the 8 *Anne, c. 7. par. 17*. It is enacted, “ that, besides the Forfeiture of such Goods, all Persons, to whose Hands any prohibited or uncustomed Goods shall knowingly come, after the unshipping thereof, shall forfeit treble the Value thereof, together with all Horses, and other Cattle and Carriages whatsoever, made use of in the Removing, Carriage, or Conveyance, of any of the aforesaid Goods.”

Penalty upon
the Person to
whose Hands
prohibited or
run Goods
shall come.

By the 8 *Anne, c. 13. par. 16*. It is enacted, “ that, besides the Forfeiture of such Certificate Goods, every Person or Persons, to whose Hands any Certificate Goods shall come knowingly, after the unshipping thereof, shall forfeit double the Amount of the Drawback for such Goods, together with all the Horses, or other Cattle and Carriages whatsoever, made use of in the Removing, Carriage, or Conveyance, of the same.”

Penalty upon
the Person to
whose Hands
Certificate
Goods shall
come.

By the 9 *G. 2. c. 35. par. 30*. It is enacted, “ that if any Person or Persons, who keep or shall keep any Tavern, Ale-house, Victualling-house, or other House, where Ale, Wine, Brandy, or other strong Liquors, shall be sold by Retail, shall knowingly receive, harbour or entertain, any Person or Persons against whom any *Capias* or other Process of Arrest shall have issued, for having beat, abused, or obstructed any Officer or Officers of the Customs in the Execution of their Office, or for any Offence or Offences that are or shall be committed against any of the Laws, now in being, for preventing Frauds in Relation to the Revenues of the Customs, or for any Crime or Crimes whatsoever that shall be committed or done in prejudice of the said Revenue, and to which *Capias* or other Process the Sheriff, or other Officer having Execution of the said Process, shall have returned, that such Person or Persons cannot be found, and which Person or Persons shall not have appeared to the said Process, or shall knowingly harbour, receive or entertain, any Person or Persons, who having been in Prison for any of the said Offences shall have escaped, or who shall have been convicted for the same, and shall fly from Justice, shall forfeit one hundred Pounds, and be rendered incapable of
 “ having

Penalty upon
an Alehouse-
keeper har-
bouring a
Smuggler.

“ having a Licence for keeping any Tavern, Ale-house, or Victualling-house, or selling Wine, Ale, Brandy, or other strong Liquors, by retale for the future.”

But by *par. 31*. It is provided, “ that no Person shall suffer any Penalty or Disability for such receiving, harbouring or entertaining, unless publick Notice shall have been given, six Days before in two succeeding *Gazettes*, of the absconding of the Person or Persons who shall be so received, harboured or entertained, and also by Writing to be fixed to the Door of the Parish Church, where such Person or Persons last dwelt before his absconding.”

Penalty on the Hundred where an Officer is obstructed, or Goods seized are rescued.

By the 19 *G. 2. c. 34. par. 6*. It is enacted, “ that if any Officer or Officers of his Majesty’s Revenue, or other Persons being employed in the seizing, or conveying, or securing any Wool, or Goods, forfeited on Account of their being prohibited or uncustomed Goods, or in endeavouring to apprehend any Offender against this Act, shall be beat, wounded, maimed, or killed by any Offender against this Act, or the said Wool, or other Goods, shall be rescued by Persons so armed as in this Act before mentioned, in all such Cases respectively, the Inhabitants of every Rape or Lath, in such Counties as are divided into Rapes and Laths, and in every other County the Inhabitants of every hundred, where such Facts shall be committed, within that Part of *Great Britain* called *England*, shall make full Satisfaction and Amends for all the Damages, which such Officers or Persons shall respectively suffer, by such beating, wounding, and maiming respectively, and by the Loss of such Goods so seized and received, and shall also pay the Sum of one hundred Pounds, for each Person so killed, to the Executors or Administrators of such Officers or Persons so killed as aforesaid; and that such respective Officers and other Persons, and their said Executors and Administrators, shall be and are hereby enabled to sue for and recover such their Damages, so as the Sum to be recovered for such beating, wounding, or maiming, shall not exceed forty Pounds, nor for the Loss of the Goods two hundred Pounds, against the Inhabitants of the said Rape or Lath, in such Counties as are divided into Rapes or Laths, and in every other County the Inhabitants of every hundred, who by this Act shall be made liable to answer all or any Part thereof.”

But by *par. 8*. It is provided, “ that where any Offender shall be apprehended and convicted of such Offence, within the Space of six Calendar Months after the Offence is committed, no Hundred, Rape, or Lath, or any Inhabitant thereof, shall be in any wise subject to make any Satisfaction for such Damages, or to pay the said one hundred Pounds to the Executors or Administrators of such killed Person.”

(G) Of the corporal Punishments to which Persons guilty of this Offence or Practices thereto tending are liable.

1. Imprisonment.

For 'forcibly obstructing an Officer, his Deputy or Assistant.

BY the 13 & 14 *C. 2. c. 11. par. 6*. It is enacted, “ that if any Officer or Officers of the Customs shall be, by any Person or Persons, armed with Club, or any Manner of Weapon, forcibly hindred, affronted, abused, beaten or wounded, either on Board any Ship or Vessel, or upon

“ the

“ the Land or Water, in the due Execution of their Office, all and every
 “ Person or Persons so resisting, affronting, abusing, or wounding the said
 “ Officer or Officers, or their Deputies, or such as shall act in their Aid or
 “ Assistance, shall by the next Justice of Peace, or other Magistrate, be
 “ committed to Prison, there to remain till the next Quarter-Sessions; and
 “ the Justices of Peace of the said Quarter-Sessions are hereby impowered
 “ to punish the Offender by Fine, not exceeding one hundred Pounds, and
 “ the Offender is to remain in Prison till he be discharged, by order of
 “ the Exchequer, both of the Fine and of the Imprisonment, or discover
 “ the Person that set him on Work, to the End that he may be legally
 “ proceeded against.”

By *par. 8.* It is enacted, “ that if any Officer of any Port, Member or
 “ Creek, shall grant or make any false Certificate of any Goods or Mer- Of Officer for
 “ chandizes, which should have been landed out of any Ship or Vessel, making a false
 “ such Officer shall suffer one Year’s Imprisonment without Bail or Main- Certificate.
 “ prize, and be further liable to such corporal Punishment as the Court of
 “ Exchequer shall think fit.”

By the *5 G. 1. c. 11. par. 7.* It is enacted, “ that if any Master, Purser, Of Master
 “ or other Person, taking Charge of any Ship or Vessel, shall permit or suffering the
 “ suffer any Goods prohibited to be worn in this Kingdom, or any foreign Package of
 “ Goods shipped out for Parts beyond the Seas, to be unshipped or landed, prohibited or
 “ or the Package of any such Goods to be opened, or put into any other Certificate
 “ Form, during the Time the said Ship or Vessel remain in Port, without Goods to be
 “ Leave of one or more of the principal Officers of the Port, such Master, opened in
 “ Purser, or other Person shall, besides being subject to the Forfeiture of Port.
 “ one hundred Pounds, suffer six Months Imprisonment without Bail or
 “ Mainprize.”

By *6 G. 1. c. 21. par. 32.* After reciting, that illegal Importations and Of Master for
 Exportations cannot be carried on by Ships or Vessels, if the Masters or suffering pro-
 Commanders thereof do take due Care to prevent the same, it is enacted, hibited or
 “ that if the Master, Purser, or other Person taking Charge of any Ship or uncustomed
 “ Vessel, shall suffer any uncustomed or prohibited Goods, to be put out of Goods to be
 “ the said Ship or Vessel into any Hoy, Lighter, Boat or Bottom, to be shipped or un-
 “ laid on Land, or shall suffer any Wool, Wool-fells, Mortlings, Short- shipped.
 “ lings, Yarn made of Wool, Wool-flocks, Fullers-Earth, Fulling-Clay,
 “ or Tobacco-Pipe-Clay, to be put on Board such Ship or Vessel, to be
 “ carried to Parts beyond the Seas, he or they so offending, being convict-
 “ ed thereof, shall, besides the Penalties and Forfeitures to which they will
 “ be liable by any Law now in being, suffer six Months Imprisonment
 “ without Bail or Mainprize.”

By the *8 G. 1. c. 18. par. 10.* After directing, that any Person or Per- For receiving
 sons, convicted of knowingly receiving or buying any run Goods, before run Goods.
 the same shall have been lawfully condemned, shall be liable to a Distress for Ante 558.
 the Penalty of twenty Pounds, it is enacted, “ that, for want of such Dis-
 “ tress, every such Offender shall be committed to Prison, without Bail or
 “ Mainprize for the Space of three Months.”

2. Whipping.

By the *9 G. 2. c. 35. par. 18.* It is enacted, “ that, upon Information Of a Person
 “ to be given upon Oath, before one or more Justices of the Peace in any lurking upon
 “ County, City or Liberty whatsoever, that any Person or Persons are or any Coast or
 “ shall be lurking, waiting, or loitering, within five Miles from the Sea navigable
 “ Coast, or from any navigable River, and that there is reason to suspect, River.
 “ that they wait with Intent to be aiding and assisting in the running,
 “ landing, or carrying away, any prohibited or uncustomed Goods, it shall
 “ and may be lawful, to and for every such Justice and Justices, to cause all
 “ such

“ such Persons to come and be brought before him and them, and to
 “ grant his, or their Warrant or Warrants for the apprehending such
 “ Offender, and bringing him or them before any of the said Justices of
 “ the Peace, and if such Persons shall not give a satisfactory Account of
 “ themselves, and their Callings and Employments, or otherwise make it
 “ appear, to the Satisfaction of such Justice or Justices, that they are not to
 “ be employed, or concerned in, or to be aiding or assisting in, the carrying
 “ on any fraudulent or clandestine Trade, or unlawful Business or Occupa-
 “ tion, and are not at such Place as aforesaid with Intent to carry on the
 “ said clandestine Practices, then every such Person, who shall not give such
 “ Account and Satisfaction to such Justice or Justices, shall be committed
 “ to the House of Correction, there to be whipt, and kept to hard Labour
 “ for any Time, which such Justice or Justices shall in his or their Discre-
 “ tion think meet, not exceeding one Month.”

Such Person to
 have Time to
 make his In-
 nocence ap-
 pear.

But by *par. 19.* It is provided, “ that if any such Person, so brought
 “ before such Justice or Justices, shall desire Time for the making it ap-
 “ pear, that he or they is or are not concerned in any of the said fraudu-
 “ lent or clandestine Practices, such Person or Persons shall not be punish-
 “ ed by whipping or other Correction; but that then and in every such
 “ Case, it shall and may be lawful, to and for every such Justice and Jus-
 “ tices, to commit such Person and Persons to the common Gaol, there
 “ to remain and continue, until he or they shall give such Account of him
 “ or themselves, or make Proof of the Matters aforesaid, to the Satisfac-
 “ tion of such Justice or Justices, or until such Person or Persons shall give
 “ and find good and sufficient Security, to the Approbation and Satisfaction
 “ of the said Justice or Justices, not to be guilty of any of the said Offen-
 “ ces, or fraudulent, clandestine, or indirect Practices.”

Of Persons
 carrying pro-
 hibited or run
 Goods.
Ante 558.

By *par. 21.* After directing, that all Watermen, Carmen, Porters, and
 other Persons whatsoever, convicted of carrying any Goods or Merchandizes
 knowing the same to be prohibited or run, shall be liable to a Distress for
 the Penalty of treble the Value of such Goods, it is enacted, “ that, for
 “ want of such Distress, every such Offender shall be committed to the
 “ House of Correction, there to be whipt, and kept to hard Labour for
 “ any Time, which the Justice or Justices of the Peace, committing him
 “ or her, shall in his or their Discretion judge meet, not exceeding three
 “ Months.”

3. Transportation.

Of Persons to
 the Number
 of eight forc-
 bly obstructing
 an Officer.

By 6 G. 1. c. 21. *par. 34.* After reciting, that the Punishment already
 inflicted by Law, on such who shall forcibly hinder Officers of the Customs
 in the due performance of their Duty, has proved insufficient, it is enacted,
 “ that if any Officer or Officers of the Customs be forcibly hindred,
 “ wounded, or beaten, in the due Execution of their Office, by any
 “ Persons armed with Club, or any Manner of Weapon, tumultuously
 “ assembled in the Day or Night, to the Number of eight or more Persons,
 “ all and every Person or Persons so hindring, wounding, or beating the
 “ said Officer or Officers, or such as shall act in their aid or Assistance,
 “ being convicted thereof, shall, by order of the Court, before whom such
 “ Offender or Offenders shall be convicted, be transported to some of his
 “ Majesty’s Colonies and Plantations in *America*, for such Term as the
 “ Court shall think fit, not exceeding seven Years, in the same Manner as,
 “ by an Act made in the fourth Year of his present Majesty’s Reign, inti-
 “ tuled, *An Act for the further preventing Robbery, &c.* the Offenders
 “ therein mentioned are to be transported to the said Colonies and
 “ Plantations.”

By the 8 G. 1. c. 18. par. 6. It is enacted, “ that all and every Person and Persons, who shall be found passing, knowingly and willingly, with any foreign Goods or Commodities landed from any Ship or Vessel, without the due Entry and Payment of the Duties by Law charged thereon, in his, her or their Custody, from any of the Coasts of this Kingdom, or within the Space of twenty Miles of any of the said Coasts, and shall be more than five Persons in Company; or shall carry any offensive Arms or Weapons; or wear any Vizard, Mask, or other Disguise, when passing with such Goods or Commodities as aforesaid; or shall forcibly hinder or resist any Officers of the Customs in the seizing or securing any Sorts or Kinds of run Goods or Commodities, shall be deemed and taken to be Runners of foreign Goods and Commodities, within the Meaning of this present Act, and, being convicted of or for any of the said Offences, for which he, she or they so convicted are by this present Act declared to be deemed, and taken to be Runners of foreign Goods and Commodities, shall be adjudged guilty of Felony, and shall, for such his, her or their Offence, be transported as a Felon to some one of his Majesty’s Colonies or Plantations in *America*, there to remain for the Space of seven Years, in the same Manner as Felons are appointed to be transported by an Act made in the fourth Year of his Majesty’s Reign, intituled, *An Act for the further preventing Robbery, &c.* and by another Act made in the sixth Year of his Majesty’s Reign, intituled, *An Act for the further preventing Robbery, &c.*

Of Persons more than five in Number found passing with uncustomed Goods;

By the 9 G. 2. c. 35. par. 10. After reciting, that divers dissolute and disorderly Persons frequently appear in great Gangs near the Sea Coasts, and the Shores of navigable Rivers, and in and about Towns and Villages adjacent thereto, and in divers other Parts of this Kingdom, carrying Fire Arms, and other offensive Weapons, to the great Terror of his Majesty’s Subjects, and the Hindrance of the Civil Officers, and the Officers of the Customs and Excise, in the Execution and Discharge of their Duty, and during their Abode there commit great Spoil and Devastation to the Estates thereabouts, in order to be aiding and assisting in the clandestine running, landing, or carrying away, prohibited and uncustomed Goods, and to rescue the same, after Seizure, from the Officers of the Customs and Excise, and to watch for Opportunities for that Purpose; and that several Officers of the Revenue, and other their Assistants, have been wounded, maimed, and some of them murdered, in the Execution of their Office, and great Quantities of run Goods have been rescued after Seizure, and Sheriffs, and other Civil Officers, have been forcibly hindered from the Execution of Process, it is enacted, “ that, upon Information to be given on Oath, before any one or more of his Majesty’s Justices of the Peace in any County, City, or Liberty whatsoever, that any Persons, to the Number of three or more, are or have, after the twenty-fourth Day of *June* in the Year of our Lord one thousand seven hundred and thirty-six, been assembled for any of the Purposes aforesaid, and are or have been armed with Fire Arms, or other offensive Weapons, such Justice or Justices of the Peace shall and may grant his or their Warrant, to the Constables, Headboroughs, and other Peace Officers whatsoever, or any of them, requiring such Officer and Officers respectively, to take to his and their Assistance, as many of his Majesty’s Subjects as may be thought necessary, for the apprehending all and every Person and Persons, against whom such Information shall be given as aforesaid, and such Justice or Justices shall and may, if upon due Examination he shall find Cause, commit all and every or any of the said Person and Persons to the next County Gaol, there to remain without Bail or Mainprize, until he, she, or they, shall be discharged by due Course of Law; and all and every such Person and Persons, upon due Proof of his, her, or their being assembled, and armed as aforesaid, in order to be aiding and assisting in the clandestine

Of three or more Persons assembled with Fire Arms for the running of Goods.

“ running

“ running, landing, or carrying away, prohibited or uncustomed Goods,
 “ and upon Conviction of and for such Offence, shall be adjudged guilty of
 “ Felony, and shall be transported as a Felon to some or one of his Ma-
 “ jesty’s Colonies or Plantations in *America*, there to remain for seven
 “ Years.”

Str. 1166.
*The King and
 Fletcher.*

The Defendant being indicted on this Act, it was found by a Special Verdict, that there were above three in Company, and that all the others had Fire Arms, but that the Defendant had only a common Horfe whip. Upon Argument, the Court strongly inclined, that he was not guilty, for the Act makes the being armed a material Circumstance in each Man’s Case, and those Acts are to be taken strictly. They did not however determine it upon the first Argument; but gave Mr. Attorney General Time to consider of it. He, upon Conference with Mr. Solicitor General, declined to argue it; and the Prisoner had Judgment, and was discharged.

For forcibly
 obstructing an
 Officer on
 Ship board.

By 9 *G. 2. c. 35. par. 28.* After reciting, that the Punishment, to which such Persons, as shall forcibly obstruct or hinder any Officer of the Customs, being on Board any Ship, Boat, or Vessel, within the Limits of any Port of this Kingdom, are liable by Law, hath proved insufficient, it is enacted, “ that if any Officer or Officers of the Customs, being on Board
 “ any Ship, Boat, or Vessel, within the Limits of any of the Ports of this
 “ Kingdom, shall be forcibly hindered, opposed, obstructed, wounded, or
 “ beaten, in the due Execution of his or their Office or Duty, by any Per-
 “ son or Persons whatsoever, either in the Day or Night, all and every
 “ Person and Persons, so forcibly hindering, opposing, obstructing, wound-
 “ ing, or beating, the said Officer or Officers in the Execution of his or
 “ their Office, and all such as shall act in their Aid or Assistance, being con-
 “ victed thereof, shall by Order of the Court, before whom such Offender
 “ or Offenders shall be convicted, be transported to some of his Majesty’s
 “ Colonies or Plantations in *America*, for such Term as such Court shall
 “ think fit, not exceeding seven Years.”

For harbour-
 ing Persons at-
 tainted by the
 19 *G. 2. c. 34.*

By the 19 *G. 2. c. 34. par. 3.* It is enacted, “ that all and every Person
 “ and Persons who shall, after the Time appointed for the Surrender of
 “ any Person or Persons, charged upon Oath with any of the Offences be-
 “ fore mentioned in this Act, shall be expired, harbour, receive, conceal,
 “ aid, abet, or succour, such Person or Persons, knowing him to have
 “ been so charged, and to have been required to surrender him or themselves
 “ by such Order or Orders as by that is directed to be made, and not to have
 “ surrendered him or themselves pursuant to such Order or Orders, being
 “ prosecuted for the same within one Year after the Offence committed,
 “ and lawfully convicted thereof, shall be guilty of Felony, and shall be
 “ transported as a Felon or Felons to some or one of his Majesty’s Co-
 “ lonies or Plantations in *America*, there to remain for the Space of seven
 “ Years.”

4. Death.

If Persons lia-
 ble to be trans-
 ported are af-
 ter taking the
 Benefit of the
 Indemnity
 guilty of the
 same Offences.

By the 9 *G. 2. c. 35.* All Persons are indemnified for, and discharged from, all Penalties, Forfeitures, Indictments, Outlawries, Convictions and Judgments, except in a few Cases therein mentioned, incurred, had or given, or that may arise or accrue for or by Reason or Means of Offences against the Customs, committed before the Twenty-seventh Day of *April* in the Year of our Lord one thousand seven hundred and thirty-six.

But by *par. 7.* It is provided, “ that if any Person or Persons, who hath
 “ been guilty of any Offence or Offences, for which such Person or Persons
 “ is or are, by any Law or Statute now in Being, liable to be transported
 “ as a Felon or Felons, shall for any of the said Offences take or receive
 “ the Benefit of this present Act, and shall afterwards be guilty of or
 “ commit any of the said Offences, for which he, she or they is or are now
 “ liable

“ liable to be transported as aforesaid, then all and every such Person and
 “ Persons, being duly convicted of or for any of the said Offences hereafter
 “ to be committed as aforesaid, and upon due Proof made, that such Person
 “ or Persons had committed any of the said Offences before the making of
 “ this Act, and had taken or received the Benefit of thereof, for his, her
 “ or their Discharge, shall be adjudged guilty of Felony, and shall suffer
 “ Death as in Cases of Felony without Benefit of Clergy.”

By the 18 G. 2. c. 28. All Persons, as in this last mentioned Act, are again indemnified for all Offences against the Customs, except as therein is excepted, committed before the first Day of *May* in the Year of our Lord one thousand seven hundred and forty-five; and there is in this the same Provision, that all who, being liable to be transported, should take the Benefit of this Act, and be again guilty of the same Offence, shall suffer Death as in Cases of Felony without Benefit of Clergy.

By the 19 G. 2. c. 34. *par.* 1. After reciting, that divers dissolute Persons have associated themselves, and entered into Confederacies to support one another, and have appeared in great Gangs in divers Parts of the Kingdom, carrying Fire Arms or other offensive Weapons, and when so assembled have been aiding and assisting in running, landing, or carrying away, prohibited or uncustomed Goods, or Goods liable to Duties of Excise; or in the illegal relanding of any Goods or Merchandizes, which have been shipped or exported upon Debenture or Certificate; or in rescuing the same after Seizure; or in obstructing the Officers of the Revenue in the Execution of their Office, to the great Discouragement of the fair Trader, and the Loss of the publick Revenue; and that several Officers of the Revenue, and their Assistants, have been wounded, maimed, and some of them killed, when in the Execution of their Office, or otherwise, by the said dissolute Persons, so associated and assembled as aforesaid, to the great Terror of his Majesty's peaceable Subjects, in Defiance of the Laws, and to the utter Subversion of all civil Authority and Power whatsoever, it is enacted, “ That if any Persons, to the Number of three or more, shall, from and after the twenty-fourth Day of *July* in the Year of our Lord one thousand seven hundred and forty-six be assembled, in order to be aiding and assisting in the illegal Exportation of Wool, or other Goods prohibited to be exported, or the carrying of Wool, or other such Goods, in order to such Exportation; or in the running, landing, or carrying away prohibited or uncustomed Goods, or Goods liable to pay any Duties, which have not been paid or secured; or in the illegal relanding of any Goods whatsoever, which have been shipped or exported upon Debenture or Certificate; or in rescuing or taking away the same, after Seizure, from any Officer or Officers of the Customs or Excise, or other his Majesty's Revenue, or other Person or Persons employed by him or them, or assisting him or them, or from the Place where they shall be lodged by him or them; or in rescuing any Person, who shall be apprehended for any of the Offences made Felony by this or any other Act relating to the Revenues of the Customs or Excise; or in the preventing the apprehending of any Person, who shall be guilty of any such Offence; or in case any Persons, to the Number of three or more, so armed as aforesaid, shall, after the said twenty-fourth Day of *July*, be so aiding or assisting; or if any Person shall, after the said twenty-fourth Day of *July*, have his Face blacked, or wear any Vizard, Mask, or other Disguise, when passing with such Goods; or shall forcibly hinder, obstruct, assault, oppose or resist, any of the Officers of the Customs or Excise, or other his Majesty's Revenue, in the seizing and securing any such Goods; or if any Person or Persons, after the said twenty-fourth Day of *July*, shall maim or dangerously wound any Officer of the Customs or Excise, or any other his Majesty's Revenue, in his attempting to go on board any Ship or Vessel, within the Limits of any of the Ports of this Kingdom; or shoot at, maim, or dangerously wound him, when on
 “ board

If Persons to the Number of three assemble with Fire Arms or other offensive Weapons.

“ board such Ship or Vessel, and in the due Execution of his Office or Duty,
 “ then every Person so offending, being thereof lawfully convicted, shall be
 “ adjudged guilty of Felony, and shall suffer Death as in Cases of Felony
 “ without Benefit of Clergy.”

If Persons
 charged with
 such Offences
 do not sur-
 render them-
 selves.

By *par. 2.* For the more easy and speedy bringing of the Offenders against
 this Act to Justice, it is enacted, “ That, if any Person or Persons shall be
 “ charged with being guilty of any of the Offences aforesaid, before any
 “ one or more of his Majesty’s Justices of Peace, or before one of the
 “ Justices of his Majesty’s Court of King’s Bench, if the Offence be com-
 “ mitted in *England*, or before the Lord Justice General, or one of the
 “ Lords of Justiciary, or any one or more of his Majesty’s Justices of Peace in
 “ *Scotland*, if the Offence be committed in *Scotland*, by Information of one
 “ or more credible Person or Persons, upon Oath, by him or them to be
 “ subscribed, such Justice of the Peace or Justice of the King’s Bench, or
 “ Lord Justice General, or Lord Justice Clerk, or Lord of Justiciary re-
 “ spectively, before whom such Information shall be made as aforesaid, shall
 “ forthwith certify under his Hand and Seal, and return such Information to
 “ one of the principal Secretaries of State of his Majesty, his Heirs or
 “ Successors, who is hereby required to lay the same, as soon as conveniently
 “ can be, before his Majesty, his Heirs or Successors, in his or their Privy
 “ Council; whereupon it shall and may be lawful for his Majesty, his Heirs
 “ or Successors, to make his or their Order, in his or their said Privy
 “ Council, thereby requiring and commanding such Offender or Offenders
 “ to surrender him or themselves, within the Space of forty Days after the
 “ Publication thereof in the *London Gazette*, to the Lord Chief Justice, or
 “ any other of his Majesty’s Justices of the Court of King’s Bench, or to
 “ any one of his Majesty’s Justices of the Peace, if the Offence be com-
 “ mitted in *England*; or to any of the Lords of Justiciary, or to any of his
 “ Majesty’s Justices of the Peace in *Scotland*, if the Offence be committed
 “ in *Scotland*; who is hereby required, upon such Offender or Offenders
 “ surrendering him or themselves, to commit him or them without Bail or
 “ Mainprize to the County Gaol, or to the Gaol or Prison of the Place
 “ where he or they shall so surrender, to the End that he or they may be
 “ forth coming, to answer the Offence or Offences, wherewith he or they
 “ shall stand charged according to due Course of Law; which Order the
 “ Clerks of his Majesty’s Privy Council shall cause to be forthwith printed
 “ and published in the two successive *London Gazettes*, and to be forthwith
 “ transmitted to the Sheriff of the County where the Offence shall be com-
 “ mitted, who shall, within fourteen Days after the Receipt thereof, cause
 “ the same to be proclaimed, between the Hours of ten in the Morning
 “ and two in the Afternoon, in the Market Places, upon the respective
 “ Market Days, of two Market Towns in the same County, near to the
 “ Place where such Offence shall have been committed; and a true Copy
 “ of such Order shall be affixed upon some publick Place in such Market
 “ Towns; and in case such Offender or Offenders shall not surrender him
 “ or themselves, pursuant to such Order of his Majesty, his Heirs or Suc-
 “ cessors, to be made in Council as aforesaid, he or they so neglecting or
 “ refusing to surrender him or themselves as aforesaid, or escaping after such
 “ surrender, shall, from the Day appointed for his or their surrender as
 “ aforesaid, be adjudged, deemed, and taken to be, convicted and attainted
 “ of Felony, and shall suffer Pains of Death as in Cases of a Person con-
 “ victed and attainted by Verdict and Judgment of Felony without Benefit
 “ of Clergy; and it shall be lawful to and for the Court of King’s Bench, or
 “ the Justices of Oyer and Terminer, or general Gaol Delivery, for the
 “ County or Place where such Person shall be, to avoid Execution against
 “ such Offender and Offenders, in such Manner as if he or they had been
 “ convicted and attainted in the said Court of King’s Bench, or before such
 “ Justices of Oyer and Terminer, or general Gaol Delivery respectively.”

By

By *par.* 17. This Act was to have Continuance for the Space of seven Years, and from thence to the End of the next Session of Parliament.

But by the 26 G. 2. *par.* 1. it is enacted, "That, so much of this Act, as relates to the further Punishment of Persons going armed, or disguised, in Defiance of the Laws of the Customs and Excise, shall be further continued until the twenty-fourth Day of *June* one thousand seven hundred and fifty-eight, and from thence to the End of the then next Session of Parliament."

Harvey, who had been committed for not surrendering himself agreeably to the Directions of this Act, being brought up by a *Habeas Corpus*, it was agreed by the Court, upon due Deliberation and Consultation, that a Suggestion should be entered upon the Rolls: And by *Lee Ch. J.* it is necessary that all the Facts should, in this Case, appear to the Court upon Record; it not being like the Case of an Attainder by Act of Parliament, where the Facts are settled, the Person named, and the only Question is if the Prisoner be the identical Person attainted?

MS. Rep.
Rex and Har-
vey, Easter
20 G. 2.

In a Suggestion entered by the Attorney General, it was, amongst other Facts to bring the Prisoner within this Act, averred, that he had been guilty of the Offence provided against by this Act at *Benacre* in the County of *Suffolk*; and that the Sheriff did, within fourteen Days after the Receipt of the Order of Council, cause the same to be proclaimed, between the Hours of ten in the Morning and two in the Afternoon, in the respective Market Places, upon the respective Market Days, of two Market Towns, (but neither of them was named in the Suggestion) in the County of *Suffolk*, the said two Market Towns being near to the Place where the said Offence was charged to have been committed.

Ford, who was of Counsel for the Prisoner, objected to the two Market Towns not being named in the Suggestion; but it being ruled that, if the Prisoner had any Objection to the Suggestion, he must demur to it, he gave up his Objection and prayed Time to plead till next Term.

As to this the Opinion of the Court was that the Prisoner ought to plead *Instanter* as is done in Indictments; and by *Foster, J.* if this Court should give a Term to plead in, it will be expected that Justices of Gaol Delivery, to whom the same Power is given by this Act as is given to this Court, should give Time till the next Assizes.

Hereupon the Prisoner denied all the Facts he was charged with; and the Attorney General affirmed them, joined Issue, and prayed a Jury.

Ford desired to have a Copy of the Suggestion; but the Court, who told him he might hear it read again, refused to grant this.

A *Venire* was awarded; and it was agreed *Per Cur.* that the Proceedings in this Case should be in the same Manner as in Gaol Delivery.

In the next Term the Prisoner was brought to the Bar; and a Jury sworn well and truly to try the several Issues joined between our Sovereign Lord the King and *John Harvey*, and a true Verdict to give according to the Evidence.

After Divers of the Facts averred had been proved, the Undersheriff of *Suffolk* proved the proclaiming the Order of Council at *Ipswich*, a Market Town, where the Prisoner was accustomed to come frequently; but he said that there were eight other Market Towns nearer to *Benacre* than *Ipswich*. It was also proved, that the said Order was proclaimed at *Leostoff*, a Market Town within five Miles of *Benacre*; and at *Hadley* another Market Town in which the Prisoner lived.

To this Evidence *Ford* demurred; and said this was not a Proclamation within the Meaning of the Act, which says, that the Proclamation shall be made in two Market Towns near the Place where the Offence was committed. Now *Hadley* is forty-two Miles distant from thence, and *Ipswich* thirty-three; and it appears, from the Evidence of the Under-

Undersheriff, that there are several Market Towns much nearer to *Benacre*.

The Counsel for the Crown answered, that the Word *near* is in this, as in many other Acts of Parliament, directory only; that the Intention of the Act is nothing more than that the Proclamation should, at the Discretion of the Sheriff, be made where the Party is most likely to hear of it; and that this Intention has in the present Case been fully complied with. If by the Word *near* had been meant a Place than which none is nearer, the Legislature would not have made Use of this Word, but of the Word *next*; which might for several Reasons have been inconvenient, and seems with Design to have been avoided. This is a Matter of Fact of which the Jury are the proper Judges.

Ford in Reply said, that although *near* was not intended to mean the same Thing as the Word *next*, it by no means follows that Towns at the Distance of forty Miles are *near*; and especially if, as in this Case, there are eight Market Towns nearer; and that this was not a Matter proper to be left to the Jury.

Lee, Ch. J. If this Man has been guilty of any Offence within this Act, he was not under a Necessity of surrendering himself upon these Proclamations.

Wright, J. All the Directions in this Act are very express, and nothing is left to Discretion; it would be of dangerous Consequence to leave Matters of this Sort to the Discretion of a Sheriff, and then enquire if he had acted fraudulently or not.

Dennison, J. No Rule of Law is more certain, than that in Capital Cases the Words of an Act of Parliament ought to be strictly complied with. In the Case of the *King* and *Fletcher* a Smuggler, before smuggling was made a Capital Offence, it was held that an Act which creates a new Felony must always be construed literally and strictly. I agree that this Act does not intend to fix it at the very next Market Town; but it plainly intends it should be near the Place where the Offence was committed, and not at the Distance of thirty or forty Miles.

Foster, J. The Undersheriff in this Case seems to have acted uprightly, and with a good Intention: But the Act has not in fact been complied with; for, although the Word *near* does not import the same rigid Exactness as the Word *next*, it certainly excludes the Distance of thirty or forty Miles, when there are so many Market Towns which are much nearer.

The Jury were directed by the Court, with Consent of Counsel on both Sides, to find all the Issues for the Crown, except that in which it was averred, that the Proclamation was made in two Market Towns near the Place where the Offence was committed, and to find that for the Defendant.

Afterwards the Prisoner was, at the Prayer of the Attorney General, remanded to be tried for the principal Offence.

Sodomy.

SODOMY, so called from the Prevalence of this Vice in the City of *Sodom*, is an unnatural Copulation betwixt two human Creatures, or betwixt an human and a brute Creature.

The Word *Buggery*, by which Name this Offence is also known, is derived from the *Italian* Word *Bugiare*, which signifies to pierce a Hole through.

If any Crime deserves to be punished in a more exemplary Manner, this does. Other Offences are prejudicial to Society; but this strikes at the Being thereof: For it is seldom known that Persons, who have been once guilty of so unnatural an Abuse of the generative Faculties, are afterwards instrumental in the Propagation of their Species.

From that Indifference to Women, so remarkable in Men of this depraved Appetite, it may fairly be concluded, that they are cursed, by Heaven, with an Insensibility to the most exquisite, and most extatick Pleasure, which human Nature is, in the present State, capable of enjoying.

It seems a very just Punishment, that such Wretches should be deprived of all Taste for an Enjoyment, upon which they did not set a proper Value; and the Continuation of so impious a Disposition, that might have transmitted to their Issue, is thereby prevented.

By the Levitical Law not only the Man or Woman, guilty of Bestiality, was to suffer Death; but the Beast was also put to Death. This is not supposed to have been done because the Beast had offended, but for the following Reasons; that the seeing such a Beast might not incite in some other Person the like foul Passion; that the Beast should not, by remaining alive keep up the scandalous Remembrance of the human Offender, who had suffered; and that the Beast might not, as is often the Case, bring forth some Monster, the Sight of which would be offensive and hateful to all good Men. A fourth Reason, and perhaps a better one than any of these, is added in a Note upon the Passage. This is, that the divine Author of the Levitical Law, to make Mankind sensible how detestable this Crime is to him, would have every thing destroyed, which had any way contributed to the commission thereof.

The Copulation of Asses with Mares, by which Mules are produced, is said, by *St. Ambrose*, to be forbidden, not on the Account of any Guilt the Beasts contract by such Practices, but because Men are forbidden to procure such unnatural Mixture.

It will here be proper to show,

- (A) What constitutes this Offence.
- (B) In what Manner it is to be punished.

(A) What constitutes this Offence.

- ¹ *Hawk.* 6. IT is said, and in a Book of good Authority, that, as every Indictment for this Offence must contain the Words *Rem Veneream habuit et carnaliter cognovit*, Emission as well as Penetration must be proved; and that the Former is *prima facie* Evidence of the Latter.
- Wherever there is a Penetration, the Probability is that there is also an Emission; but the former may be without the Latter: And it may be easily conceived, that it would in many Cases be very difficult if not impossible to prove an Emission where it has in fact been. It is very true that Emission is in some Cases Evidence of Penetration; but it must be allowed that the one may be, and frequently is, without the other. It seems then, with Deference to so great an Authority, a little strange to make any Fact essential to a Crime, of which the more substantial Part may be committed without it; and it is perhaps unreasonable to rely upon the Proof of that subordinate Fact as Evidence of the principal one, when the one may very well exist without the other.
- ³ *Inst.* 59.
¹ *H. H. P. C.* 628. Besides that the Reason of the Thing and the Necessity of the Case speak strongly against what is advanced by Mr. Serjeant *Hawkins*, it is laid down by those two great Lawyers *Coke* and *Hale*, that the least Penetration maketh a Buggery, although there be no *Emissio feminis*.
- ³ *Inst.* 59.
¹ *H. H. P. C.* 670. The Patient as well as the Agent is guilty of Felony, unless he be within the Age of Discretion.
- ³ *Inst.* 59.
¹ *H. H. P. C.* 670. Although this Offence can be committed by one Person only; yet if any other is present abetting and aiding to do the Act, he is also a principal.
- ³ *Inst.* 59.
¹ *H. H. P. C.* 670. An Accessary may be in this Crime, both before and after the Commission thereof.

(B) In what Manner it is to be punished.

- OUR ancient Authors agree that the Punishment for this Offence was Death; but they differ as to the Mode of inflicting it.
- Britt. Lib.* 1. c. 9. According to *Britton* a Sodomite was to be burnt.
- Flet. Lib.* 6. c. 35. In *Fleta* it is said, *pecorantes et sodomite in terra vivi confodiantur*.
- Mirr.* c. 4. f. 14. With this last agrees the *Mirror*; and it is added, *issent que Memoire seont restraine, pur le grand abomination del fait*.
- ³ *Inst.* 58. About the Time of *Richard* the First, the Practice was to hang a Man and drown a Woman guilty of this Offence.
- ²⁵ *H. 8.* c. 6.
⁵ *Eliz.* c. 17. As the Law now stands, it is Felony without Benefit of Clergy; and the Judgment is, as in other Felonies, to be hanged by the Neck till the Party is dead.

Soldiers.

A SOLDIER, so called from the *German* Word *Sold* or *Sould*, which signifies a Stipend, is a Man hired for Pay to serve in War.

The antient Method of retaining Soldiers was thus. A Knight ¹ *Inft.* 71. a. or Esquire of the County, who had Revenues, Farmers and Tenants, would covenant with the King, by Indenture inrolled in the Exchequer, to serve him, for such a Term, with so many Men, especially named in a List, in his War.

There are Regulations concerning Soldiers in divers ancient Statutes; but ¹⁸ *H.* 6. as these were adapted to the way of retaining Soldiers just now mentioned, ^{c. 18. c. 19.} ⁷ *H.* 7. c. 1. which has for many Years been disused, it would be mispending Time to ³ *H.* 8. c. 5. give an Account of them. ² & ³ *E.* 6.

c. 2. 4 & 5 *P.* & *M.* c. 3.

The Regulations as to Soldiers, at this Time observed, depend upon a few Modern Acts of Parliament, and principally upon one, which is from Year to Year passed, intituled, *An Act for punishing Mutiny and Desertion; and for the better Payment of the Army and their Quarters.*

Such of these, as are of more general Use to be known, shall be treated of in the following Order,

- (A) Of inflicting Pen.
- (B) In what Cases Soldiers are free from Arrest.
- (C) Of the quartering of Soldiers.
- (D) How Carriages for the Use of his Majesty's Forces are to be furnished.
- (E) Of Desertion.
- (F) Of the Punishments to which Soldiers are liable by martial Law.
- (G) Of the Civil Punishments to which Soldiers are liable.
- (H) Of the Liberty given to discharged Soldiers of exercising Trades.
- (I) Of divers Things not properly reducible under any of the foregoing Heads.

I

(A) Of

(A) Of inlisting Men.

A Person in-
listing may
dissent within
twenty-four
Hours.

BY the 30 G. 2. c. 6. par. 69. it is enacted, " That when and as often
" as any Person or Persons shall be inlisted as a Soldier or Soldiers in
" his Majesty's Land Service, he or they shall, within four Days, but not
" sooner than twenty-four Hours, after such inlisting respectively, be car-
" ried before the next Justice of the Peace of any County, Riding, City
" or Place, or chief Magistrate of any City or Town Corporate, not being
" an Officer of the Army, and before such Justice or chief Magistrate, he
" or they shall be at Liberty to declare his or their Dissent to such inlisting;
" and upon such Declaration, and returning the inlisting Money, and also
" each Person so dissenting paying the Sum of twenty Shillings for the
" Charges expended or laid out upon him, such Person or Persons so in-
" listed shall be forthwith discharged and set at Liberty, in the Presence of
" such Justice or chief Magistrate; but if such Person or Persons shall re-
" fuse or neglect, within the Space of twenty-four Hours, to return and
" pay such Money as aforesaid, he or they shall be deemed and taken to
" be inlisted, as if he or they had given his or their Assent thereto before
" such Justice or chief Magistrate; or if such Person or Persons shall de-
" clare his or their having voluntarily inlisted himself or themselves, then
" such Justice or chief Magistrate shall, and he is hereby required forthwith
" to, certify under his Hand, that such Person or Persons is or are duly inlist-
" ed, setting forth the Place of the Birth, Age and Calling, of him or them
" respectively, if known, and that the second and sixth Sections of the Ar-
" ticles of War, against Mutiny and Desertion, were read to him or them,
" and that he or they had taken the Oath mentioned in the said Articles of
" War; and if any such Person or Persons, so to be certified as duly in-
" listed, shall refuse to take the said Oath of Fidelity before the said Justice
" or chief Magistrate, it shall and may be lawful for such Officer, from
" whom he has received such Money as aforesaid, to detain and confine
" such Person or Persons, until he or they shall take the Oath before re-
" quired; and every military Officer, that shall act contrary hereto, or
" offend herein, shall incur the like Penalty and Forfeiture, as is by this
" Act to be inflicted upon any Officer for making a false and untrue
" Muster."

The second Section of the Articles of War, which is to be read to an inlisted Man, contains the following Articles.

Art. 1. " Whatsoever Officer or Soldier shall presume to use traitorous
" or disrespectful Words against the sacred Person of his Majesty, his
" Royal Highness the Prince of *Wales*, or any of the Royal Family; if
" a commissioned Officer, he shall be cashiered; if a Non-commissioned Of-
" ficer or Soldier, he shall suffer such Punishment, as shall be inflicted
" upon him by the Sentence of a Court-martial.

Art. 2. " Any Officer or Soldier, who shall behave himself with Con-
" tempt or Disrespect towards the General, or other Commander in chief
" of our Forces, or shall speak Words tending to his Hurt or Dishonour,
" shall be punished, according to the Nature of his Offence, by the Judg-
" ment of a Court-martial.

Art. 3. " Any Officer or Soldier, who shall begin, excite, cause or
" join, in any Mutiny or Desertion, in the Troop, Company or Regi-
" ment, to which he belongs, or in any other Troop or Company, in our
" Service, or on any Party, Post, Detachment or Guard, on any Pretence
" whatsoever, shall suffer Death, or such other Punishment as by a Court-
" martial shall be inflicted."

Art. 4. " Any Officer, Non-commissioned Officer or Soldier, who,
" being present at any Mutiny or Sedition, does not use his utmost En-
" deavours

“ deavours to suppress the same, or, coming to the Knowledge of any Mutiny, or intended Mutiny, does not without Delay give Information thereof to his commanding Officer, shall be punished by a Court-martial with Death, or otherwise, according to the Nature of his Offence.”

Art. 5. “ Any Officer or Soldier, who shall strike his superior Officer, or offer to draw, or shall lift up any Weapon, or offer any Violence against him, being in the Execution of his Office, on any Pretence whatsoever, or shall disobey any lawful Command of his superior Officer, shall suffer Death or such other Punishment as shall, according to the Nature of his Offence, be inflicted upon him by the Sentence of a Court-martial.”

The sixth Section of the Articles of War, which is also to be read to an enlisted Man, contains the following Articles.

Art. 1. “ All Officers and Soldiers, who, having received Pay, or having been duly enlisted in our Service, shall be convicted of having deserted the same, shall suffer Death, or such other Punishment as by a Court-martial shall be inflicted.”

Art. 2. “ Any Non-commissioned Officer or Soldier, who shall, without Leave from his commanding Officer, absent himself from his Troop or Company, or from any Detachment with which he shall be commanded, shall, upon being convicted thereof, be punished, according to the Nature of his Offence, at the Discretion of a Court-martial.”

Art. 3. “ No Non-commissioned Officer or Soldier shall enlist himself in any other Regiment, Troop or Company, without a regular Discharge from the Regiment, Troop or Company, in which he last served, on the Penalty of being reputed a Defeater, and suffering accordingly. And in Case any Officer shall knowingly receive and entertain such Non-commissioned Officer or Soldier, or shall not, after his being discovered to be a Defeater, immediately confine him, and give Notice thereof to the Corps in which he last served, he the said Officer so offending shall by a Court-martial be cashiered.”

Art. 4. “ Whatsoever Officer or Soldier shall be convicted of having advised, or persuaded, any other Officer or Soldier to desert our Service, shall suffer such Punishment as shall be inflicted upon him by the Sentence of a Court-martial.”

The Oath, which is to be administered to an enlisted Man, is in these Words.

“ I swear to be true to our Sovereign King *George*, and to serve him honestly and faithfully, in Defence of his Person, Crown and Dignity, against all his Enemies and Opposers whatsoever: And to observe and obey his Majesty's Orders, and the Orders of the Generals and Officers set over me by his Majesty.”

By the 30 G. 2. c. 11. intituled, *An Act for the Regulation of his Majesty's Marine Forces while on Shore*, the same Provisions are made as to the enlisting Men to serve as Marines, as in the Paragraph now cited are made for the enlisting Men to serve as Soldiers; and it may once for all be observed, that the same Regulations, as to their being free from Arrests, their Quarters, their being subject to military Punishments, and many other Things, are made by this Act for Marines, as are made by the Mutiny Act for Soldiers.

By 30 G. 2. c. 6. *par.* 70. it is enacted, “ That if any Person or Persons shall receive the enlisting Money from any Officer, knowing it to be such, and shall abscond, or refuse to go before such Justice or chief Magistrate in order to declare his Assent or Dissent as aforesaid, such Person or Persons shall be deemed and taken to be enlisted, to all Intents and Purposes whatsoever, and shall and may be proceeded against, as if he or they had taken the Oath directed by the said Articles of War, to be taken before such Justice or chief Magistrate.”

The same Regulations made for Marines as for Soldiers.

A Person absconding after taking enlisting Money to be deemed enlisted.

MS. Rep. Parker an Apprentice, who had enlisted without the Consent of his
Rex and Par- Master, being brought up by a Habeas Corpus, the Court of King's Bench
ker, Easter ordered him to be discharged.
 31 G. 2.

(B) In what Cases Soldiers are free from Arrest.

A Soldier list-
 ing as Volun-
 teer not to be
 arrested unless
 for some Crime
 or a Debt of
 ten Pound.

BY 30 G. 2. c. 6. *par.* 64. In order to prevent, as far as may be, any unjust or fraudulent Arrests that may be made upon Soldiers, whereby his Majesty and the Publick may be deprived of their Service, it is enacted, “ That no Person whatsoever, who is or shall be listed, or shall list and enter himself as a Volunteer in his Majesty’s Service, as a Soldier, either in the Kingdom of *Great Britain* or *Ireland*, or in *Jersey*, *Guernsey*, *Alderney* or *Sark*, or the Islands thereto belonging, or in any of his Majesty’s Plantations, during the Continuance of this Act, shall be liable to be taken out of his Majesty’s Service by any Process or Execution whatsoever, other than for some criminal Matter, unless for a real Debt or other just Cause of Action, and unless, before the taking out of such Process or Execution, not being for a criminal Matter, the Plaintiff or Plaintiffs therein, or some other Person or Persons on his or their Behalf, shall make Affidavit before one or more Judge or Judges of the Court of Record, or other Court, out of which such Process or Execution shall issue, or before some Person authorized to take Affidavits in such Court, that to his or their Knowledge the original Sum, justly due and owing to the Plaintiff or Plaintiffs from the Defendant or Defendants, in the Action, or Cause of Action, on which Process shall issue, or the original Debt for which such Execution shall be issued out, amounts to the Value of ten Pounds at least, over and above all Costs of Suit in the same Action, or in any other Action on which the same shall be grounded; a Memorandum of which Oath shall be marked on the Back of such Process, for which Oath or Memorandum no fee shall be taken; and if any Person shall nevertheless be arrested contrary to the Intent of this Act, it shall and may be lawful for one or more Judge or Judges of such Court, upon Complaint thereof made by the Party himself, or by any his superior Officer, to examine into the same by Oath of the Parties or otherwise, and, by Warrant under his or their Hands and Seals, to discharge such Soldier, so arrested contrary to the Intent of this Act, without paying any Fee or Fees, upon due Proof made before him or them, that such Soldier, so arrested, was legally listed as a Soldier in his Majesty’s Service, and arrested contrary to the Intent of this Act, and also to award to the Party so complaining such Costs, as such Judge or Judges shall think reasonable: For the Recovery whereof, he shall have the like Remedy that the Person who takes out the said Execution might have had for his Costs, or the Plaintiff in the like Action might have had for the Recovery of his Costs, in case Judgment had been given for him with Costs against the Defendant in the said Action.”

But Execution may be had against the Goods of a Soldier.

But by *par.* 65. To the End that honest Creditors, who aim only at the Recovery of just Debts due to them from Persons entered into, and listed in, his Majesty’s Service, may not be hindered from suing for the same, but on the contrary may be assisted and forwarded in their Suits; and instead of an Arrest, which may at once hurt the Service, and Occasion a great Expence and Delay to themselves, may be enabled to proceed in a more speedy and cheap Method, it is enacted, “ That it shall and may be

“ lawful

“ lawful to or for any Plaintiff or Plaintiffs, upon Notice first given in Writing of the Cause of Action to such Person or Persons so listed, or left at his or their last Place of Residence before such listing, to file a common Appearance in any Action to be brought for or upon Account of any Debt whatsoever, so as to entitle such Plaintiff to proceed therein to Judgment or Outlawry, and to have an Execution thereupon, other than against the Body or Bodies of him or them so listed as aforesaid, this Act, or any Thing herein, or any former Law or Statute to the contrary notwithstanding.”

This Exemption from being arrested, except for criminal Matter or a Debt of ten Pound, extended formerly only to Volunteers. But by the 30 G. 2. *Impressed Soldier not to be arrested but for a criminal Matter.* c. 8. par. 20. it is enacted, “ That the Commissioners, present at a Meeting for listing Soldiers as in this Act is before directed, shall cause the second and sixth Sections of the Articles of War, against Mutiny and Desertion, to be read to the Men impressed by virtue of this Act, and from and after the reading the said Articles of War, every Man so impressed shall be deemed a listed Soldier to all Intents and Purposes, and shall not be liable to be taken out of his Majesty’s Service by any Process, other than for some criminal Matter.”

To a *Latitat* issued to arrest a Man, the Sheriff returned that he was listed according to the Act of the 4 & 5 Anne, c. 10. *et ea Occasione capere non possum.* It was hereupon insisted that the Sheriff ought to have arrested the Defendant, and that then he might have been discharged by a Judge, on common Bail, if he was regularly listed, but that the Sheriff was not to take upon him to determine as to the Regularity of his being listed. The Court upon Consideration held this to be a good Return, and that, as this Act worked by way of *Superfedeas* to any Process to be issued against Persons listed, the Sheriff, if he should arrest such a Person, would be liable to an Action for false Imprisonment. It appears from the Clause, by which the Plaintiff is enabled to file common Bail and proceed to Judgment against the Defendant, that it is not the Intention of the Act that a Soldier should be liable to be arrested and discharged on common Bail. If the Man was not regularly listed, the Plaintiff has his Remedy by Action against the Sheriff for a false Return. *Ld. Raym. 1246. Sheriff of Middlesex’s Case.*

A Soldier being in Custody on a Writ *De Excommunicato Capiendo*, for Non-payment of Cofts in a Suit for Tithes in a Court Christian, he was ordered by the Court of King’s Bench to be discharged as being within the Reason of the Mutiny Act. *11 Mod. 191. Anon. Mich. 7 Anne.*

But as the Words in this Act were, at that Time, *that any Person who voluntarily lists himself shall not be taken out of his Majesty’s Service by any Process whatsoever*, it was formerly held, by the Court of King’s Bench, that only mesne Process was intended, and that a Soldier might be taken in Execution: It appears however from what fell from *Holt*, Ch. J. that the Court of Common Pleas had been of a contrary Opinion. *11 Mod. 234. Mascall and Darvys, Trin. 8 Anne. ibid. 252.*

To remove all Doubt as to this, the Words now constantly inserted in the Mutiny Act are *that no Person listed as a Volunteer in his Majesty’s Service, as a Soldier, shall be liable to be taken out of his Majesty’s Service by any Process or Execution whatsoever, other than for some criminal Matter unless for a real Debt, &c.* *30 G. 2. c. 6. f. 64.*

The Construction however once was, that, if more than ten Pound had been recovered by a Judgment for Damages and Cofts, in an Action for a Debt under ten Pound, and a second Action is brought upon this Judgment, a Soldier shall not be discharged upon common Bail; the Court being of Opinion that, as the Debt, which they were to consider, was the Sum recovered by the Judgment, the Defendant ought to be held to special Bail. *Barnes’s 311. Nichols and Wilder, East. 6 G. 2.*

But the Law is now otherwise; for in the last Mutiny Act and in all the Mutiny Acts for some Years past it has been provided, *that the original* *30 G. 2. c. 6. f. 64.*

nal Debt, for which Execution shall be issued, must amount to ten Pounds at least, over and above all Costs of Suit in the same Action, or in any other Action, on which the same shall be grounded.

Str. 2.
Bagley and
Jenners, 10
Mod. 346.

A Trooper, who listed on the sixteenth Day of May, was arrested on the nineteenth. Upon a Motion to discharge him on common Bail, it was said for the Plaintiff, that, as the Affidavit only went to his learning to ride, this is not doing Duty as the Act requires, but is only to qualify himself for the doing Duty. *Per Cur'*: It is doing Duty, he receives his Pay, and must be discharged on common Bail.

Str. 7.
Johnson and
Lowth, 10
Mod. 346.

Upon a Motion to discharge a Gunner in the Train of Artillery on common Bail, it was insisted for the Plaintiff, that a Gunner receives one Shilling *per* Day for his Pay, that he is appointed by Warrant, and that he is in the Nature of a Commission Officer. To this it was answered, that a Gunner is listed as common Soldiers are, and that he is liable to all the Penalties in the Mutiny Act, to which common Soldiers are liable. *Per Cur'*: We are informed that a Gunner is within the Description of a common Soldier, the extraordinary Pay is only in Consideration of the Skill requisite in his Place. He was discharged upon common Bail.

MS. Rep.
Metbuen and
Martin, Mich.
27 G. 2. in the K. B.

The Defendant a Life-Guard Man having been arrested, by a *Capias ad satisfaciendum*, in order to obtain his Liberty paid a Sum of Money.

On shewing Cause against a Rule why the said Money should not be repayed, it was insisted for the Plaintiff, that a Life-Guard Man is not to be considered as an enlisted Soldier, for that, so far from receiving any enlisting Money, he usually gives sixty Guineas or more for his Place. The Propriety of the present Application was also objected to, because it was not for the obtaining of Liberty, but to have Money repaid, which this Court has in no Instance ordered to be done.

Wright, Justice, *Lee*, Ch. J. being absent: The giving Money is not necessary to an enlisting. As he was forced to pay Money for his Liberty, the present Application to this Court is very proper.

It was ordered to stand over, till an Enquiry could be made in what Manner this Man was enlisted? Afterwards in the same Term, a Certificate being produced that he was enlisted as a private Soldier, and that the Articles of War were read to him, the Rule was made absolute.

1 Barn. 311.
Bowler and
Owen.

An Out-pensioner of *Chelsea* College having been arrested, a Question arose, whether he was intitled to his Discharge as a Soldier in his Majesty's Service? The Court held he was not; being under no military Discipline, and only subject to the Controul of the Commissioners.

(C) Of the quartering of Soldiers.

Soldiers may be quartered in Inns, Ale-houses, &c. but not in private Houses.

BY the 30 G. 2. c. 6. par. 22. After reciting, that whereas by the *Petition of Right*, in the third Year of King *Charles* the First, it is enacted and declared, that the People of this Land are not by the Laws to be burthened with the sojourning of Soldiers against their Wills; and by a Clause in an Act of Parliament, made in the one and thirtieth Year of the Reign of King *Charles* the Second, it is declared and enacted, that no Officer, Civil or Military, nor other Person whatsoever, should from thenceforth presume to place, quarter or billet, any Soldier or Soldiers upon any Subject or Inhabitant of this Realm, of any Degree, Quality or Profession whatsoever, without his Consent; and that it shall and may be lawful for any Subject,

Subject, Sojourner or Inhabitant, to refuse to quarter any Soldier or Soldiers, notwithstanding any Demand or Warrant, or Billeting whatsoever: But forasmuch as at this Time, and during the Continuance of this Act, there is and may be Occasion for the marching and quartering of Regiments, Troops and Companies, in several Parts of this Kingdom, it is enacted, "that for and during the Continuance of this Act, and no longer, it shall and may be lawful to and for the Constables, Tythingmen, Headboroughs, and other chief Officers and Magistrates of Cities, Towns and Villages, and other Places, within *England, Wales*, and the Town of *Berwick upon Tweed*; and in their Default or Absence, for any one Justice of the Peace inhabiting in or near any such City, Town, Village or Place, and for no others; and such Constables, and other chief Magistrates as aforesaid, are hereby required to quarter and billet the Officers and Soldiers, in his Majesty's Service, in Inns, Livery-Stables, Ale-houses, Victualling Houses, and the Houses of Sellers of Wine by Retail, to be drank in their own Houses or Places thereunto belonging, and all Houses of Persons selling Brandy, Strong Waters, Cyder or Metheglin, by Retail, to be drank in Houses, other than and except the House or Houses of any Distillers, who keep Houses or Places of distilling Brandy or Strong Waters, and the House of any Shopkeeper, whose principal Dealings shall be more in other Goods and Merchandizes, than in Brandy or Strong Waters, so as such Distillers or Shopkeepers do not permit or suffer tripling in his or their Houses, and in no other, and in no private House whatsoever; nor shall any more Billets at any Time be ordered, than there are effective Soldiers present to be quartered."

By the same *Par.* it is enacted, "That if any Constable, Tythingman, A Magistrate or such like Officer, or Magistrate, as aforesaid, shall presume to quarter or billet any Officer or Soldier in any private House, without the Consent of the Owner or Occupier, in such Case, such Owner or Occupier shall have his or their Remedy at Law, against such Magistrate or Officer for the Damage that such Owner or Occupier shall thereby sustain."

In an Action of Trespass against a Constable, for quartering a Dragoon upon the Plaintiff, it was found by a special Verdict, that the Plaintiff kept a House at *Epsom*, and let Lodgings to such as came there for the Benefit of the Air and Waters, that he dressed Meat for his Lodgers at four Pence per Joint, sold them Small Beer at two Pence per Mugg, and also found them Stable Room, Hay, and other Things for Horses, at such and such Rates. Judgment was in this Case for the Plaintiff; and by *Holt*, Ch. J. this Case is so plain that there is no Occasion for giving Reasons.

By the 30 *G. 2. c. 6. par. 22.* it is enacted, "That if any military Officer shall take upon him to quarter Soldiers otherwise than is limited and allowed by this Act, or shall use or offer any Menace or Compulsion to or upon any Mayors, Constables, or civil Officers, before mentioned, tending to deter and discourage any of them from performing any Part of their Duty hereby required, or appointed, such military Officer shall, for every such Offence, being thereof convicted, before any two or more of the next Justices of the Peace of the County, by the Oath of two credible Witnesses, be deemed and taken to be *ipso facto* cashiered, and shall be utterly disabled to have or hold any military Employment within this Kingdom, or in his Majesty's Service; provided the said Conviction be affirmed at the next Quarter-Sessions of the Peace of the said County, and a Certificate thereof be transmitted to the Judge Advocate, who is hereby required to certify the same to the next Court-martial."

By *par. 46.* it is enacted, "That if any Officer, military or civil, by this Act authorized to quarter Soldiers in any Houses hereby appointed for that Purpose, shall at any Time, during the Continuance of this Act, quarter the Wives, Children, or Men or Maid Servants, of any Officer or Soldier in any such Houses, against the Consent of the Owners, the

or Constable,
quartering Sol-
diers in private
Houses liable
to an Action.

Salk. 387.
Parkhurst and
Foster, Carth.
417.
Ld. Raym.
479.
Post. 580.

Penalty on a
Military Of-
ficer quarter-
ing Soldiers
contrary to
this Act.

Soldiers
Wives, Chil-
dren or Ser-
vants, not to
be quartered
without Con-
sent.

- “ Party offending, if an Officer of the Army, shall upon Complaint and
 “ Proof thereof made to the Commander in chief of the Army, or
 “ Judge Advocate, be *ipso facto* cashiered; and if a Constable, Tything-
 “ man, or other civil Officer, he shall forfeit to the Party aggrieved twenty
 “ Shillings, upon Complaint and Proof made thereof to the next Justice
 “ of Peace, to be levied by Warrant of such Justice, by Distress and Sale
 “ of his Goods.”
- Persons ag- By *par.* 22. it is enacted, “ That in case any Person shall find himself
 griev'd by the “ aggrieved, in that such Constable, Tythingman or Headborough, chief
 quartering of “ Officer or Magistrate, such chief Officer or Magistrate not being a Justice
 Soldiers to be “ of the Peace, has quartered or billeted in his House a greater Number
 relieved. “ of Soldiers than he ought to bear in Proportion to his Neighbours, and
 “ shall complain thereof to one or more Justice or Justices of the Peace
 “ of the Division, City or Liberty, where such Soldiers are quartered;
 “ or in case such chief Officer or Magistrate shall be a Justice of the
 “ Peace, then on Complaint made to two or more Justices of the Peace
 “ of such Division, City or Liberty, such Justices respectively shall
 “ have, and have hereby, Power to relieve such Person, by ordering
 “ such and so many of the Soldiers to be removed, and quartered
 “ upon such other Person or Persons, as they shall see Cause; and such
 “ other Person or Persons shall be obliged to receive such Soldiers ac-
 “ cordingly.”
- No Justice be- By *par.* 23. it is enacted, “ That no Justice or Justices of the Peace,
 ing a military “ having or executing any military Office or Commission in that Part of
 Officer to “ Great Britain called *England*, shall or may, during the Continuance of
 quarter the “ this Act, directly or indirectly be concerned in the quartering, billeting
 Soldiers under “ or appointing any Quarters for, any Soldier or Soldiers in the Regiment,
 his own Com- “ Troop or Company, under the immediate Command or Commands of
 mand. “ such Justice or Justices, according to the Disposition made for quartering
 “ of any Soldier or Soldiers by Virtue of this Act; but that all Warrants,
 “ Acts, Matters or Things, executed or appointed by such Justice or Justices
 “ of the Peace, for or concerning the same, shall be void, any Thing
 “ in this Act to the contrary notwithstanding.”
- Penalty on an By *par.* 26. it is enacted, “ That if any Officer shall take, or cause to
 Officer taking “ be taken, or knowingly suffer to be taken, any Money of any Person
 Money to ex- “ for excusing the quartering of Officers or Soldiers, or any of them, in
 cuse the quar- “ any House allowed by this Act, every such Officer shall be cashiered,
 tering of a “ and be incapable of serving in any military Employment what-
 Soldier. “ soever.”
- In what Man- By *par.* 28. After reciting, that some Doubts have arisen, whether com-
 ner Officers manding Officers of any Regiment, Troop or Company, may exchange
 may exchange any Men or Horses quartered in any Town or Place, with another Man
 Men or Horses or Horse quartered in the same Town or Place, for the Benefit of the Ser-
 in their Quar- vice, it is enacted, “ that such exchange as above mentioned may be made
 ters. “ by such commanding Officers respectively, provided the Number of
 “ Men and Horses do not exceed the Number at that Time billeted on
 “ such House or Houses; and the Constables, Tythingmen, Headboroughs,
 “ and other chief Officers and Magistrates of the Cities, Towns and Vil-
 “ lages, or other Places, where any Regiment, Troop or Company, shall
 “ be quartered, are hereby required to billet such Men and Horses hereby
 “ exchanged accordingly.”
- Penalty on a By *par.* 66. it is enacted, “ That if any High Constable, Constable,
 Constable for “ Bedel, or other Officer or Person whatsoever, who, by Virtue or Colour
 not quartering “ of this Act, shall quarter or billet, or be employed in quartering or
 Soldiers or for “ billeting, any Officers or Soldiers, shall neglect or refuse, for the Space
 taking Money “ of two Hours, to quarter or billet such Officers or Soldiers, when there-
 to excuse the “ unto required, in such Manner as is by this Act directed, provided
 quartering “ sufficient Notice be given before the Arrival of such Troops; or shall
 them. “ receive

“ receive, demand, contract, or agree for any Sum or Sums of Money;
 “ or any Reward whatsoever, for or on Account of excusing, or in order
 “ to excuse, any Person or Persons whatsoever from quartering or receiving
 “ into his, her or their, House or Houses; any such Officer or Soldier, and shall
 “ be thereof convicted, before any one or more Justice or Justices of Peace
 “ of the County, City or Liberty, within which such Offence shall be
 “ committed, either by his own Confession, or by the Oath of one or more
 “ credible Witness or Witnesses, which Oath the said Justice or Justices is
 “ and are hereby impowered to administer, every such High Constable,
 “ Constable, Bedel, or other Officer or Person so offending, shall forfeit,
 “ for every such Offence, the Sum of five Pounds, or any Sum of Money not
 “ exceeding five Pounds, nor less than forty Shillings, as the said Justice or
 “ Justices, before whom the Matter shall be heard, shall in his or their Discre-
 “ tion think fit, to be levied by Distress and Sale of the Goods of the Per-
 “ son offending, by Warrant under the Hand and Seal, or Hands and Seals,
 “ of such Justice or Justices, before whom such Offender shall be convicted,
 “ or one or more of them, to be directed to any other Constable within
 “ the County, City or Liberty, or to any of the Overseers of the Poor of
 “ the Parish, where the Offender shall dwell; the said Sum of five Pounds,
 “ or the said Sum not exceeding five Pounds, nor less than forty Shillings,
 “ when levied, to be paid to the Overseer of the Poor of the Parish
 “ wherein the Offence shall be committed, or to some one of them, for the
 “ Use of the Poor of the said Parish.”

By *par. 67.* it is enacted, “ That it shall and may be lawful to
 “ and for any one or more Justice or Justices of the Peace, within their
 “ respective Counties, Cities or Liberties, by Warrant or Order under
 “ his or their Hand and Seal, or Hands and Seals, at any Time or
 “ Times, during the Continuance of this Act, to require and Command
 “ any High Constable, Constable, Bedel, or other Officer, who shall quar-
 “ ter or billet any Soldiers in pursuance of this Act, to give an Account in
 “ Writing, unto the said Justice or Justices requiring the same, of the
 “ Number of Officers or Soldiers who shall be quartered or billeted by
 “ them, and also the Names of the Housekeepers or Persons upon whom
 “ every such Officer or Soldier shall be quartered or billeted, together with
 “ an Account of the Street or Place where every such House-keeper dwells,
 “ and the Signs, if any, belonging to their Houses; to the End it may
 “ appear, to the said Justice or Justices, where such Officers and Soldiers are
 “ quartered and billeted, and that he or they may be thereby the better
 “ enabled to prevent, or punish, all Abuses in the quartering or billeting of
 “ them.”

By *par. 24.* it is enacted, “ That the Officers and Soldiers, so quartered
 “ and billeted as aforesaid, shall be received and furnished with Diet and
 “ Small Beer by the Owners of the Inns, Livery Stables, Alehouses, Vic-
 “ tualling-houses, and other Houses in which they are allowed to be quar-
 “ tered and billeted by this Act, paying and allowing for the same the
 “ several Rates, herein after mentioned to be payable, out of the Subsistence
 “ Money for Diet and Small Beer.”

But by *par. 25.* it is provided, “ That in case any Innholder, or other
 “ Person, on whom any Non-commission Officers, or Soldiers, shall be
 “ quartered by Virtue of this Act, except on a March, or employed in re-
 “ cruiting, and likewise except the Recruits by them raised, for the Space
 “ of seven Days at most, for such Non-commission Officers and Soldiers
 “ who are recruiting, and Recruits by them raised, shall be desirous to fur-
 “ nish such Non-commission Officers or Soldiers with Candles, Vinegar
 “ and Salt, and with either Small Beer or Cyder, not exceeding five Pints
 “ for each Man *per Diem, gratis*, and allow to such Non-commission Of-
 “ ficers or Soldiers the Use of Fire, and the necessary Utensils for dress-
 “ ing

A Justice may
 require an Ac-
 count of the
 quartering of
 Soldiers.

Officers and
 Soldiers to be
 furnished with
 Diet and Small
 Beer in their
 Quarters.

What may be
 allowed Soldi-
 ers in the
 Room of furni-
 shing Diet
 for them.

“sing and eating their Meat, and shall give Notice of such his Desire
 “to the commanding Officer, and shall furnish and allow the same ac-
 “cordingly; then and in such Case, the Non-commission Officers and Sol-
 “diers so quartered shall provide their own Victuals.”

Penalty on a Person not receiving an Officer or Soldier quartered upon him.

By *par. 66.* it is enacted, “That if any Victualler, or any other Person, liable by this Act to have any Officer or Soldier quartered or billeted on him or her, shall refuse to receive or victual any such Officer or Soldier, so quartered or billeted upon him or her as aforesaid; or shall refuse to furnish or allow, according to the Directions of this Act, the several Things herein before respectively directed to be furnished or allowed to Non-commission Officers or Soldiers, so quartered or billeted on him or her as aforesaid; or shall neglect or refuse to furnish good and sufficient Hay and Straw for each Horse, so quartered or billeted on him or her as aforesaid, at the Rate herein before mentioned, and shall be thereof convicted, before one or more Justice or Justices of the Peace of the County, City or Liberty, within which such Offence shall be committed, either by his own Confession, or by the Oath of one or more credible Witness or Witnesses, which Oath the said Justice or Justices is and are hereby impowered to administer, every Person so offending shall forfeit, for every such Offence, the Sum of five Pounds, or any Sum of Money not exceeding five Pounds, nor less than forty Shillings, as the said Justice or Justices, before whom the Matter shall be heard, shall in his or their Discretion think fit, to be levied by Distress and Sale of the Goods of the Person offending, by Warrant under the Hand and Seal, or under the Hands and Seals, of such Justice or Justices, before whom such Offender shall be convicted, or one or more of them, to be directed to any Constable within the County, City or Liberty, or to any of the Overseers of the Poor of the Parish, where the Offender shall dwell; the said Sum of five Pounds, or the said Sum not exceeding five Pounds, nor less than forty Shillings, when levied, to be paid to the Overseers of the Poor of the Parish, wherein the Offence shall be committed, or to some one of them, for the Use of the Poor of the said Parish.”

MS. Rep.
Morton and
Cloebury and
another, Bucks,
Lent Assizes
 1757.

In an Action of Trespas against two Justices of the Peace, who had issued a Warrant for levying the Penalty upon the Plaintiff, for not receiving a Soldier billeted upon him; the Case appeared from the Evidence to be thus. A Shopkeeper, who also dealt in Spirituous Liquors, in order to intitule himself to a Licence for selling Spirituous Liquors by Retale, had a Licence as a Victualler. For the Sake of obtaining this last Licence some Beer was laid in by him, of which an Account was taken by the Excise Officer, as is done of the Stock of a Victualler; but he never sold any of this, nor acted in any Manner as a Victualler, nor suffered Spirituous Liquors to be drank in his House.

In this Case there was a Nonsuit for want of producing the Warrant of the two Justices; but *Foster, J.* who tried the Cause, said he should upon the Merits have been of Opinion, that the Plaintiff was not liable to have Soldiers quartered upon him.

By *par. 33.* that the Quarters of Officers and Soldiers in *Great Britain*, and in *Jersey, Guernsey, Alderney, and Sark*, and the Islands thereunto belonging, may hereafter be duly paid and satisfied, and his Majesty's Duties of Excise be better answered, it is enacted, “That every Officer, to whom it belongs to receive, or that does actually receive, the Pay or Subsistence Money, either for a whole Regiment, or particular Troops or Companies, or otherwise, shall immediately, upon each Receipt of every particular Sum, which shall from Time to Time be paid, returned, or come to his or their Hands, on Account of Pay or Subsistence, give publick Notice thereof to all Persons keeping Inns, or other Places, where
 “Officers

Officer receiving the Subsistence Money to pay what is due where Soldiers are quartered at certain Rates, and in Default thereof the Paymaster of the Army is to do it.

“ Officers or Soldiers are quartered by Virtue of this Act; and shall appoint
 “ the said Inn-keepers, and others, to repair to his or their Quarters at
 “ such Times as they shall appoint, for the Distribution and Payment of
 “ the said Pay or Subsistence Money to the Officers or Soldiers, which shall
 “ be within four Days at the furthest after the Receipt of the same as afore-
 “ said: And the said Inn-keepers and others shall then and there acquaint
 “ such Officer or Officers with the Accounts or Debts, if any shall be, be-
 “ tween them and the Officers and Soldiers so quartered in their respec-
 “ tive Houses; which Accounts the said Officer or Officers are hereby re-
 “ quired to accept of, and immediately pay the same, before any Part of
 “ the said Pay or Subsistence Money be distributed either to the Officers or
 “ Soldiers: Provided the said Accounts exceed not, for one Commission
 “ Officer of Horse, being under the Degree of a Captain, for such Officer’s
 “ Diet and Small Beer *per Diem* two Shillings; nor for one Commission Of-
 “ ficer of Dragoons, being under the Degree of a Captain, for such Officer’s
 “ Diet and Small Beer *per Diem* one Shilling; nor for one Commission Officer
 “ of Foot, being under the Degree of a Captain, for such Officer’s Diet and
 “ Small Beer *per Diem* one Shilling; and if such Officer shall have a Horse or
 “ Horses, for each such Horse or Horses for their Hay and Straw *per Diem*,
 “ six Pence; nor for one Light Horseman’s Diet and Small Beer *per Diem*
 “ six Pence, and Hay and Straw for his Horse *per Diem* six Pence; nor for
 “ one Dragoon’s Diet and Small Beer *per Diem* six Pence, and Hay and
 “ Straw for his Horse *per Diem* six Pence; nor for one Foot Soldier’s Diet
 “ and Small Beer *per Diem* four Pence: And if the Officer or Officers, as
 “ aforesaid, shall not give Notice, as aforesaid, and shall not immediately,
 “ upon producing such Account stated, satisfy, content and pay, the same,
 “ upon Complaint and Oath made thereof by any two Witnesses, at the
 “ next Quarter-Sessions for the County or City where such Quarters were,
 “ which Oath the Justices of the Peace at such Sessions are hereby autho-
 “ rized and required to administer, the Paymaster or Paymasters of his Ma-
 “ jesty’s Guards and Garrisons are hereby required and authorized, upon
 “ Certificate of the said Justices, before whom such Oath was made, of the
 “ Sums due upon such Accounts, and the Persons to whom the same is
 “ owing, to pay and satisfy the said Sums out of the Arrears due to the said
 “ Officer or Officers, upon Penalty that such Paymaster or Paymasters shall
 “ forfeit their respective Place or Places of Paymaster or Paymasters, and
 “ be discharged from holding the same for the future; and in case there shall
 “ be no Arrears due to the said Officer or Officers, then the said Paymaster
 “ or Paymasters are hereby authorized and required to deduct the Sums he
 “ or they shall pay, pursuant to the Certificate of the said Justices, out
 “ of the next Pay or Subsistence Money of the Regiment to which such
 “ Officer or Officers shall belong; and such Officer or Officers shall, for
 “ every such Offence, or for neglecting to give Notice of the Receipt of
 “ such Pay or Subsistence Money as aforesaid, be deemed or taken, and
 “ are hereby declared *ipso facto* cashiered. And where it shall happen,
 “ that the Subsistence Money due to any Officer or Soldier shall, by Occa-
 “ sion of any Accident, not be paid to such Officer or Soldier, or such
 “ Officer or Soldier shall neglect to pay the same, so that Quarters cannot
 “ be or are not paid, as this Act directs; and where any Horse, Foot or
 “ Dragoons, shall be upon their March, so that no Subsistence can then
 “ be remitted to them, to make Payment as this Act directs, or they
 “ shall neglect to pay the same; in every such Case it is hereby further
 “ enacted, that every such Officer shall, before his or their Departure out
 “ of their Quarters, where such Regiment, Troop or Company, shall re-
 “ main for any Time whatsoever, make up the Accounts, as this Act
 “ directs, with every Person with whom such Regiment, Troop or Com-
 “ pany, have quartered, and sign a Certificate thereof, and give the said
 “ Certificate by him so signed to the Party to whom such Money is due,
 “ with

“ with the Name of such Regiment, Troop or Company, to which he or
 “ they shall belong; to the End the said Certificate may be forthwith
 “ transmitted to the Paymaster of his Majesty’s Guards and Garrisons,
 “ who is hereby required immediately to make Payment thereof to the Per-
 “ son or Persons to whom such Monies shall be due, to the End the
 “ same may be applied to such Regiment, Troop or Company, respective-
 “ ly, under Pain as is in this Act before directed for Non-payment of
 “ Quarters.”

Officers and
 Soldiers to be
 quartered in
Scotland, as
 they were
 quartered be-
 fore the Union.

By *par. 30.* it is enacted, “ That it shall and may be lawful to quarter
 “ Officers and Soldiers in *Scotland*, in such and the like Places and Houses as
 “ they might have been quartered in, by the Laws in Force in *Scotland*, at
 “ the Time of the Union; and that the Possessors of such Houses shall
 “ only be liable to furnish the said Officers and Soldiers quartered there, as
 “ by the said Laws in Force at the Time of the Union was provided; and
 “ that no Officer shall be obliged to pay for his Lodging, where he shall
 “ be regularly billeted, except in the Suburbs of *Edinburgh*.”

Soldiers to be
 removed, if
 quartered in a
 Place where
 an Election for
 a Member of
 Parliament is
 to be made.

By the 8 *G. 2. c. 30. par. 1.* After reciting, that by the ancient common
 Law of this Land all Elections ought to be free; and that by an Act passed
 in the third Year of the Reign of King *Edward* the First, of famous Me-
 mory, it is commanded, upon great Forfeiture, that no Man by Force of
 Arms, nor by Malice or Menacing, shall disturb any to make free Elec-
 tion; and that the Freedom of Elections, of Members to serve in Parlia-
 ment, is of the utmost Consequence to the Preservation of the Rights and
 Liberties of this Kingdom; and that it hath been the Usage and Practice
 to cause any Regiment, Troop or Company, or any Number of Soldiers,
 which hath been quartered in any City, Borough, Town or Place, where
 any Election of Members to serve in Parliament hath been appointed to
 be made, to remove and continue out of the same during the Time of such
 Election, except in such particular Cases as are herein after specified, to the
 End that the said Usage and Practice may be settled and established for the
 future, it is enacted, “ That when and as often as any Election of any Peer
 “ or Peers to represent the Peers of *Scotland* in Parliament, or of any Mem-
 “ ber or Members to serve in Parliament, shall be appointed to be made,
 “ the Secretary at War for the Time being, or in case there shall be no
 “ Secretary at War, then such Person who shall officiate in the Place of
 “ the Secretary at War, shall and is hereby required, at some convenient
 “ Time before the Day appointed for such Election, to issue and send forth
 “ proper Orders, in Writing, for the Removal of every such Regiment,
 “ Troop or Company, or other Number of Soldiers, as shall be quartered
 “ or billeted in any such City, Borough, Town or Place, where such Elec-
 “ tion shall be appointed to be made, out of every such City, Borough,
 “ Town or Place, one Day at the least before the Day appointed for such
 “ Election, to the Distance of two or more Miles from such City, Bo-
 “ rough, Town or Place, and not to make any nearer Approach to such
 “ City, Borough, Town or Place, as aforesaid, until one Day at the least
 “ after the Poll, to be taken at such Election, shall be ended and the Poll
 “ Books closed.”

Penalty on a
 Secretary at
 War not remo-
 ving Soldiers
 so quartered.

By *par. 2.* it is enacted, “ That in case the Secretary at War for the
 “ Time being, or such Person who shall officiate in the Place of the Secre-
 “ tary at War, shall neglect or omit to issue or send forth such Orders as
 “ aforesaid, according to the true Intent and Meaning of this Act, and shall
 “ be thereof lawfully convicted, upon any Indictment to be presented at
 “ the next Assizes, or Sessions of Oyer and Terminer, to be held for the
 “ County where such Offence shall be committed, or on an Information to
 “ be exhibited in the Court of King’s Bench, within six Months after such
 “ Offence committed, such Secretary at War, or Person who shall officiate
 “ in the Place of the Secretary of War, shall for such Offence be discharged
 “ from their said respective Offices, and shall from thenceforth be utterly
 “ disabled

“ disabled, and made incapable to hold any Office or Employment, civil or
 “ military, in his Majesty’s Service.”

But by *par. 5.* it is provided, “ That the Secretary at War, or such The Secretary at War is not to incur the Penalty, unless he has Notice of the issuing of the Writ.
 “ Person who shall officiate in the Place of the Secretary at War, shall not
 “ be liable to any Forfeiture or Incapacity for not sending such Order, as
 “ aforefaid, upon any Election to be made of a Member to serve in Parlia-
 “ ment, on a Vacancy of any Seat there, unless Notice, of the making out
 “ any new Writ for such Election, shall be given to him by the Clerk of
 “ the Crown in Chancery, or other Officer making out any new Writ for
 “ such Election, which Notice he is hereby directed and required to give
 “ with all convenient Speed after the making out the said Writ.”

By *par. 3.* it is provided, “ That nothing in this Act contained shall ex- This Act is not to extend to any Place, where any of the Royal Family resides, nor to any Garrison.
 “ tend, or be construed to extend, to the City and Liberty of *Westminster*,
 “ or the Borough of *Southwark*, for or in Respect of the Guards of his
 “ Majesty, his Heirs or Successors, nor to any City, Borough, Town or
 “ Place, where his Majesty, his Heirs or Successors, or any of his Royal
 “ Family, shall happen to be or reside at the Time of any such Election as
 “ aforefaid, for or in Respect of such Number of Troops or Soldiers only,
 “ as shall be attendant as Guards to his Majesty, his Heirs or Successors, or
 “ to such other Person of the Royal Family as is aforefaid; nor to any
 “ Castle, Fort or fortified Place, where any Garrison is usually kept, for
 “ or in Respect of such Number of Troops or Soldiers only, whereof such
 “ Garrison is composed.”

By *par. 4.* it is provided, “ That nothing in this Act shall extend, or be Nor to any Soldier, who has a Right to Vote at such Election.
 “ construed to extend, to any Officer or Soldier, who shall have a Right to
 “ Vote at any such Election as aforefaid, but that every such Officer and
 “ Soldier may freely, and without Interruption, attend and give his Vote at
 “ such Election, any Thing herein before contained to the contrary not-
 “ withstanding.”

(D) How Carriages for the Use of his Majesty’s Forces are to be furnished.

BY the 30 G. 2. c. 6. *par. 40.* it is enacted, “ That for the better and Justices to order Constables to provide Carriages.
 “ more regular Provision of Carriages for his Majesty’s Forces, in their
 “ Marches, or for their Arms, Clothes and Accoutrements, in *England*,
 “ *Wales*, and the Town of *Berwick upon Tweed*, all Justices of the Peace,
 “ within their several Counties, Ridings, Divisions, Shires, Liberties and
 “ Precincts, being duly required thereunto by an Order from his Majesty,
 “ or the General of his Forces, or the Master General, or Lieutenant Ge-
 “ neral of his Majesty’s Ordinance, shall, as often as such Order is brought
 “ and shewn unto one or more of them, by the Quarter Master, Adjutant
 “ or other Officer, of the Regiment, Detachment, Troop or Company, so
 “ ordered to march, issue out his or their Warrants to the Constables or
 “ Perty Constables of the Division, Riding, City, Liberty, Hundred and
 “ Precinct, from, through, near or to which such Regiment, Detachment,
 “ Troop or Company, shall be ordered to march, requiring them to make
 “ such Provision for Carriages, with able Men to drive the same, as is men-
 “ tioned in the said Warrant, allowing them sufficient Time to do the
 “ same, that the neighbouring Parts may not always bear the Burthen;
 “ and in case sufficient Carriages cannot be provided within any such Li-
 “ berty, Division or Precinct, then the next Justice or Justices of the
 “ County, Riding or Division, shall, upon such Order as aforefaid, being
 “ brought

“ brought and shewn to one or more of them, by any of the Officers afore-
 “ said, issue his or their Warrants to the Constables or Petty Constables of
 “ such next County, Riding, Liberty, Division or Precinct, for the Pur-
 “ poses aforesaid, to make good such Deficiency: And the aforesaid Officer
 “ or Officers, who, by Virtue of the aforesaid Warrant from the Justices
 “ of the Peace, are to demand the Carriage or Carriages, therein mentioned,
 “ of the Constable or Petty Constables to whom the Warrant is directed, is
 “ and are hereby required, at the same Time, to pay down in Hand to the
 “ said Constable or Petty Constable, for the Use of the Person who shall
 “ provide such Carriages and Men, the Sum of one Shilling for every Mile
 “ any Waggon with five Horses shall travel; and the Sum of one Shilling
 “ for every Mile any Wain with six Oxen, or four Oxen and two Horses,
 “ shall travel; and the Sum of nine Pence for every Mile any Cart with
 “ four Horses shall travel; and so in Proportion for less Carriages; for
 “ which respective Sums so received, the said Constable or Petty Constable
 “ is hereby required to give a Receipt, in Writing, to the Person or Persons
 “ paying the same: And such Constable or Petty Constable shall order and
 “ appoint such Person or Persons, having Carriages within their respective
 “ Liberties, as they shall think proper, to provide and furnish such Carriages
 “ and Men accordingly.”

Carriages to be provided in Scotland, as they were provided before the Union. By *par.* 45. it is enacted, “ That the Carriages for the Services of the Forces, from Time to Time quartered or marching in *Scotland*, shall be provided in like Manner, and at the Rates, and the Furnisher of such Carriages shall be paid, as was directed by the Law in Force in *Scotland* at the Time of the Union.”

Penalty on an Officer forcing a Carriage to go more than one Day's Journey, or suffering Women and others to ride, or demanding Saddle Horses to be provided. By *par.* 40. it is enacted, “ That if any military Officer or Officers, for the Use of whose Troop or Company the Carriages were provided, shall force and constrain any Waggon, Wain, Cart or Carriage, to travel more than one Day's Journey; or shall not discharge the same in due Time for their Return home; or shall suffer any Soldier or Servant, except such as are sick, or any Woman, to ride on the Waggon, Wain, Cart or Carriage as aforesaid; or shall force any Constable or Petty Constables, by Threatnings or menacing Words, to provide Saddle Horses for themselves or Servants; or shall force Horses from the Owners, by themselves, Servants or Soldiers; every such Officer, for every such Offence, shall forfeit the Sum of five Pounds; Proof thereof being made upon Oath, before two of his Majesty's Justices of the Peace of the same County or Riding, who are to certify the same to the Paymaster General, or other respective Paymaster of his Majesty's Forces, who is hereby required to pay the aforesaid Sum of five Pounds, according to the Order and Appointment under the Hands and Seals of the aforesaid Justices of the Peace of the same County or Riding.”

No Carriage is obliged to carry more than twenty hundred Weight. By *par.* 44. it is enacted, “ That no Waggon, Wain, Cart or Carriage, impressed by the Authority of this Act, shall be liable or obliged, by Virtue of this Act, to carry above twenty hundred Weight, any Thing in this Act contained to the contrary notwithstanding.”

Penalty on a Constable not appointing, or on Persons appointed not providing Carriages, and on Persons obstructing the providing of Carriages. By *par.* 41. it is enacted, “ That if any High Constable, or Petty Constable, shall wilfully neglect or refuse to execute such Warrants of the Justices of the Peace, as shall be directed unto them for providing Carriages as aforesaid; or if any Person or Persons, appointed by such High Constable or Petty Constable to provide or furnish any Carriage and Man, shall refuse or neglect to provide the same; or any other Person or Persons whatsoever shall wilfully do any Act or Thing, whereby the Execution of the said Warrants shall be hindered or frustrated; every such Constable, or other Person or Persons, so offending shall, for every such Offence, forfeit any Sum not exceeding forty Shillings, nor less than twenty Shillings, to the Use of the Poor of the Parish where any such Offence shall be committed: And all and every such Offence and Offences

“ shall and may be enquired of, heard and fully determined, by two of his Majesty’s Justices of the Peace, dwelling in or near the Place where such Offence shall be committed, who have hereby Power to cause the said Penalty to be levied by Distress and Sale of the Offenders Goods.”

By *par.* 42. After reciting, that the respective Sums of Money, by this Act appointed to be paid to the Constable, by the Officers demanding such Carriages, are not, in many Cases, sufficient to answer the Charge and Expence of providing the same, in so much that the said Constable is frequently at great Charges, over and above what is received by him of the said Officers, to the great Burthen of the Township of which he is Constable, or else the Persons performing such Carriages are grievously oppressed: For Remedy whereof, and that the said Overplus Charge may be born by each County or Riding, at the general Charge of such County or Riding, it is enacted, “ That the Treasurer or Treasurers of each respective County or Riding shall, without Fee or Reward, pay unto such Constable all and every such reasonable Sum or Sums of Money, so by him paid or laid out for such Carriages; over and above what was, or ought to have been, paid by the Officer requiring such Carriages; out of the publick Stock of such County or Riding, according to such Rates, Orders, Rules and Directions, as the said Justices of the Peace, in their Quarter-Sessions assembled, within their respective Jurisdictions, shall from Time to Time, during the Continuance of this Act, make, direct and appoint, which Orders shall be made without Fee or Reward, Regard being always had to the Season of the Year, and the Length and Condition of the Ways by and through which such Carriages are to travel.”

If the Sum ordered to be paid by the military Officer is insufficient to defray the Expence of Carriages, the Surplus is to be paid out of the County Treasury.

The Court granted a *Mandamus* on the 1 G. 1. c. 34. directed to the Justices of the Peace, to allow the Defendants, being Constables, their extraordinary Charges in providing Carriages on the late Expedition into *Scotland*.

Str. 42.
Rex and Hunt
and another,
Hil. 3 G. 1.

It seems as if the Treasurer of the County refused to pay this Money to the Constables; for, more than Year after, another *Mandamus* was granted by the Court, directed to the Justices of Peace, for them to compel the Treasurer of the County to reimburse a Constable, of the Name of *Hunt*, the extraordinary Charges he had been at in providing Carriages on the Expedition into *Scotland*.

Str. 93.
Hunt’s Case,
Easter 4 G. 1.

(E) Of Desertion.

BY the 1 G. 1. *st.* 2. c. 47. *par.* 1. After reciting, that a pernicious and dangerous Practice has been industriously carried on in these Kingdoms of Great Britain and Ireland, by Papists and other evil disposed Persons, disaffected to his Majesty’s Title and Government, under false and groundless Pretences, to delude his good Subjects, who had engaged themselves as Soldiers in the Service of his Majesty and their Country, and to prevail with them by corrupt and indirect Means to desert the same, oftentimes in order to procure their Assistance for a Popish Pretender, the avowed Enemy of the Protestant Religion and the Laws and Liberties of these Kingdoms; for which Purposes the said Papists and other evil disposed Persons have, with great Diligence, frequented the publick Houses, and other Places, where the said Soldiers used to resort, or are quartered, and, by Entertainments, seditious Speeches and vain Promises, have often seduced his Majesty’s said Subjects from their Duty and Allegiance, it is enacted, “ That if any Person or Persons whatsoever, other than such as are or shall be enlisted as Soldiers, against whom sufficient Remedy is already

Penalty on any Person persuading a Soldier to desert.

“ provided by Law, shall, by Words or other Means whatsoever, directly
 “ or indirectly, persuade or procure any Soldier or Soldiers in the Service
 “ of his Majesty, his Heirs or Successors, to desert or leave such Service,
 “ or shall go about and endeavour, in Manner aforesaid, to persuade, pre-
 “ vail on or procure, such Soldier or Soldiers to desert or leave such Service
 “ as aforesaid, every such Person or Persons so offending as aforesaid, and
 “ being thereof lawfully convicted, shall, for every such Offence, forfeit to
 “ his Majesty, his Heirs or Successors, or to any other Person or Persons
 “ who shall sue for the same, the Sum of forty Pounds, to be recovered
 “ by Bill, Plaint or Information, in any of his Majesty’s Courts of Record
 “ at *Westminster*; and if it shall happen, that any such Offender, so con-
 “ victed as aforesaid, hath not any Goods or Chattels, Lands or Tenements,
 “ to the Value of forty Pounds, to pay und satisfy the same; or that, from
 “ the Circumstances and Hainousness of the Crime, it shall be thought pro-
 “ per and convenient, the Court, before which the said Conviction shall be
 “ made as aforesaid, shall award the said Offender to Prison, there to re-
 “ main for any Time not exceeding six Months, without Bail or Mainprize,
 “ and also to stand in the Pillory, for the Space of one Hour, in some
 “ market Town next adjoining to the Place where the Offence was com-
 “ mitted, in open Market there, or in the Market Town itself where the
 “ Offence was committed.”

But by *par. 2.* it is provided, “ That no such Action shall be brought,
 “ or Prosecution carried on, by Virtue of this Act, unless the same be com-
 “ menced within six Months after the Offence is committed.”

In what Courts
 the Penalty for
 persuading a
 Soldier to de-
 sert may be
 recovered.

By the 3 *G. 1. c. 2. par. 50.* it is enacted, “ That for such Offence as
 “ shall be committed against this last cited Act, within that Part of *Great*
 “ *Britain* called *England*, the Penalties thereby enacted shall be sued for
 “ and recoverable in any of his Majesty’s Courts of Record at *Westminster*;
 “ and for such Offences against the said Act, as shall be committed in
 “ that Part of *Great Britain* called *Scotland*, the same shall be sued for and
 “ recoverable in his Majesty’s Court of Exchequer in *Scotland*; and for such
 “ Offences against the said Act, as shall be committed in *Ireland*, the
 “ same shall and may be sued for and recoverable in any of the four
 “ Courts in *Dublin*, any Thing in the said Act to the contrary thereof in
 “ any wise notwithstanding.”

A Person sus-
 pected of De-
 sertion may be
 committed to
 Prison.

By the 30 *G. 2. c. 6. par. 49.* After reciting, that Soldiers, being duly
 “ enlisted, do afterwards desert, and are often found wandering, and otherwise
 “ illegally absenting themselves from his Majesty’s Service, it is enacted,
 “ That it shall and may be lawful to and for the Constable, Headborough
 “ or Tythingman of the Town or Place, where any Person, who may reason-
 “ ably be suspected to be such a Deserter, shall be found, to apprehend
 “ or cause him to be apprehended, and to cause such Person to be brought
 “ before any Justice of the Peace, living in or near such Town or Place,
 “ who hath hereby Power to examine such suspected Person; and if, by
 “ his Confession, or the Testimony of one or more Witness or Witnesses
 “ upon Oath, or by the Knowledge of such Justice of the Peace, it shall
 “ appear or be found, that such suspected Person is a listed Soldier, and
 “ ought to be with the Troop or Company to which he belongs, such Justice
 “ of the Peace shall forthwith cause him to be conveyed to the Gaol of the
 “ County or Place where he shall be found, or to the House of Correction
 “ or other publick Prison, in such Town or Place where such Deserter
 “ shall be apprehended, or to the *Savoy*, in case such Deserter shall be ap-
 “ prehended within the City of *London* or *Westminster* or Places adjacent, and
 “ transmit an Account thereof to the Secretary of War for the Time being,
 “ to the End that such Person may be proceeded against according to Law;
 “ and the Keeper of the said Gaol, House of Correction or Prison, shall re-
 “ ceive the full Subsistence of such Deserter, during the Time he shall con-
 “ tinue in his Custody, for the Maintenance of the said Deserter, but shall

“ not

“ not be intitled to any Fee or Reward, on the Account of the Imprisonment of such Deferter, any Law, Custom or Usage, to the contrary notwithstanding.”

By *par. 50.* It is, for the Encouragement of any Person or Persons to secure and apprehend such Deferter as aforesaid, enacted, “ That such Justice of the Peace shall also issue his Warrant in Writing to the Collector or Collectors of the Land Tax Money, of the Parish or Township where such Deferter shall be apprehended, for paying out of the Land Tax Money, into the Hands of such Person who shall apprehend, or cause to be apprehended, any Deferter from his Majesty’s Service, the Sum of twenty Shillings for every Deferter that shall be so apprehended and committed; which Sum of twenty Shillings shall be satisfied by such Collector, to whom such Warrant shall be directed, and allowed in his Account.”

A Reward for apprehending a Deferter to be paid by the Collector of the Land Tax.

By *par. 51.* it is provided, “ That, if any Person shall harbour, conceal or assist, any Deferter from his Majesty’s Service, knowing him to be such, the Person so offending shall forfeit, for every such Offence, the Sum of five Pounds; and upon Conviction, by the Oath of one or more credible Witness or Witnesses, before any of his Majesty’s Justices of the Peace, the said Penalty of five Pounds shall be levied, by Warrant under the Hands of the said Justice or Justices of the Peace, by Distress and Sale of the Goods and Chattels of the Offender; one Moiety of the said Penalty to be paid to the Informer, by whose Means such Deferter shall be apprehended, and the Residue of the said Penalty to be paid to the Officer, to whom any such Deferter or Soldier did belong: And in case any such Offender, who shall be convicted, as aforesaid, of harbouring and assisting any such Deferter, shall not have sufficient Goods and Chattels, whereon Distress may be made to the Value of the Penalty for such Offence; or shall not pay such Penalty within four Days after such Conviction; then and in such Case such Justice of the Peace shall and may, by Warrant under his Hand and Seal, either commit such Offender to the common Gaol, there to remain, without Bail or Mainprize, for the Space of three Months, or cause such Offender to be publickly whipped, at the Discretion of such Justice.”

Penalty on any Person harbouring a Deferter knowing him to be so.

By *par. 52.* it is provided, “ That no Commission Officer shall break open any House, to search for Deserters, without a Warrant from a Justice of the Peace; and that every Commission Officer, who shall, without a Warrant from one or more of his Majesty’s Justices of the Peace, which said Warrant the said Justice or Justices of the Peace are hereby empowered to grant, forcibly enter into, or break open, the dwelling House or Outhouses of any Person whatsoever, under Pretence of searching for Deserters, shall, upon due Proof thereof, forfeit the Sum of twenty Pounds.”

No House to be broke open to search for a Deferter without a Warrant from a Justice of Peace.

(F) Of the Punishments to which Soldiers are liable by martial Law.

BY the 30 G. 2. c. 6. *par. 1.* After reciting, that whereas the raising or keeping a standing Army within this Kingdom, in Time of Peace, is contrary to Law: And whereas his Majesty has judged it necessary to declare War against *France*: and whereas it is judged necessary, by his Majesty and this present Parliament, that a Body of Forces should be continued, for the Safety of this Kingdom, the Defence of the Possessions of the

Offences which may be punished with Death.

Crown of *Great Britain*, and the Preservation of the Balance of Power in *Europe*: And whereas no Man can be forejudged of Life or Limb, or subjected, in Time of Peace, to any Kind of Punishment, within this Realm, by martial Law, or in any other Manner, than by the Judgment of his Peers, and according to the known and established Laws of this Realm; yet nevertheless, it being requisite for the retaining such Forces in their Duty, that an exact Discipline be observed, and that Soldiers, who shall mutiny or stir up Sedition, or desert his Majesty's Service within this Realm, or the Kingdom of *Ireland*, or in *Jersey*, *Guernsey*, *Alderney* and *Sark*, or the Islands to the same belonging, be brought to a more exemplary and speedy Punishment than the usual Forms of the Law will allow, it is enacted, "That
 " if any Person being mustered, or in pay, as an Officer, or who is or
 " shall be listed, or in pay, as a Soldier, and on the twenty-fourth Day of
 " *March* one thousand seven hundred and fifty-seven shall remain in such
 " Service, or shall, during the Continuance of this Act, voluntarily enter
 " himself in his Majesty's Service as a Soldier, shall at any Time, during
 " such Continuance of this Act, within the Realm of *Great Britain*, or
 " in the Kingdom of *Ireland*, or in *Jersey*, *Guernsey*, *Alderney* or *Sark*, or
 " the Islands thereto belonging, or in the Island of *Minorca*, or in his Majesty's
 " Garrison of *Gibraltar*, or in any of his Majesty's Dominions beyond the
 " Seas respectively, begin, excite, cause or join, in any Mutiny or
 " Sedition in the Company, Troop or Regiment, whereto he doth belong,
 " or in any other Company, Troop or Regiment, in his Majesty's Service;
 " or shall not use his Endeavours to suppress the same, or, coming to the
 " Knowledge of any Mutiny or intended Mutiny, shall not without Delay give
 " Information thereof to his commanding Officer; or shall desert his Majesty's
 " Service; or, being a Soldier actually listed in any Regiment, Troop or
 " Company, shall list himself into any other Regiment, Troop or Company,
 " without a Discharge produced in Writing from the Colonel, or, in his
 " Absence, the Field Officer commanding in chief the Regiment, Troop or
 " Company, in which he last served as a listed Soldier; or shall be found
 " sleeping upon his Post, or shall leave it before relieved; or if any
 " Officer or Soldier in his Majesty's Army shall, either upon Land, within
 " or out of *Great Britain*, or upon the Seas, hold Correspondence with
 " any Rebel, or Enemy of his Majesty, or give them Advice or Intelligence,
 " either by Letters, Messages, Signs or Tokens, in any Manner or Way
 " whatsoever, or shall treat with such Rebels or Enemies, or enter into
 " any Condition with them, without his Majesty's Licence, or Licence
 " of the General, Lieutenant General or Chief Commander; or shall strike
 " or use any Violence against his superior Officer, being in the Execution
 " of his Office, or shall disobey any lawful Command of his superior
 " Officer; all and every Person and Persons so offending, in any of the
 " Matters before mentioned, shall suffer Death, or such other Punishment
 " as by a Court martial shall be inflicted."

Punishment of a Papist enlisting and not declaring himself to be such.

By the 1 G. 1. *st.* 2. *c.* 47. *par.* 3. After reciting, that to carry on the Service of the Pretender, and for other wicked Purposes, many Papists, pretending themselves to be Protestants, and taking the Oath of Abjuration, and subscribing the Test, when thereunto required, being so allowed to do by the Pope, and their other spiritual Superiors, the better to disguise and conceal their Designs, do enlist themselves in his Majesty's Troops, whereby the greatest Danger may arise to these Kingdoms, if not timely prevented, it is enacted, "That any Person or Persons, having professed the Popish
 " Religion, who, since the first Day of *February* one thousand seven hundred
 " and fifteen, have been enlisted in his Majesty's Troops, and who shall
 " not, after the first Day of *June* one thousand seven hundred and sixteen,
 " in *Great Britain* or *Ireland*, or in the Isles of *Guernsey* or *Jersey*, produce
 " a Testimonial of his having publickly renounced the same, or shall not

“ at the Time of his inlisting, declare to the Officer or Soldier who so in-
 listeth him, that he hath been; or at present is, of the Popish Religion,
 “ shall in such Case be liable to and receive such corporal Punishment, nor
 “ extending to Loss of Life, as a Court-martial shall inflict for the same,
 “ who are hereby impowered so to do.”

By 30 G. 2. c. 6. par. 3. it is enacted, “ That it shall and may be lawful
 “ to and for Courts-martial, by their Sentence and Judgment, to inflict
 “ corporal Punishment, not extending to Life or Limb, on any Soldier for
 “ Immoralities, Misbehaviour, or neglect of Duty.”

Immoralities
 or Misbehavi-
 our in Soldiers
 may be pu-
 nished.

By par. 53. it is provided, “ That it shall and may be lawful to and for
 “ his Majesty to form, make and establish; Articles of War, for the better
 “ governing of his Majesty’s Forces, and for bringing Offenders against the
 “ same to Justice; and to erect and constitute Courts-martial, with Power
 “ to try, hear and determine, any Crimes or Offences by such Articles of
 “ War, and inflict Penalties by Sentence or Judgment of the same, as well
 “ within the Kingdoms of *Great Britain* and *Ireland*, *Jersey*, *Guernsey*, *Al-*
 “ *derney* and *Sark*, and the Islands thereto belonging, as in the Island of
 “ *Minorca*, his Majesty’s Garrison of *Gibraltar*, and in any of his Majesty’s
 “ Dominions beyond the Seas.”

New Articles
 of War may be
 made and
 Courts mar-
 tial appointed
 by his Ma-
 jesty.

But by par. 54. it is provided, “ That no Person or Persons shall be ad-
 “ judged to suffer any Punishment, extending to Life or Limb, by the said
 “ Articles of War, within the Kingdoms of *Great Britain* and *Ireland*,
 “ *Jersey*, *Guernsey*, *Alderney* and *Sark*, and the Islands thereto belonging,
 “ except for such Crimes as are expressed to be so punishable by this
 “ Act.”

But the Pu-
 nishment by
 such new Ar-
 ticles is not to
 extend to Life
 or Limb.

By par 8. it is provided, “ That no Officer or Soldier, being acquitted
 “ or convicted of any Offence, shall be liable to be tried a second Time, by
 “ the same or any other Court-martial, for the same Offence, unless in the
 “ Case of an Appeal from a Regimental to a general Court-martial, and that
 “ no Sentence, given by any Court-martial, and signed by the President
 “ thereof, be liable to be revised more than once.”

No Person to-
 be tried a se-
 cond Time for
 the same Of-
 fence.

By par. 57. it is provided, “ That no Person or Persons, being acquitted
 “ or convicted of any capital Crimes, Violences or Offences, by the civil
 “ Magistrate, shall be liable to be punished by a Court-martial for the same
 “ otherwise than by cashiering.”

No Person ac-
 quitted or con-
 victed by the
 Civil to be pu-
 nished by the
 martial Law.

Only Volunteers were formerly liable to be punished by martial Law, but
 by the 30 G. 2. c. 8. par. 20. it is enacted, “ That the Commissioners pre-
 “ sent at a Meeting for listing of Soldiers, as in this Act is before directed,
 “ shall cause the second and sixth Sections of Articles of War, against Mu-
 “ tiny and Desertion, to be read to the Men impressed by Virtue of this
 “ Act; and, from and after the reading the said Articles of War, every
 “ Man so impressed shall be deemed a listed Soldier, to all Intents and Pur-
 “ poses, and shall be subject to the Discipline of War, and, in case of De-
 “ sertion, shall be proceeded against as a Deserter, by any Law now in Force,
 “ or by any Law to be made for Punishment of Deserters.”

Impressed
 Men rendered
 liable to mar-
 tial Law.

By the 30 G. 2. c. 6. par. 9. it is provided, “ That nothing in this Act
 “ shall be any Ways construed to extend to or concern any of the Militia
 “ Forces of this Kingdom, or of the Kingdom of *Ireland*, or in *Jersey*,
 “ *Guernsey*, *Alderney* or *Sark*, or the Islands thereto belonging.”

The Militia
 exempted from
 martial Law.

But by 30 G. 2. c. 25. par. 25. it is enacted, “ That in case of actual
 “ Invasion, or upon imminent Danger thereof, or in case of Rebellion, it
 “ may and shall be lawful for his Majesty, his Heirs and Successors, the
 “ Occasion being first communicated to the Parliament, if the Parliament
 “ shall be then sitting, or declared in Council and notified by Proclama-
 “ tion, if no Parliament shall be then sitting or in Being, to order and di-
 “ rect his Lieutenants, and on their Death or Removal, or in their Absence
 “ from their respective Counties, Ridings or Places, any three or more De-
 VOL. IV.

But if they are
 drawn out and
 embodied they
 are to be sub-
 ject to martial
 Law.

“ pury Lieutenants, with all Convenient Speed, to draw out and embody
 “ all the Regiments and Battallions of Militia of their respective Counties,
 “ Ridings or Places, by this Act appointed to be raised and trained, or so
 “ many of them as his Majesty, his Heirs and Successors, shall in his or
 “ their great Wisdom judge necessary, in such Manner as shall be best adapted
 “ to the Circumstances of the Danger; and to put the said Forces under
 “ the Command of such General Officers, as his Majesty, his Heirs and
 “ Successors, shall be pleased to appoint over them; and to direct them
 “ to be led, by their respective Officers, into any Parts of this Kingdom,
 “ for the Suppression of such Invasions or Rebellions: And the said Officers
 “ of the Militia, and private militia Men, shall, from the Time of their
 “ being drawn out and embodied, as aforesaid, and until they shall be
 “ returned again, by Order of their commanding Officers, to their respec-
 “ tive Parishes or Places of Abode, remain under the Command of such
 “ General Officers, and shall be intitled to the same Pay, as the Officers
 “ and private Men in his Majesty’s other Regiments of Foot receive, and
 “ no other: and the Officers of the Militia, and private Militia Men,
 “ shall be hereby, during such Time as aforesaid, subjected and made liable
 “ to all such Articles of War, Rules and Regulations, as shall be then by
 “ Act of Parliament in Force, for the Discipline and good Government of
 “ any of his Majesty’s Forces in *Great Britain*, any Thing herein contained
 “ to the contrary notwithstanding.”

(G) Of the Civil Punishments to Which Soldiers are liable.

A Soldier not to be exempt from the ordinary Course of Law; BY the 30 G. 2. c. 6. par. 9. it is provided, “ That nothing in this
 “ Act shall extend, or be construed to extend, to exempt any Officer
 “ or Soldier whatsoever from being proceeded against by the ordinary Course
 “ of Law.”

and being accused of Crimes to be delivered over to the Civil Magistrate. And by par. 58. it is provided, “ That if any Officer, Non-commission
 “ Officer or Soldier, shall be accused of any capital Crime, or of any Vio-
 “ lence or Offence against the Person, Estate or Property, of any of his
 “ Majesty’s Subjects, which is punishable by the known Laws of the
 “ Land, the commanding Officer or Officers of every Regiment, Troop,
 “ Company or Party, is and are hereby required to use his utmost Endeav-
 “ ours, to deliver over such accused Person to the civil Magistrate; and
 “ shall also be aiding and assisting to the Officers of Justice in seizing and
 “ apprehending such Offender, in order to bring him to Trial; and if any
 “ such commanding Officer shall wilfully neglect or refuse, upon Applica-
 “ tion made to him for that Purpose, to deliver over any such accused Per-
 “ son to the civil Magistrate, or to be aiding and assisting to the Officers of
 “ Justice in the apprehending such Offender, every such Officer so offending,
 “ and being thereof convicted, before any two or more Justices of the
 “ Peace for the County where the Fact is committed, by the Oath of two
 “ credible Witnesses, shall be deemed and taken to be *ipso facto* cashiered,
 “ and shall be utterly disabled to have or hold any civil or military Office
 “ or Employment, within this Kingdom, or in his Majesty’s Service;
 “ provided the said Conviction be affirmed at the next Quarter-Sessions of
 “ the Peace for the said County, and a Certificate thereof be transmitted to
 “ the Judge Advocate, who is hereby obliged to certify the same to the
 “ next Court-martial.”

By the 19 G. 2. c. 21. *par. 5.* it is enacted, " That in case any com-
 " mon Soldier, belonging to any Regiment in his Majesty's Service, shall
 " be convicted of profane cursing or swearing as aforesaid, and shall not im-
 " mediately pay down the Penalty by him forfeited, or give Security for
 " the same as aforesaid, and also the Cost of the Information, Summons
 " and Conviction, as in and by this Act is directed, every such common
 " Soldier, instead of being committed to the House of Correction, as by
 " this Act is directed, shall, by the said Justice, Mayor, Bailiff or other
 " head Officer, be ordered to be publickly set in the Stocks for the Space of
 " one Hour, for every single Offence; and for any Number of Offences,
 " whereof he shall be convicted at one and the same Time, two
 " Hours."

A Soldier guilty of cursing or swearing to be set in the Stocks.

By the 39 Eliz. c. 17. *par. 2.* After reciting, that divers lewd and licentious Persons, contemning both Laws, Magistrates and Religion, have of late Days wandered up and down in all Parts of this Realm, under the Name of Soldiers, abusing the Title of that honourable Profession to countenance their wicked Behaviours, and do continually assemble themselves, in the Highways and elsewhere, in Troops, to the great Terror and Astonishment of her Majesty's true Subjects, the Impeachment of her Laws, and the Disturbance of the Peace and Tranquillity of this Realm; and that many heinous Outrages, Robberies and horrible Murders, are daily committed by these dissolute Persons, and, unless some speedy Remedy be had, many Dangers are like by these Means to ensue and grow towards the Commonwealth, it is enacted, " That all idle and wandering Soldiers, or idle Persons which now are or hereafter shall be wandering as Soldiers, shall settle themselves in some Service, Labour or other lawful Course of Life, without wandering, or otherwise repair to the Places where they were born, or to their dwelling Places, if they have any, and there remain betaking themselves to some lawful Course of Life as aforesaid, upon pain that all Persons, offending contrary to this Act, to be reputed as Felons, and to suffer as in Case of Felony without Benefit of Clergy."

A wandering Soldier declared to be guilty of Felony.

By *par. 3.* it is enacted, " That every idle and wandering Soldier which, coming from his Captain from the Seas, or beyond the Seas, shall not have a Testimonial, under the Hand of some one Justice of the Peace of or near the Place where he landed, setting down therein the Place and Time when and where he landed, and the Place of his Dwelling or Birth, unto which he is to pass as aforesaid, and a convenient Time therein limited for his Passage, or, having such Testimonial, shall wilfully exceed the Time therein limited above fourteen Days: And also as well every such idle and wandering Soldier, as every idle Person wandering as a Soldier, which shall at any Time hereafter forge or counterfeit any such Testimonial, or have with him or them any such Testimonial forged or counterfeited as aforesaid, knowing the same to be counterfeited or forged, in all these Cases every such Act or Acts to be Felony, and the Offenders to suffer as aforesaid, without Benefit of Clergy."

A wandering Soldier with a forged Testimonial to suffer as a Felon.

By *par. 4.* it is enacted, " That it shall be lawful for the Justices of Assize, Justices of Gaol Delivery, and the Justices of Peace of every County, and for all Justices of Peace of Towns corporate, having Authority to hear and determine Felonies, to hear and determine all such Offences in their General Sessions; and to execute the Offenders which shall be convicted before them, as in Cases of Felony is accustomed; except some honest Person, valued at the last Subsidy next before the Time to ten Pounds in Goods, or forty Shillings in Lands, or else some honest Freeholder as by the said Justices shall be allowed, will be contented, before such Justices as such Person shall be arraigned of Felony, to take him or them into his Service for one whole Year then next following, and then, before the said Justices, will be bound by Recognizance of ten Pounds,

But a Soldier offending against this Act is not to be executed if any Person will take him into Service for a Year.

" to

“ to be levied of his Lands, Goods, Tenements and Chattels, to the Use
 “ of our Sovereign Lady the Queen, if he keep not the said Person or
 “ Persons for one whole Year, and bring him to the next Sessions for the
 “ Peace and Gaol Delivery next ensuing after the said Year: And if any
 “ such Person retained depart within the Year, without the Licence of him
 “ that so retaineth him, then he to be indicted, tried and adjudged as a Fel-
 “ lon, and not to have the Benefit of his Clergy.”

(H) Of the Liberty given to discharged Sol- diers of exercising Trades.

Discharged
 Soldiers may
 exercise
 Trades in any
 Place.

BY the 22 G. 2. c. 44. *par. 1.* After reciting, that there have been and
 are divers Officers and Soldiers, who have served his Majesty in the
 late Wars, some of which are Men that used Trades, others that were Ap-
 prentices to Trades, who had not served out their Times, and others who
 by their own Industry have made themselves apt and fit for Trades; many
 of which, the Wars being now ended, would willingly employ themselves in
 those Trades, which they were formerly accustomed to, or which they are
 apt or able to follow and make Use of, for the getting their Living by their
 own Labour, but are or may be hindered from exercising those Trades in
 certain Cities or Corporations, and other Places within this Kingdom, be-
 cause of certain By-Laws and Customs of those Places, and of the Statute
 made in the fifth Year of Queen *Elizabeth*, prohibiting the Use of certain
 Trades by any Person, who hath not served an Apprenticeship to such Trade
 for the Space of seven Years, it is enacted, “ That all such Officers and
 “ Soldiers, who have been at any Time employed in his Majesty’s Service,
 “ since his Accession to the Throne, and have not since deserted the said
 “ Service, may set up and exercise such Trades, as they are apt and able for,
 “ in any Town or Place within the Kingdoms of *Great Britain* and *Ireland*,
 “ without any Lett, Suit or Molestation, of any Person or Persons what-
 “ soever, for or by Reason of the using such Trades; and if any such Of-
 “ ficer or Officers, Soldier or Soldiers, shall be sued, impleaded or indicted,
 “ in any Court whatsoever, within this Kingdom, for using or exercising
 “ any such Trades as aforesaid, then the said Officer or Officers, Soldier or
 “ Soldiers, making it appear to the same Court, where they are so sued,
 “ impleaded or indicted, that they have served the King’s Majesty as afore-
 “ said, shall, upon the general Issue pleaded, be found not guilty in any
 “ Complaint, Bill, Information or Indictment, exhibited against them; and
 “ such Person or Persons, who notwithstanding this Act shall prosecute
 “ their said Suit by Bill, Complaint, Information or Indictment, and shall have
 “ a Verdict pass against them, or become nonsuit therein, or discontinue
 “ their said Suit, shall pay unto such Officer or Officers, Soldier or Soldiers,
 “ double Costs of Suit, to be recovered as any other Costs at common
 “ Law may be recovered; and all Judges and Jurors, before whom any
 “ such Suit, Information or Indictment, shall be brought, and all other
 “ Persons whatsoever, are to take Notice of this present Act, and shall
 “ conform themselves thereunto, any Statute, Law, Ordinance, Custom or
 “ Provision, to the contrary in any wise notwithstanding.”

The Privilege
 of the Univer-
 sities saved as
 to the licensing
 of Taverns.

But by *par. 2.* it is provided, “ That this Act shall not in any wise be
 “ prejudicial to the Universities of *Oxford* or *Cambridge*, or either of them,
 “ or extend to give Liberty to any Person to set up the Trade of a Vintner,
 “ or to sell any Wine or other Liquors within the said Universities,
 “ without Licence had and obtained from the Vice-Chancellors of the
 “ same respectively.”

By

By the 30 G. 2. c. 25. par. 25. it is enacted, "That every Man having ^{A Militia Man} personally served in the Militia, when called out and assembled in case of ^{of who is married} actual Invasion, or imminent Danger thereof, or in case of Rebellion, and ^{and has been in actual} being a married Man, may set up and exercise any such Trade as he is ^{Service may} apt and able for, as freely as any Soldier may do by an Act passed in the ^{set up a Trade} twenty-second Year of his Majesty's Reign, intituled, *An Act to enable* ^{in any Place.} *such Officers and Soldiers, as have been in his Majesty's Service since his Accession to the Throne, to exercise Trades.*"

In an Action *Qui tam* for exercising the Trade of a Sadler, the Defendant ^{MS. Rep.} not having been an Apprentice to that Trade, it appeared from the Evidence, ^{Mott and Williams, Easter} which was stated in a Case reserved, that the Defendant was one of the ^{31 G. 2. in} *Blackwell Hall* Volunteers, who associated themselves in the late Rebellion; ^{the K. B.} that, by one Article of this Association, they were not to put themselves under the Command of any of his Majesty's Officers, or to be subject to military Discipline, until the Rebels came within sixty Miles of *London*; and that, as this never happened, they were never in fact under the Command of any Officer appointed by his Majesty, or subject to military Discipline: And the Question was, whether this gave the Defendant a Right, under the 22 G. 2. c. 44. to exercise this Trade?

Lord *Mansfield*, Ch. J. I should have been glad to have found the Defendant within the Act of the twenty-second of the King: But that Act only extends to such as have been Soldiers; and no Man is to be deemed a Soldier, unless he has been actually enlisted, and had the Articles of War read to him.

The other Justices being of the same Opinion, the *Posse* was ordered to be delivered to the Plaintiff.

(I) Of divers Things not properly reducible under any of the foregoing Heads.

BY the 5 W. & M. c. 21. and by the 9 & 10 W. 3. c. 25. par. 19. it is ^{The Probate} provided, "That nothing in these Acts contained, shall extend ^{of a Soldier's} to charge the Probate of any Will, or Letters of Administration, of any ^{Will to be exempt from the} common Soldier, who shall be slain or die in his Majesty's Service, ^{Stamp Duty.} a Certificate being produced from the Captain of the Troop or Company, under whom such Soldier served at the Time of his Death, and Oath made of the Truth thereof, before the proper Judge or Officer by whom such Probate or Administration ought to be granted, which Oath such Judge or Officer is hereby authorized and required to administer, and for which no Fee or Reward shall be taken."

By the 43 Eliz. c. 3. par. 2. it is provided, That every Parish shall be ^{The Method} charged with a weekly Sum for the Relief of sick, hurt and maimed Sol- ^{of taxing Pa-} diers, and there are in the same Act Directions for applying the Money ^{rishtes for the} raised for this Purpose: But as the Practice is, at this Day, to leave such ^{Relief of Sol-} Soldiers to be provided for by the respective Parishes to which they belong, ^{diers is now} it is unnecessary to mention these.

By the 30 G. 2. c. 6. par. 29. it is enacted, "That it shall and may ^{A Soldier ha-} be lawful for any two Justices of the Peace for the County, Town or ^{ving a Wife or} Place, where any Non-commission Officer or private Soldier shall be ^{Child may be} quartered, in case such Non-commission Officer or Soldier have either ^{examined as} Wife or Child, or Children, to cause such Non-commission Officer or ^{to the Place of} Soldier to be summoned before them, in the Town or Place where such ^{his Settlement.} Non-commission Officer or Soldier shall be quartered, in order to make Oath of the last Place of their legal Settlement, which Oath the said

“ Justices are hereby impowered to administer; and such Non-commission
 “ Officers and private Soldiers, as aforesaid, are hereby directed to obey
 “ such Summons, and to make Oath accordingly, which Oath shall be at
 “ any Time admitted in Evidence as to such last legal Settlement, before
 “ any of his Majesty’s Justices of the Peace, or at any General or Quarter
 “ Sessions of the Peace; and such Justices are hereby required to give an
 “ attested Copy, of such Affidavit so made before them, to the Person
 “ making the same, to be by him delivered to his commanding Officer, in
 “ order to be produced when required: Provided always, that in case any
 “ Non-commission Officer or private Soldier shall be again summoned to
 “ make Oath as aforesaid, then on such attested Copy, of the Oath by him
 “ formerly taken, being produced by him, or by any other Person on his
 “ Behalf, such Non-commission Officer or Soldier shall not be obliged to
 “ take any other further Oath, with Regard to his last legal Settle-
 “ ment, but shall leave a Copy of such attested Copy of Examination, if
 “ required.”

Penalty for
 buying the
 Arms or
 Clothes of a
 Soldier.

By the 30 G. 2. c. 6. par. 51. it is enacted, “ That if any Person shall
 “ knowingly detain, buy or exchange, or otherwise receive, any Arms,
 “ Clothes, Caps or other Furniture, belonging to the King, from any
 “ Soldier or Deserter, upon any Account or Pretence whatsoever, or cause
 “ the Colour of such Clothes to be changed, the Person so offending shall,
 “ for every such Offence, forfeit the Sum of five Pounds; and upon Con-
 “ viction, by the Oath of one or more credible Witness or Witnesses, be-
 “ fore any of his Majesty’s Justices of the Peace, the said Penalty of five
 “ Pounds shall be levied, by Warrant under the Hands of the said
 “ Justice or Justices of the Peace, by Distress and Sale of the Goods and
 “ Chattels of the Offender; and in case any such Offender, who shall be
 “ convicted as aforesaid, shall not have Goods and Chattels whereon Distress
 “ may be made, to the Value of the Penalty recovered against him for such
 “ Offence, or shall not pay such Penalty within four Days after such Con-
 “ viction, then and in such Case such Justice of the Peace shall and may, by
 “ Warrant under his Hand and Seal, either commit the Offender to the
 “ common Gaol, there to remain, without Bail or Mainprize, for the Space
 “ of three Months, or cause such Offender to be publicly whipped, at the
 “ Discretion of such Justice.”

Ld. Raym.
 101.

Beaumont and
 Pine.

By *Holt*, Ch. J. an Agent of a Regiment is but a Servent of the Colonel,
 and his Receipt charges the Colonel; there being no Privity between the
 King and the Agent.

Ld. Raym.
 312.

Taylor and
 Jones.

In *Assumpsit* the Plaintiff declared, that he was and yet is Captain of a
 Company of Soldiers, and that the Defendant, in Consideration that the
 Plaintiff would permit *A. B.* a Soldier in his Company to be absent ten Days,
 assumed to the Plaintiff, to bring back the said *A. B.* or to pay the Plaintiff
 twenty Pound, and that the said *A. B.* did not return within the ten Days. It
 was in this Case objected, that here is no Consideration to support this Action;
 for that the Captain of a Company has not such a Property in a Soldier as to
 give him Leave to absent himself from the King’s Service. But *Per Cur’*:
 When the Captain sees he has no Occasion to use a Soldier in the King’s Service,
 he may give him Leave to be absent for some reasonable Time, and such
 Leave is a Benefit to the Soldier: And Judgment was for the Plaintiff.

10 Mod. 383.
 Smith and
 Parks.

A Lease being forfeited for Non-payment of Rent, the Lessor brings an
 Ejectment; hereupon a Rule was made, that upon the Defendant’s bringing
 into Court what was due for Arrears of Rent with Costs, the Proceedings in
 Ejectment should stay: But the Lessor obtained another Rule for discharging
 this last Rule, unless the Defendant, who was a Soldier and so by Law inti-
 tled to Protection, would give Security for the Payment of Rent.

Stamps.

A Stamp is a Mark which is by Law ordained to be affixed to certain Instruments, Writings and Things.

The Use of this Mark is to denote that the Duty or Duties, imposed upon any Instrument, Writing or Thing, has or have been paid, or that Security is given for the Payment of the same.

Some Stamps are by Law directed to be made use of, as in the Case of printed Linens, which are not put under the Care of the Commissioners for managing the Stamp Duties; but the present Design is to treat only of such as are under their Management.

In doing this it will be proper to give an Account,

(A) Of the particular Stamp Duties to which certain Instruments, Writings and Things, are liable.

(B) Of some Regulations that principally concern the Officers of the Stamp Duties.

(C) What the Consequence is of Ingrossing or Writing any Matter or Thing liable to a Stamp Duty upon Vellum, Parchment or Paper, that has not been duly stamped.

1. To any Person so ingrossing or writing.
2. To some particular Persons.
3. To the Instrument or Thing so ingrossed or written.

(D) Of Regulations for preventing Frauds to the Prejudice of the Stamp Duties.

1. By writing a second Matter upon the same Vellum, Parchment or Paper, before it has been a second Time duly stamped.
2. In the Manner of writing certain Matters.
3. In legal Proceedings.
4. In News Papers, Almanacks and Pamphlets.
5. In the Money or other Consideration given with Apprentices.
6. In Cards and Dice.
7. In other Cases.

(E) Of the Jurisdiction given to Justices of the Peace in pecuniary Penalties for Offences against the Statutes imposing Stamp Duties.

(F) Of the corporal Punishments to which Persons guilty of Offences against the said Statutes are liable.

(A) Of

(A) Of the particular Stamp Duties to which certain Instruments, Writings and Things are liable.

MUCH the greater Part of the Stamp Duties were at first imposed for a Time; but all the Acts of Parliament, by which they were imposed, have either been made perpetual, or are so continued as to be at this Day in force.

The particular Duties, to which many Instruments, Writings or Things, are liable, have been imposed by divers Acts of Parliament: But as they have been more generally imposed by three, viz. 5 *W. & M. c. 21.* 9 & 10 *W. 3. c. 25.* 12 *A. st. 2. c. 9.* the Sums charged by either of these shall be placed in a Column which answers to each of them. All other Duties shall be placed in a fourth Column, and the respective Statutes, by which they were imposed, cited in the Margin.

To prevent Repetition in the following List of the Stamp Duties, every one of these is placed only under the Name of the Instrument or Thing therewith chargeable.

For Instance, if the Duty, which an Advocate ought to pay on his Admission, is desired to be known, it will be found only under the Word *Admission*, and not under the Word *Advocate* also.

No other Articles are liable to the Payment of any Stamp Duties in *Scotland*, except such as have the Words *in Great Britain* or *in Scotland* annexed to them.

		5 <i>W. & M. c. 21.</i>	9 & 10 <i>W. 3. c. 25.</i>	12 <i>A. st. 2. c. 9.</i>	
30 <i>G. 2. c. 19.</i>	Act Notarial in <i>England</i>	—	—	—	
<i>Ibid.</i>	<i>Scotland</i>	—	—	—	
12 <i>G. 1. c. 33.</i>	Action entering of in any inferior Court that holds Plea of forty Shillings, but issues no Writ, Process or Mandate.	6 d.	6 d.	6 d.	1 s.
10 <i>A. c. 19.</i>	Adjudication in <i>Scotland</i> .				6 d. 1 s.
	Admission into a Company	1 s.	1 s.		
	Corporation	1 s.	1 s.		
	an Inn of Chancery	1 s.	1 s.		
	of Court	1 s.	1 s.		
	University	1 s.	1 s.		
10 <i>A. c. 19.</i>	to a Copyhold Estate				2 s. 3 d.
12 <i>A. st. 1. c. 2.</i>	But no Duty is to be paid upon the Admission to a Custom Right or Tenant Right Estate.				
	Admission to a Fellowship of the College of Physicians	40 s.	40 s.	40 s.	
	to the Office of Advocate of any Court in <i>England</i>	40 s.	40 s.	40 s.	
	<i>Scotland</i>				40 s.
	to the Office of Attorney of any Court in <i>England</i>	40 s.	40 s.	40 s.	
	<i>Scotland</i>				40 s.
	to the Office of Clerk of any Court in <i>England</i>	40 s.	40 s.	40 s.	
	<i>Scotland</i>				40 s.
	to the Office of Notary of any Court in <i>England</i>	40 s.	40 s.	40 s.	
	<i>Scotland</i>				40 s.
					Admission

	5 W.	9 & 10	12 A.	
	£ M.	W. 3.	£. 2.	
	c. 21.	c. 25.	c. 9.	
Admission to the Office of Proctor of any } Court in <i>England</i> } <i>Scotland</i> ———	40s.	40s.	40s.	
to the Office of Solicitor of any } Court of Equity } to any other Office in any } Court in <i>England</i> } <i>Scotland</i> ———	40s.	40s.	40s.	120s. 2 G. 2. c. 23.
But a Person admitted to either of these Offices; or to any other Office in a Corporation or inferior Court, which is an annual Office, and under the Value of ten Pounds <i>per Annum</i> , is exempted.				6 & 7 W. 3. c. 12. 9 & 10 W. 3. c. 25. 12 A. £. 2. c. 9.
If a Man has been admitted an Attorney in any of the Courts of King's Bench, Common Pleas, Exchequer, Counties Palatine of <i>Chester</i> , <i>Lancaster</i> or <i>Durham</i> , or Great Session of <i>Wales</i> , he may be admitted a Solicitor in any Court of Equity, without being liable to any further Stamp Duties.				2 G. 2. c. 23.
And any Person, who has been admitted a Sol- licitor in any one Court of Equity in <i>Eng- land</i> , may be admitted a Solicitor in any other Court of Equity, without being liable to any further Stamp Duties.				<i>Ibid.</i>
And he that has been admitted a Solicitor in any of the Courts of Equity at <i>Westminster</i> , may be admitted an Attorney of the Courts of King's Bench or Common Pleas, without being liable to any further Stamp Duties.				<i>Ibid.</i>
Advertisement in any News Paper published } weekly or oftener in <i>Great Britain</i> } And ——— } in any News Paper or Pamphlet, } published at any Time ex- } ceeding one Week, in <i>Great</i> } <i>Britain</i> ——— }				1s. 10 A. c. 19. 1s. 30 G. 2. c. 19. <i>Ibid.</i> 2s. 10 A. c. 19.
But a single Advertisement printed by itself is exempted.				
Affidavit ———	6d.	6d.		
But Affidavits of burying in Woollen, and those made before Custom-house Officers, Justices of Peace, or Commissioners for raising any Aids or Duties, are exempted.				5 W. & M. c. 21. 9 W. 3. c. 25.
Affidavits for obtaining the Allowance of the Duties of such Soap as is used in the Wool- len or Linen Manufacture are also ex- empted.				12 A. £. 2. c. 9.
Allegation in any Court of Admiralty ———	6d.	6d.		
——— the Cinque Ports	6d.	6d.		
——— Ecclesiastical ———	6d.	6d.		
Almanack for one Year printed upon one } Side of a Sheet of Paper in <i>Great Britain</i> }				1d. 9 A. c. 23.
And ———				1d. 30 G. 2. c. 19.
VOL. IV. 7 N				Almanack

		5 W.	9 & 10 M.	12 A.		
		W.	W.	st.		
		c. 21.	c. 25.	c. 9.		
9 A. c. 23.	Almanack for one Year printed in any other } Manner in <i>Great Britain</i> _____ }					2d.
30 G. 2. c. 19.	And _____					2d.
4 A. c. 23.	But the perpetual Almanacks or Calendars in Bibles or Common Prayer Books are ex- empted.					
<i>Ibid.</i>	And if an Almanack contains more than one Sheet of Paper, only one Sheet is to be stamped.					
	And if an Almanack is to serve for more Years than one, the Duty imposed by the 9 A. c. 23. is only to be paid for every Year as far as three Years; but that im- posed by the 30 G. 2. c. 19. is to be paid for every Year it is to serve for.					
	Answer in a Court of Admiralty _____	6d.		6d.		
	the Cinque Ports _____	6d.		6d.		
	Ecclesiastical _____	6d.		6d.		
	of Equity _____	1s.		1s.		
	Appeal from a Court of Admiralty in <i>England</i> _____	40s.	40s.	40s.		
	<i>Scotland</i> _____				40s.	
	the Court of Arches _____	40s.	40s.	40s.		
	Prerogative Court of <i>Canterbury</i> _____	40s.	40s.	40s.		
	<i>York</i> _____	40s.	40s.	40s.		
	Appearance upon Common Bail _____	6d.		6d.		
	Special Bail _____	1s.		1s.		
4 A. c. 12.	But these Duties are to be extended only to Appearances in Actions where no Bail is filed or put in.					
8 A. c. 9.	Apprentice, if the Money given with him } does not exceed fifty Pounds, in the Pound } in <i>Great Britain</i> _____ }					6d.
<i>Ibid.</i>	if it exceeds fifty Pounds, in } the Pound in <i>Great Britain</i> }					1s.
10 A. c. 19.	Apprising in <i>Scotland</i> _____					2s. 3d.
	Attachment from a Court of Admiralty _____	5s.		5s.		
	the Cinque Ports _____	5s.		5s.		
	Bail Common _____	6d.		6d.		
	Special _____	1s.		1s.		
	Bill in any Court of Equity _____	1s.		1s.		
9 A. c. 23.	of Lading _____					4d.
30 G. 2. c. 19.	Bond in <i>England</i> _____	6d.	6d.	6d.		1s.
<i>Ibid.</i>	<i>Scotland</i> _____				6d.	1s.
	But a Bail Bond or the Assignment thereof } is only liable to pay _____ }	6d.		6d.		
	Brief for collecting Charity _____	40s.				
9 A. c. 23.	Cards <i>per Pack</i> in <i>Great Britain</i> _____					6d.
29 G. 2. c. 13.	And _____					6d.
9 A. c. 23.	Certificate for the obtaining any Drawback } in <i>Great Britain</i> _____ }					8d.
	of a Degree in either of the four } Inns of Court _____ }	40s.				
	of a Degree in an Univerfity _____	40s.				

But

	5 W.	9 & 10	12 A.	
	£ M.	W. 3.	st. 2.	
	c. 21.	c. 25.	c. 9.	
But the Degree of Batchelor of Arts is exempted.				6 & 7 W. 3. c. 12.
Certificate of Marriage ——— ———	5s.			
But a Certificate of the Marriage of a Seaman's Widow is exempted.				6 & 7 W. 3. c. 12.
Charter Party in <i>England</i> ——— ———	6d.	6d.	6d.	1s. 30 G. 2. c. 19.
<i>Scotland</i> ——— ———			6d.	1s. <i>Ibid.</i>
Citation from a Court Ecclesiastical ———	6d.	6d.		6d. 12 G. 1. c. 33.
<i>Clare constat</i> in <i>Scotland</i> ———				2s. 3d. 10 A. c. 19.
Collation to any Benefice of the Value of } ten Pounds in the King's Books }	40s.	40s.		
Cognition of Heir in <i>Scotland</i> ———				2s. 3d. 10 A. c. 19.
Commission from an Ecclesiastical Court not } otherwise charged ——— }	2s. 6d.	2s. 6d.		
Contract in <i>England</i> ——— ———	6d.	6d.	6d.	1s. 30 G. 2. c. 19.
<i>Scotland</i> ——— ———			6d.	1s. <i>Ibid.</i>
Copy of an Affidavit ——— ———	6d.	6d.		
Allegation in a Court of Admiralty	6d.	6d.		
the Cinque Ports	6d.	6d.		
Ecclesiastical	6d.	6d.		
an Answer in any Court of Admiralty	6d.	6d.		
the Cinque Ports	6d.	6d.		
Ecclesiastical	6d.	6d.		
of Equity —	1d.	1d.		
a Bill in any Court of Equity ———	1d.	1d.		
Citation from any Court Ecclesiastical	6d.	6d.		
Court Roll of any Manor ———				2s. 3d. 10 A. c. 19.
Final Decree in any Court of Admiralty	6d.	6d.		
the Cinque Ports	6d.	6d.		
Ecclesiastical	6d.	6d.		
of Equity	6d.	6d.		
Depositions in any Court of Admiralty	6d.	6d.		
the Cinque Ports	6d.	6d.		
Ecclesiastical	6d.	6d.		
of Equity	1d.	1d.		
Interrogatories in any Court of Equity	1d.	1d.		
an Inventory exhibited in any Court } of Admiralty }	6d.	6d.		
the Cinque Ports	6d.	6d.		
Ecclesiastical	6d.	6d.		
a Libel in any Court of Admiralty	6d.	6d.		
the Cinque Ports	6d.	6d.		
Ecclesiastical	6d.	6d.		
Monition from any Court Ecclesiastical	6d.	6d.		
an Order of any Court at <i>Westminster</i>	6d.	6d.		
any Pleadings in any Court of Equity	1d.	1d.		
Law	1d.	1d.		
a <i>Postea</i> ——— ———	6d.	6d.		
any Proceeding in any Court of Equity	1d.	1d.		
Proceeding in any Court at <i>West-</i> } <i>minster</i> not otherwise charged }	6d.	6d.		
a Record of any Court at <i>Westminster</i> } not otherwise charged ——— }	6d.	6d.		
of <i>Nisi Prius</i> ———	6d.	6d.		
Rule of any Court of <i>Westminster</i>	6d.	6d.		

	5 W. & M. c. 21.	9 & 10 W. 3. c. 25.	12 A. ft. 2. c. 9.	
Copy of a Sentence in a Court of Admiralty—	6d.	6d.		
the Cinque Ports	6d.	6d.		
Ecclesiastical—	6d.	6d.		
Will. ————	1d.	1d.		
9 A. c. 23. Debenture for any Drawback in <i>Great Britain</i>				8d.
Decree of any Court of Admiralty ————	6d.	6d.		
the Cinque Ports ————	6d.	6d.		
Ecclesiastical ————	6d.	6d.		
of Equity ————	6d.	6d.		
personal of any Court of Admiralty—	2s.6d.	2s.6d.		
the Cinque Ports	2s.6d.	2s.6d.		
30 G. 2. c. 19. Deed in <i>England</i> ————	6d.	6d.	6d.	1s.
<i>Ibid.</i> <i>Scotland</i> not charged with the Duty } of 2s. 3d. by the 10 A. c. 19. }			6d.	1s.
Degree except that of Bachelor of Arts in an } University ———— }	40s.			
in either of the four Inns of Court—	40s.			
Depositions in a Court of Admiralty ————	6d.	6d.		
the Cinque Ports ————	6d.	6d.		
Ecclesiastical ————	6d.	6d.		
of Equity ————	1d.	1d.		
by Commission from such Court—	1s.	1s.		
9 A. c. 23. Dice <i>per Pair</i> in <i>Great Britain</i> ————				5s.
29 G. 2. c. 13. And ————				5s.
Dismission of a Bill in any Court of Equity —	6d.	6d.		
Dispensation to hold two Benefices from the } the Archbishop of <i>Canterbury</i> ———— }	40s.	40s.	40s.	
Master of the Faculties ————	40s.	40s.	40s.	
Donation of a Benefice of the Value of ten } Pounds in the King's Book ———— }	40s.	40s.		
12 G. 1. c. 33. Entry of an Action in any inferior Court that } holds Plea of forty Shillings, but issues no } Writ, Process or Mandate ———— }	6d.	6d.		6d.
Exemplification of a Grant or Letters Patent } under the Great Seal, or Seal of the Duchy } of <i>Lancaster</i> , of a Dignity ———— }	40s.	40s.	40s.	
Franchise ————	40s.	40s.	40s.	
an Honour ————	40s.	40s.	40s.	
a Liberty ————	40s.	40s.	40s.	
Privilege ————	40s.	40s.	40s.	
Promotion ————	40s.	40s.	40s.	
under the Seal of any Court —	5s.	5s.		
Faculty from the Archbishop of <i>Canterbury</i> —	40s.	40s.	40s.	
Master of the Faculties ————	40s.	40s.	40s.	
10 A. c. 19. Grant by Copy of Court Roll ————				2s. 3d.
under the Great Seal, or Seal of the } Duchy of <i>Lancaster</i> , of a Dignity — }	40s.	40s.	40s.	
Franchise —	40s.	40s.	40s.	
an Honour —	40s.	40s.	40s.	
a Liberty —	40s.	40s.	40s.	
Privilege —	40s.	40s.	40s.	
Promotion —	40s.	40s.	40s.	

	5 W.	9 & 10	12 A.	
	& M. W. 3.	f. 2.		
	c. 21.	c. 25.	c. 9.	
Grant under the Great Seal, the Seal of the Exchequer, the Seal of the Duchy of Lancaster, or the Privy Seal not being directed to the Great Seal, of Lands—	40s.	40s.		
Profits —	40s.	40s.		
of an Office or Employment above the Value of fifty Pounds <i>per Annum</i> in England	40s.	40s.	40s.	
Scotland			40s.	
of any Sum exceeding a hundred Pounds under the Great Seal, or the Privy Seal not being directed to the Great Seal	40s.	40s.	40s.	
of any Sum exceeding a hundred Pounds under the Great Seal of Scotland			40s.	
Indenture in England	6d.	6d.	6d.	1s. 30 G. 2. c. 19;
Scotland not charged with the Duty of 2s. 3d. by the 10 A. c. 19.			6d.	1s. <i>Ibid.</i>
But an Indenture for the binding of a Parish Child Apprentice is only liable to the Duty of	6d.			
Inrolment in a Court of Record, or by any <i>Custos Rotulorum</i> or Clerk of the Peace, of a Conveyance	5s.			
Release	5s.			
Surrender of Grant	5s.			
Office	5s.			
other Deed whatsoever	5s.			
Institution to a Benefice in England	5s.	5s.	5s.	
Scotland			5s.	
Interrogatories in a Court of Equity	1s.	1s.		
Instrument obligatory in England	6d.	6d.	6d.	1s. <i>Ibid.</i>
Scotland			6d.	1s. <i>Ibid.</i>
Inventory exhibited in any Court of Admiralty	6d.	6d.		
the Cinque Ports	6d.	6d.		
Ecclesiastical	6d.	6d.		
Judgment signed in any Court at <i>Westminster</i> —	2s. 6d.	2s. 6d.		
Lease in England	6d.	6d.	6d.	1s. <i>Ibid.</i>
Scotland			6d.	1s. <i>Ibid.</i>
by Copy of Court Roll				2s. 3d. 10 A. c. 19;
Letter of Attorney in England	6d.	6d.	6d.	1s. 30 G. 2. c. 19.
Scotland			6d.	1s. <i>Ibid.</i>
Letters of Administration, where the Estate is more than twenty Pounds	5s.	5s.		
But Letters of Administration of the Estate of a Seaman or common Soldier dying in his Majesty's Service are exempted.				5 W. & M. c. 21. 9 W. 3. c. 25;
Letters of Mart in England	5s.	5s.	5s.	
Scotland			5s.	

	5 W. & M. c. 21.	9 & 10 W. 3. c. 25.	12 A. ft. 2. c. 9.	
Letters Patent under the Great Seal, or Seal of the Dutchy of <i>Lancaster</i> , of a Dignity	40s.	40s.	40s.	
Franchise	40s.	40s.	40s.	
an Honour	40s.	40s.	40s.	
a Liberty	40s.	40s.	40s.	
Privilege	40s.	40s.	40s.	
Promotion	40s.	40s.	40s.	
But Letters Patent for collecting of Charity called Briefs are only liable to the Duty of	40s.			
6 & 7 W. 3. c. 12. And Letters Patent containing a Commission of Rebellion in Procefs are exempted.				
Libel in any Court of Admiralty	6d.	6d.		
the Cinque Ports	6d.	6d.		
Ecclesiastical	6d.	6d.		
Licence from any Court Ecclesiastical Ordinary	5s.	5s.	5s.	
the Presbytery in <i>Scotland</i>	5s.	5s.	5s.	
But Licences to Schoolmasters and Tutors are only liable to the Duties of	5s.	5s.		
And a Licence for Marriage pays only in <i>England</i>	5s.		5s.	
<i>Scotland</i>			5s.	
9 A. c. 23. Licence for retailing of Ale in <i>Great Britain</i>				1s.
29 G. 2. c. 12. And				20s.
<i>Ibid.</i> But Licences for keeping Alehouses on the military Roads in <i>Scotland</i> are exempted.				
9 A. c. 23. Licence for retailing of Wine in <i>Great Britain</i>				4s.
30 G. 2. c. 19. And if no other Licence is taken out				100s.
<i>Ibid.</i> But if an Ale Licence is taken out only				80s.
<i>Ibid.</i> And if an Ale and Spirituous Liquor Licence are taken out only				40s.
12 G. 1. c. 33. Mandate from any Court holding Plea of Matriculation in an University	40s. —	6d.	6d.	6d.
Monition from a Court of Admiralty the Cinque Ports	—	1s.	1s.	
<i>Ibid.</i> Ecclesiastical	—	2s.6d.	2s.6d.	
		2s.6d.	2s.6d.	
		6d.	6d.	6d.
10 A. c. 19. News Paper of Half a Sheet or less in <i>Great Britain</i>				$\frac{1}{2}d.$
30 G. 2. c. 19. And				$\frac{1}{2}d.$
10 A. c. 19. more than Half a Sheet and not exceeding one Sheet in <i>Great Britain</i>				1d.
30 G. 2. c. 19. And				$\frac{1}{2}d.$
10 A. c. 19. But the daily Accounts or Bills of Goods exported and imported, and weekly Bills of Mortality, so as such Accounts and Bills contain no other Matter than has usually been comprised therein, are exempted.				
<i>Ibid.</i> <i>Novodamus</i> in <i>Scotland</i>				2s.3d.
30 G. 2. c. 19. Notarial Act in <i>England</i>		6d.	6d.	6d.
<i>Ibid.</i> <i>Scotland</i>				6d.

Order

	5 W.	9 & 10	12 A.	
	& M.	W.	3.	st. 2.
	c. 21.	c. 25.	c. 9.	
Order of any Court at <i>Westminster</i> _____	6d.	6d.		
a beneficial one under his Majesty's Sign Manual, except for the Service of the Army or Navy, or Ordinance } in <i>England</i> _____	2s.6d.	2s.6d.	2s.6d.	
<i>Scotland</i> _____			2s.6d.	
Pamphlet of Half a Sheet or less in <i>Great</i> } <i>Britain</i> _____				$\frac{1}{2}$ d. 10 A. c. 19.
larger than Half a Sheet and not } exceeding one Sheet in <i>Great</i> } <i>Britain</i> _____				1d. <i>Ibid.</i>
larger than one Sheet and not ex- } ceeding six in 8vo, twelve in } 4to, or twenty in Folio, for every } Sheet in one Copy in <i>Great</i> } <i>Britain</i> _____				2s. <i>Ibid.</i>
But Acts of Parliament, Orders of Council, Forms of Prayer or Thanksgiving, or any Act of State ordered by her Majesty, her Heirs or Successors, to be printed, the Votes or other Matters which shall be ordered by either House of Parliament to be printed, Books commonly used in the Schools of <i>Great</i> <i>Britain</i> , and Books containing only Matters of Devotion are exempted.				<i>Ibid.</i>
Pardon of a Crime in <i>England</i> _____	40s.	40s.	40s.	
<i>Scotland</i> _____			40s.	
But the Pardon called <i>Newgate</i> or <i>Circuit</i> } Pardon is only liable to pay _____	40s.			
Pardon of a Fine or Forfeiture _____	40s.	40s.		
And if the Fine or Forfeiture exceeds one } hundred Pounds in <i>England</i> _____	40s.	40s.	40s.	
<i>Scotland</i> _____			40s.	
Pasport in <i>England</i> _____	6d.	6d.	6d.	1s. 30 G. 2. c. 19.
<i>Scotland</i> _____			6d.	1s. <i>Ibid.</i>
Pleadings in a Court of Equity _____	1s.	1s.		
Law _____	1d.	1d.		
Policy of Insurance in <i>England</i> _____	6d.	6d.	6d.	1s. <i>Ibid.</i>
<i>Scotland</i> _____			6d.	1s. <i>Ibid.</i>
And every Policy within the Bills of Morta- } lity is liable to a further Duty of _____				2s. 4d. 10 A. c. 26.
<i>Postea</i> _____	2s.6d.	2s.6d.		
Presentation to a Benefice above the yearly } Value of ten Pounds in the King's Books— } Probate of a Will where the Estate is more } than twenty Pounds _____	40s.	40s.		
_____	5s.	5s.		
But the Probate of the Will of a common Soldier or Seaman dying in his Majesty's Service is exempted.				
Process from any Court, except such on which } a <i>Capias</i> issues from a Court holding Plea } of forty Shillings _____	6d.	6d.		6d. 12 G. 1. c. 33.
from the Court of the Dutchy of } <i>Lancaster</i> _____	6d.	6d.		

Procurator

			5 W.	9 & 10	12 A.	
			£ M.	W. 3.	£. 2.	
			c. 21.	c. 25.	c. 9.	
30 G. 2. c. 19.	Procuracion in <i>England</i>	—————	6d.	6d.	6d.	1s.
<i>Ibid.</i>	<i>Scotland</i>	—————			6d.	1s.
<i>Ibid.</i>	Protest in <i>England</i>	—————	6d.	6d.	6d.	1s.
<i>Ibid.</i>	<i>Scotland</i>	—————			6d.	1s.
	Recognifance	—————	5s.	5s.		
6 & 7 W. 3. c. 12.	But a Recognifance taken before a Justice of Peace is exempted.					
	Record of <i>Nifi Prius</i>	—————	2s.6d.	2s.6d.		
	Register of a Degree in either of the four Inns of Court	—————	40s.			
	an Univerfity	—————	40s.			
	But the Degree of Batchelor of Arts is exempted.					
	Relaxation of an Attachment from a Court of Admiralty	—————	5s.	5s.		
	a Fine or Forfeiture	—————	40s.	40s.		
	And if the Fine or Forfeiture exceeds one hundred Pounds in <i>England</i>	—————	40s.	40s.	40s.	
	<i>Scotland</i>	—————			40s.	
30 G. 2. c. 19.	Release in <i>England</i>	—————	6d.	6d.	6d.	1s.
<i>Ibid.</i>	<i>Scotland</i>	—————			6d.	1s.
10 A. c. 19.	Refignation of heretable Right in <i>Scotland</i>	—————				2s. 3d.
	Reprieve from any corporal Punishment in <i>England</i>	—————	40s.	40s.	40s.	
	<i>Scotland</i>	—————			40s.	
<i>Ibid.</i>	Retour of Service of Heir in <i>Scotland</i>	—————				2s. 3d.
	Rule of any Court at <i>Westminster</i>	—————	6d.	6d.		
<i>Ibid.</i>	Saifine in <i>Scotland</i>	—————				2s. 3d.
	Sentence of any Court of Admiralty	—————	5s.	5s.		
	Final of any Court of Admiralty the Cinque Ports	—————	6d.	6d.		
	Ecclestaftical	—————	6d.	6d.		
<i>Ibid.</i>	Service of Heir in <i>Scotland</i>	—————				2s. 3d.
	<i>Significavit</i>	—————	5s.	5s.		
	Statute Merchant	—————	5s.	5s.		
	Staple	—————	5s.	5s.		
<i>Ibid.</i>	Surrender of Copyhold Estate	—————				2s. 3d.
<i>Ibid.</i>	But a Surrender to the Use of a Will is exempted.					
12 A. ft. 1. c. 2.	A Surrender of a Custom Right or Tenant Right Estate is also exempted.					
10 A. c. 19.	Surrender of heretable Right in <i>Scotland</i>	—————				2s. 3d.
<i>Ibid.</i>	Transfer of Stock in <i>Great Britain</i>	—————				2s. 3d.
12 A. ft. 2. c. 9.	And	—————				4s. 6d.
	Warrant a beneficial one under his Majesty's Sign Manual, except for the Service of the Army, Navy or Ordinance, in <i>England</i>	—————	2s.6d.	2s.6d.	2s.6d.	
	<i>Scotland</i>	—————			2s.6d.	
	Warrant of a Court of Admiralty	—————	2s.6d.	2s.6d.		

	5 W.	9 & 10 W.	12 A.
Writ of Appeal except to a Court of Delegates	5s.	5s.	6d. 12 G. 1. c. 33.
Bill of Middlesex	6d.	6d.	6d. Ibid.
Capias	6d.	6d.	6d. Ibid.
Certiorari	5s.	5s.	6d. Ibid.
Covenant for levying a Fine	5s.		
Dedimus potestatem	6d.	6d.	6d. Ibid.
Entry for suffering a Recovery	5s.		
Error	5s.	5s.	6d. Ibid.
Habeas Corpus	5s.		
Latitat	6d.	6d.	6d. Ibid.
Quo minus	6d.	6d.	6d. Ibid.
Subpoena	6d.	6d.	6d. Ibid.
every original one not particularly charged, except such as a Capias issues upon	6d.	6d.	6d. Ibid.
every other Writ, out of any Court holding Plea of forty Shillings or more	6d.	6d.	6d. Ibid.

Whenever any of the Articles in this List, except that Sort of Almanacks and Pamphlets mentioned to be excepted, is contained in more Skins, Sheets; or Pieces of Parchment or Paper than one, every such Skin, Sheet or Piece, is liable to the Payment of the respective Duties.

Besides certain Particulars therein mentioned to be exempted, the following Things and Persons are also expressly declared to be free from Stamp Duties.

Bills of Exchange, Accounts, Bills of Parcels, Bills of Fees, Bills or Notes, not sealed, for the Payment of Money at Sight, or upon Demand, or at the End of certain Days.

Warrants of a Justice of the Peace, Proceedings of a Court-martial which relate to any Trial of a common Soldier, and all Orders, Decrees, and Proceedings before any Commissioners of Sewers, or in the Court of Stannaries.

Warrants or Instruments signed by the Chief Justices in Eyre, or by any Warden, Lieutenant, or other Officer, of her Majesties Forests or Chafes, or by their Officers, for any Matter or Thing relating to their respective Offices.

Bonds and others Securities of the Bank. 3 G. 1. c. 8. f. 39.

Bonds and other Securities of the South-Sea Company. 3 G. 1. c. 9. f. 16.

Bonds and other Securities of the two Companies for the Assurance of Ships and Merchandize at Sea, and lending Money on Bottomry. 6 G. 1. c. 18. f. 8.

All Persons that shall be admitted to sue or defend in Forma Pauperis are likewise exempted from Stamp Duties. 5 W. & M. c. 21. f. 14. 9 & 10 W. 3. c. 25. f. 63. 12 G. 1. c. 33. f. 7.

(B) Of some Regulations that principally concern the Officers of the Stamp Duties.

Stamps for every particular Sum to be provided; and Notice of these to be given by Proclamation.

BY the 5 *W. & M. c. 21. par. 7.* it is enacted, “ That the Commissioners for managing the Stamp Duties shall provide six several Marks or Stamps, differing from each other, for the several and respective Duties hereby granted, with which several Marks or Stamps, all Vellum, Paper and Parchment, upon which any of the several and respective Things herein before charged shall be ingrossed or written, shall be stamped and impressed; which said several Marks and Stamps shall be published by Proclamation, to be issued under the Great Seal of *England*, a convenient Time before the twenty-eighth Day of *June*, which shall be in the Year of our Lord one thousand six hundred and ninety-four, to the End that all Persons may have due Notice thereof; and that the said Marks or Stamps, or any of them, shall or may be altered or renewed from Time to Time, as their Majesties, their Heirs or Successors, shall think fit, so as publick Notification be given thereof as aforesaid.”

9 *A. c. 23. f. 24.*
10 *A. c. 19. f. 103.*
29 *G. 2. c. 12. f. 2.*
30 *G. 2. c. 19. f. 17.*

Whenever any new Duty has been imposed, by a subsequent Statute, of a Sum for which no Stamp was before provided, it has always been directed in such Statute, that a new Stamp or Mark should be provided and published by Proclamation a convenient Time before the Commencement of the said Duty.

Penalties on divers Persons for not publishing such Proclamation.

By the 10 *Ann. c. 19. par. 110.* it is enacted, “ That as often as her Majesty, her Heirs or Successors, shall think fit to alter any Marks or Stamps, to be provided and used for Vellum, Parchment or Paper, in pursuance of this Act, or any of the former Acts for imposing Stamp Duties, the Proclamation, which is to be made for the giving all Persons due Notice thereof, shall, within thirty Days after the Date thereof, be sent to the Mayor, chief Magistrate or other head Officer, of every City, Corporation, Borough and Market Town, throughout her Majesty’s Kingdom of *Great Britain*; which Officers respectively shall cause the same to be published to the Inhabitants of such City, Corporation, Borough or Town, either on the next Market Day, or next *Sunday* in the Church immediately after the Time of divine Service, upon Pain of forfeiting the Sum of two hundred Pounds.”

Judges are to take judicial Notice of any Proclamation for the publishing of Stamps.

By the 10 *Ann. c. 19. par. 180.* After reciting, that some Doubt has arisen, whether the Judges are judicially to take Notice of the Proclamation issued by their late Majesties King *William* and Queen *Mary*, in pursuance of an Act made in the fifth Year of their said Reign, and of the Types, Marks or Stamps thereby published, it is enacted, “ That all Courts of Justice and Judges whatsoever ought, without any Proof or Allegation in that Behalf, judicially to take Notice of the said Proclamation, and of all the Types, Marks and Stamps, thereby published, and which shall hereafter be published by any Proclamation of her Majesty, her Heirs or Successors, in pursuance of any Act or Acts of Parliament relating to the Stamp Duties, or any of them, as and for the true and lawful Types, Marks and Stamps, made and provided, or to be made and provided, in pursuance of this and other the respective Acts of Parliament in that Behalf made.”

9 & 10 *W. 3. c. 25. f. 49.*
12 *A. st. 2. c. 9. f. 25.*

Where a second or third Duty has by any Act been imposed upon the same Thing, of a Sum for which a Mark or Stamp was before provided, it has till very lately been directed in such Act, that such Mark or Stamp should

be affixed to the Vellum, Parchment or Paper, it was to be ingrossed or written upon, a second or third Time, as the case required.

But by the 30 G. 2. c. 19. f. 18. it is enacted, "That to prevent the Multiplication of Stamps upon such Pieces of Vellum or Parchment, or such Sheets or Pieces of Paper, on which several Duties are by several Acts of Parliament imposed, it shall and may be lawful for the Commissioners for managing the Stamp Duties, instead of the distinct Stamps, directed to be provided, to denote the several Duties on the Vellum, Paper or Parchment, charged therewith, to cause one new Stamp to be provided, to denote the said several Duties on every Piece of Vellum or Parchment, or Sheet or Piece of Paper, charged with the said several Duties."

Several Duties imposed upon the same Thing may be denoted by one Stamp.

By the 5 W. & M. c. 21. par. 10. it is enacted, "That if any Officer appointed for the marking or stamping Vellum, Parchment or Paper, shall fix any Mark or Stamp to any Vellum, Parchment or Paper, before the several and respective Duties, thereupon charged by this Act, shall be duly answered and paid, or be secured to be paid to their Majesties Use, he shall for every such Offence forfeit the Sum of one hundred Pounds."

Penalty on an Officer stamping any Thing before the Duty is paid.

One Moiety of this Penalty is given to their Majesties, and the other Moiety to him or them that shall inform or sue for the same, in any of their Majesties Courts of Record, by Bill, Plaint or Information, wherein no Effoin, Protection, Wager of Law, or more than one Impar lance, shall be allowed; and it may once for all be observed, that the Penalties incurred by Offences against the Stamp Duties are in general disposed of in the same Manner.

1 A. B. 2. c. 22. f. 6. 9 A. c. 23. f. 37. 10 A. c. 19. f. 107. 30 G. 2. c. 19. f. 25.

By the 5 W. & M. par. 9. it is enacted, "That all Vellum, Parchment and Paper, hereby intended to be charged with the several and respective Duties aforesaid, shall, before any of the Matters or Things herein before mentioned shall be thereupon ingrossed or written, be brought to the head Office aforesaid, or to some other Sub-commissioner or Officer to be appointed by the Commissioners, as herein is directed for that Purpose, to be stamped and marked; and the said Commissioners, Sub-commissioners and Officers aforesaid, are hereby impowered and required forthwith, upon Demand to them made by any Person or Persons, to stamp and mark any Quantities or Parcels of Vellum, Parchment or Paper, he or they paying to such Officer or Officers, as shall be appointed in that Behalf, the respective Duties hereby directed to be paid for the same, without any other Fee or Reward, which Stamp or Mark shall be a sufficient Discharge for the several and respective Duties, hereby granted upon the said Vellum, Parchment or Paper, which shall be so stamped or marked."

Vellum, Parchment or Paper to be stamped properly before it is written upon, and no Fee to be taken by any Officer for stamping

In the subsequent Acts for imposing a Stamp Duty, the Officers are in like Manner required to stamp Parchment or Paper upon Demand, without Fee or Reward.

9 & 10 W. 3. c. 25. f. 59. 9 A. c. 23.

f. 25. 10 A. c. 19. f. 104. 12 A. B. 2. c. 9. f. 14.

And by the 30 G. 2. c. 19. par. 24. it is enacted, "That if any Officer employed in the Execution of this Act, in Relation to the said Duties, shall neglect or refuse to do or perform any Matter or Thing, by this Act required to be done or performed by him, whereby any of his Majesty's Subjects shall or may sustain any Damage whatsoever, such Officer so offending shall be liable, by any Action to be founded on this Statute, to answer to the Party grieved all such Damage with treble Costs of Suit."

Any Officer neglecting to do his Duty is liable to answer the Damage with treble Costs.

By the 5 W. & M. c. 21. par. 13. it is enacted, "That the Commissioners for managing the Stamp Duties shall take especial Care, that the several Parts of this Kingdom, the Dominion of Wales, and Town of Berwick upon Tweed, shall, from Time to Time, be sufficiently furnished

The Commissioners to take Care that the Kingdom be furnished with "with Stamps.

“ with stamped Vellum, Parchment and Paper, so as their Majesties Subjects may have it at their Election; to buy the same of the Officers or Persons to be employed by the said Commissioners, at the usual or most common Rates above the said Duty, or to bring their own Vellum, Parchment or Paper, to be stamped as aforesaid.

The Price of stamped Vellum, Parchment and Paper to be set once a Year.

By the 6 & 7 *W. 3. c. 12. par. 9.* it is enacted, to the End that the Subjects may have stamped Vellum, Parchment and Paper, at an easier Rate than formerly, “ That the Lord High Treasurer, or Commissioners of the Treasury for the Time being, shall once in the Year, at least, set the Prices of all Sorts of stamped Vellum, Parchment or Paper, that it shall be sold at; and that the Commissioners for managing the Stamp Duties shall stamp the Price so set upon every Skin or Piece of Vellum or Parchment, or Sheet or Piece of Paper, so by them to be sold.”

Whenever any Stamp is altered, the Vellum, Parchment or Paper stamped therewith is to be changed by the Commissioners.

By the 5 *W. & M. c. 21. par. 16.* it is enacted, “ That, as often as their Majesties, their Heirs or Successors, shall think fit to alter or renew the said Marks or Stamps, or any of them, it shall be lawful for all Persons, who shall at that Time have in their Custody or Possession any Vellum, Parchment or Paper, marked with the Mark or Stamp which shall be so altered or renewed, and upon which none of the Matters or Things hereby charged shall be ingrossed or written, at any Time, within sixty Days after such Intention of renewing or altering shall be published by Proclamation as aforesaid, to bring or send such Vellum, Parchment or Paper, unto the Commissioners for managing the Stamp Duties, at their head Office in *London* or *Westminster*, or to such other Officers as shall be appointed as aforesaid: And the said Commissioners and Officers respectively are hereby required to deliver, or cause to be delivered, unto the several Persons, who shall bring or deliver any Quantity of Vellum, Parchment or Paper, the like Quantity of Vellum, Parchment or Paper, and as good in Quality, stamped with such new Stamp or Mark, without demanding or taking, directly or indirectly for the same, any Sum of Money or other Consideration whatsoever, under the Penalty of forfeiting for every Offence one hundred Pounds.”

9 & 10 *W. 3. c. 25.*
9 *A. c. 23.*
10 *A. c. 19.*
12 *A. st. 2. c. 9.*
12 *G. 1. c. 33.*
30 *G. 2. c. 19.*

The three last Clauses, for furnishing the Kingdom with stamped Vellum, Parchment and Paper, setting the Price of the same, and for exchanging the same upon any Renewal or Alteration of the Stamps, relate only to the Duties imposed by the 5 *W. & M. c. 21.* But there are, in subsequent Acts for imposing other Stamp Duties, Clauses to the same Effect.”

Commissioners to deliver Paper stamped for the printing of Almanacks upon, and to take back such Copies of Almanacks as are not sold.

By the 9 *A. c. 23. f. 38.* it is enacted, “ That in regard to the Uncertainty how many Almanacks for any one Year will be sold, the Commissioners for managing the Stamp Duties shall and may deliver to the Person or Persons, Bodies Politick or Corporate, by or for whom any Almanack or Almanacks is or are to be printed or published, Paper marked or stamped, according to the true Intent and Meaning of this Act, for the printing such Almanack or Almanacks, upon his, her or their, giving sufficient Security to pay the Amount of the Duties hereby charged thereupon, within the Space of three Months after such Delivery; and that the said Commissioners, upon bringing to them any Number of the Copies of such Almanacks, within the said Space of three Months, and Request to them in that Behalf made, shall cancel all the Stamps upon such Copies, and abate to such Person or Persons so much of the Money due on such his, her or their, Security or Securities, as such cancelled Stamps shall amount unto, any Thing herein contained to the contrary notwithstanding.”

By the 10 *An. c. 19. par. 114.* in regard of the Uncertainty how many Copies of News Papers or Pamphlets, to be contained in one Sheet or in a less Piece of Paper, may be fold; and to the Intent the Duties hereby granted thereupon may not be lessened, by printing a less Number than may be fold, out of a Fear of a Loss thereby in printing more Copies than will be fold; it is enacted, "That the Commissioners for managing

The Commissioners to make an Allowance for Copies of News Papers and Pamphlets unfold.

"the Stamp Duties, or the major Part of them, or such head Officers as they shall appoint in this Behalf, shall and may cancel, or cause to be cancelled, all the Stamps upon such Copies of any Impression of such News Paper or Pamphlets, as shall really and truly remain unfold, in the Hands of the Person or Persons by or for whom the same shall be printed or published; and upon Oath or Oaths made before the same Commissioners, or the major Part of them, or such head Officer, who are hereby empowered to administer the same, and to examine into all Circumstances relating to the selling or disposing of the printed Copies of such News Paper or Pamphlet, to the Satisfaction of such Commissioners or head Officer, that all such Copies, so cancelled, shall be really and truly remaining unfold, in the Hands of the Person or Persons by or for whom the same were printed or published, and that none of them shall have been fraudulently returned, or re-bought, after the same shall have been sold and disposed of, shall and may cause the like Number of other Sheets, Half Sheets or less Pieces of Paper, to be stamped with the same respective Stamps *gratis*, and without paying any Duties for the same, for the Person or Persons who paid the Duties for such Stamps, as shall be on such Copies so remaining unfold, any Thing herein contained to the contrary notwithstanding: And the same Commissioners, or the major Part of them, are hereby empowered to make such Rules and Orders, for regulating the Methods, and limiting the Times for such Cancelling and Allowances as aforesaid, with respect to such several and respective News Papers and Pamphlets, as they shall, upon Experience and Consideration of the several Circumstances, find necessary or convenient, for the effectual securing the Duties on such News Papers or Pamphlets, and doing Justice to the Persons concerned in printing and publishing the same."

By the 5 *W. & M. c. 21. par. 12.* it is enacted, "That the Commissioners for managing the Stamp Duties shall and may appoint a fit Person to attend in any Court or Office, to take Notice of the Vellum, Parchment or Paper, upon which any of the Matters or Things hereby charged shall be imposed, written or put, and of the Marks or Stamps thereupon, and of all other Matters and Things tending to secure their Majesties Duties arising by this Act; and that the Judges in the several Courts, and such others to whom it may appertain, at the Request of the said Commissioners, or any two or more of them, shall make such Orders in the respective Courts, and do such other Matters and Things, for the better securing the said Duties, as shall be lawfully and reasonably desired in that Behalf."

Inspectors in Courts and Offices may be appointed, and the Judges are to make Orders for securing the Stamp Duties.

By the 9 *An. c. 23. par. 28.* it is enacted, "That all publick Officers, who shall have in their Custody any publick Books, Files, Records, Remembrances, Dockets or Proceedings, the Sight or Knowledge whereof may tend to the securing of these or any her Majesty's Stamp Duties, or to the Proof or Discovery of any Fraud or Omission in Relation thereto, or to any of them, shall, at any seasonable Time or Times, permit any Officer or Officers thereunto authorized by the Commissioners for managing the Stamp Duties, or the major Part of them, to inspect and view such Books, Files, Records, Remembrances, Dockets and Proceedings as aforesaid, and to take thereout such Notes and Memorandums, as shall be necessary for the Purposes last mentioned, without Fee or Reward, upon Pain that such Clerk, or other Officer or Officers, who shall refuse or neglect so to do, upon reasonable Request in that Behalf made, shall,

Penalty for obstructing the Inspectors appointed.

“ for every such Refusal or Neglect, forfeit the Sum of five Pounds with
 “ full Costs of Suit.”

(C) **What the Consequence is of Ingrossing
 or Writing any Matter or Thing liable to
 a Stamp Duty upon Vellum, Parchment
 or Paper, that has not been duly stamped.**

1. **To any Person so ingrossing or writing.**

Penalty of five hundred Pounds for ingrossing or writing on Vellum, Parchment or Paper, not properly stamped. **B**Y the 5 *W. & M. c. 21. par. 11.* it is enacted, “ That if any Person
 “ or Persons shall ingross or write, or cause to be ingrossed or written,
 “ upon any Vellum, Parchment or Paper, any Matters or Things, for
 “ which the said Vellum, Parchment or Paper, is hereby charged to pay
 “ any Duty, before such Time as the said Vellum, Parchment or Paper
 “ shall be marked or stamped as aforesaid, or upon which there shall not be
 “ some Stamp or Mark resembling the same, or shall ingross or write, or
 “ cause to be ingrossed or written, any Matter or Thing upon any Vellum,
 “ Parchment or Paper, that shall be marked or stamped for any lower Duty
 “ than is the Duty by this Act payable for what shall be so ingrossed or
 “ written, such Person so offending shall, for every Offence forfeit the Sum
 “ of one hundred Pounds.”

This Penalty reduced to five Pounds. But by the 6 & 7 *W. 3. c. 12. par. 7.* it is enacted, “ That the Penalty
 “ of five hundred Pounds, mentioned in this last Act, shall no longer stand
 “ and be in Force, but is hereby altered and changed into the Penalty of
 “ five Pounds only; and that for the future, in all Cases where by the said
 “ Act the Offender was to forfeit five hundred Pounds, he shall forfeit no
 “ more than five Pounds, to be recovered with Costs of Suit, any Thing
 “ in the said Act to the contrary notwithstanding.”

9 & 10 *W. 3. c. 25. f. 59.* A Penalty of ten Pounds with full Costs of Suit is inflicted, by the
 9 *A. c. 23. f. 27.* subsequent Acts of Parliament for imposing Stamp Duties, for an Offence of
 the same Kind against either of them.

10 *A. c. 19. f. 105.* 12 *A. f. 2. c. 9. f. 28.* 12 *G. 1. c. 33. f. 13.* 30 *G. 2. c. 19. f. 25.*

2. **To some particular Persons.**

A publick Officer of any Court to forfeit his Place as well as to pay the Penalty. **B**Y the 5 *W. & M. c. 21. par. 11.* it is enacted, That if any Clerk,
 “ Officer or Person, who, in respect of any publick Office or Employment,
 “ is or shall be intitled or intrusted to make, ingross or write, any Re-
 “ cords, Deeds, Instruments or Writings, by this Act charged to pay a
 “ Duty as aforesaid, shall be guilty of any Fraud or Practice, to deceive
 “ their Majesties of any Duty by this Act payable, by making, ingros-
 “ sing or writing, any such Record, Deed, Instrument or Writing, or
 “ causing the same to be made, ingrossed or written, upon Vellum, Parch-
 “ ment or Paper, not marked or stamped according to this Act, or upon
 “ which there shall not be some Mark or Stamp resembling the same,
 “ or upon Vellum, Parchment or Paper, marked or stamped with any
 “ Mark or Stamp which he shall know to be counterfeited, or by in-
 “ grossing or writing any such Deed, Instrument or other Writing, upon
 “ Vellum, Parchment or Paper, that shall be marked or stamped for a
 “ lower

“ lower Duty as aforesaid, that then every such Clerk, Officer or Person,
 “ so guilty of any such Fraud or Practice, and being thereof lawfully con-
 “ victed, shall, over and above the Penalty aforesaid, forfeit his Office,
 “ Place or Employment respectively, and be disabled to hold or enjoy the
 “ same for the future.”

By the same *par.* it is enacted, “ That if any Attorney, belonging to
 “ any Court whatsoever, shall be guilty of any such Fraud or Practice as
 “ aforesaid, and be convicted thereof, he shall, over and above the Penalty
 “ aforesaid, be disabled for the future to practise as an Attorney.”

An Attorney
to be disabled
from practising
as well as to pay
the Penalty.

But by the 1 *Ann. st. 2. c. 22. par. 4.* it is enacted, “ That no Officer
 “ shall be subject to any the Penalties, Forfeitures, Disabilities or Incapa-
 “ cities, in this or any of the former Acts for imposing any Stamp Duties
 “ mentioned, for writing, or causing to be written, any of the Matters
 “ or Things liable to Stamp Duties, in any Book or Roll without any Marks
 “ or Stamps thereon, which shall have been first shewn to and signed by the
 “ Commissioners for managing the Stamp Duties, or any three or more of
 “ them, or some Officer or Officers by them, or the major Part of them, for
 “ that Purpose authorized and empowered to signify his or their Leave or
 “ Approbation, that the Matters or Things, to be written in such Book or
 “ Roll, may be therein written without any Marks or Stamps thereon, so
 “ as the Person or Persons, having the Custody of such Book or Roll, do
 “ from Time to Time, when and as often as he or they shall be thereto
 “ required, permit the said Commissioners, or any of them, or any Officer
 “ or Agent, by them or the major Part of them for that Purpose appointed,
 “ to inspect and view such Book or Roll, and do also, from Time to Time,
 “ when and as often as he or they shall be thereto required, by the said Com-
 “ missioners, or the major Part of them, or any other by them or the
 “ major Part of them authorized, pay unto the Receiver General for the
 “ Time being of the said Duties, or such other Officer or Person as the said
 “ Commissioners, or the major Part of them, shall appoint to receive the
 “ same, all such Sum or Sums of Money, which according to the true In-
 “ tent and Meaning of the said Acts, or any of them, ought to be paid, in
 “ Respect of all and every such Matters and Things, as shall be written in
 “ such Book or Roll, any thing herein, or in any of the said former Acts,
 “ contained to the contrary thereof notwithstanding.”

But an Officer
incurs no Pe-
nalty for writ-
ting in a Book
unstamped,
with Leave of
the Commis-
sioners.

By the 9 *Ann. c. 23. par. 27.* it is enacted, “ That if any Officer of the Cus-
 “ toms shall sign any Certificate or Debenture, for drawing back any Cus-
 “ toms or Duties, not appearing to have been duly stamped according to
 “ Law, every such Officer so offending shall, for every such Offence, for-
 “ feit the Sum of ten Pounds, together with full Costs of Suit; and every
 “ such Officer of the Customs offending herein, and being convicted of
 “ such Offence, shall, over and besides the Penalty or Forfeiture as afore-
 “ said, forfeit and lose his Office or Employment, and be incapable to hold
 “ the same.”

An Officer of
the Customs to
forfeit ten
Pounds and
his Office.

By the 10 *Ann. c. 19. par. 105.* it is enacted, “ That if any Steward
 “ or other Officer, or his Deputy, shall write or ingross, or cause to be
 “ written or ingrossed, or sign, any of the respective Matters and Things
 “ by this Act charged, before the Vellum, Parchment or Paper, where-
 “ upon the same shall be respectively ingrossed or written, shall appear to
 “ have been so duly stamped or marked as aforesaid, he shall forfeit the
 “ Sum of ten Pounds, together with full Costs of Suit, and such Steward,
 “ or other Officer, or his Deputy, offending herein, and being convicted of any
 “ such Offence, shall, over and besides the Forfeiture or Penalty aforesaid,
 “ forfeit and lose his Office or Employment, and be incapable to hold the
 “ same.”

A Steward to
forfeit ten
Pounds and his
Office.

3. To the Batter so ingrossed or written.

An Instrument or Writing to be of no Avail till the Duty and a Penalty of five Pounds is paid, and the same is stamped.

By the 5 *W. & M. c. 21. par. 11.* it is enacted, " That if any Deed, Instrument or Writing whatsoever, by this Act charged with the Payment of a Duty as aforesaid, shall, contrary to the true Intent and Meaning thereof, be written or ingrossed by any Person or Persons whatsoever, not being a known Clerk or Officer, who, in respect of any publick Office or Employment, is or shall be intitled to the making, writing or ingrossing the same upon Vellum, Parchment or Paper, not marked or stamped according to this Act, or upon Vellum, Parchment or Paper, marked or stamped for a lower Duty as aforesaid, that then, and in every such Case, there shall be due, answered and paid, to their Majesties, over and above the Duty aforesaid, for every such Deed, Instrument or Writing, the Sum of five Pounds; and no such Record, Deed, Instrument or Writing, shall be pleaded or given in Evidence in any Court, or admitted in any Court to be good, useful or available, in Law or Equity, until as well the said Duty; as the said Sum of five Pounds, shall be first paid to their Majesties Use, and a Receipt produced for the same under the Hand or Hands of some of their Majesties Officers, which shall be appointed to receive the Duties above-mentioned, and until the Vellum, Parchment or Paper, upon which such Deed, Instrument or Writing, shall be written or made, shall be marked or stamped with a lawful Mark or Stamp; and their Majesties Officer or Officers last-mentioned are hereby enjoined and required, upon Payment or Tender of the said Duty and Sum of five Pounds unto him or them, to give a Receipt for the same, and to mark or stamp the said Vellum, Parchment or Paper, with the Mark or Stamp that shall be proper for such Deed, Instrument or Writing respectively."

9 & 10 *W. 3. c. 25. f. 59.* There is in the other Stamp Acts a Clause penned, *mutatis mutandis*, in nearly the same Words as this: But the Exception, as to the Person writing or ingrossing being a known Clerk or Officer, who, in respect of any publick Office or Employment, is or shall be intitled to the making, writing or ingrossing the same, is only in that of the 9 & 10 *W. 3. c. 25.*
 9 *A. c. 23. f. 27.*
 10 *A. c. 19. f. 105.*
 10 *A. c. 26. f. 71.* 12 *A. f. 2. c. 9. f. 25.* 12 *G. 1. c. 33. f. 8.* 30 *G. 2. c. 19. f. 25.*

L. Raym.
 1445. *Rex & Recks.*

Upon a Trial at Bar, on an Information in the Nature of a *Quo Warranto*, an Instrument stamped with one Stamp was produced, purporting the Admission of five Persons upon the nineteenth of *December* one thousand seven hundred and twenty-one, amongst whom the Defendant was the third Person named. *Raymond Ch. J.* and *Fortescue* and *Reynolds J.* were of Opinion, that this ought not to be read; for that, if not quite void for Uncertainty, it could be only good for the Person first named. Then four Pieces of Parchment, each of them duly stamped, which imported the several Admissions of the four Persons last named on the said nineteenth Day of *December*, were offered in Evidence: But, it being proved by the Witness producing them, that these were not stamped till two Months after the said Day, the same three Judges were clearly of Opinion, that as the Parchment was not stamped at the Time of the Admission, it could not be given in Evidence, till the Penalty is paid, and a Certificate of such Payment is produced.

But wherever the Penalty is paid, and a Receipt for the Payment of the same is produced, an Instrument becomes good and available in all Courts, although it was not stamped at the Time it was executed; for the Design of the several Statutes is only to prevent Frauds in the Stamp Duties.

Upon

Upon a Writ of Error, from the Court of the County Palatine of Lancaster, it appeared, by a Bill of Exceptions, that a Patent produced in Evidence was not stamped at the Time of sealing: But the whole Court were of Opinion, that, being stamped at the Time it was produced at the Trial, it was proper Evidence; for that the Intention of the Stamp Acts was not to make Deeds void, which were not stamped, but to add a Penalty, that has in the present Case been paid, to enforce the Payment of the respective Duties.

A Motion was made to set aside a Verdict, because a *Disfringas* was not stamped at the Time of the Trial; but, the Solicitor having taken Care to get it stamped, before the *Possea* was brought in, the Motion was rejected: *Et per Cur'*: As it is now stamped, we cannot take Notice whether it was so or not at the Assizes; and, if it was not, Advantage should have been then taken of the Defect.

From the Words of the several Statutes, and from these Cases, it appears, that nothing more is in general intended than to make unstamped Instruments void to certain Purposes; but by the 8 *A. c. 9. par. 39.* it is enacted, "That all Indentures of Apprenticeship, wherein shall not be truly inserted or written the full Sum and Sums of Money received, or in any wife directly or indirectly given, paid, secured or contracted for, with or in Relation to any Clerk or Apprentice, or whereupon the Duties payable by this Act shall not be paid or lawfully tendered, or which shall not be stamped, or lawfully tendered to be stamped, shall be void; and not available in any Court or Place to any Purpose whatsoever."

An Apprentice had served three Years; but the Master had never paid the Duty of Sixpence in the Pound for the Money received with him. This Case being referred to *Fortescue J.* who went the Circuit, he was of Opinion, that, as six Months Time was given for the Master to pay the Duty in, a Settlement was during that Time gained, which could not afterwards be defeated; and the Sessions held it to be a Settlement. Upon removing the Order of Sessions it was quashed; *Et per Cur'*: This would be making the Indenture good to one Purpose, when by the 8 of *Ann. c. 9.* it is declared, that such Indenture shall not be good to any Purpose whatsoever; and the positive Words of an Act of Parliament, however hard the Case is, ought not to be broke through.

(D) Of Regulations for preventing Frauds to the Prejudice of the Stamp Duties.

AS many of the Stamp Duties were at first imposed for a Time, the Regulations concerning them were also temporary: But, as the different Acts of Parliament, by which the former were imposed, have been all made perpetual, or are so continued as to be at this Day in Force, it may once for all be observed, that the latter do still subsist.

1. By writing a second Matter upon the same Vellum, Parchment or Paper, before it has been a second Time duly stamped.

Penalty upon the Person fraudulently using the same Stamp, for some second Matter liable to a Stamp Duty.

By the 1 *An. st. 2. c. 22. par. 2.* it is enacted, “ That if any Person or Persons shall write or ingross, or cause to be written or ingrossed, either the whole, or any Part, of any Writ, Mandate, Bond, Affidavit, or other Writing, Matter or Thing, whatsoever, in respect whereof of any Duty is payable by any of the Acts for imposing Stamp Duties, on the whole, or any Part, of any Piece of Vellum, Parchment or Paper, whereon there shall have been before written any other Writ, Mandate, Bond, Affidavit, or other Matter or Thing; in respect whereof any Duty was payable by any of the said Acts, before such Vellum, Parchment or Paper, shall have been again marked or stamped according to the said Acts; or shall fraudulently erase or scrape out, or cause to be erased or scraped out, the Name or Names of any Person or Persons, or any Sum, Date or other Thing, written in such Writ, Mandate, Bond, Affidavit, or other Writing, Matter or Thing as aforesaid; or shall fraudulently cut, tear or get, off any Mark or Stamp from any Piece of Vellum, Parchment or Paper, or any Part thereof, with Intent to use such Mark or Stamp for any other Writing, Matter or Thing; in respect whereof any Duty shall be payable by Virtue of any of the said Acts, that then so often, and in every such Case, every Person so offending, in any of the Particulars before-mentioned, shall, for every such Offence, forfeit the Sum of twenty Pounds, with full Costs of Suit.”

The Assignment of a Bail Bond need not be stamped at the Time of making it.

But by the 4 *Ann. c. 16. par. 20.* it is enacted, “ That a Sheriff or other Officer may assign a Bail Bond, or other Security taken by such Sheriff or Officer from the Bail, to the Plaintiff in the Action, by endorsing the same, and attesting it under his Hand and Seal in the Presence of two credible Witnesses, without any Stamp.”

But it must be before an Action is brought upon it.

It is provided, however, by the same *par.* “ That the Assignment, so endorsed, must be duly stamped, before any Action is brought thereupon.”

But, notwithstanding the Penalty inflicted upon the Person making Use of the same Stamp a second Time, to the Prejudice of the Stamp Duties, it seems probable, that the second Matter, for which it was so made Use of, was good and available to all Intents and Purposes till the 12 *Ann. st. 2. c. 9.*

Several Matters wrote upon the same Vellum, Parchment or Paper, to be charged severally.

By the 24 *par.* of this Statute it is enacted, “ That where any more than one, of any the Matters or Things hereby charged with any Stamp Duty; shall be engrossed, written, entered or registered, upon one Piece of Vellum, Parchment or Paper, the said respective Duties, hereby granted, shall be, and hereby are, charged upon every one of such Matters or Things respectively.”

The contrary is indeed laid down in the following Case, which was some few Years before this Statute.

Salk. 612.
Anon. Mich.
4 Ann.

A Warrant of Attorney, for entering up a Judgment, was written upon a Sheet of Paper, which likewise contained a Bond, and had only one Stamp; whereas, by the Acts concerning the Stamp Duties, it ought to have two Stamps. Judgment was entered up by Virtue of this Warrant; and now it was moved, that the Judgment and Execution might be set aside for this Cause: *Sed per Cur^{iam}*: There may be Reason to refuse such a Warrant of Attorney in Evidence, but no Reason to make all void; for there is nothing in the Act which imports that.

No Act is mentioned in the Book; and there is no Clause in any one before the 12 *Ann. st. 2. c. 9.* by which such a Warrant of Attorney is expressly charged with a second Duty.

The Clause last cited implies, that the Case of writing more than one Matter liable to a Stamp Duty upon the same Vellum, Parchment or Paper, was not before provided against; for, if such Provision had been made by any former Statute, some Notice would have been therein taken of it.

It may also be fairly concluded, from the Provision in another Clause just now cited, *that no Action shall be brought upon the Assignment of a Bail Bond, endorsed upon such Bond, until the Bond has been a second Time stamped,* that, if no such Provision had been made, an Action might have been brought upon such Assignment.

The true Reason, perhaps, of the Judgment in this Case was, that such Warrant of Attorney did not require a second Stamp; for the Reason mentioned by the Reporter is so inconclusive, that the Judgment of the Court cannot be presumed to have been thereupon founded. It is not easy to conceive a Case, where this Warrant could have been produced in Evidence: But, to allow the Possibility of such a Case, if the Court had been of Opinion, that it would not have been admissible Evidence, they must also have been of Opinion, that the Judgment in this Case entered upon it was bad; for in the same Sentence, of any of the preceding Acts, in which it is said, *that no Instrument, unless duly stamped, shall be pleaded or given in Evidence in any Court,* it is added, *or be admitted, in any Court, to be good, useful or available, in Law or Equity.*

By the 1 *Ann. st. 2. c. 22. par. 5.* it is enacted, “ That all Writings, Matters and Things, in respect whereof any Stamp Duties shall be payable, shall be written in such Manner, that some Part thereof shall be upon, or as near as conveniently can be to, the Stamps or Marks, which shall, in Pursuance of any Act of Parliament, be placed upon the Vellum, Parchment or Paper, whereupon the same shall be written or ingrossed, upon Pain that the Person, who shall write or ingross, or cause to be written or ingrossed, any such Writing, Matter or Thing, contrary to the Tenor and true Meaning hereof, shall, for every such Offence, forfeit the sum of ten pounds, with full Costs of Suit.”

Penalty for not writing Part of the Matter upon or near to the Stamps.

2. In the Manner of writing certain Things.

By the 5 *W. & M. c. 21. par. 15.* it is enacted, “ That, to the End their Majesties may not be defrauded of any of the Duties hereby granted, all Records, Writs, Pleadings and other Proceedings in Courts of Law and Equity, and all Deeds, Instruments and Writings whatsoever, hereby charged, shall be ingrossed and written in such Manner as they have been usually accustomed to be written or are now written.”

Records, Deeds, and all Writings to be ingrossed and wrote as they usually have been.

In the 9 & 10 *W. 3. c. 25. par. 64.* there is a Clause to the same Effect, and in nearly the same Words.

3. In Legal Proceedings.

By the 5 *W. & M. c. 21. par. 4.* for the preventing Abuses committed, by arresting Persons without any Writ or legal Process to justify the same, by Means whereof the Duty, hereby given to the Crown upon such Process, will be lost, it is enacted, “ That every Officer or Clerk, belonging to the Court of King’s Bench, Common Pleas, or Exchequer, who shall sign any Writ or Process, before Judgment, to arrest any Person or Persons thereupon, shall, at the Signing thereof, set down upon such Writ or Process

Penalty upon a Clerk for not entering the Time of signing a Writ or Process.

“ Procefs the Day and Year of figning the fame, which fhall be entered
 “ upon the Remembrance, or in the Book where the Abftraft of fuch Writ
 “ or Procefs fhall be entered, upon Pain to forfeit the Sum of ten Pounds,
 “ for every Offence or Neglect of fuch Officer or Clerk aforefaid.”

In the 9 & 10 *W. 3. c. 25. par. 42.* there is a Clause to the fame Effect.
 Penalty on a Sheriff delivering out a Warrant, without having a Writ in his Cuftody. By the 6 *G. 1. c. 21. par. 43.* after reciting, that many Under Sheriffs, and other Perfons acting as fuch, do make and deliver out Blank Warrants to Attornies, Bailiffs and others, for the arresting and taking Perfons into Cuftody upon mean Procefs, without having any Writ or Writs, or other legal Procefs, in their Cuftody, to juftify the fame, whereby his Majesty’s Duties are greatly leffened and his Subjects aggrieved, it is enacted, “ That

“ if any High Sheriff, Under Sheriff, or his or their Deputy or Deputies,
 “ their Clerks or Agents, fhall make or caufe to be made or delivered out,
 “ to any Perfon or Perfons whomsoever, any Warrant or Warrants, either
 “ Blank or filled up in part or in all, before they, or fome of them, fhall
 “ actually have in their Cuftody the refpective Writs, upon which fuch
 “ Warrants fhould and ought to iffue, that then the feveral Perfons fo of-
 “ fending, and every of them, fhall forfeit the Sum of ten Pounds for every
 “ fuch Offence.”

Penalty upon a Sheriff, for not fetting down upon a Warrant the Time of figning the Writ upon which it iffues. By *par. 54.* after reciting that, by one Statute made in the Fifth Year of the Reign of King *William* and Queen *Mary*, for granting to their Majefties feveral Duties upon Stamped Vellum, Parchment and Paper, and by another made in the Ninth Year of his faid Majefty’s Reign, for granting to his Majefty, his Heirs and Successors, further Duties upon Stamped Vellum, Parchment and Paper, it was, *inter alia*, enacted, That every Officer or Clerk belonging to the Court of King’s Bench, Common Pleas, or Exchequer, who fhould fign any Writ, before Judgment, to arrest any Perfon or Perfons thereupon, fhould, at the figning thereof, fet down upon fuch Writ or Procefs the Day and Year of his figning the fame, under the Forfeiture of ten Pounds for every fuch Offence or Neglect, it is, for the better preventing the Frauds aforefaid, enacted, “ That every Warrant, to be

“ made out or iffued upon any fuch Writ or Writs, fhall have the fame
 “ Day and Year plainly and diftinctly fet down thereon, as fhall be fo fet
 “ down upon the Writ itfelf, under the Forfeiture of ten Pounds for every
 “ fuch Neglect or Omission, to be paid by the Perfon who fhall write, fill
 “ up, or deliver out, fuch Warrant.”

Penalty for not entering or filing an Appearance or Common Bail within eight Days. By the 9 & 10 *W. 3. c. 25. par. 33.* it is enacted, “ That when
 “ Common Bail is to be filed in any Court whatsoever, or an Appearance is to
 “ be upon fuch Common Bail, the Defendant fhall caufe fuch Appearance, or
 “ Common Bail, to be entered or filed within eight Days after the Day upon
 “ which the Procefs, on which the Defendant is arrested, fhall be returnable,
 “ upon Penalty of five Pounds to be paid to the Plaintiff, for which the
 “ Court fhall immediately award Judgment, whereupon the Plaintiff may
 “ take out Execution.”

Str. 737. White and Holland. Upon Debate it was held, that an abfolute Rule fhould be made on the firft Motion, for the Payment of five Pounds, for not filing Common Bail according to the 9 & 10 *W. 3. c. 25.* the Words of the Statute being, that the Court fhall immediately award Judgment, whereupon the Plaintiff may take out Execution.

Penalty of 20 l. on an Officer or Attorney in certain Cafes. By the 1 *Ann. ft. 2. c. 22. par. 1.* for the Prevention of feveral Frauds, whereby her Majefty’s Duties, by the feveral Acts of Parliament in that Behalf made, impofed on stamped Vellum, Parchment and Paper, have been very much leffened, it is enacted, “ That if any Clerk, Officer, At-
 “ torney, Solicitor or other Perfon, to whom it fhall appertain, or who
 “ fhall be employed or intrufted, to enter or file any Action, Plaint, Bail,
 “ Appearance, Admiffion, or other Matter or Thing, in refpect whereof
 “ any Duty fhall be payable by Virtue of the faid Acts, or any of them,
 “ fhall neglect to enter, file or record the fame, as by Law the fame ought

“ to be entered, filed or recorded, within the Space of four Months after such Clerk, Officer, Attorney, Solicitor, or other Person, shall have received any Money for, or in respect of, the entering, filing or recording, of any such Action, Plaint, Bail, Appearance, Admission, or other Matter or Thing, or shall have promised or undertaken to enter, file or record, the same; or shall neglect to enter, file or record, any such Action, Plaint, Bail, Appearance, or other Matter or Thing, before any subsequent, further or other Proceeding, Matter or Thing, in, upon or relating to, the same shall be had, entered, filed or recorded; or if any Clerk, Officer, Attorney, Solicitor, or other Person or Persons, shall transact, enter, record or file, any such suit, or other Proceeding, Matter or Thing, subsequent and relating to such Action, Plaint or Appearance, before the same shall have been duly entered, filed or recorded, that then every such Clerk, Officer, Attorney, Solicitor or other Person, so neglecting or offending, shall, for every such Offence or Neglect, forfeit the Sum of twenty Pounds, with full Costs of Suit.”

But by the same *par.* it is provided, “ That nothing in this Act contained shall extend, or be construed to extend, to oblige or compel any Clerk, Officer or other Person, to enter or file any Appearance, where any Judgment is entered by Confession, any thing therein contained to the contrary notwithstanding.”

By *par.* 3. it is enacted, “ That every Person, who shall, in or upon any Suit or Information, which shall be commenced or brought upon or in Pursuance of this Act, be convicted of any the Neglects or Offences herein before mentioned, shall likewise incur the Forfeitures and Disabilities, which such Offender should or would have incurred, if he had been convicted of Writing, contrary to the said Acts, or any of them, the Entry of any Plaint or Action, or any Writ, Bond, or other Writing, Matter or Thing, on Vellum, Parchment or Paper, not marked or stamped according to the said Acts, nor having any Stamp or Mark thereon resembling any of the Marks or Stamps in the said Acts, or any of them, mentioned.”

By the 6 G. 1. c. 21. *par.* 56. it is enacted, “ That all Pains, Penalties and Provisions, given and laid on by this Act, and an Act passed in the first Year of the Reign of her late Majesty Queen Anne, intituled, *An Act for preventing Frauds in her Majesty's Duties upon stamped Vellum, Parchment and Paper*, for the Punishment or Prevention of such Frauds and Omissions, as are herein and therein mentioned or intended, relating to the Duties then in Being, shall extend and be construed to extend to the like Frauds and Omissions relating to any of his Majesty's other Stamp Duties imposed or laid on since the making of the said last mentioned Act.”

By the 5 Ann. c. 19. *f.* 29. After reciting, that by Reason of the doubtful Wording of the Statute made in the first Year of her Majesty's Reign, intituled, *An Act for preventing Frauds in her Majesty's Duties upon stamped Vellum, Parchment and Paper*, the Attornies and Clerks of the several Courts of Record at *Westminster* may be in Danger of incurring the Penalties, Forfeitures and Disabilities, mentioned in the said Act and other former Acts relating to the said Duties, by Reason of their proceeding in any Actions or Suits in any of the said Courts, before the Attorney or Clerk of the adverse Party hath entered, filed or recorded, such Bail, Appearance, or other Matter or Thing, as he or they ought to have entered, filed or recorded, in the said respective Courts, it is for the explaining thereof enacted, “ That no Person or Persons shall forfeit, incur or be prosecuted for, any Penalty, Forfeiture or Disability, mentioned in the said Act made in the first Year of her Majesty's Reign, for or by Reason of his or their transacting, entering, recording or filing, or having transacted, entered, recorded or filed, any further or other Proceeding, Matter or Thing, subsequent or relating to any Action, Plaint, Bail or Appearance, which by any other

A Forfeiture and Disability are also incurred by an Officer or Attorney in such Cases.

Penalties of the first of Anne to extend to the like Frauds against some subsequent Stamp Acts.

An Attorney or Clerk is not to incur any Penalty or Disability, by Reason of the Neglect of the Attorney or Clerk of the other Side.

“ Person or Persons whatsoever ought to have been, or is first to be, entered, filed or recorded, in any of her said Majesty’s Courts of Record at Westminster, before the same hath been, or shall be, duly entered, filed or recorded, any Thing in the said several Acts, or any of them, or in this present Act, to the contrary thereof in any wise notwithstanding.”

4. In News Papers, Almanacks and Pamphlets.

- The Paper for printing News Papers or Pamphlets upon to be stamped before it is used.
- By the 10 *An. c. 19. par. 104.* it is enacted, “ That all Paper, upon which any News Paper or Pamphlet shall be printed, the Paper to be used in printing Pamphlets exceeding one Sheet of Paper only excepted, shall before such printing be brought to the head Office for stamping or marking Vellum, Parchment or Paper, and the Commissioners for managing the Stamp Duties, by themselves or by their Officers employed under them, shall, and they are hereby impowered and required forthwith, upon Demand to them made by any Person or Persons, from Time to Time, to stamp or mark, as this Act directs, any Quantities or Parcels of Paper, he or they paying, to the Receiver General of the Stamp Duties for the Time being, or to his Deputy or Clerk, for the Use of her Majesty, her Heirs and Successors, the respective Duties payable for the same by this Act.”
- Penalty for printing or selling any unstamped News Papers or Pamphlets.
- By *par. 105.* it is enacted, “ That, if any Person or Persons, or Corporation, shall print, or cause to be printed, any News Paper or Pamphlet, Pamphlets exceeding one Sheet only excepted, or sell, utter or expose to Sale, any such News Paper or Pamphlet, before the Paper, whereupon the same shall be respectively printed, shall appear to have been duly stamped or marked, then every such Person or Corporation, so offending in any of the Particulars before mentioned, shall, for every such Offence, forfeit the Sum of ten Pounds together with full Costs of Suit.”
- Penalty for not paying the Duty of Advertisements.
- By *par. 118.* it is enacted, “ That all and every Person and Persons, who shall print or publish, or cause to be printed or published, any Advertisement or Advertisements, shall, within the Space of thirty Days after the Printing or Publication of such Advertisement or Advertisements, pay, or cause to be paid, the Duty or Duties, thereon hereby charged, to the respective Persons to whom the same are hereby appointed to be paid, that is to say, to the Receiver General, for the Time being, of the Duties on Stamped Vellum, Parchment and Paper, or his Deputy or Clerk, the said Duties for all such Advertisements, as shall be so printed or published within the Limits of the weekly Bills of Mortality; and to the next adjacent head Officer, for the Time being, appointed for the Collection of the said Stamp Duties, the said Duties hereby charged for and upon all such Advertisements, which shall be printed or published in any Place out of those Limits; and in Default of such Payment, within the Time herein before for that Purpose limited, the Printer or Publisher of every such Advertisement shall be liable to pay treble the Duties, before by this Act chargeable thereupon, to be recovered, with full Costs of Suit.”
- What Books are to be deemed Almanacks.
- By *par. 175.* it is, for the better ascertaining and securing her Majesty’s Duties upon Calendars and Almanacks, enacted, “ That all Books and Pamphlets, serving chiefly to the Purpose of an Almanack, by whatsoever Name or Names entitled or described, are and shall be charged with those Duties, by Virtue of the Act in that Case made in the first Session in this present Parliament; but not with any of the Duties charged by this Act on Pamphlets or other printed Papers, any Thing herein contained to the contrary notwithstanding.”

By *par. 111.* it is, for the better collecting and securing the Duties hereby charged upon Pamphlets, containing more than one Sheet of Paper, enacted, "That one printed Copy of every such Pamphlet, which shall be printed or published within the Cities of *London* or *Westminster*, or within the Limits of the weekly Bills of Mortality, shall, within the Space of six Days after the printing thereof, be brought to the head Office for marking or stamping Vellum, Parchment or Paper; and the Title thereof, with the Number of Sheets contained therein, and the Duty hereby charged thereon, shall be registered or entered in a Book there to be kept for that Purpose, which Duty shall be thereupon paid to the Receiver General of the Stamp Duties, or his Deputy or Clerk, who shall thereupon forthwith give a Receipt for the same on such printed Copy, or the same shall be stamped to denote the Payment of the Duty hereby charged on such Pamphlet: And that one printed Copy of every such Pamphlet, as last mentioned, which shall be printed or published in any Part of *Great Britain*, not being within the Limits last before mentioned, shall, within the Space of fourteen Days after the printing thereof, be brought to some head Collector of the Stamp Duties, who is hereby required forthwith to enter the Title thereof, with the Number of Sheets contained therein, and the Duty hereby charged thereon, in a Book to be by him kept for that Purpose, which Duty shall be thereupon paid to such Collector, who shall thereupon give a Receipt for the same on such printed Copy."

A printed Copy of every Pamphlet to be brought to the Stamp Office and entered within a Time limited.

By *par. 112.* it is enacted, "That if any such Pamphlet, containing more than one Sheet of Paper, shall be printed or published, and the Duty hereby charged thereon shall not be duly paid, and the Title thereof registered, and one Copy thereof stamped, where required so to be, within the respective Times herein before for those several Purposes limited, that then the Author, Printer and Publisher of, and all other Persons concerned in or about the Printing or Publishing of, such Pamphlet, shall lose all Property therein, and in every Copy thereof, although the Title thereto were registered in the Book of the Stationers in *London*, according to the late Act of Parliament made in that Behalf, so as any Person, notwithstanding the said Act, may freely print and publish the same, paying the Duty payable in Respect thereof by Virtue of this Act, without being liable to any Action, Prosecution or Penalty, for so doing; any Thing in the said Act of Parliament, for vesting the Copies of printed Books in the Authors or Purchasers of such Copies, or in any By-Law, contained, or any Custom, or other Thing, to the contrary notwithstanding: And the Printer and Publisher of such Pamphlet, and every other Person concerned in the Printing or Publishing thereof, shall, in such Cases, forfeit the Sum of twenty Pounds, with full Costs of Suit."

Penalty for not entering a Pamphlet at the Stamp Office and paying the Duty thereof.

By *par. 113.* it is enacted, "That no Person whatsoever shall sell, or expose to Sale, any such Pamphlet, without the true respective Name or Names, and Place or Places of Abode, of some known Person or Persons, by or for whom the same was really and truly printed or published, written or printed thereupon, upon Pain that every Person offending herein shall, for every such Offence, forfeit the Sum of twenty Pounds, with full Costs of Suit."

Penalty for selling a Pamphlet without the true Name of the Printer or Publisher thereof.

5. In the Money or other Consideration given with Apprentices.

By the 8 *An. c. 9. par. 35.* it is enacted, "That the full Sum or Sums of Money received, or in any wise directly or indirectly given, paid, agreed or contracted for, with or in Relation to every Clerk, Apprentice or Servant, which shall be, within the Kingdom of *Great Britain*, put or placed to or with any Master or Mistress, to learn any Profession,

Penalty for not inserting the Sum given with an Apprentice in an Indenture.

“ Profession, Trade or Employment, shall be truly inserted and written, in
 “ Words at Length, in some Indenture or other Writing, which shall
 “ contain the Covenants, Articles, Contracts or Agreements, relating to
 “ the Service of such Clerk, Apprentice or Servant, as aforesaid, and shall
 “ bear Date upon the Day of the Signing, Sealing or other Execution, of
 “ the same, upon Pain that every Master or Mistress, to or with whom, or
 “ to whose Use, any Sum of Money whatsoever shall be given, paid, secu-
 “ red or contracted for, in Respect of any such Clerk, Apprentice or
 “ Servant, which shall not be truly and fully so inserted and specified in
 “ some such Indenture, or other Writing, shall, for every such Offence,
 “ forfeit double the Sum so given, paid, secured or contracted for; the one
 “ Moiety of which Forfeitures shall be to her Majesty, her Heirs and Suc-
 “ cessors, and the other Moiety to any Person or Persons, who shall inform
 “ and sue for the same, by Action of Debt, Bill, Plaint or Information, in
 “ any Court of Record at *Westminster*, or in the Exchequer of *Scotland*, at
 “ any Time after the executing, making or signing of any such Indenture
 “ or Writing, or making any such Contract or Agreement, and within one
 “ Year after the Time limited or appointed for the Service of such Clerk,
 “ Apprentice or Servant, to or with such Master or Mistress, shall be
 “ expired.”

An Apprentice
 where the Du-
 ty is not paid
 to be incapaci-
 tated from ex-
 ercising the
 Trade.

By *par.* 39. it is enacted, “ That all such Indentures or Writings as
 aforesaid, wherein shall not truly be inserted and written the full Sum and
 Sums of Money received, or in any wise directly or indirectly given,
 paid, secured or contracted for, with or in Relation to such Clerk, Ap-
 prentice or Servant, as aforesaid, or whereupon the Duties payable by this
 Act shall not be duly paid or lawfully tendered, or which shall not be
 stamped or lawfully tendered to be stamped, according to the Tenor and
 true Meaning of this Act, within the respective Times herein for that
 Purpose severally and respectively limited, shall be void and not available
 in any Court or Place, or to any Purpose whatsoever; and the Clerk,
 Apprentice or Servant, whom the same shall concern or relate to, shall
 in such Case be utterly incapable of being free of any City, Town,
 Corporation or Company, and of following or exercising the intended
 Profession, Trade or Employment, any Charter, Custom, or By-Law to
 the contrary notwithstanding.”

No Indenture
 of Apprentice-
 ship to be ad-
 mitted in Evi-
 dence for a
 Party thereto,
 unless Oath is
 made that the
 Sum given
 with such Ap-
 prentice is tru-
 ly inserted
 therein.

By *par.* 43. it is enacted, “ That no Indenture or Writing, required by
 this Act to be stamped, shall be given or admitted in Evidence, in any
 Suit to be brought by any of the Parties thereunto, unless such Party,
 in whose Behalf the same shall be given or admitted in Evidence, do
 first make Oath, that to the best of his or her Knowledge, the Sum or
 Sums, therein for that Purpose inserted or mentioned, was or were really
 and truly all that was directly or indirectly given, paid, secured or con-
 tracted for, on Behalf or in Respect of such Clerk, Apprentice or Ser-
 vant, as aforesaid, to or for the Benefit of the Master or Mistress, to
 or with whom such Clerk, Apprentice or Servant, was put or
 placed.”

Penalty for not
 paying the
 Duty if any
 Thing not
 Money is gi-
 ven with an
 Apprentice.

By *par.* 45. it is enacted, “ That, where any Thing or Things, not
 being lawful Money of *Great Britain*, shall directly or indirectly be given,
 assigned, conveyed, delivered, contracted for or secured, to or for the
 Use or Benefit of any Master or Mistress, with or in Respect of any such
 Clerk, Apprentice or Servant, for whom a Duty is chargeable by this
 Act, the Duties hereby granted, and last mentioned, shall be answered
 and paid for the full Value and Values of such Thing or Things, and the
 same Duties for the said Values shall be secured and answered in the same
 Manner and Form, and under the like Pains, Penalties, Forfeitures and
 Incapacities, as are before in this Act provided for securing the said Rates
 upon Monies given or paid, or agreed to be given or paid, with such
 Clerks, Apprentices or Servants as aforesaid.”

But

But by the 9 *An. c. 21. par. 65.* After reciting, that several Persons have, through Neglect or Inadvertency, omitted to pay the several Rates and Duties, payable on the Account of Monies or other Consideration given with any Clerk or Apprentice, and to have the Indentures or Contracts stamped within the Times for those Purposes respectively limited, by the Act of Parliament in that Case made, whereby such Clerks and Apprentices will, according to that Act, be disabled to follow or exercise the intended Trades, Professions or Employments, unless some further Provision be made, it is enacted, "That upon Payment of the respective Rates and Duties, which have been so omitted or neglected to be paid, on or before the twenty-ninth Day of *September* in the Year of our Lord one thousand seven hundred and eleven, to such Person or Persons to whom the same ought to be paid, according to the said former Act, and tendering to be stamped such Indentures or Contracts, so omitted to be stamped, on or before the twenty-fifth Day of *December* in the said Year one thousand seven hundred and eleven, the same Indentures or Contracts shall be stamped, and shall be good and available in Law or Equity, and the Clerks or Apprentices therein named shall be capable of following and exercising the respective intended Trades, Professions or Employments, as fully as if the Rates and Duties, so omitted to be paid, had been duly paid, and the Indentures or Contracts stamped within the respective Times in the said Act for those Purposes limited, any Thing therein contained to the contrary notwithstanding."

A further Time given for the Payment of the said Duties.

A Clause, to the same Effect as this last, has been inserted in a great Number of Acts of Parliament which have been since passed.

By the 9 *An. c. 21. par. 66.* it is enacted, "That if any Master or Mistress shall hereafter neglect to pay the Duties or Rates, payable on the Account of Money or other Consideration given with any Clerk, Apprentice or Servant, within the respective Times herein, and by an Act passed in the eighth Year of her Majesty's Reign, for that Purpose limited, according to the true Intent and Meaning of the same, every such Master shall for every such Neglect forfeit the Sum of fifty Pounds."

A further Penalty on the Master or Mistress neglecting to pay the Duties.

By the 18 *G. 2. c. 22. par. 24.* it is enacted, "That if any Master or Mistress shall neglect to pay the Rates and Duties, by two several Acts of Parliament, made and passed in the eighth and ninth Years of the Reign of her late Majesty Queen *Anne*, charged and continued on the Account of Money or other Consideration given with any Clerk, Apprentice or Servant, within the respective Times in and by the said former Acts limited and appointed in that Behalf, according to the true Intent and Meaning of the same, every such Master and Mistress shall, for every such Offence, forfeit and pay double the Rates and Duties charged, and directed to be paid and levied, by the said former Acts or either of them, over and above all Penalties and Forfeitures thereby inflicted, for all Monies which shall be given, paid, contracted or agreed for, with or in Relation to every such Clerk, Apprentice or Servant."

A further Penalty on the Master or Mistress.

By *par. 25.* it is enacted, "That if any Master or Mistress of any such Clerk, Apprentice, or Servant respectively, shall neglect to pay the said Rates and Duties, so charged by the said former Acts, or either of them, within the respective Times therein limited in that Behalf, whereby the Penalties or Forfeitures, incurred by Virtue of this Act, will become charged upon, and be payable by them respectively; and any such Clerk, Apprentice or Servant respectively, shall and do in that Case pay, or cause to be paid, the Rates and Duties charged by the said former Acts, or either of them; and also the Penalties and Forfeitures inflicted and incurred by this present Act, at any Time within one Year after the same shall so respectively become charged, incurred and made payable, by Virtue of this Act, as aforesaid, such Master or Mistress not having then paid

Encouragement given to an Apprentice to pay the Duties, if the Master does not.

“ the said Rates, Duties, Penalties and Forfeitures, respectively, although
 “ required by such Clerk, Apprentice or Servant, so to do, then, and in
 “ such Case, it shall and may be lawful to and for any such Clerk, Appren-
 “ tice or Servant, within three Months after such Payment of the said
 “ Rates, Duties, Penalties and Forfeitures respectively, by him, her or
 “ them, as aforesaid, to demand of his or her Master or Mistress, or his,
 “ her or their Executors or Administrators, such Sum or Sums of Money,
 “ as was or were paid to such Master or Mistress, for or in Respect of such
 “ Clerkship, Apprenticeship or Servitude; and in case such Sum or Sums of
 “ Money shall not be paid, within three Months after such Demand thereof
 “ made, it shall and may be lawful to and for any such Clerk, Apprentice
 “ or Servant, to sue for and recover the same, with full Costs of Suir,
 “ against such Master or Mistress, his, her or their Executors or Admini-
 “ strators; and every such Clerk, Apprentice or Servant, shall and may,
 “ immediately after Payment of such Rates, Duties, Penalties and Forfeit-
 “ ures, as aforesaid, be discharged from his, her or their Clerkship, Ap-
 “ prenticeship and Servitude, respectively, and from all Actions, Penalties,
 “ Forfeitures and Damages, for not serving the Time for which he, she
 “ or they were respectively bound, contracted for, or agreed to serve such
 “ Master or Mistress respectively.”

All Penalties
 incurred dis-
 charged upon
 Payment of
 double Duties.

By the 20 G. 2. c. 45. *par. 5.* it is enacted, “ That if any Master or
 “ Mistress, who by reason of neglecting to pay the Rates and Duties, for Money
 “ or other Consideration received with any Clerk, Apprentice or Servant,
 “ shall become liable to forfeit and pay double Rates and Duties, as by an
 “ Act passed in the eighteenth Year of the Reign of his present Majesty is
 “ directed, shall respectively pay the said double Rates and Duties, unto the
 “ Person or Persons to whom the same ought to have been paid, in pursu-
 “ ance of the said Act, and other Acts in that Behalf made, and also ten-
 “ der the Indentures or Contracts to be stamped, at any Time within two
 “ Years after the End or Determination of the Apprenticeship or Service
 “ of any such Clerk, Apprentice or Servant respectively, and before any
 “ Suit or Prosecution shall have been commenced, for recovering any of
 “ the Penalties or Forfeitures inflicted or incurred by the said former
 “ Acts, or any of them, then, and in such Case, the Indentures or Con-
 “ tracts of such Clerk, Apprentice or Servant respectively, shall be good
 “ and available in Law or Equity, and may be given in Evidence in any
 “ Court whatsoever; and the Clerks, Apprentices or Servants, therein
 “ named, shall be capable of following and exercising their respective in-
 “ tended Trades and Employments, as fully as if the Rates and Duties,
 “ so omitted, had been duly paid within the respective Times in the said
 “ former Acts, or any of them, limited and appointed; and all and every
 “ Person and Persons, who shall have incurred any Penalties by the Omis-
 “ sions aforesaid, upon Payment of such double Rates and Duties, as
 “ aforesaid, within the respective Times herein last before limited, in that
 “ Behalf, shall be, and they are hereby, acquitted and discharged of and
 “ from the said Penalties and Forfeitures, any Thing in the said former Acts,
 “ or any of them, to the contrary notwithstanding.”

Encourage-
 ment given to
 an Apprentice
 to pay the
 double Duties,
 if the Master
 does not.

By *par. 6.* it is enacted, “ That if any Master or Mistress shall, by
 “ Reason of such Neglect as aforesaid, become liable to forfeit such double
 “ Rates and Duties as aforesaid, and any such Clerk, Apprentice or Servant
 “ respectively, shall and do, at any Time after such Forfeiture incurred,
 “ either in the Presence of one or more credible Witnesses or Witnessess, or
 “ by Writing under the Hand of such Clerk, Apprentice or Servant re-
 “ spectively, signed in the Presence of one or more credible Witnesses or
 “ Witnessess, require his or her Master or Mistress respectively, to pay the
 “ said double Rates or Duties, so incurred as aforesaid, and such Master or
 “ Mistress shall not, within three Months after such Request, pay the
 “ same, and any such Clerk, Apprentice or Servant, shall, at any Time
 “ within

“ within two Years after the Determination of his Clerkship, Apprenticeship
 “ or Servitude, pay the said double Rates and Duties so forfeited and incur-
 “ red, and not paid by his or her Master or Mistress respectively, as afore-
 “ said, then, and in such Case, it shall and may be lawful to and for any
 “ such Clerk, Apprentice or Servant, within three Months after such Pay-
 “ ment of the said double Rates and Duties, by him, her or them, as afore-
 “ said, to demand of his or her Master or Mistress, or his, her or their
 “ Executors or Administrators, double the Sum or Sums of Money, or
 “ other Consideration respectively given, paid, and agreed, or contracted,
 “ to be paid to such Master or Mistress, for or in Respect of such Clerk-
 “ ship, Apprenticeship or Servitude; and in case such Sum or Sums of Mo-
 “ ney shall not be paid, within three Months after such Demand thereof
 “ made, it shall and may be lawful to and for any such Clerk, Apprentice
 “ or Servant, to sue for and recover the same, with full Costs of Suit,
 “ against such Master or Mistress, his, her or their Executors or Admini-
 “ strators; and every such Clerk, Apprentice or Servant, so paying such
 “ double Rates or Duties, as aforesaid, shall and may, immediately after
 “ Payment thereof respectively, and upon signifying, by Writing under
 “ his or her Hand, that he or she desires to be discharged from his, her or
 “ their Clerkship, Apprenticeship and Service respectively, shall be accord-
 “ ingly discharged from the same respectively, and from all Actions, Pe-
 “ nalties, Forfeitures and Damages, for not serving the Time for which
 “ he, she or they, were respectively bound, contracted for, or agreed to
 “ serve such Master or Mistress respectively.”

And by *par. 7.* it is provided, “ That every such Clerk, Apprentice or
 “ Servant, shall avail him or herself, and have such and the same Benefit or
 “ Advantage of the Time he or she shall respectively have continued with;
 “ and served such Master or Mistress respectively, as he or she could or
 “ might have done, in case of an Assignment or Turning over to any new
 “ or other Master or Mistress.”

By *par. 8.* it is provided, “ That in case where any Prosecution shall be
 “ commenced against any Master or Mistress, for recovering any of the Pe-
 “ nalties and Forfeitures inflicted and incurred by the said former Acts, or
 “ any of them, the Clerk, Apprentice or Servant, of such Master or Mistress
 “ respectively, shall pay such double Rates and Duties, at any Time within
 “ two Years after the End of his, her or their Clerkship, Apprenticeship or
 “ Servitude, and every such Clerk, Apprentice or Servant respectively,
 “ shall, upon Payment of such double Rates and Duties as aforesaid, be
 “ capable and qualified to follow his, her or their respective Trades and
 “ Employments; and the Indentures or Contracts of such Clerk, Appren-
 “ tice and Servant respectively, shall be good and available in Law and
 “ Equity, and may be given in Evidence in any Court whatsoever; any
 “ Thing in this Act, or the said former Acts, or any of them, to the con-
 “ trary notwithstanding.”

Encourage-
 ment given to
 an Apprentice
 to pay the
 double Duties,
 after a Prose-
 cution is com-
 menced against
 the Master.

6. In Cards and Dice.

By the 9 *Ann. c. 23. par. 41.* it is enacted, “ That all Makers of play-
 “ ing Cards and Dice in *Great Britain*, before they respectively shall begin
 “ to make any such Cards or Dice, shall give or send Notice, in Writing,
 “ of the usual House or Place where they respectively shall make, or in-
 “ tend to make the same; which Notice shall be given or sent to the Com-
 “ missioners for managing the Stamp Duties, or to their Officers next ad-
 “ jacent to the Place where such Cards or Dice shall be made; and the
 “ like Notice shall be given or sent, by every such Maker of Cards or
 “ Dice, as often as they respectively shall change their Place for that
 “ Purpose; and as often as any Person or Persons shall set up, or exercise
 “ the

Penalty upon
 a Person not
 giving Notice
 of the Place
 where Cards
 or Dice are
 made.

- “ the Employment of making Cards or Dice, in any House or Place whatsoever in *Great Britain*, the like Notice shall be given or sent; upon Pain that every Person, making Default in giving such Notice as aforesaid, shall, for every such Offence, forfeit the Sum of fifty Pounds; and that all and every Person and Persons, who shall make any Cards or Dice in any House or Place not notified as aforesaid, shall, for every such Offence, forfeit the Sum of fifty Pounds.”
- Further Penalty on not giving Notice of such Place. By the 10 *An. c. 19. par. 166.* it is enacted, “ That if any Person whatsoever shall make, or cause to be made, any Cards or Dice in any House, Room or Place, before he shall have given due Notice of his or her Intention to make Cards or Dice in such House or Place, according to the Form and Effect of an Act made in the ninth Year of her Majesty’s Reign, such Person shall, over and above the Penalties imposed by that Act, forfeit all the Cards and Dice, and all Materials and Utensils for making Cards and Dice, which shall be found in such House or Place, or which shall have been made and manufactured there, before such due Notice shall have been given.”
- Penalty on removing Materials begun to be wrought into Cards or Dice. By the same *Par.* it is enacted, “ That no Materials whatsoever, begun to be wrought for or towards the making of Cards or Dice, shall be removed, from the Place wherein the same shall have been so begun to have been wrought, until the same shall have been completely made and worked into Cards or Dice, or the Duties, for the Cards or Dice therewith intended to be made, shall be paid or secured, upon Pain that every Person, who shall remove, or cause or permit to be removed, any such Materials, contrary to the true Meaning hereof, shall forfeit double the Amount of the Duty on the Cards or Dice, which might have been made from or with such Materials, with full Costs of Suit.”
- Penalty for removing Cards or Dice before they are sealed or marked. “ By the 9 *An. c. 23. par. 41.* it is enacted, “ That no Maker of Cards or Dice, chargeable with Duties by this Act, shall remove, or suffer to be removed, the same from the House or Place of making thereof, from Time to Time, until such Mark upon the Dice, and such Seal upon the Paper and Thread enclosing every Pack of Cards, shall be put thereupon, as the Commissioners for managing the Stamp Duties shall, from Time to Time devise and appoint, in Writing under their Hands, to denote the Charging of the said Duties, upon Pain of forfeiting all such Cards and Dice, and treble the Value thereof, as shall be removed contrary to this Act.”
- But Cards or Dice unmarked may be removed for Exportation. But by the 10 *An. c. 19. par. 170.* it is, for the Encouragement of the Exportation of Cards and Dice into foreign Parts, enacted, “ That it shall and may be lawful to remove any Cards or Dice, from the Place where the same are or shall be made, without Sealing, Marking or Stamping the same, or paying any the Duties payable for the same, by this or any former Act of Parliament; provided that, within one Month after the same shall be made, and before the same shall be so removed from the Place of making thereof, a Bond be entered into to her Majesty, her Heirs or Successors, with sufficient Surety or Sureties, in a Penal Sum of double the Duties on such Cards or Dice, with a Condition for the exporting such Cards or Dice into some Port or Ports beyond the Seas, within a Time to be limited in such Bond, and that the same, or any of them, shall not be relanded again in any Part of *Great Britain*, and that such Bond be left in the Hands of the Commissioners for managing the Stamp Duties, and a Certificate be given by them, or such Officer as shall be in that Behalf appointed, that such Bond is entered into with Relation to such Cards or Dice, any Thing in the Act for imposing a Duty upon Cards or Dice, made in the ninth Year of her Majesty’s Reign, to the contrary notwithstanding.”

By the 29 G. 2. c. 13. par. 6. after reciting that great Frauds are or may be committed by the Makers of Cards and Dice, under Pretence that the same are intended for Exportation, it is enacted, "That all playing Cards made in *Great Britain*, which shall be intended for Exportation, shall, before they are packed up for Exportation, be inclosed in Paper and Thread, in Packs or Parcels, in such Manner as the Commissioners for managing the Stamp Duties shall direct and appoint, in order to distinguish them from other Cards liable to the Duties thereon imposed; and that for the said Purpose one Card, in every Pack of playing Cards so made or intended for Exportation, or so many Cards in every such Pack, as the said Commissioners shall direct and appoint, shall also be marked or stamped on the spotted or painted Side thereof, with such Mark, and in such Manner, as the said Commissioners shall direct; and if any Person or Persons shall vend, utter, or expose to Sale, to be used in *Great Britain*, any playing Cards so marked, stamped and distinguished, as Cards for Exportation, every Person so offending shall, for every Pack of Cards so vended, uttered, or exposed to Sale as aforesaid, forfeit and pay the Sum of twenty Pounds."

Penalty for selling Cards marked for Exportation.

And by par. 7. it is enacted, "That no Bond, which shall be entered into for exporting Cards or Dice, shall be vacated or delivered up, unless and until Proof be made that such Cards or Dice have been entered or shipped for Exportation, as Cards and Dice, and not as stationary Wares; and unless and until a Certificate of such Entry and Shipping, signed by the proper Officer or Officers of the Customs, be produced, which Certificate the said Officer or Officers are hereby directed and required to give without Fee or Reward; any Thing in the Act made in the fifth Year of the Reign of his late Majesty King *George* the First to the contrary notwithstanding."

The Bond for exporting Cards or Dice not to be vacated, till a Certificate is produced of their being shipped as such.

By the 9 An. c. 23. par. 42. it is enacted, "That the Makers of Cards and Dice shall, once in every twenty-eight Days, make true Entry upon Oath, with the Commissioners for managing the Stamp Duties, or with their Officer next adjacent to the Place of making such Cards and Dice, which Oath the said Commissioners, or any three or more of them, or the said Officer, have hereby Power to administer, of all the Cards and Dice by such Makers thereof respectively made, within the Time for which every such Entry ought to be made; and shall once in every six Weeks pay all the Duties owing from such Maker; upon Pain of forfeiting the Sum of twenty Pounds for every Default in making such Entry, and double the Duty for Non-payment thereof."

Penalty for not making a true Entry of all Cards and Dice made, and paying the Duty for the same.

By the 6 G. 1. c. 21. par. 57. after reciting the Substance of this last Clause; and that the respective Card Makers do often make up Cards, the Duties on which amount to fifty Pounds and upwards *per* Week, and each Card Maker may make up treble that Quantity if he shall think fit, whereby they have an Opportunity of being greatly in Arrear to his Majesty, and the said Duties are thereby often in Danger of being lost, in regard the same Act hath made no Provision whatsoever, for securing the said Duties, until the said six Weeks shall expire, be the Danger ever so apparent, it is enacted, "That every Card Maker shall be obliged, at the respective Times of entering every Parcel or Quantity of playing Cards as aforesaid, to enter into Bond to his Majesty, his Heirs and Successors, with sufficient Surety or Sureties, in the penal Sum of treble the Duties on such Cards, with Condition thereunder written for the true Payment of his Majesty's Duties on such Cards, within the Space of six Weeks next after the Date of such Bond; any Thing contained in any Law to the contrary notwithstanding."

Further Provision for securing the Duties on Cards.

By the 9 An. c. 23. par. 43. it is enacted, "That every Maker of Cards or Dice, who shall endeavour to defraud her Majesty, by any Concealment, shall, for every such Offence, forfeit the Sum of twenty Pounds."

Penalty for any Endeavour to conceal Cards or Dice.

- Penalty for selling unmarked Cards or Dice. By the 10 *An. c. 19. par. 162.* it is enacted, "That no playing Cards or Dice shall be sold or exposed to Sale, or used in Play in any publick Gaming House, unless the Paper and Thread inclosing, or which shall have inclosed the same, shall have been respectively sealed and stamped, according to the Act in that Behalf made, and unless one of the Cards of each Pack or Parcel of Cards shall be also marked or stamped, on the spotted or painted Side thereof, with such Mark or Marks, as the Commissioners for managing the Stamp Duties shall direct or appoint; upon Pain that every Person or Persons, who shall sell or expose to Sale any such Cards or Dice, which shall not have been so respectively sealed, marked and stamped, as hereby and by the said Act is respectively required, shall forfeit for every Pack or Parcel of such Cards, and every one of such Dice, so sold or exposed to Sale, the Sum of five Pounds."
- The Penalty for selling unmarked Cards increased. By the 6 *G. 1. c. 21. par. 55.* it is enacted, "That if any Person or Persons shall hereafter sell or expose to Sale any playing Cards, the same not being, at the Time of such selling or exposing to Sale, actually stamped on the spotted or painted Side, and also inclosed in Paper and Thread sealed and stamped, as by the Act of the tenth Year of her late Majesty is directed, then every Person so offending shall, for every such Offence, forfeit the Sum of ten Pounds, with full Costs of Suit."
- Penalty for selling waste Cards unmarked on the back Side. By the 29 *G. 2. c. 13. par. 10.* it is enacted, "That if any Maker of playing Cards, or any other Person, shall sell or dispose of any Cards, commonly called *Waste Cards*, unless he or she shall, before such Sale, mark the Back or plain Side of every painted or pictured Card, in such Manner as to render the same unfit to be used in Play, every Person so offending shall, for every such Offence, forfeit the Sum of twenty Pounds."
- Penalty for suffering Cards marked for Exportation to be used in a publick Gaming-House. By *par. 6.* it is enacted, "That if any Person or Persons shall use, or permit to be used, in any publick Gaming House, any playing Cards marked, stamped and distinguished, as is herein directed, as Cards for Exportation, every Person so offending shall, for every Pack of Cards, so used, or permitted to be used, as aforesaid, forfeit and pay the Sum of twenty Pounds."
- All Pieces of Ivory, &c. marked to denote any Chance, to be deemed Dice. By the 10 *A. c. 19. par. 168.* it is, to prevent the evading of the Payment of the Duties on Dice, by new Inventions of any Thing used or to be used in Play instead of Dice, enacted, "That all Pieces of Ivory, Bone or other Matter, made or used for any Game or Play, with any Letters, Figures, Spots or other Marks thereupon, to denote any Chance or Chances, are and shall be construed, deemed and adjudged to be Dice, and to be charged accordingly with the full Duties on Dice; and if there shall be more than six Chances signified on any one of such Pieces of Ivory, Bone or other Matter, then such one Piece shall be, and is hereby charged, with the full Duty of five Shillings payable for a Pair of Dice, and if there shall be more than the Number or Chances usually in a Pair of Dice, then such one Piece shall be, and is hereby further charged, with a further Duty proportionate to the Number of Chances exceeding those of one Pair of Dice."
- Penalty for using the same Label or Stamp for Cards a second Time, or for new marking Dice. By the 6 *G. 1. c. 21. par. 55.* after reciting, that a Practice hath of late prevailed, for Persons to cut out, and tear off, the Mark or Stamp upon the spotted or painted Side of playing Cards, after such Cards have been sold, used or played with, and, by pasting on or affixing the same Stamps and Marks on other Cards, do frequently make one Mark or Stamp serve for two or three several Packs of Cards; and that the Seal and Stamp upon the Outside Papers, inclosing each Pack of Cards, are frequently made use of again, after they have been sold and disposed of, to inclose other Packs of playing Cards, by which fraudulent and unjust Practices his Majesty's Revenue is daily lessened and diminished, it is enacted, "That if any Person or Persons shall fraudulently cut, tear or get off any Mark or Stamp, in Respect
" whereof

“ whereof or whereby any Duties are payable, or are denoted to be paid or
 “ payable to his Majesty, on playing Cards, or shall file, square or new
 “ spot, any Dice which have been sold or played with, or shall fraudulently
 “ inclose any Parcel or Pack of playing Cards in any Outside Paper, so
 “ sealed and stamped as aforesaid, then every Person so offending, in any
 “ of the Particulars before mentioned, shall, for every such Offence, forfeit
 “ the Sum of ten Pounds with full Costs of Suit.”

By the 29 G. 2. c. 13. par. 8. after reciting, that a fraudulent Practice hath prevailed of felling and buying Covers and Labels, which have been before made use of to denote the Duty payable upon Cards, it is enacted,
 “ That if any Person shall sell or buy any such Cover or Label, in order to
 “ be made use of for the inclosing any Pack or Parcel of Cards, every Per-
 “ son so offending shall, for every such Offence, forfeit the Sum of twenty
 “ Pounds.”

Penalty for felling or buying Labels that have been before used.

But by par. 9. it is enacted, “ That if either the Buyer or Seller of any
 “ such Cover or Label shall inform against the other Party, concerned in
 “ buying or felling such Cover or Label, the Party so informing shall be
 “ admitted to give Evidence against the Party informed against; and shall
 “ be indemnified against the Penalties so by him or her incurred.”

But either Buyer or Seller informing is discharged thereof.

By the 10 An. c. 19. par. 169. it is enacted, “ That it shall and may be
 “ lawful to and for any Officer or Officers, thereunto appointed by the
 “ Commissioners for managing the Stamp Duties, to enter into any House
 “ or Place where Cards or Dice are or shall be made, or exposed to Sale, or
 “ suspected to be privately made, or into any publick Gaming-House, Room
 “ or Place, and there to search and see what Quantities of Cards or Dice
 “ shall be making, and whether the Cards or Dice so sold, or exposed to
 “ Sale, or so used in Play, be duly sealed, marked and stamped, according
 “ to the true Mearing of this Act, and of the Act made in the ninth Year
 “ of her Majesty’s Reign; and if the Owner or Occupier of any House or
 “ Place, where Cards or Dice are or shall be made, sold or exposed to Sale,
 “ or of any such publick Gaming-House as aforesaid, shall, at any Time or
 “ Times, refuse Entrance or Liberty of Search to such Officer or Officers,
 “ such Owner or Occupier shall, for every such Refusal, forfeit the Sum of
 “ ten Pounds, with full Costs of Suit.”

Penalty on hindering an Officer from searching a Card Maker’s House or a Gaming-House.

By the 6 G. 1. c. 21. par. 59. it is enacted, “ That in case the Com-
 “ missioners for managing the Stamp Duties shall be informed, or have
 “ Cause to suspect, that any Person or Persons do make, or cause to be
 “ made, any playing Cards or Dice, in any House or Place whatsoever in
 “ Great Britain, without sending or giving Notice thereof in Writing to
 “ the said Commissioners at their head Office, and Affidavit being made
 “ thereof, by the Person or Persons so informing or giving Notice, before
 “ one or more Justice or Justices of the Peace, for the County or Place
 “ where such Cards or Dice shall be making or made, declaring the Grounds
 “ of his or their Knowledge or Suspicion, that then and in such Case it
 “ shall and may be lawful for any Officer or Officers, employed by or
 “ acting under the Commissioners for managing the Stamp Duties, in the
 “ Day Time, and in the Presence of a Constable or other lawful Officer
 “ of Peace, who is hereby required to be aiding and assisting therein, by
 “ Warrant from such Justice or Justices of the Peace, before whom such
 “ Affidavit shall be made, to be directed to such Officer or Officers as aforesaid,
 “ which Warrant the said Justice or Justices of the Peace are hereby
 “ authorized and required to grant, to break open the Door, or any Part,
 “ of such House or Place, where any such Cards or Dice are so, as aforesaid,
 “ suspected to be made or making; and to enter into such House or Place,
 “ and to seize all such Cards, Dice, Tools or Materials, with which they
 “ are made or making, that shall be then and there found, and to detain
 “ and keep the same in such House or Place, as the said Commissioners
 “ shall

Further Powers given to an Officer.

“ shall direct or appoint; and in case the same shall not, within five Days
 “ next after such Seizure, be claimed and replevied by the true and lawful
 “ Owners thereof, then the said Cards, Dice, Tools and other Materials,
 “ shall be forfeited, and shall and may be sold by the Direction of the said
 “ Commissioners after the said five Days, are expired; one Moiety of the
 “ Produce thereof, all necessary Charges being first deducted out of the
 “ whole, to be paid to the Use of his Majesty, his Heirs or Successors,
 “ and the other Moiety to the Party or Parties who shall discover the
 “ same.”

The Powers
and Penalties
of former Acts
extended to
the New Du-
ties on Cards
and Dice.

By the 29 G. 2. c. 13. *par.* 4. it is enacted, “ That all Powers, Provi-
 “ sions, Articles, Clauses, and other Penalties and Forfeitures, Distribution
 “ of Penalties and Forfeitures, and all other Matters and Things, prescribed
 “ or appointed in any Act or Acts of Parliament relating to the like Duties,
 “ and not hereby altered, shall be of full Force and Effect, with Relation
 “ to the additional Duties hereby charged on Cards and Dice, and shall be
 “ applied and put in Execution for raising, levying, collecting and securing,
 “ the additional Duties hereby charged, according to the true Intent and
 “ Meaning of this Act, as fully to all Intents and Purposes, as if the
 “ same Powers, Provisions, Articles, Clauses, Penalties and Forfeitures,
 “ and every of them, had severally and respectively been hereby enacted,
 “ with Relation to the additional Duties hereby charged on Cards and
 “ Dice.”

7. In other Cases.

Penalty for
marrying any
Persons with-
out Publica-
tion of Banns
or a Licence.

By the 10 An. c. 19. *par.* 176. after reciting, that great Loss hath hap-
 “ pened of the Duties upon stamped Vellum, Parchment and Paper, and
 “ other Inconveniencies daily grow, from clandestine Marriages, it is enacted,
 “ That every Parson, Vicar or Curate, or other Person in Holy Orders,
 “ beneficed or not beneficed, who shall marry any Person in any Church or
 “ Chapel, exempt or not exempt, or in any other Place whatsoever, with-
 “ out Publication of the Banns of Matrimony between the respective Par-
 “ ties according to Law, or without Licence first had and obtained from
 “ the proper Ordinary for the said Marriage, shall, for every such Offence,
 “ forfeit the Sum of one hundred Pounds; and if such Offender shall be a
 “ Prisoner in any Prison or Gaol, other than a County Gaol, at the Time
 “ of such Offence committed, and shall be duly convicted of such Offence,
 “ then upon Oath made of such Imprisonment, before any Judge of her
 “ Majesty’s Courts of Record at *Westminster*, and upon producing a Copy
 “ of the Record of such Conviction, to be likewise proved upon Oath be-
 “ fore the said Judge, which Oaths the said Judge is hereby empowered to
 “ administer, the said Judge is hereby required to grant his Warrant, to the
 “ Keeper of the Gaol or Prison where such Offender is a Prisoner, which
 “ Warrant such Keeper is hereby required to obey, to remove such Offender
 “ to the Gaol of that County where such Offender is a Prisoner, there to
 “ remain charged in Execution with the Penalty inflicted by this Act, and
 “ with all and every the Causes of his former Imprisonment; and if any
 “ Gaoler or Keeper of any Prison shall be privy to, or knowingly permit,
 “ any Marriage to be solemnized in his said Prison, before Publication of
 “ Banns, or Licence obtained, as aforesaid, he shall, for every such Offence,
 “ forfeit the Sum of one hundred Pounds.”

Penalty for
not making
out Licences
to sell Ale.

By the 6 G. 1. c. 21. *par.* 56. after reciting, that a Practice hath obtained
 “ to take the usual Recognizances, from Persons for whom Ale Licences are
 “ intended, for selling Ale or other exciseable Liquors, and to take a List
 “ of their Names and the Fees for such Licences, but to omit to make
 “ out or write the same to avoid the Payment of the Stamp Duties, given
 “ thereon by an Act made in the ninth Year of the Reign of her late
 “ Majesty,

Majesty, it is enacted, " That all Mayors, Town Clerks and other Persons, whom it may concern, who shall take any such Recognizances, shall be obliged to make, or cause to be made out, Ale Licences duly stamped, before such Recognizances be taken, under the Penalty of ten Pounds for every such Offence."

By the 11 G. 1. c. 30. *par.* 44. after reciting, that several Persons have of late endeavoured to evade the Payment of the Stamp Duties on Policies of Assurance or Insurance, by giving Promissory Notes, instead of Policies, for the Insuring of Goods, Ships or Merchandizes at Sea, by which Notes the Insurer notifies or expresses the Terms on which he would insure, to the great Detriment and Loss of his Majesty's Revenue, it is enacted, " That when any Vessel, Goods or Merchandize shall be insured, a Policy duly stamped shall be issued, or at least made out, within the Space of three Days at furthest, and the Insurer or Insurers neglecting to make out such Policy, within the Time aforesaid, shall forfeit the Sum of one hundred Pounds for every such Offence; and all Promissory Notes for Assurances or Insurances of Ships, Goods or Merchandizes, at Sea or going to Sea, are hereby declared void, and nothing shall be recovered thereon by the Insured."

Penalty for not making out a Policy of Insurance within three Days.

(E) Of the Jurisdiction given to Justices of the Peace in pecuniary Penalties for Offences against the Statutes imposing Stamp Duties.

By the 10 An. c. 19. *par.* 172. it is enacted, " That it shall and may be lawful to and for any two or more Justices of the Peace, residing near to the Place where any pecuniary Forfeitures, not exceeding twenty Pounds, upon this or any of the Acts of Parliament, touching any the Duties under the Management or Care of the Commissioners for managing the Stamp Duties, shall be incurred, or any Offence against any of the same Acts shall be committed, in any wise relating to the same, or any of them, by which any Sum of Money only may be forfeited, to hear and determine the same; which said Justices of the Peace are hereby authorized and required, upon any Information exhibited, or Complaint made in that Behalf, within one Year after Seizure made, or such Offence committed, to summon the Party accused, and also the Witnesses on either Side, and, if upon his Appearance, or Contempt, the Party accused shall be convicted of the Offence alledged against him, to award and issue out Warrants, under their Hands and Seals, for levying any pecuniary Penalties, so adjudged, on the Goods of the Offender, and to cause Sale to be made thereof, in case they shall not be redeemed in six Days, rendering to the Party the Overplus, if any; and if any Party shall find himself aggrieved, or remain unsatisfied in the Judgment of the said Justices, then he, she or they shall or may, by Virtue of this Act, complain or appeal to the Justices of the Peace at the next General Quarter-Sessions for that County, Riding or Place, who are hereby empowered to summon and examine Witnesses upon Oath, and finally to hear and determine the same, and, in case of Conviction, to issue Warrants for levying the Penalties as aforesaid."

Two Justices of the Peace may determine in all Cases, where the Penalty does not exceed twenty Pounds.

The Justices
may mitigate
the Penalties.

By *par. 173.* it is provided, " That it shall and may be lawful to and for the said respective Justices, where they shall see Cause, to mitigate or lessen any such Penalties, as they in their Discretions shall think fit, the reasonable Costs and Charges of the Officers and Informers, as well in making the Discovery as in the Prosecution of the same, being always allowed over and above such Mitigation, and so as such Mitigation does not reduce the Penalties to less than double the Duties, over and above such Costs and Charges; any Thing contained in this Act, or any other Act of Parliament, to the contrary notwithstanding."

The Proceed-
ings of the
Justices not to
be removed by
Certiorari.

By *par. 174.* it is provided, " That no Writ or Writs of *Certiorari* shall supersede Execution, or other Proceedings, upon any Order or Orders made by the Justices aforesaid, in pursuance of this Act, but that Execution, and other Proceedings, shall be had and made thereupon; any such Writ or Writs, or Allowance thereof, notwithstanding."

(F) Of the corporal Punishments to which Persons guilty of Offences against the said Statutes are liable.

Hawkers of
unstamped
News Papers
to be impri-
soned.

BY the 16 G. 2. c. 26. *par. 5.* after reciting, that great Numbers of News Papers, Pamphlets and other Papers, subject and liable to the Stamp Duties, and which are not stamped according to Law, are daily sold, hawked, carried about, uttered, and exposed to Sale, by divers obscure Persons, who have no known or settled Habitation, to the great Loss of the fair Trader, and the Prejudice of his Majesty's Revenue; and that several Doubts and Difficulties have arisen, relating to the Execution of the Laws formerly made, and now in Being, for preventing of such Practices, and punishing the Offenders, it is enacted, " That in case any Person or Persons shall sell, hawk, carry about, utter, or expose to Sale, any News Paper, or any Book, Pamphlet or Paper, deemed or construed to be a News Paper, within the Intention and Meaning of any of the Acts of Parliament relating to the Stamp Duties now in Force, not being stamped or marked, as in the said Acts are directed or appointed, it shall and may be lawful for any Justice of the Peace to commit every such Offender, being thereof convicted before him, by their own Confession, or by the Oath of one or more credible Witness or Witnesses, to the House of Correction, for any Time not exceeding three Months, and it shall and may be lawful for any Person to seize, apprehend, and carry before a Justice of the Peace, of the County, City, Riding, Division or Place where such Offence shall be committed, any such Person so offending as aforementioned; and every Person, so seizing or apprehending such Offender, and carrying him or her before such Justice of the Peace as aforesaid, shall, upon Conviction of every such Offender, and producing a Certificate of such Conviction under the Hand of such Justice, which Certificate such Justice is hereby required to give, without Fee or Reward to be taken for the same, be intitled to the Reward of twenty Shillings, to be paid by the Receiver-General of his Majesty's Stamp Duties."

By

By the 30 G. 2. c. 19. par. 26. it is, for preventing a Diminution of the Revenue arising from the Duties payable on Almanacks, by subjecting the Venders of unstamped Almanacks to the same Penalties as, by an Act passed in the sixteenth Year of his Majesty's Reign, are inflicted on Venders of unstamped News Papers, enacted, "That every Person who shall sell, utter, or expose to Sale, any Almanack liable to any Duty by this or any former Act imposed, such Almanack not being stamped or marked, as by this or any former Act is directed, every Person so offending shall, for every such Offence, be liable to the same Punishment, as is inflicted on any Hawker of unstamped News Papers by the said Act made in the sixteenth Year of the Reign of his present Majesty; and every Justice of the Peace shall have the like Power to convict such Offender, as by the said Act is granted, with Relation to the Conviction of Offenders against the said Act; and every Person, who shall apprehend such Offender, shall be intitled to the like Reward, as by the said Act is granted for the Apprehension of Offenders against the said Act."

Hawker of unstamped Almanacks to be imprisoned.

By the 5 W. & W. c. 21. par. 11. it is enacted, "That if any Person or Persons whatsoever shall, at any Time or Times hereafter, counterfeit or forge any Stamp or Mark, which shall be provided or made in pursuance of this Act; or shall counterfeit or resemble the Impression of the same upon any Vellum, Parchment or Paper, thereby to defraud their Majesties, their Heirs or Successors, of any the Duties hereby granted; or shall utter, vend or sell, any Vellum, Parchment or Paper, with such counterfeit Mark or Impression thereupon, knowing such Mark or Impression to be counterfeited, then every such Person so offending, being thereof convicted in due Form of Law, shall be judged a Felon, and shall suffer Death as in Cases of Felony, without the Benefit of Clergy."

The Person guilty of counterfeiting a Stamp, or selling Paper marked with a counterfeit Stamp, to suffer Death.

There is a Clause to the same Effect in the Acts for imposing Stamp Duties passed in the ninth and tenth Years of the Reign of William the Third, and in the eighth Year of the Reign of Queen Anne.

9 & 10 W. 3. c. 25. s. 59. 8 A. c. 9. s. 41.

In the 9 An. c. 23. par. 34. there is the same Clause with the following Addition, "That if any Person whatsoever shall privately and fraudulently use any Stamp, provided or used, or to be provided or used, in pursuance of this or any former Act or Acts of Parliament relating to the Duties upon stamped Vellum, Parchment and Paper, so as thereby to defraud her Majesty, her Heirs or Successors, of any Duty payable by this or any such former Act or Acts of Parliament; then every such Person so offending, and being thereof convicted in due Form of Law, shall be adjudged a Felon, and suffer Death as in Cases of Felony, without Benefit of Clergy."

The Person fraudulently using a Stamp to suffer Death.

In some subsequent Statutes for imposing Stamp Duties, the same Clause is inserted with the Addition as in this last Statute.

10 A. c. 19. s. 115. 10 A. c. 26. s. 72.

By the 6 G. 1. c. 21. par. 60. it is, for ascertaining a Doubt which hath arisen, whether a Person, who causeth or procureth a Mark or Stamp, to resemble any Mark or Stamp to be provided or used for any of the Duties under the Management of the Commissioners for managing his Majesty's Stamp Duties, to be counterfeited or forged, ought to be adjudged a Felon, by Virtue of the Acts of Parliament relating to the said Duties, or any of them, enacted, "That any Person causing or procuring to be forged or counterfeited any Stamp or Mark, to resemble any Stamp or Mark provided, made or used, or to be provided, made or used, in pursuance of any Act or Acts of Parliament relating to the said Duties, or any of them, or causing or procuring any Vellum, Parchment, Paper, Cards or

The Person procuring or using a counterfeit Stamp to suffer Death.

"Dice,

“ Dice, to be marked or stamped with such counterfeit Mark or Stamp, shall and ought to be adjudged to have actually done and committed the same himself, and to be a Felon, and to suffer Death as in Cases of Felony, without Benefit of Clergy.”

29 G. 2. c. 12. In two Acts of Parliament since passed, imposing Stamp Duties, the original Clause, in the Act passed in the fifth Year of the Reign of King William and Queen Mary, is inserted, with the Addition of the Clause in this last Act, as well as that of the Act passed in the ninth Year of the Reign of Queen Anne.

All the foregoing Clauses extended to the Stamps directed to be used by any of the Stamp Acts. All the foregoing Clauses are by the last Stamp Act reduced into one, and they are thereby extended to the Stamps directed to be used by former Acts: It being by the 30 G. 2. c. 19. par. 27. enacted, “ That, if any Person shall counterfeit or forge, or procure to be counterfeited or forged, any Seal, Stamp or Mark, to resemble any Seal, Stamp or Mark, directed or allowed to be used by this or any other Act of Parliament, for the Purpose of denoting the Duties by this or any other Act of Parliament granted, or shall counterfeit or resemble the Impression of the same, with an Intent to defraud his Majesty, his Heirs and Successors, of any of the said Duties; or shall utter, vend or sell, any Vellum, Parchment or Paper, liable to any Stamp Duty, with such counterfeit Stamp or Mark, knowing the same to be counterfeit; or shall privately and fraudulently use any Seal, Stamp or Mark, directed or allowed to be used by this or any other Act of Parliament relating to the Stamp Duties, with Intent to defraud his Majesty, his Heirs and Successors, of any of the said Duties, every Person so offending, and being thereof lawfully convicted, shall be adjudged a Felon, and shall suffer Death as in Cases of Felony, without Benefit of Clergy.”

The Person selling Cards with counterfeit Stamps to suffer Death. By the 29 G. 2. c. 13. par. 5. it is enacted, “ That if any Person shall vend, utter, or expose to Sale, any Cards with a counterfeit Seal, Stamp or Mark, knowing the same to be counterfeit, every Person so offending, and being thereof lawfully convicted, shall be adjudged a Felon and shall suffer Death as in Cases of Felony, without Benefit of Clergy.”

Statutes.

A Statute is a written Law, made with the Concurrence of the King and both Houses of Parliament.
The Method of passing Bills in Parliament has been already shewn, under the Title Court of Parliament.

What falls properly under this Head shall be considered in the following Order.

- (A) Of some Requisites which are essential to the Validity of a Statute.
- (B) Of those Things which are incidental to an Act of Parliament.
- (C) From what Time a Statute begins to have Effect.
- (D) How long an Act of Parliament continues in Force.
- (E) Of the vast Power of an Act of Parliament.
- (F) Of publick and private Statutes.
- (G) Of affirmative and negative Statutes.
- (H) Whose Province it is to construe an Act of Parliament.
- (I) Rules to be observed in the Construction of Statutes.
 1. Words and Phrases, the Meaning of which in a former Act of Parliament have been ascertained, are, when used in a subsequent Act, to be understood in the same Sense.
 2. In the Construction of any Part of a Statute every other Part thereof must be considered.
 3. Where divers Statutes relate to the same Thing, they must all be taken into Consideration in construing any one of them.
 4. The Common Law is much to be regarded in the Exposition of Statutes.
 5. The Intention of the Makers thereof must, in the Construction of an Act of Parliament, be attended to.
 6. Statutes are to be construed according to Equity.
 7. Such Acts of Parliament, as are of publick Concern, ought to have a liberal Construction.
 8. Remedial Statutes must be expounded liberally.
 9. Penal Acts of Parliament are to be strictly construed.
 10. Divers other Rules to be observed in the Construction of Statutes.

(K) How Persons guilty of Disobedience to an Act of Parliament may be punished.

(L) Of pleading Statutes.

1. Of publick Statutes.
2. Of private Statutes.
3. The general Rules which must be observed in pleading Acts of Parliament.
4. Some Rules, for pleading Statutes, which relate to particular Parts of the Pleadings.
5. Of Mis-recital of Statutes in Pleading.
6. Of Surplusage in reciting an Act of Parliament pleaded.

(A) Of some Requisites which are essential to the Validity of a Statute.

⁴ *Inst.* 25.
^{Bro. Parl.} *pl.*
^{76.} *Hob.* 111. **N**O Statute is good, unless it is assented to by the King and both Houses of Parliament.

² *Inst.* 585. It has been said, that a Parliament may be holden without summoning the Lords Spiritual to it: But the better Opinion is, that they ought to be summoned; because they have, by the Law and Custom of Parliament, as good a Right to sit in the House of Lords as any other Barons.

² *Inst.* 585. If the Prelates however, after having been summoned, voluntarily absent themselves, the King, Lords Temporal and Commons, may make an Act of Parliament without them.

² *Inst.* 585,
586. This is constantly the Case, where a Bill is brought into Parliament for attainting any Offender of High Treason. The Lords Spiritual are forbid, by the Canon Law, to be present at the passing such a Bill; yet, if the Act proceeds, it is valid.

² *Inst.* 585,
586. In like Manner where the Spiritual Lords, being present, refuse to give their Assent to, or protest against the passing of any Bill, and the Act proceeds, it is good without them.

² *Inst.* 586.
(a) ¹¹ *R.* 2.
^{fl.} 2. c. 2.
(b) ¹¹ *R.* 2.
^{fl.} 2. c. 3. Two Bills being read in Parliament, the one, intituled, (a) *A Confirmation of the Statute of Provisors, and the Forfeiture of him that accepteth a Benefice against that Statute*; the other intituled, (b) *The Penalty of him that bringeth a Summons, or Sentence of Excommunication, against any Person upon the Statute of Provisors, and of a Prelate executing it*, both which tended to restrain the Authority, which was claimed by the Pope, of disposing of Ecclesiastical Benefices within this Realm, the Archbishops of *Canterbury* and *York*, for the whole Clergy of their Provinces, made their solemn Protestations in open Parliament, that they would in no wise assent to any Law in Restraint of the Pope's Authority. These Protestations were at their Request inrolled; yet both Bills were passed by the King, Lords Temporal and Commons, and are amongst the printed Statutes.

² *Inst.* 585. As the Voices in Parliament ought to be absolute, either in the Affirmative or in the Negative, if the Bishops and Clergy give their Voices with a Condition, such conditional Voices are as none; and an Act is good without their Concurrence.

^{Rot. Parl.}
⁶ *H.* 6. n. 27. A Bill was brought into Parliament in the Time of *Henry* the Sixth,
² *Inst.* 587. That no Man should contract, or marry himself to any Queen of England, without the Special Licence and Assent of the King, on Pain to lose all his Goods
and

and Lands. The Bishops and Clergy assented thereto, as far forth as the same swerved not from the Law of God and the Church; and so as the same imported no deadly Sin. This being holden as no Assent, it was specially entered, that it was enacted by the King, Lords Temporal and Commons.

And wherever any Act is so specially entered in the Parliament Rolls, to ^{2 Inst. 585;} have been enacted by the King, Lords Temporal and Commons, it is not ^{587.} to be inferred, that the Prelates were not summoned to Parliament: But it must be intended that they voluntarily absented themselves; or refused to give their Assent to, or protested against the passing an Act; or gave such Voices as were *contra Legem et consuetudinem parliamenti*.

Many ancient Statutes are indeed penned in the Form of Charters, Ordinances, Commands or Prohibitions from the King, without mentioning either ^{Hawk. Pref. to the Stat.} Lords or Commons, and many others have only the general Words, *It is* ^{1 Inst. 98.} *provided or It is ordained*, without saying by whom: But, as these have constantly been received as Statutes, the Presumption is, that they were made by lawful Authority.

The Difference, according to Lord Coke, between a Statute and an Ordinance is, that the latter has not the Assent of the King, Lords and Commons, but is made by only one or two of these Powers. ^{4 Inst. 25.}

Mr. Prynne, in his Remarks upon this Passage, says there is no such Difference, nor any Difference at all, betwixt a Statute and an Ordinance. To prove this he produces more than a hundred printed Acts of Parliament, in which the Words *Act* and *Ordinance* are either used indifferently, or coupled together as synonymous Terms. He likewise cites a Clause, contained in all Writs for electing Knights, Citizens and Burgeses, of Parliament, which runs thus, *ad faciendum et consentiendum hijs, quæ de communi concilio Regni Nostri contigerint ordinari*; and infers, that the Name *Ordinance of Parliament* took its rise from the Word *ordinari* in this Clause. ^{Prynne's Antiquary. on 4 Inst. 13. Prynne's Inverarcb. Redivivus. 27 to 74.}

Where any Statute is against common Right and Reason, or repugnant, or impossible to be performed, the Common Law shall controul it, and adjudge it to be void. ^{8 Rep. 118. Bonham's Case. 2 Inst. 527. Finch. 74.}

A Statute contrary to natural Equity, as to make a Man Judge in his own Cause, is likewise void; for *Jura Naturæ sunt immutabilia*. ^{Hob. 87. 8 Rep. 118.}

But it is said in another Case, where this last Case is cited, that an Act must be clearly contrary to natural Equity; for that the Judges will strain hard, rather than interpret any Act of Parliament void *ab Initio*. ^{11 Rep. 63. Foster's Case. 10 Mod. 115.}

Before the Art of Printing was introduced into England, all Statutes were, at the End of every Session of Parliament, transcribed on Parchment, and sent to the Sheriff of every County, and with them a Writ from the King, commanding him to proclaim them throughout his Bailiwick. After he had proclaimed them, which was usually done in his County Court, the Transcripts were there deposited, that any Person might read or take Copies of them. ^{2 Inst. 526. 644. 4 Inst. 26.}

But an Act of Parliament was, even in the ancient Times when this laudable Practice prevailed, equally binding, although it had not been so proclaimed. ^{4 Inst. 26. 2 Inst. 526.}

The Title of an Act of Parliament is no Part of it.

^{3 Rep. 33. Poulter's Case. Hard. 324. Ld. Raym. 77.}

This is usually framed by the Clerk of that House in which the Bill first passes; and is seldom read more than once.

The Custom of affixing Titles to Statutes did not begin till about the eleventh Year of the Reign of Henry the Seventh. ^{Ld. Raym. 77. Chance and Adams, Hard. 324.}

A Preamble

6 *Mod.* 62. A Preamble generally contains the Motives and Inducements to the making of a Statute: But it is no Part thereof. Heretofore Acts of Parliament were made without Preambles.
Mills and Wilkins.
 8 *Mod.* 144.

(B) Of those Things which are incidental to an Act of Parliament.

¹ *Inst.* 235. **W**HEREVER any Thing is provided for generally by any Act of Parliament, all Remedies and Requisites thereto necessary are supplied by the Common Law.
² *Inst.* 222.

¹ *Hawk.* 305. If any Offence is made Felony by Statute, it seems clear, that every such Statute does, by necessary Consequence, subject the Offender to the like Attainder, Forfeiture, &c. and does require the like Construction, as to those who shall be accounted Accessaries before or after, and to all other Intents and Purposes, as is incident to a Felony at the Common Law.
³ *Inst.* 47.
 49, 50.

¹ *H. H. P. C.* 652. Misprision of Felony is as well incidental to a Felony by Statute, as to one at the Common Law.

¹² *Rep.* 130, 131. When any Power is given by Statute, all Incidents, necessary to the making it effectual, are also given: For the Maxim is, *Quando lex aliquid concedit, concedere videtur et id, per quod devenitur ad illud.*

² *Inst.* 306. If an Action of Waste should now be given against Tenant in Tail after Possibility of Issue, &c. treble Damages would, although not mentioned, be recoverable against him: For these were recoverable under a former Statute, by which this Action was given; and whenever the same Action is given in any new Case, all that before appertained to it is also given.
Bro. Waste,
pl. 68.

(C) From What Time a Statute begins to have Effect.

¹ *Roll. Abr.* 465. **E**VERY Statute begins to have Effect, unless a Time for its Commencement is therein mentioned, from the first Day of that Session of Parliament in which it is made.
Harves's Case. Bro. Relat. pl. 35.

Bro. Parl. pl. 86. 4 Inst. 25, 27. Hob. 309. Sid. 310.

Ld. Raym. 371. But wherever a particular Day, to which it shall extend, is appointed by an Act of Parliament, its Relation shall be confined to that Day.
Rex and Gale. Plowd.

79. Bro. Parl. pl. 86. Hob. 222.

¹ *Jo.* 22. If two Acts are made in the same Session of Parliament, and no Time is fixed for the Commencement of either, neither shall have Priority: For both have Relation to the same Day and Instant of Time; and they shall, although contained in two Chapters, be construed, as if they had been one and the same Act of Parliament.
Standen and The University of Oxford.

It is in general true that Statutes have no Retrospect beyond the Time of their Commencement; for the Rule and Law of Parliament is, that *Nova constitutio futuris formam debet imponere, non pr.eteritis.*

A Treaty of Marriage being on Foot, between the Plaintiff and a Person whom he afterwards married, and had 2000*l.* with her as a Portion; *Shooter*; who was of kin to the Plaintiff, promised to give him as much; or to leave him as much by his Will. This promise was made before the 24th Day of June 1677. *Shooter* died in the September following, without having paid the Money, or made Provision by his Will for the Payment thereof. An Action was brought against his Executors, and the Question made upon a special Verdict was, whether this Promise, it not being in Writing, was within the 29 *Car. 2. c. 3.* whereby it is enacted, "That from and after the twenty-fourth Day of June, which shall be in the Year of our Lord one thousand six hundred and seventy-seven, no Action shall be brought, to charge any Person, upon any Agreement made upon Consideration of Marriage, unless the Agreement, upon which such Action shall be brought, or some Memorandum or Note thereof, shall be in Writing and signed, &c." Judgment was for the Plaintiff. *Et Per Cur'*: It cannot be presumed, that this Act was to have a Retrospect, so as to take away a Right of Action, to which the Plaintiff was intitled before the 24th Day of June 1677.

But Statutes do, in some Cases, relate to a Time antecedent to their Commencement.

If a Parson holds a Farm, with Condition not to alienate, and then a Statute is made, which inflicts a Punishment upon him for holding a Farm: Yet the Condition remains good.

Where *A.* covenants not to do some 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: Or 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 not to do a Thing, which then was unlawful, and an Act comes and makes it lawful to do it, such Act of Parliament is no Repeal of the Covenant.

It has however been, in a later Case, held, that in construing an Act of Parliament, made *ex post facto*, the Words ought not to be strained to defeat a Covenant, to the Benefit whereof a Party was well intitled at the Time the Act was made.

(D) How long an Act of Parliament continues in Force.

STATUTES are either temporary or perpetual.

Temporary Statutes continue in force, unless repealed, till the Time for which they were made expires; perpetual ones till they are repealed.

Every Statute, for the Continuance of which no Time is limited, is perpetual, although it is not expressly declared so to be.

It has been laid down, that, where a Statute is made for seven Years, and after the Expiration of that Term, it is by another Act made perpetual, the latter only is to be considered as in force.

But this Case does not seem to be Law. The Statute against Perjury, made in the 5th Year of the Reign of Queen Elizabeth, was only to continue in force till the End of the next Parliament. Another Parliament was begun in the thirteenth Year of her Reign, another in the twenty-seventh, and another in the twenty-eighth: But this Act was not made perpetual, till the twenty-ninth Year of the Reign of that Princess. The first Statute

has, however, been always held to be in force, and the Offence of Perjury is constantly charged, in an Indictment, to have been committed against the Form of that Statute.

Str. 1066.

Rex and Morgan.

In an Indictment for Perjury, in an Affidavit to hold to Bail, the Affidavit was laid to have been taken by virtue of the 12 G. 1. c. 29. which was a temporary Law for five Years only, and after continued with some Alterations by the 5 G. 2. c. 27. It was objected for the Defendant, that it ought to have been laid to have been taken by virtue of the latter Act, and especially as it is not a bare Continuance, but the first is in some respect altered. This Objection was over-ruled; and by Lord *Hardwick*, Ch. J. When an Act is continued, every Body is estopped to say that it is not in force; and, as there has been no Alteration in this respect, it is but a common Continuance *quoad hoc*.

Lutw. 221.

Anon. Owen

135. *Cro.*

Eliz. 750.

If, before the Expiration of a temporary Act of Parliament, another Act is made to continue it for ever, the Former remains in force as much as if it had been at first perpetual.

4 *Inst.* 43.

Divers Parliaments have attempted to bar, restrain, suspend, qualify, or make void, the Acts of subsequent Parliaments: but this never could be effected; for a later Parliament hath ever Power to abrogate, suspend, qualify, or make void, the Acts of a former, in the whole or any Part thereof, notwithstanding any Words of Restraint or Prohibition in the Acts of the former.

Jenk. Cent. 2.

Some Parts of *Magna Charta*, although it is expressly declared by the 42 E. 3. c. 3. that all Statutes contrary thereto shall be void, have been repealed or altered by subsequent Statutes; yet these last have been constantly held to be in force.

2 *Inst.* 686.

Where an Act, which has been repealed, is revived, the repealing Act becomes of no force.

12 *Rep.* 7.

The Bishops

Case. 2 *Inst.* 686.

By the Repeal of a repealing Statute, the first Statute is revived.

12 *Rep.* 7.

The Bishops

Case.

But if an Act has been repealed by three different Acts, although two of these repealing Acts are repealed, yet the third continues in force and repeals the original Act.

Jenk. 233.

pl. 6.

When a Statute is repealed, all Acts done under it while it was in force, are good: But, if it is declared null, all those are void.

All Statutes, besides that they may be put an End to by being in fact repealed, are likewise liable to a Repeal by Implication.

11 *Rep.* 61.

Foster's Case,

Sborw. 520.

Ld. Raym.

160. 4 *Inst.* 43.

Every Affirmative Act is a Repeal, by Implication, of a precedent Affirmative one, so far as it is contrary thereto, although there are no negative Words in it: For *leges posteriores priores abrogant*.

Raym. 397.

Anon.

But where a Statute, before perpetual, is continued, by an affirmative Statute, for a limited Time, this does not amount to a Repeal of it at the End of that Time.

6 *Mod.* 287.

The Inhabitants of St.

Clements and

The Inhabitants of St. Andrew's.

Where two Acts, contradictory to each other, are passed in the same Session, the latter only shall take Effect.

Fitzg. 195.

The Attorney

General and

The Governor

of Chelsea Water-

Works.

If a Proviso is repugnant to the Purview or enacting Part of a Statute, it shall stand, and be, so far as it is so, a Repeal of the Purview, because it was last agreed to by the Makers of the Law.

11 *Rep.* 63.

Foster's Case.

1 *Roll. Rep.* 88.

10 *Mod.* 118.

But Repeals by Implication are not favoured in Law; nor are they allowed, except the Inconsistency or Repugnancy is plain: For they carry with them

them a Reflection upon the Wisdom of the Legislature; and such Repeals have ever been confined, to the repealing as little of the preceding Laws as is possible.

Although two Acts of Parliament are *seemingly* repugnant, yet, if there be no Clause of *non Obstante* in the latter, they shall, if possible, have such a Construction; that the latter may not be a Repeal of the former.

*Dy. 347. Wife
ton's Case.
Bro. Parl. pl.
9. 11 Rep 63.
Hard. 344.*

(E) Of the vast Power of an Act of Parliament.

THE Power of an Act of Parliament is so exceeding great, that only the Laws of God and Nature can controul it.

An Act of Parliament can do no Wrong, but it may do some Things which look pretty odd: For it may discharge a Person from the Allegiance he lives under, and restore him to a State of Nature.

*12 Mod. 688.
The City of
London and
Wood.*

An Estate may be made to cease by a Statute, in the same Manner as if the Party possessing it was dead: as is done by the 21 H. 8. c. 13. which declares, that, if any Person accepts a second Benefice, the first shall be void in the same Manner as if the Incumbent had died.

*6 Rep. 46.
Mildmay's
Case.*

A Man may by an Act of Parliament be enabled to have or be an Heir, who otherwise could not have or be an Heir.

*1 Lev. 75.
Wheatly and
Thomas.*

An Estate Tail, may be created by Act of Parliament without a Donor; and the Validity of such a Limitation is not to be measured by the strict Rules of the Common Law: For an Act of Parliament can controul the Rules of the Common Law.

*Raym. 355.
Murrey and
Eyton, 1 Jo.
105.*

A Man can only forfeit such Estate as he has, as where Tenant in Tail with Remainder over forfeits, the Remainder is saved: But, if the Land of Tenant in Tail is given by Name unto the King by a Statute, the Remainder is not saved.

*Godb. 315.
Sheffield and
Ratcliffe.*

If the King is intitled by an Act of Parliament to the Land of J. S. he takes it discharged of all Tenures whatsoever.

*Bro. Parl.
pl. 77.*

Where Land is subject to a Rent Charge, if this Land is given to any Person by a Statute, the Rent is thereby discharged.

*Bro. Parl.
pl. 28.*

A Statute cannot make it lawful for A. to commit Adultery with the Wife of B. for the Laws of GOD forbid this: But it may dissolve her Marriage with B. and make her the Wife of A.

*12 Mod. 688.
The City of
London and
Wood.*

An Act of Parliament cannot alter the Course of Nature, so as to make a Woman a Man: But it can make her a Man to all civil Purposes; for it can make her a Mayor or a Justice of Peace.

*2 Jo. 12.
Crow and
Ramsey.*

(F) Of publick and private Statutes.

SUCH Statutes, as relate to all the Subjects of the Realm, are publick or general ones.

*8 Rep. 138.
Barrington's
Case.*

Although the Words of a Statute are special: Yet if the Reason of it is general, it thereby becomes a general Act.

*10 Rep. 1013.
Beaufage's
Case.*

But

Plowd. 204. But, wherever the Intent of an Act of Parliament is particular, it shall, *Stradling and Morgan.* although the Words of it are general, be deemed a private Act.

4 *Rep.* 77. All Statutes that concern the King are general: For every Subject has an *Holland's Case.* Interest in him as the Head of the Body Politick; and must be as sensible
8 *Rep.* 28, 138. of any Thing that affects him, as a Member of the natural Body is of
Hob. 227. what the Head at any Time feels.

Sid. 209. *Rex* and *Parwin.* The Preamble of the 13 & 14 *Car.* 2. c. 12. recites divers Mischiefs to the Publick, that arise for want of proper Regulations concerning the Poor: And by *Par.* 4. it is enacted, "That for the Redress of the Mischiefs intended hereby to be remedied, a Workhouse shall be erected in the County of *Middlesex*, &c." The Words in this Preamble were held to make that Part of the Act general; because it concerns the Safety of the King's Person; and the Quiet of his Government, that a Stop should be put to such Evils: And this Clause, for erecting a Workhouse, was also held to be general, because, as it refers to the Mischiefs mentioned in the Preamble, a Remedy is thereby provided for them in the County of *Middlesex*.

12 *Mod.* 249. Any Act of Parliament concerning the publick Revenue is a publick
Anon. 12 *Mod.* Law: but some Clauses in it may be private, because they relate to private
613. 10 *Rep.* Persons; for a Statute may be general in one Part and special in another.
57. *Plowd.* 65.
Hob. 227. *Sid.* 24.

Skin 429. *Rex* and *Baggs.* If a Statute be of a private Nature, as where it concerns a particular Trade; yet, if any Forfeiture is given to the King, it thereby becomes a publick Statute.

Ld. Raym. 120. In Debt on Bond the Defendant pleaded a certain Statute for the Discharge
Jones and Axen. of poor Prisoners, but did not set it out. Exception was taken that this Statute should have been pleaded at large, because it is a private Statute: For it does not extend to all poor Prisoners, but to such only as were in Prison at a Time therein mentioned. *Per Cur'*: This shall be construed to be a publick Act. 1. Because all the People of *England* may be concerned as Creditors to these poor Prisoners. 2. It is an Act of Charity, and therefore ought to have a more favourable Interpretation. 3. As it is a long Act, and difficult to be pleaded, these poor People could never bear the Expence of pleading it specially.

Ld. Raym. 390. *Pitts* and *Polehampton.* The 8 & 9 *W.* 3. c. 18. for the Relief of Creditors, by making Compositions with their Debtors, in case two Thirds in Number and Value do agree, was held to be a private Act.
12 *Mod.* 249.

Ld. Raym. 709. *Ingram* and *Foot.* The Judges are not obliged to take Notice of an *Act of Pardon*, unless
12 *Mod.* 613. they are by such Act directed so to do: For an Act of Pardon is not a general Act; and it is no Consequence, that because a Man may give it in Evidence upon the general Issue pleaded, that therefore the Judges must take Notice of it in a collateral Case.

4 *Rep.* 76. A Statute that concerns Trade is a general one: For the Genus Trade is
Holland's Case. composed of all the Kinds of Trades.

4 *Rep.* 76. But an Act of Parliament, that only relates to a certain Trade, or to
Holland's Case. any Person by Name of that Trade, is special: because the particular Trade is a Species of the Genus Trade; and the Person named is an Individual of that Trade.

4 *Rep.* 120. The Statute against Non-residence and that against Pluralities are publick;
Dumport's Case. for they extend to every Species of the Spirituality.
2 *Roll. Abr.*
465. 4 *Rep.* 76.

4 *Rep.* 76. An Act of Parliament, however, that concerns only some Species of
Holland's Case. the Spirituality, as the Bishops, or a particular Bishop, is a private one.
2 *Roll. Abr.*
466. *Cro. Ja.* 112. 2 *Mod.* 57.

The Statute of first *Westminster*, which says *that no Sheriff or other Minister of the King shall take any Reward to do his Office, but be satisfied with what he receives from the King*, is a general Law; because it extends to all Officers.

But the 23 *H. 6. c. 10.* which is confined to Sheriffs, has been held to be a private Act.

2 *Saund.* 154.
Benson and Wilby, Trin.
 22 *Car. 2. Plowd.* 65. *Sid.* 24, 439.

The contrary has indeed been laid down in some Cases; and in one, subsequent to the Case in *Saunders, Holt*, Ch. J. was of Opinion, that this is a publick Statute.

2 *Lew.* 103.
Okey and Sell,
Pasch. 26
Car. 2. 1 Lew.
 83. *Sid.* 23.

The former Opinion is, however, more agreeable to the Principle which governs in such Cases; and the Authorities in support of it are of much greater Weight.

The Act of Parliament made in the Time of *Henry the Sixth*, *that all Corporations and Licences granted by that Prince should be void*, was held to be a private Act; because, as it does not include all Corporations, it is not general, but particular in a Generality, or, to speak with more Propriety, general in a Particularity.

Plowd. 65.
Dyer and Manningham.
Bro. Parl. pl. 6.
 4 *Rep.* 76.
Dy. 119.

In many Acts of Parliament, which would otherwise have been private, there are Clauses in the respective Acts, by which they are declared to be publick.

(G) Of affirmative and negative Statutes.

SOME Statutes are, from their being made in the Affirmative, called Affirmative: Others obtain the Name of negative Statutes, because they are penned in negative Terms.

It is a Maxim in Law, that a Statute made in the Affirmative, without any Negative express or implied, doth not take away the Common Law.

2 *Inst.* 200.
 1 *Inst.* 111,
 115.
Show. Parl. Ca. 64.

By the 43 *E. 3. c. 11.* it is enacted, "That the Pannel of Assize shall be arrayed four Days before the Day of Assize:" Yet, if this is done two Days before the Day of Assize, it is good; for two Days were sufficient at the Common Law, and where a Statute is; as here, in the Affirmative, it does not take away the Common Law.

Bro. Parl.
 pl. 70.

The Statute of *Marlbridge, c. 21.* and the Statute of 2 *Westm. c. 39.* are, "That, after Complaint made to the Sheriff, he may take the *Posse comitatus* and make Replevin. *Et per Cur'*: He may serve Process with Power at the Common Law, and a Statute in the Affirmative is not against this.

Bro. Parl.
 pl. 108.

But, although an Affirmative Statute does not take away the Common Law, it is nevertheless binding; and a Party may make his Election, to proceed upon such Statute, or at the Common Law.

2 *Inst.* 200.
Bro. Parl.
 pl. 70. 1 *Rep.*
 64. *Cro. Eliz.*
 104.

If an affirmative Statute, which is introductive of any new Law, limits a Thing to be done in one Manner, it shall not, even where there are no negative Words, be done in any other.

Plowd. 206.
Stradling and Morgan. *Hob.*
 298. *Sid.* 56.

But where the Question was, whether an Appointment of Overseers, made after the Expiration of the Time limited by Statute for such Appointment,

Str. 1123. *Rex and Sparrow.*

ment, was valid? It was held to be so. *Et per Cur'*: The 43 *Eliz. c. 2.* ought to have a liberal Construction; because it is an Act under which Provision is to be made for the Poor. As it was not in the Power of the Parish to compel the Justices to make an Appointment within the Time, this Appointment ought *ex necessitate* to be held good. Although this Statute is introductive of a new Law; yet no negative ought to be implied against the Meaning and Justice thereof.

11 *Rep. 64.*
Foster's Case.

Where a Power is given, by a Statute introducing some new Law, to a certain Person, by the Designation of that one Person, although it is an affirmative Statute, all others are excluded from the Exercise thereof, *quia inclusio unius est exclusio alterius.*

Plowd. 206.
Stradling and
Morgan.

If an Action, founded upon a Statute, is directed to be brought before the Justice of *Glamorgan*, in his Sessions, it cannot be brought before any other Person, or in any other Place.

11 *Rep. 59.*
Foster's Case.

It being by the 31 *E. 3. c. 12.* provided, "That Error in the Exchequer Chamber shall be amended before the Chancellor and Treasurer," such Error cannot be amended before any other Person; and yet this is an affirmative Statute.

By the 26 *G. 2. c. 22.* for establishing the *British Museum*, some Acts were directed to be done by the Majority of the Trustees. It was so clear, that these Acts could not be done, under this Statute, by the Majority of the Trustees present at any Meeting, unless that Majority was also a Majority of the whole Trustees, that the 27 *G. 2. c. 16.* was made, for enabling the Majority of those Trustees who shall be present, provided that seven are present, at any Meeting to do them.

11 *Rep. 64.*
Foster's Case.

But an Act of Parliament, even if there are negative Words in it, does not in many Cases exclude the Jurisdiction of the Court of *King's Bench*; because the Pleas there are before the King himself.

11 *Rep. 64.*
Foster's Case.

The Designation, however, of a certain Person, to whom some new Power is given by an affirmative Statute, does not always exclude another, who was by a precedent Statute authorized to do the same Thing.

Stamf. Prer.
69.

11 *Rep. 64.*

By the 8 *H. 6. c. 16.* it is provided, *That, after Office found, he who finds himself aggrieved may, within a Month, offer his Traverse, and to take the Premises to Farm; and that the Chancellor, Treasurer or other Officer shall demise them to him to Farm until, &c.* By the 1 *H. 8. c. 16.* Liberty is given to the Person aggrieved to do this at any Time within the Space of three Months. Afterwards the 32 *H. 8. c. 40.* authorizes the Master of the Wards, to grant a Lease of the Lands of a Ward, or an Idiot, while they remain in the Hands of the Crown. This last Act, notwithstanding the Designation of a new Person, shall not take away the Power granted by the Former: for if, before any Lease is made by the Master of the Wards, the Chancellor or Treasurer make a Lease of any such Premises, the Master of the Wards cannot afterwards demise the same.

Bro. Parl.
pl. 72.

A negative Statute so binds the Common Law, that a Man cannot afterwards use it.

2 *Inst. 105.*
Bro. Parl.
pl. 72.

At the Common Law, if a Lord distrained for Customs, Services, or any other Duties, when none were behind, an Action of Trespass lay: But since the Statute of *Marlbridge*, the Words of which are, *Si quis major vel minor districtiones faciat super tenementum suum pro servitijs vel consuetudinibus, que sibi deberi dicat, vel pro re altera, unde ad Dominum feodi pertineat districtiones facere, et postea convincatur, quod tenens ea sibi non debet, non ideo puniatur dominus per redemptionem,* it has been held that in such Case no Action lies.

2 *Inst. 68.*
Bro. Parl.
pl. 72.

A Woman, as well as a Man, might, at the Common Law, have had an Appeal of the Death of any of her Ancestors: But a Woman can now only have it in the Case of her Husband's Death; for by *Magna Charta, c. 34.* it is declared, *Nullus capiatur aut imprisonetur propter appellum famine de morte alterius quam viri sui.*

An affirmative Statute does not take away a Custom.

1 *Inst.* 111,
115.

It has been formerly laid down, that a Custom is also good against a negative Statute, unless some new Law is thereby introduced: for, if it is only declarative of the Common Law, as a Man might have prescribed or alledged a Custom against the Common Law, so he may against such a Statute; for *consuetudo privat communem Legem.*

1 *Inst.* 115;

But it has been since held, that no Prescription or Custom, unless it is therein saved, is good against a negative Act of Parliament, whether it be declaratory of any old Law, or introductory of a new one.

1 *Jo.* 271;
Ld. Lovelace's
Cafe. 2 *Bull.*
36. *Shorr.*
420. *Shorr.*
Parl. Ca. 175.

(H) Whose Province it is to construe an Act of Parliament.

THE Power of construing Statutes is in the Judges: For they have a Liberty and Authority over the Laws, and especially over Statute Laws, to mould them according to Reason and Convenience to the best and truest Use.

Hob. 346.
Sheffield and
Radcliffe.
Plow. 109.
3 *Rep.* 7.
Mar. 90.
pl. 148.
2 *Inst.* 614.

But only the Judges of the temporal Courts have this Power.

An Ordinary cannot impose any new Condition in a Bond of Administration, but must take it in the Words of the 21 *H. 8. c. 5.* and, when an Action is brought upon it, the Meaning of that Statute, and of the Condition, must be ascertained by a Court of Common Law.

Hob. 83.
Stawney's Ca. 2;

In a Case, where a Question arose, whether a Man was a Bankrupt? It was insisted, that as the Jury had only found Facts, but had not drawn the Conclusion that he was a Bankrupt, the Court could not do this: *Sed non Allocatur. Et per Cur:* As the Jury have found the Facts, the Court may judge from these, whether the Man is within the Description of any of the Bankrupt Acts.

2 *Jo.* 142.
Dodsworth and
Anderson.

It was found, by a special Verdict, that the Defendant had an Estate of one hundred Pounds a Year; that he carried on the Business of a Poulterer; that he had a Hare in his Custody; and that he did sell a Hare for four Shillings; and one Question was whether this Person was a Chapman within the Meaning of the 5 *A. c. 14.* by which it is enacted, "That if any Highlar, Chapman, Carrier, Inn-keeper, Victualler or Alehouse-keeper, shall have in his Custody or sell any Hare, Pheasant, Partridge, Moor, Heath Game or Grouse, he shall forfeit for every such Offence the Sum of five Pounds."

MS. Rep.
East. 27 *G. 2.*
Searle Qui tam
and *Poulter.*

Upon arguing this Case it was said, for the Defendant, that, if the Word *Chapman* had been here intended for a Word of general Signification, it would have been the last Word made use of, and would not, as is done, have been inserted before the Word *Carrier*, and other Words of a more confined Signification. It was also said, that, as the Jury have not by this Verdict found him a Chapman, the Court cannot now infer that he is one; and 2 *Roll Abr.* 693. 1 *Inst.* 227. *Com.* 479. *Ld. Raym.* 1581. *Kel.* 78. were cited.

It was answered, that the Doubt in the Cases cited was whether sufficient Facts were found by the Jury. But here the Facts of having a Hare in his Custody and selling a Hare are found, and the only Doubt of the Jury is, what the Meaning of the Word *Chapman* in this Act of Parliament is; and the Case in *Sir Tho. Jones* 142. just now mentioned, was relied on, to show that it is the proper Business of the Court, to construe such Words as this in an Act of Parliament.

The

The Reply was, that, as divers Acts of Parliament had described a *Bankrupt*, the Court in the Case in Sir *Thomas Jones* did nothing more than judge if the Person was within any of these Descriptions: But no Statute has described a *Chapman*.

The Judgment, in which the Court were unanimous, was for the Defendant; and by *Ryder*, Ch. J. the Word *Chapman* is in some Cases, as when applied to a Tradesman who becomes a Bankrupt, of very general Signification; but its Meaning in this Case must be gathered from the Act itself. It is clear from the Preamble, that the Design of this Statute is to prevent the Destruction of the Game by idle and profligate Persons; but not to prevent all Sale of Game; and much less to prevent all Persons, who may fall under the Denomination of the Word *Chapman* in its larger Sense, from having it in their Custody. Two Sorts of Persons are by this Act forbid to have Game in their Custody; the Carriers of it, and such as suffer it to be eat in their Houses. The Word *Chapman*, then as it stands between the Words *Higler* and *Carrier*, means only a Petty Chapman; who by reason of his trading up and down the Country, is likely to be employed in carrying Game; and could never be intended to include a Poulterer.

(I) Rules to be observed in the Construction of Statutes.

1. Words and Phrases, the Meaning of which in a former Act of Parliament have been ascertained, are, when used in a subsequent Act, to be understood in the same Sense.

EXCEPTION was taken to an Indictment upon the 14 *Car. 2. c. 12.* against Churchwardens and Overseers, for not making a Rate to reimburse a Constable, that the Statute only puts it in their Power by the Word *may* to make such a Rate, but does not require the doing of it as a Duty, for the Omission of which they are punishable: *Sed non alloatur*; for where a Statute directs the doing of a Thing for the sake of Justice, or the publick good, the Word *may* means the same as the Word *shall*. The 23 *H. 6.* says the Sheriff *may* take Bail; but the Construction has been that he *shall* do this.

Every Crime, which is by any Statute ordained to have or undergo Judgment of Life or Member, is a Felony; although the Word *Felony* is not mentioned in the Statute.

But if an Offence is by Statute only prohibited under Pain of forfeiting all that a Man has; or of forfeiting Body and Goods; or of being at the King's Will for Body, Land and Goods; it shall amount to no more than a high Misdemeanor.

If an Act of Parliament says *an Offender shall be punished according to his Demerits*, these Words import that he shall be only punished in the ordinary Course of Justice by Indictment.

When a Statute gives a Penalty *to be recovered before a Justice of the Peace*, but prescribes no Method, it ought to be by Bill.

An Information, which had been exhibited against the Defendant a Sadler, for a Penalty given by the 1 *Fac. 1. c. 22.* was quashed; and by Lord Mansfield, Ch. J. Wherever a Power is given, as is here done, by any Statute *to enquire, bear, and determine*, it always means according to the Course of the

the Common Law by a Jury; and the Proceeding must be by Indictment.

2. In the Construing of any Part of a Statute every other Part thereof must be considered.

It is the most natural and genuine Exposition of an Act of Parliament, ^{1 Inst. 381.} to construe one Part of the Act by another Part of the same Act: For that best expresseth the Meaning of the Makers; and such Exposition is *ex visceribus actus*.

When one Branch of a Statute is obscure, Expositors accustom themselves to consider the other Branches; for oftentimes the Words and Meaning of one Clause lead to the Sense of another. ^{Plowd. 365; Storwell and Zouch. 11 Mod. 161.}

An Act of Parliament ought upon the whole to be so construed, that, if it can be prevented, no Clause, Sentence, or Word; shall be superfluous, void, or insignificant. ^{1 Show. 108. Rex and Berchett. Hard. 344.}

The Title of a Statute is not to be regarded in construing it, because it is no Part thereof. ^{Hard. 324. Ld. Raym. 77.}

It is in general true, that the Preamble of a Statute is a Key to open the Mind of the Makers, as to the Mischiefs that are intended to be thereby remedied. ^{Plowd. 369. Howell and Zouch. 1 Inst. 79.}

But this Rule must not be carried so far, as to confine the more general Words of an enacting Clause to any particular Words in the Preamble: For there was a Time when Acts of Parliament were made without Preambles; and even now Preambles are no more than Recitals of some Inconveniencies, but they do not exclude any other, for which a Remedy is given by the enacting Clause. ^{8 Mod. 144. Rex and Althoes. 6 Mod. 62. Palm. 486. 1 Jo. 164.}

It was said by Lord Cooper, that he could by no Means agree with the Notion, that a Preamble shall restrain the Operation of an enacting Clause; and he said, that if the Preamble of the *Coventry Act* had only recited the Barbarity of flitting *Coventry's* Nose; and the enacting Clause had been general, against the cutting off any Member, whereby a Man is disfigured or defaced; it might with equal Reason have been objected, that cutting off the Lips, or putting out an Eye, would not have been within the Act, because they are not recited in the Preamble. ^{1 Will. 320. Copeman and Gallant.}

General Words in a Statute may be restrained by subsequent Sentences or Clauses in the same Statute. ^{8 Mod. 8. Rex and The Archbishop of Armagh.}

If Lands are *disgavelled*, by Act of Parliament, *to all Intents and Purposes*, and *made descendible as Lands at the Common Law*, the former general Words are so restrained, by the more particular subsequent ones, that, although the Partability of an Estate, by which many Families have been reduced to a low Estate, is put an End to, the Custom to devise is not hereby taken away: For this is a Privilege at the Common Law, and no Part of the Custom of Gavelkind. ^{1 Lev. 80. Wiseman and Cotton.}

But no preceding restraining Words shall controul the general Words in the enacting Part of an Act of Parliament. ^{8 Mod. 144. Rex and Althoes. Palm. 486. 1 Jo. 164.}

Where a Thing is given or limited by particular Words in a Statute, this shall not be taken away or altered by any subsequent general Words. ^{1 Jo. 26. Standon and The University of Oxford.}

1 Rep. 47. A Saving in a Statute, which is repugnant to the Purview of the Statute;
Alton Wood's is void.
Cafe, Plowd.
 564.

1 Jo. 339. The Purview of an Act may be qualified or restrained by a Saving in it:
Rex and Priest, But, if the Saving is destructive of the Purview, it shall be void.
 10 Mod. 115.

Fitzg. 195. Where the Proviso in a Statute is directly contrary to the Purview, the
The Attorney Proviso shall be held good, and not the Purview: Because it speaks the last
General and Intention of the Legislators.
the Governors
of Chelsea
Waterworks.

3. Where divers Statutes relate to the same Thing, they
 must all be taken into Consideration in construing any one
 of them.

Plowd. 206. If one Act of Parliament prohibits a thing to be done, and another Act
Stradling and is after made, whereby a Forfeiture is inflicted upon the Person doing that
Morgan. thing, both these are to be considered as one Act.

Bro. Waste, When an Action, founded upon a former Statute, is given by another
pl. 68. Statute in a new Cafe, all that was adjoined to it in the first Statute is also
 given with it.

4 Rep. 4. Ver- An Act lately made shall be taken to be within the Equity of one made
non's Cafe. long since; and there are in our Books frequent Instances of its being so
 held.

Ld. Raym. If a thing, which had no Existence before the making of a latter Act of
 1028. *Sir* Parliament, is within the Reason of a former Act, it shall be taken to be
Will. Moore's within its Meaning.
Cafe, 2 Jo. 63.

1 Vent. 246. The 13 Eliz. c. 10. concerning Leases made by Spiritual Persons, being
Bayly and enlarged by the 14 Eliz. c. 11. although only the former of these is recited
Murin. in the 18 Eliz. c. 11. the latter is by Consequence also recited.

In the same Cafe it is laid down, that there is such a Connection betwixt
 all the Statutes concerning Leases made by Ecclesiastical Persons, that they
 are all to be taken into the Construction of any one of them. The 32 H. 8,
 c. 28. is not recited in the 1 Eliz. c. 19. nor in the 13 Eliz. c. 10. yet a
 Lease is not warranted by either of these Statutes, unless it has the Quali-
 fications required by the 32 H. 8. and this Course is usual in the construing of
 Statutes made *in pari materia*.

Barn. Ch. Rep. The 22 & 23 Car. 2. c. 10. for the better settling of Intestates Estates,
 276. is continued with some additional Clauses by the 1 Jac. 2. c. 17. it was held
Wallis and by Lord *Hardwick* Chancellor, that for this Reason the latter must be con-
Hodson. sidered, as if the former had been repeated and re-enacted by it.

M. S. Rep. A Question arising whether Justices of the Peace had a Power to appoint
Rex and Lock, five Overseers for the Parish of *St. Chads* in *Shrewsbury*, it was held that they
Still, and had not: And by Lord *Mansfield*, Ch. J. the Number of Overseers was
others. by the 39 Eliz. c. 3. to be precisely four. As this Number might in some
 Cafes have been found too large, Power is given by the 43 Eliz. c. 2. of
 appointing four, three, or two, Respect being had to the Greatness of the
 Parish; but no Power is given to exceed in any Cafe the Number of four.
 The Rule of Law as to a special Authority is, that every thing done under
 the Colour of it, which is not within it, is void. There was no need to in-
 sert negative Words in either of these Acts: Nay, since no Power had been
 ever given to appoint five Overseers, it would have been quite nugatory to
 have said that five shall not be appointed. As the 39 Eliz. was undoubtedly
 under Consideration of the Legislature, when the 43 Eliz. was made, it
 ought, although long since expired, to be now taken into Consideration in
 explaining this last: For it is a Rule in the Construction of Statutes, that all
 which

which have relation to the same Subject, notwithstanding some of them may be expired or are not referred to, must be taken as one System and construed consistently; and the Practice has been so to do in Cases of Bankruptcy, Church Leases, and in other Cases.

4. The Common Law is much to be regarded in the Exposition of Statutes.

Wherever an Act of Parliament makes use of any Term known at the Common Law, it shall be taken in the same Sense it was taken in at the Common Law. *6 Mod. 143. Smith and Harman.*

To know what the Common Law was before the making of any Statute, whereby it may be known, whether the Act be introductory of a new Law or affirmatory of the old, is the very Lock and Key to set open the Windows of a Statute. *Plowd. 365. Zouch and Storwell. 2 Inst. 301, 308. 3 Rep. 13. Hob. 83, 97.*

In order to construe a Statute truly, four Things are necessary to be understood and considered. 1. What the Common Law was before. 2. What the Defect or Mischief was, for which the Common Law had not provided. 3. The Remedy that is by the Act provided for this Mischief. 4. The true Reason of this Remedy. *5 Rep. 7. Heydon's Case. 1 Inst. 272. 2 Inst. 301.*

The best Exposition of an Act of Parliament is to expound it as near to the Rule and Reason of the Common Law as may be, and by the Course which that observes in Cases of its own. *1 Will. 252. Miles and Williams. Plowd. 365.*

2 Inst. 148, 301. 1 Saund. 240. 10 Mod. 245.

By the Statute *de donis* it is enacted, that a Fine levied of entailed Lands *ipso jure fit nullus*: Yet the Interpretation has been, that such a Fine shall not be a Nullity and only a Discontinuance; because at the Common Law, if a Bishop seized in the Right of his Church, or a Husband in that of his Wife, had aliened by Fine, it was but a Discontinuance. *3 Rep. 85: The Case of Fines. Hob. 97.*

When an Act of Parliament gives any Thing generally, it is given subject to the Controul and Order of the Common Law. *1 Show. 455: Rex and The Bishop of London. Sav. 39. Hard. 62.*

If a new Remedy is given by a Statute in a particular Case, this shall not be extended to alter the Common Law in any other than that particular Case. *11 Rep. 59: Forster's Case. Hob. 298. Cart. 36. Vaugh. 179.*

The Statute of *1 Westm. c. 20. de malefactoribus in parcis et vivariis* shall not extend to *Forests*: Because it is in Restraint of the Common Law, and such Statutes are to be construed strictly. *Bro. Parl. pl. 72. 2 Inst. 455. Vaugh. 179.*

All obscure Statutes ought to be construed according to the Rules of the Common Law. *Win. 86. Hickford and Machin.*

5. The Intention of the Makers thereof must, in the Construction of an Act of Parliament, be attended to.

Such a Construction ought to be put upon a Statute, as may best answer that Intent which the Makers of it had in View; for *qui hæret in Litera hæret in cortice*. *Plow. 232. William and Barkley. 11 Rep. 73.*

The

Plow. 205. The Intent of Legislators is to be collected sometimes from the Cause
Stradling and or Necessity of making an Act of Parliament; sometimes from Words in
Morgan. other Parts of the same Act; and sometimes from foreign Circumstances.
Litt. Rep. 212. When this can be discovered, it must be followed, with Reason and Discre-
11 Mod. 161. tion, in the Construction of an Act, although such Construction seems con-
1 Show. 491. trary to the Letter of it.
1 Jo. 105.

2 Inst. 11, Great Regard ought, in construing a Statute, to be paid to that Expo-
136, 181. sition which the Sages of Law, who lived about the Time or soon after it
 was made, have put upon it; because they were best able to judge of the
 Intent of the Makers thereof.

Plow. 57. Wherever any Words of an Act of Parliament are obscure or doubtful,
Wimbish and the Intent of the Legislators is, in order to find out their Meaning, to be
Tailboys. resorted to.

Plow. 366. Every Thing, which is within the Intent of the Makers of a Statute, is,
Zouch and although it be not within the Letter, as strongly within the Act as that
Stowell. which is within the Intent and the Letter also.
10 Rep. 101.

Plow. 366. By the 4 *H. 7. c. 24.* it is provided, that the Right of any Person, who
Zouch and was within the Age of twenty-one Years at the Time of levying a Fine,
Stowell. shall not be thereby bound: Yet, if a Disseisor dies leaving a Wife with
 Child, and the Disseisor levies a Fine, and afterwards that Child is born,
 such Child, although not within the Letter of the Act, because, as the Age
 of a Child begins only from the Time of its Birth, it cannot be said to have
 been at that Time within the Age of twenty-one Years, is within the In-
 tent of it; and his Right shall be saved.

Plow. 57. The Words of 2 *Westm. c. 23.* are, *in Casu quando vir amisit per defaultam*
Wimbish and *tenementum, quod fuit jus uxoris sue, durum fuit, quod uxor, post mortem viri*
Tailboys. *sui, non habuit aliud recuperare quam per breve de recto, propter quod Dominus*
rex statuit, quod Mulier post mortem viri sui habeat recuperare per breve de
Ingressu, cui ipsa in vita sua contradicere non potest. Only a Loss by Default of
 the Husband is within the Letter of this Act: But the Construction has been,
 that a Woman shall have this Writ of *Cui in vita*, although the Loss was by
 Default of both her and her Husband; because, as a Woman is supposed
 to have acted under the Coercion of her Husband, this is within the Intent
 of the Makers of it.

On the other Hand, a thing, which is within the Letter of an Act of
 Parliament, is not within the Act, if it is not within the Intention of the
 Makers of such Act.

Plow. 18. The Statute of *Marlebridge, c. 4.* prohibits generally *the driving a Distress*
Reniger and *taken in one County into another.* It has however been adjudged, that, if Land
Fogassa. held of a Manor lies in another County, the Lord may distrain upon such
 Land, and drive the Distress into the County where the Manor lies; for, as
 it would be inconvenient and a great Loss to the Lord if he could not
 drive the Distress to his Manor, this Case, although within the Words, is
 not within the Meaning of this Act of Parliament.

Plow. 205. By the Statute of *Gloucester, c. 1.* it is provided, "That a Disseisor shall
Stradling and recover Damages, in a Writ of Entry founded upon a Disseisin, against him
Morgan. who is found Tenant after the Disseisor." If a Disseisor makes a Feoff-
 ment by Deed to three Persons, and makes Livery of Seisin to two of
 them, but the third was not present at the Livery; nor ever agreed to the
 Feoffment; nor received any of the Profits; he shall not, although he is by
 the Death of the other two Tenant after the Disseisor, be liable to answer
 Damages to the Disseisor: For the Legislators could never intend to make
 him, who never assented to the wrong done to the Disseisor, answerable
 for it.

6. Statutes are to be construed according to Equity.

Equity is a Construction made by the Judges, that Cases out of the letter of a Statute, which are within the same Mischief or Cause of making the Statute, shall be within the Remedy that is thereby provided: And the Reason thereof is, that the Law-makers could not possibly set down all Cases in express Terms.

In order to form a right Judgment, whether a Case is within the Equity of a Statute, it is a good way to suppose that the Law-maker is present; and that you have asked him this Question; did you intend to comprehend this Case? then you must give yourself such an Answer, as you imagine he, being an upright and reasonable Man, would have given. If this be, that it is within the Equity, you may safely hold it to be so: For while you do no more than he would have done, you do not act contrary to the Law but in Conformity thereunto.

In some Cases the Letter of an Act of Parliament is restrained by Equity, in others it is enlarged, and in others the Construction is contrary to the Letter.

The first of these Equities is defined by Aristotle in this Manner. *Æquitas est correctio legis generatim latae, qua parte deficit*: or, as the Passage is explained by Perionius, *Æquitas est correctio quædam legi adhibita, quia ab ea abest aliquid propter generalem sine Exceptione comprehensionem*.

The Words of 2 Westm. c. 11. are general, that all Bailiffs and Receivers, who in passing their Accounts before Auditors assigned shall be found in Arrear, may be committed to the next Gaol: Yet, if an Infant Bailiff or Receiver be found in Arrear, he shall not be committed; for he is not, by reason of his want of Discretion, within the Equity of this Statute.

If a Law is made, that whosoever does a certain Thing shall be adjudged a Felon and suffer Death, yet where a Madman does this he shall be excused: For, as the Action is not to be imputed to him, but to an involuntary Ignorance brought upon him by the Hand of God, he is not within the Reason of the Law.

But, if such prohibited Thing is done by a drunken Person, it is Felony; and, although he did not when drunk know what he did, he shall, because he brought this Ignorance upon himself by his own folly, suffer Death. He does indeed deserve to be doubly punished; for he has been guilty of two Offences, by setting an evil Example in being drunk to others, and by doing the Thing which the Law forbid to be done.

Such Actions as proceed from involuntary Ignorance are, in legal Phrase, said to be done *ex ignorantia*; others, which are owing to Ignorance that might have been avoided, *ignoranter*.

That Species of Equity which enlarges the Letter of a Statute is thus defined. *Æquitas est verborum legis directio efficiens, cum una res solummodo legis cavetur verbis, ut omnis alia in equali genere eisdem caveatur verbis*.

The Words of the 13 E. 1. are *Circumspecte agatis de negotijs tangentibus Episcopum Norwicensem*; yet this Statute, although only the Bishop of Norwich is named, has been constantly extended by Equity to all other Bishops.

So the Remedy given by the 9 E. 3. c. 3. against Executors is extended by Equity to Administrators; because they are within the Reason of this Statute.

Judges have frequently expounded a Statute contrary to the Words thereof, for the Sake of making it agree with Reason and Equity.

3 Rep. 7. Hob. 346.

- Plowd.* 13.
Reniger and Fogassa. The 1 *E. 2. st. 2.* makes it Felony, if a Prisoner confined for Felony breaks Prison: Yet, if the Prison is on Fire, and he breaks it in order to save his Life, he shall be excused by the Law of Reason, although this Action is contrary to the Words of the Act of Parliament.
- Plowd.* 88.
Strange and Croker.
2 Inst. 84. By 2 *Westm. c. 12.* the Party acquitted upon an Appeal may recover Damages against all who have been Abettors of the Appeal: But, if a Son abets his Mother in bringing an Appeal, he shall not, although he acts contrary to the Words of this Statute, be liable to Damages; for the Common Law and Reason both say, that it is his Duty to aid and abet his Mother.
- 10 Mod.* 282.
Hammond and Webb. But an Act of Parliament, which is to take away a Remedy that the Party has at the Common Law, ought not to be construed by Equity.
- Vaugh.* 373.
Bole and Horton. When the Words of a Law do not extend to an Inconvenience rarely happening, and do to those Inconveniencies which often happen, they are not to be strained further than they reach: But that Case is to be considered as a *Casus omiffus*; for the Law regardeth *quæ frequentius accidunt*.
- 3 Leon.* 133.
Wroth and The Countess of Suffex. A Statute shall not be expounded by Equity to overthrow an Estate.
- Carth.* 396.
Inhabitants of Dalbury and Foston.
Salk. 534. The Sense of Words used in an Explanatory Act of Parliament is not be extended by Equity: But their Meaning, this being a legislative Exposition of a former Act, must be strictly adhered to.

7. Such Acts of Parliament, as are of publick Concern, ought to have a liberal Construction.

- 11 Rep.* 71.
Magdalen College's Case.
Str. 517, 518, 519. The Crown is bound by the general Words of Acts of Parliament, made for the Maintenance of Religion, the Advancement of Learning, or the Support of the Poor: Because such Acts, in which the publick are interested, must be so construed that they may be effectual.
- Keilw.* 198.
pl. 1. Every Word in an Act of Pardon shall be taken most strongly against the King.
- Str.* 253, 258.
Pierce and Hopper. Statutes made *pro bono publico* shall be expounded in such a Manner, that they may as far as possible attain the End proposed.
- 2 Vern.* 431.
New River Company and Graves. The New River Water Act was held, although only the City of London is therein mentioned, to extend to Places adjacent; because all Acts made for the Conveniency of the Publick ought to have a liberal Construction.
- 12 Mod.* 513.
Callady and Pilkington. But it has been held, that an Act of Parliament for discharging Insolvent Debtors ought to be construed strictly, because it gives away the Right of the Subject; and by *Holt, Ch. J.* Let an Act of Parliament be ever so charitable, yet, if it gives away the Property of the Subject, it ought not to be countenanced.

8. Remedial Statutes must be expounded liberally.

- 1 Inst.* 381. *b.* Construction must be made of a Statute in Suppression of the Mischief, and in Advancement of the Remedy.
- Plowd.* 57.
Wimbish and Tailboys. All Statutes made for the Suppression of Fraud, and to give a more speedy Remedy for Right, are to be construed liberally; because such are for the Advancement of Justice.
- 3 Rep.* 7.
Heydon's Case. It is the Business of Judges always to put such a Construction upon an Act of Parliament, as may redress the Mischief and advance the Remedy, and to suppress all subtle Inventions and Evasions for the Continuance of the Mischief, and *pro privato Commodo*; and to give Strength and Life to the
- 11 Rep.* 71.
Cro. Car. 533. Cure

Cure and Remedy, according to the true Intent of the Makers of the Law, *pro bono publico*.

A Fine levied by a Husband only, who is seised in right of his Wife, is within the Letter of the Statute of *Gloucester*; but, as the Heir was thereby barred of the Inheritance of his Mother by the Warranty of his Father, the Construction has been, in order to prevent this Mischiefe, that such a Fine with Warranty shall not bind the Heir, unless Assets descend. *1 Inst. 381.*

By the 13 *Eliz. c. 10.* it is enacted, "That from henceforth all Leases, Gifts, Grants, Feoffments, Conveyances or Estates to be made; had, done or suffered, by any Master and Fellows of a College, &c. to any Person or Persons, Bodies politick or Corporate, other than for the Term of twenty-one Years or three Lives, shall be utterly void and of none Effect to all Intents, Constructions and Purposes". After the making of this Statute, the Master and Fellows of *Magdalen College* granted certain Premises by Indenture to the Queen, her Heirs and Successors, for ever, with Condition that she should, before a Day mentioned in the Indenture, convey and assure the same, by Letters Patent under the great Seal, to *Benedict Spinola* a Merchant of *Genoa*; and the Question was if this Grant to the Queen was good? Or in other Words, whether the Queen was bound by the general Words of this Statute? It was laid down, that where the Crown has any Prerogative Estate, Right, Title, or Interest, this shall not be barred by the general Words of an Act of Parliament: But that in this Case, as the Queen was not deprived of any Estate, Right, Title, Interest or Prerogative which she had in these Premises, before making of this Statute, she was bound thereby; and that this Construction was necessary, for the preventing of subtle Inventions and Evasions, by which this Act, made for the Maintenance of Religion and the Advancement of Arts and Sciences, might be illuded. *11 Rep. 74, 75. Magdalen College's Case.*

9. Penal Acts of Parliament are to be strictly construed.

The Rules of the Common Law will not suffer the general Words of a Statute to be restrained, to the Prejudice of him upon whom a Penalty is to be inflicted: But there are a Multitude of Cases, where such general Words shall be restrained in his Favour. *2 Plowd. 17. Reniger and Fogassa. Br. Parl. pl. 13.*

Wherever a greater Punishment is ordained by an Act of Parliament for a second Offence, the Meaning is after Conviction and Judgment for the first; for penal Statutes are to be construed strictly, and the first appeareth to be no Offence, till Judgment hath been given against it. *2 Inst. 468.*

The Statute which gave Attaint in a Plea real, being a penal Statute, was never extended to a Plea personal. *B. 9. Parl. 20.*

All Statutes that give Costs are to be construed strictly; for Costs are a kind of Penalty. *Salk. 205. Cone and Bowles.*

But however true it may in general be, that penal Laws are to be construed strictly; yet even in these the Intention of the Legislature is to be regarded. *3 Rep. 7. Heydon's Case. 8 Mod. 65.*

It is declared by the 25 *E. 3.* to be Treason for a Servant to kill his Master. A Question being made upon this Statute, whether a Servant, who had killed his Master's Wife, ought to have Judgment to be drawn and hanged, or only to be hanged? It was held by all the Judges, that this is Treason, and the Judgment was that he should be drawn and hanged: And by *Coke Justice*, Although Statutes, which encrease a Punishment beyond what it was at the Common Law, are penal, and ought not to be extended by Equity, yet the Words of these ought to be construed according to the Intent of the Makers of them. *Plowd. 86. Strange and Greker.*

- Cro. Car. 71.* The 7 *H. 7. c. 1.* and the 3 *H. 8. c. 1.* make the Départure of a Soldier from his Captain without Licence Felony. A Question arising whether the Departure of a Soldier without Licence from his Conductor, to whom he was delivered to be brought to the Sea-side, was Felony? It was resolved, by nine Judges against three, that it was Felony; for that a Conductor is a Captain within the Intention and Meaning of these Statutes, and that Penal Statutes, when made for the publick Service and Good of the King and Realm, may very well be taken liberally according to the Intent of the Makers of them.
- 11 Rep. 34, 35.* An Offender, who had been guilty of Arson, was ousted of his Clergy, notwithstanding that it was not expressly taken from him by Statute; and the Book adds, there are many Cases in our Books, where Penal Statutes have been taken by Intendment for the Suppression of a Mischief, the Advancement of Justice, and the putting a stop to Crimes and heinous Offences.
- 2 Brown. 110, 111, 116.* All remedial Statutes, which are made for the good of the Publick, ought, although they are penal, to receive an equitable Exposition.
- Plow. 36.* Statutes, that are penal to particular Persons, may, if beneficial to all others, have an equitable Construction; for every Statute is penal to some Person: Yet, if the Extending it by Equity is more advantageous than prejudicial to the greater Part of the People, it may by the Rules of Law be so extended.
- 10 Mod. 117.* The Statute of *Marlebridge, c. 24.* of Waste, is penal; yet, because it is remedial, it has been interpreted by Equity. The Words of it are, *Firmarii non faciunt vastum*: But it has been held that the Word *Firmarii* should extend to Strangers, and that this Statute extends to Waste *omittendo*, although the Word is *faciant*, which literally imports active Waste.
- 2 Brown. 302.* It was insisted, that the Statute against Simony, being a penal Law, ought to receive no Aid from a Court of Equity: *Sed per Wright* Lord Keeper; This Court will aid remedial Laws, notwithstanding they are penal, not by making them more penal, but to let them have their proper Effect.
- 10 Mod. 282.* The Statute of *Marlebridge, c. 24.* of Waste, is penal; yet, because it is remedial, it has been interpreted by Equity. The Words of it are, *Firmarii non faciunt vastum*: But it has been held that the Word *Firmarii* should extend to Strangers, and that this Statute extends to Waste *omittendo*, although the Word is *faciant*, which literally imports active Waste.
- Hammond and Webb.*
- Prec. in Ch. 215.* Attorney General and *Sudell.*

10. Divers other Rules to be observed in the Construction of Statutes.

- Hob. 97.* Such an Exposition is to be made of any Act of Parliament, as does not suffer it to be eluded.
- Moore and Hussy. 3 Rep. 7.*
- 11 Rep. 73.*
- 2 Inst. 611, 614.* All Statutes are to be construed for the preventing, as much as possible, of Delay.
- 1 Inst. 360.* Acts of Parliament are to be so construed, that no Man, who is innocent or free from Injury or Wrong, be punished or endamaged.
- Cart. 136.* No Statute shall be interpreted so as to be inconvenient, or against Reason.
- Hughes and Hughes.*
- 1 Inst. 97.* 5 *Rep. Cawdrie's Case.*
- Sid. 232.* By the 12 *Car. 2. c. 17.* All Parsons presented in the late Times, who should conform as in that Act was directed, were to be confirmed in their Churches, notwithstanding any Act or Thing whatsoever: Yet it was held, that this Act did not extend to the confirming one who had been simoniacally promoted.
- Crawley and Phillips.*
- 10 Mod. 344.* If the Meaning of an Act of Parliament is doubtful, the Consequences are to be considered in the Construction thereof: But where it is plain, no Consequences are to be regarded; for this would be Assuming a legislative Authority.
- The Queen and Simpson.*

Where the Penning of a Statute is dubious, long Usage is a just medium *Vaugh. 169.* to expound it by; for *Jus et norma loquendi* is governed by Usage, and the Meaning of Things spoken or written must be, as it hath constantly been received to be: But if Usage hath been against the obvious Meaning of an Act of Parliament, by the only and common Acceptation of the Words, then it is rather an Oppression of those concerned than an Exposition of the Act.

Statutes which give any new Remedies shall not have a liberal Construction. *2 Sid. 63. Pool and Neel.*

An Act of Parliament creating any new Jurisdiction must be construed strictly. *Str. 258, 260. Pierce and Hopper. 10 Rep. 75.*

It was held by the Court of Exchequer, that the Statute of the 6 G. 1. c. 21. which gives the Commissioners of Excise a Jurisdiction, to condemn in summary way certain Goods therein mentioned, shall be construed very strictly; because it breaks in upon the ancient Jurisdiction of this Court. *Bunb. 106. Warwick and White.*

A private Act of Parliament, which only relates to one particular Thing, is to be interpreted literally. *2 Mod. 57. Threadneedle and Lynam.*

(K) How Persons guilty of Disobedience to an Act of Parliament may be punished.

WHENSOEVER a Statute giveth a Forfeiture or Penalty against him who wrongfully detaineth or dispossesseth another of his Duty or Interest, in that Case, he that hath the Wrong shall have the Forfeiture or Penalty, and shall have an Action therefore upon the Statute at the Common Law; for the King shall not have the Forfeiture in that Case; and so it was adjudged in the Exchequer, upon Conference with the other Judges, in an Information, for the treble Value, for not setting out the Tithes at *Iclington* in the County of *Cambridge*. *Inst. 159. Lev. 290.*

As every Act of Parliament made against any Injury, Mischief, or Grievance, doth impliedly give a Remedy; the Party injured may have an Action grounded upon that Act, although no Remedy is expressly given. *2 Inst. 55, 74. 10 Rep. 75.*

Wherever a Statute commands or prohibits a Thing for the Advantage of any Person, that Person shall have an Action upon such Statute to recover Satisfaction for any Injury done him contrary thereto; for it would be strange, if a Person could in such Case have no Remedy but in Equity. *6 Mod. 26. Anon.*

If a Penalty is given by Statute, but no Action for the Recovery of it is therein given, an Action of Debt will lie for such Penalty. *Popb. 175. Welden and Vesey.*

If any Thing is prohibited by an Act of Parliament under a certain Penalty, and this Penalty, or any Part of it, is given to him who will sue for it, any Person, although not particularly injured by the Offence, may bring an Action or Information *Qui tam* for it. *2 And. 127, 128. Agard and Tandish. 2 Hawk. 265.*

But where a Penalty is given by Statute to be recovered in any Court of Record, this can only be recovered in the Courts at *Westminster*; for being a Penal Law, it must be taken strictly, and the Courts at *Westminster* are those in which the King's Attorney General attends. *Salk. 178. Walwyn and Smith.*

In an Action upon a Statute giving a Penalty, against several Defendants, only one Penalty shall be recovered. *Cro. Eliz. 480. Partridge and Naylor.*

1 Salk. 182. But, if a Conviction be upon a Statute, which gives a Forfeiture, each Defendant must pay the Forfeiture: For the Penalty, in this Case, is not in the Nature of a Satisfaction to the Party injured but a Punishment of the Offender; and although Debts are joint Crimes are several.

Cro. Eliz. 655. When an Act of Parliament commands or prohibits any thing generally, the Person guilty of Disobedience to it, besides being answerable in an Action to the Party thereby injured, is also liable to be indicted for his Contempt of the Law.

1 Hawk. 60.

2 Sid. 209. But if the Thing commanded or prohibited can only be prejudicial to one or two Persons, as if it be to repair the Bank of a River, for want of doing which the Ground of a certain Person is overflowed, no Indictment lies; the Remedy here being by an Action upon the Case.

1 Mod. 71.

Rex and Le-

ginbam.

Ibid. 288.

Fitzg. 66.

Rex and

Woolston.

10 Mod 337.

If an Act of Parliament only inflicts a new Punishment upon the Person guilty of an Offence, which was before punishable at the Common Law, such Offence is still punishable as it was before the making this Act. The Crime of Forgery, notwithstanding the *5 Eliz.* is at this Day punishable in the same Manner as it was at the Common Law.

Cro. Ja. 643. But an Indictment against the Defendant, for acting as a Justice of Peace, not having Lands to the Value of forty Pounds *per Ann.* was held bad; because a Penalty is given; and the Method of recovering it is prescribed in the Statute which prohibits this. *Et per Cur.* Where a Statute appoints a Penalty for the doing of a Thing, which was no Offence before, and directs how it shall be recovered, it shall be punished by that Means and not by Indictment.

1 Mod. 34.

Crofton's Case.

Hil. 21 Car. 2.

1 Vent. 63.

Sid. 209.

Since this Case it has been laid down, that, if the Thing commanded or prohibited by Act of Parliament is of a publick Concern, an Offender may be indicted, although the Offence is a new created one, and a Penalty with the Manner of recovering it is appointed; for that the giving other affirmative Remedies shall not, without the negative Words *and not otherwise*, take away the general Way of Proceeding, which the Law appoints for all Offences.

2 Hawk. 211.

Sporv. 398,

399.

Fitzg. 47.

The former is however the better Opinion; for it seems to be now settled that, if any Statute appoints a particular Method of Proceeding against an Offender, as by Commitment, Action, Information, &c. without mentioning an Indictment, no Indictment lies; because, as the other Methods of Proceeding are only mentioned, that by Indictment seems to be impliedly excluded.

2 Hawk. 211.

But it has been adjudged, that if such a Statute gives a Recovery by Action, Bill, Complaint, Information, or *otherwise*, an Indictment may be upon it.

Str. 828.

Rex and

Malland.

By the *12 G. 1. c. 35.* a Penalty of twenty Shillings *per thousand* is given for burning Place Bricks and Stock Bricks together; but there is in this Act no Appropriation of the Penalty nor any Method of recovering it directed. Upon a Demurrer to an Indictment for this Offence, the Court held, that this, like every unappropriated Penalty, was in the Nature of a Debt to the Crown, and suable for in a Court of Revenue, but that this Offence was not indictable.

1 Mod. 5.

Troy's Case.

Whenever a Statute makes any thing Criminal, which was not so before, an Information will although not given by express Words lie.

(L) Of pleading Statutes.

1. Of publick Statutes.

A Publick Act of Parliament may be pleaded generally, without reciting it: For the Rule of Law is, that the Judges are, *ex Officio*, bound to take Notice of all publick Acts.

4 Rep. 76. *Holland's Case*.
Bro. Parl. pl. 69.
2 Roll. Ab. 465. Cro. Eliz. 601. Doct. pl. 337.

Upon this Principle, that the Judges are of themselves to take judicial Notice of a general Statute, it is held, that *Nul tiel Record* cannot be pleaded to such a Statute. God forbid that, if the Record of a publick Act of Parliament should be lost, or consumed by Fire or any other Means, this should tend to the Prejudice of the Commonwealth. In such Case the Judges might, either from some printed Copy, or from some Record in which it had been pleaded, or in some other Way, inform themselves of the Contents of a lost Statute.

8 Rep. 28. *The Prince's Case*
Cro. Car. 355.

Where Part of a Statute is publick and the rest of it private, there is no Necessity that the Part which is publick should be specially pleaded.

10 Rep. 57. *The Chancellor of Oxford's Case*.
Hob. 227. Sid. 24.

2. Of private Statutes.

If a Person would avail himself, in pleading, of any Part of a private Act of Parliament, it must be set out specially: For, unless this is done, the Judges cannot take judicial Notice of any Thing therein contained.

4 Rep. 76. *Holland's Case*.
2 Roll. Ab. 466.
2 Mod. 57.
Doct. pl. 339.

A special Statute may be put in Issue, and tried by the Record, upon *Nul tiel record* pleaded, unless it is produced exemplified, as was done in the Prince's Case; and therefore the Plea of *Nul tiel record* was, in that Case refused.

H. H. C. L. 16.
8 Rep. 28. *The Prince's Case*.

3. The general Rules which must be observed in pleading Acts of Parliament.

The Title thereof need not in pleading a Statute be set out; because this is no Part of the Statute.

Ld. Raym. 77. *Chance and Adams*.

There is no Necessity, that the Preamble of an Act of Parliament should be specially pleaded: For, although this usually contains the Motives of making an Act of Parliament, it is no Part thereof.

6 Mod. 62. *Mills and Wilkins*.
8 Mod. 144.

If a Thing might have been done at the Common Law, and a Statute comes and makes certain Circumstances necessary to the Validity thereof, this shall not alter the Manner of pleading, which was before the making of such Statute.

12 Mod. 540. *Birch and Bellamy*.

A Tenant for Years cannot, since the 29 Car. 2. c. 3. assign over his Term without writing: But, as he might have done this at the Common Law, an Assignment may be pleaded without alledging it to have been in Writing; and it may be given in Evidence that it was so.

Ibid.

But

- Ibid.* But where the Power to do a thing was originally granted by an Act of Parliament, it must be shewn, in the Pleadings, that the thing was done according to the Direction of such Act and every subsequent one thereto relating.
- Ibid.* If a Will of Lands is at this Day pleaded, it must be shewn, that it was in Writing, as is by the 32 H. 8. c. 1. by which Power to make such a Will was first given directed it should be: And it must also be shewn, that the further requisites made necessary by the 29 Car. 2. c. 3. have been complied with.
- Stra. 1066. Rex and Morgan.* When a temporary Statute, which has expired, is continued by a subsequent Statute, it is sufficient to plead the former without taking any Notice of the latter.
- Plow. 206. Stradling and Morgan.* But, if one Act of Parliament has prohibited a Thing to be done, and another is after made which inflicts a Forfeiture on the Person who shall do that Thing, he, who sues for the Forfeiture, must plead both these Acts; for they are to be considered as one Act.
- Plow. 105. Fulmerstone and Steward. Plow. 65, 410. Cro. Ja. 140. 2 Jo. 50.* Exception was taken to a Replication, because only Part of a Statute had been therein recited; and it was insisted that the Whole of it, as is usual in other Matters of Record, ought to have been recited: But the whole Court agreed that this Replication was good; for no Man is obliged to recite, in pleading, any more of a Statute than the Clause which makes for himself.
- Plow. 410. Newys and Lark. Bro. Plead. pl. 164. Ld. Raym. 120.* But if there is, in that Clause of an Act of Parliament which is to be recited, any Proviso or Exception, this must be recited, although it should make against the Party reciting it: For, as the Proviso or Exception is parcel of the Clause, the Clause, if this was omitted, would not be perfect Law.
- Cro. Ja. 140. Read and Potter. Ld. Raym. 120.* If one Party, however, has only pleaded such Clause or Clauses of a Statute as it was for his Interest to plead, the other Party may plead any other Clause or Clauses of the same Statute.
- Ld. Raym. 210. Birt and Rotbwell.* If in pleading a Statute it is said, that the Parliament at which it was made continued *usque ad* a certain Day, the Words *usque ad* do in this Case include the Day to which they relate; for it is usual to say, that a Parliament continued *usque ad* a certain Day *quo die* it was prorogued: But in all other Cases the Day, to which they relate, is by these Words *usque ad* excluded.

4. Some Rules, for pleading Statutes, which relate to particular Parts of the Pleadings.

- 2 Inst. 121. Bro. Añ sur le Stat. pl. 47. Bro. Parl. pl. 75.* It is a Rule of Law, that, when a Statute introduces any new Action, the Writ must recite the Statute.
- Bro. Añ sur le Stat. pl. 47. Bro. Parl. pl. 75.* But if a Statute, which gives a new Action, ascertains the Form of the Writ to be used, as is done by the Statute giving a *Formedon in descender* and by other Statutes, it is not necessary to mention such Statute in the Writ; for the Writ itself is in this Case a recital of the Statute.
- Bro. Añ sur le Stat. pl. 47. Bro. Parl. pl. 75.* If an Action, however, that was at the Common Law, is given in any new Case, the Act of Parliament, by which this is given, need not be recited in the Writ.
- Bro. Añ sur le Stat. pl. 47. Bro. Parl. pl. 75.* In an Action of Trespass brought by an *Executor de bonis asportatis in vita testatoris*, there is no Necessity to recite in the Writ the Statute by which such Action was given; because an Action of Trespass was at the Common Law in other Cases.

Where a Statute gives a Plea, the Plea must be in the very Words of such Statute. *11 Mod. 207. Hall and Holliday.*

5. Of Mis-recital of Statutes in Pleading.

If one Party mis-recites the Matter, Year, Day or Place; in Pleading an Act of Parliament, the other Party may demur generally: For there is no such Act; and he who undertakes to set out a Law must do it truly. *Bro. Parl. pl. 87. Cro. Ja. 215. 2 Hawk. 246.*

If a Man recites a certain Statute as made on such a Day, and the Statute was not made on that Day, he has, although it be a general Statute, failed: For he does not refer the Statute to the Knowledge of the Judges, as he would have done if he had said against the Form of the Statute in such Case provided, if he had said so, the Law would have referred the Thing to such Statute as had been apt for it: but, as he has recited one and did not intend any other Statute, if there be none such his Action is grounded upon that which does not exist; and the recital of the Day, which was here surplusage, does vitiate if it is mis-recited. *Plowd. 79, 84. Partridge and Strange. Bro. Parl. 87.*

The 32 H. 8. c. 9. was recited to have been made at a Parliament held the twenty-eighth Day of April in the thirty-second Year of the Reign of Henry the Eighth, whereas in Truth the Parliament began the twenty-eighth Day of April in the thirty-first Year of that Prince's Reign, and was continued by Prorogations till the Time of making this Act, so that no Parliament was held as the Plaintiff had recited. It was held, that for this Mis-recital the Count should abate. *Plowd. 79, 84. Partridge and Strange. Cro. Ja. 111. 1 Lev. 296.*

But in Debt upon the Statute of E. 6. for not setting out Tithes, the Plaintiff declared, that whereas on the fourth Day of November in the second Year of the Reign of Edward the Sixth it was enacted, &c. It was insisted upon, in Arrest of Judgment, that there is no such Statute, because the Parliament began in the first Year of that Prince's Reign, and was continued by Prorogations to the Time of making this Statute: *Sed non allocatur, Et per Cur'*: There are a thousand Precedents to the contrary, and in respect of the constant Usage, in reciting this Statute as the Plaintiff has here done, we will not alter it; for it would disturb a great Number of Judgments, and *multitudo errantium tollit peccatum.* *Yelv. 126, 127. Oliver and Collins. 2 Mod. 241. Skin. 110, 111.*

It is very plain that this last Case was so determined, for the Sake of conforming to some wholesome Maxims of Law, as *Stare decisis, Interest reipublice res judicatas non rescindi*: But the Doctrine laid down in the venerable *Plowden* seems, nevertheless, to be founded in strong Reason.

The safest Way of pleading an Act of Parliament is to shew, that the Parliament was holden on such a Day of such a Year of the King, without taking any Notice of its Commencement: For the Court is bound to take judicial Notice of the Commencement of a Parliament, and also of its Prorogations and Sessions. *Ld. Raym. 210. Birt and Mason. 1 Lev. 296. Ld. Raym. 343. Lutw. 140.*

A Mis-recital of the Day of the Commencement of a Parliament does not, even where it is a private Act, vitiate: For, although the Judges are not *ex officio* to take Notice of the Contents of such an Act, the Commencement of a Parliament is a publick Thing of which they are to take Notice. *Mo. 551. The Bishop of Norwich's Case. Ld. Raym. 210, 343. 1 Lev. 296.*

If a Statute is recited to have been made at a Parliament held on a certain Day by Prorogation, whereas it was in Fact held on that Day by Adjournment, this Mis-recital is fatal: For, as an Adjournment does not put an End to a Session, the Day of meeting, after such Adjournment, is only a Day of the same Session which was before began. *12 Mod. 602. Anon. 2 Mod. 242. Ld. Raym. 343.*

But a Mis-recital of the Day of making an Act of Parliament, which is fatal in a Declaration, would not have been so in a Plea in Bar. *Brownl. 196. Woolley and Shepherd.*

- No.* 302. *Langby and Haynes.* A Repugnancy in reciting the Time of holding a Parliament is fatal. As if it is said on such a Day in the first and second Year of the Reign of a certain King: For it is impossible that one and the same Day should be in two Years.
- 2 Hawk.* 247.
- Ld. Raym.* A Statute was alledged to have been made on the twelfth Day of *November* in the sixth Year of the Reign of *William* the Third, whereas, the Queen being at that Time alive, the Stile was *William* and *Mary*; and for this Mis-recital the Judgment was arrested.
- 1224. Anon.*
- Ld. Raym.* 77. As the Title of an Act of Parliament is no Part of the Act, the Mis-recital of this is not fatal.
- Pasch.* 8 *W.* 3. *Chance and Adams.*
- Hardr.* 324. This last Case, which was in the Court of Common Pleas, appears to have been determined upon the Authority of one in which *Hale*, Ch. B. had determined the same Way.
- Pasch.* 15 *Car.* 2. *The Attorney General and Hutchinson.*
- 6 Mod.* 62. But in a later Case it was held, that the Mis-recital of the Title of a Statute does viciate: And by *Holt*, Ch. J. It is very true that the Title of an Act of Parliament is no more a Part of the Law, than the Title of a Book is a Part of the Book; and there is, for that Reason, no Necessity to set it out: But, where a Party does set this out specially, he thereby ties himself up to an Act so intitled, and if he cannot produce one he is gone. The saying of *Hale*, if at all, was sudden; and, notwithstanding my great Veneration for him, I cannot agree with him. *Gould*, J. agreed with the Ch. J. *Powell*, J. gave no Opinion: But said, that he had concurred with the other Judges of the Common Pleas solely upon the Authority of the Opinion of *Hale* as reported in *Hardres*.
- Cro. Eliz.* 236. Although publick Acts of Parliament need not be recited in pleading, yet if a Party takes upon him to set out one of these specially, and mis-recites it, such Mis-recital is fatal.
- Vanderplanben and Griffith.*
- Cro. Car.* 232. *2 Mod.* 99. *Freem.* 311.
- Ld. Raym.* 382. *Platt and Hill.* If, in pleading a publick Act specially, the Conclusion is *contra formam Statuti* or *contra formam Statuti in hujusmodi Casu editi*, a Mis-recital does not viciate; because, as a publick Act needed not to have been recited, the Judges will, although it be mis-recited, take judicial Notice of the true Contents of such Act. But, if the Conclusion had been *contra formam Statuti prædicti* or *vigore Statuti prædicti*, the Mis-recital would have been fatal; for, by this Conclusion, the Pleadings would have been tied up to the mis-recited Statute.
- Plovd.* 79, 84. *Cro. Car.* 233. *Freem.* 311.
- Cro. Eliz.* 245. The Mis-recital of a publick Act is so fatal, that the Court, well knowing there is no such Statute, cannot, even if both Parties should agree that there is such a one, give Judgment.
- Love and Wotton.*
- Sid.* 356. *Hil.* A private Statute being mis-recited, in pleading, the Plaintiff demurred: But did not show the Mis-recital for Cause. The Court doubted, whether, as this was a private Statute, they could, either from a printed Copy, or from the Record, or otherwise, take Notice that the Statute was not as the Defendant had recited it; and the Case was adjourned.
- 19 Car.* 2. *Holby and Bray.*
- Ld. Raym.* 382. *Mich.* 10 *W.* 3. *Platt and Hill.* It has been since held, that, although a private Statute be mis-recited in pleading, the Court must take it to be as recited, unless it is denied to be so by pleading *Nul tiel record*; or shewn to be otherwise, by alledging that it is further enacted, &c. and then if the Mis-recital is material Advantage may be taken thereof.
- 2 Mod.* 241.
- Cro. Car.* 136. Every Mis-recital of an Act of Parliament, which alters the Sense thereof, is fatal.
- 522. Ld. Raym.* 382. *2 Mod.* 98.
- Cro. Eliz.* 185. The Words of the 8 *H.* 6. c. 9. are, *if it be found by Verdict, or in any other Manner by due Form of Law, that the Party, &c.* In reciting this Clause the
- Ld. Raym.* 382.

the Words *or in any other Manner* were omitted. This was held to be a fatal Mis-recital; because the Sense of the Statute is thereby altered, it being tied up to a Recovery by Verdict only: But, if the Mis-recital had been in a Point not material, it had been otherwise.

By the 8 Eliz. c. 2. par. 3. it is enacted, That if any Person shall cause any other Person to be arrested to answer in any Court, where any Liberty or Privilege is used to hold Plea in any Action or Actions personal, &c. In reciting this Clause the Word *personal* was omitted. This was held to be such a Mis-recital as vitiated; because this Act was recited to extend to all Actions, whereas it did in Truth only extend to personal Actions.

But the Mis-recital of a Statute, in some Words which are not material, does not vitiate.

In an Action of false Imprisonment the Defendant justified under the 1 M. c. 3. One part of this Act being recited in these Words, *if any Person shall maliciously and contemptuously molest, &c.* it was upon a general Demurrer insisted, that the Words of the Act are in the Disjunctive *maliciously or contemptuously: Sed per Cur'*: Where the Words which precede and follow a Disjunctive are of the same Sense, there the Meaning is not changed by using the Copulative *and* in the Room of the Disjunctive *or*: But if the Words had been of a different Import, as *by Word or Deed*, it would have been otherwise. Another Part of this Act was thus recited, *by the said Justices or by the better Part of them*. To this Recital it was objected, that the Words of the Act are *or by the more Part of them*: But this Objection was likewise over-ruled.

The Words of the Statute of Winchester are, *forasmuch as from Day to Day Robberies, Murders, Burnings and Theft, be more often used than, &c.*

In an Action against a hundred brought, by a Person who had been robbed, upon this Statute, it was recited *Robberies, Murders, Burning of Houses, and Theft*: But, as the Plaintiff's Case was only concerning a Robbery, the Court were all of Opinion, that the Mis-recital of the Statute as to Burning did not vitiate.

A Mis-recital of a private Act of Parliament is cured by a Verdict: For Advantage should have been taken of this by pleading *Nul tiel Record*, or by shewing the Act to have been otherwise.

But a Mis-recital of a publick Statute is not cured by a Verdict: Nor can the Court, who are bound to take Notice of the Contents of such a Statute, proceed to give Judgment, because they know the Statute to be otherwise.

It has indeed been laid down, that a Mis-recital of a publick Statute in Words that do not go to the Ground of the Action, is after a Verdict helped by the Statute of Jeofails.

This Doctrine does not however appear to be well founded; for it is built upon a Supposition, that a Mis-recital in Words that do not go to the Ground of an Action, which must mean immaterial Words, wants to be helped: But, if the Cases just mentioned are Law, such immaterial Mis-recital does not vitiate, and consequently cannot want the Aid of the Statute of Jeofails.

6. Of Surplusage in reciting an Act of Parliament pleaded.

An Act of Parliament for Restitution of Heir, after Attainder of Treason, enabled the Heir to enter. He did enter, and brought a *Scire facias* against J. N. *Quare terra resumit non debet et liberari querenti*. The Word *resumit* was not in the Act: yet the better Opinion was, that this Surplusage, even in a judicial Writ, did not vitiate.

Summons and Severance.

THIS Title is distinguished in the Books by the Name of *Summons and Severance*; but the proper Name of it is *Severance*; for the *Summons* is only a *Process*, which must, in certain Cases, issue before Judgment of *Severance* can be given.

Severance is a Judgment, by which, where two or more are joined in an Action, one or more of these is enabled to proceed in such Action without the other or others.

It will here be proper to shew:

- (A) The Necessity of a Judgment of *Severance* in many Cases.
- (B) By whom a Judgment of *Severance* may be given.
- (C) Where a *Summons* must issue, before a Judgment of *Severance* can be had.
- (D) At what Time Judgment of *Severance* must be prayed.
- (E) Who may have a Judgment of *Severance*.
- (F) In what Actions Judgment of *Severance* may be.
- (G) Where the *Writ* abates, notwithstanding there has been a Judgment of *Severance*.
- (H) The Consequence of a Judgment of *Severance* to the Party severed.

(A) The Necessity of a Judgment of *Severance* in many Cases.

IT is a Principle of Law, that, where two or more have a joint Right to a Thing, they must join in an Action for the Recovery thereof.

1 *Inst.* 180.

Joint Tenants must implead jointly: for they claim under one and the same Title.

1 *Inst.* 163, 164.

So Parceners, who make but one Heir, must, in order to recover the Possession of their Ancestor, be joined in one *Præcipe*.

Godolph. Orph.

Executors, because the Right of their Testator devolves on all of them, must likewise all join in an Action for the Recovery thereof.

Leg. 134.

Salk. 3.

Carth. 61.

And

And wherever the Right of Action is in two or more Persons, and they have not all joined in one that is brought, the Defendant may plead in Abatement: For, if one could recover in such Case singly, every other might do the same; and by this Means a Defendant would be liable to answer in divers Actions for the same Thing.

Cro. Eliz. 554.
Deering and Moor. 9 *Rep.*
37. *Salk.* 3. 32.
2 *Lev.* 113.
3 *Lev.* 354.
1 *Mod.* 102.

It is indeed in the Power of any one or more, where two or more have a joint Right of Action, to commence a Suit in the Name of all in whom such Right is: But, notwithstanding that a Plea in Abatement would be thereby prevented, it would still be in the Power of any one of them, by neglecting to appear, or refusing to proceed afterwards in such Suit, to render it fruitless.

1 *Inst.* 139.
Bro. Summ. and Sev.
pl. 17.

For if two or more join in bringing an Action, and one makes Default, the Nonsuit of him is the Nonsuit of them all.

Bro. Summ. and Sev. pl. 2.
pl. 5. pl. 7.

So if divers join in a Writ of Error, the Assignment of Error cannot be by one without the others.

Cro. Eliz. 892.
Andrews and Ld. Cromwell.

To prevent the great Inconvenience, and the Failure of Justice, which would be, if all, in whom there is a joint Right of Action, should be precluded, by the Negligence or Collusion of any one of them, from having the Effect of a Suit for the Recovery of such Right, the Law has provided, that, if any one of those Persons, in whose Name a joint Action is commenced, does not appear, or after Appearance makes Default, the other or others may have Judgment *ad sequendum solum*, or in other Words a Judgment of Severance.

Hard. 318.
Manly and Lovell. *Bro. Summ. and Sev.* pl. 4.
pl. 16.

If two bring Assize, and one comes not at the Day, a Summons *ad sequendum simul* may issue; and, if the Party summoned does not appear at the Return of the Summons, the other Party may pray Judgment *ad sequendum solum*.

Bro. Summ. and Sev. pl. 4.
pl. 18.

So if Eight have joined in an Assize, and Five of them are nonsuited, or will not sue, Judgment of Severance may be against these Five.

Bro. Summ. and Sev.
pl. 16.

So in *Quo Jure*, by two, if one makes Default, Summons and Severance may be, and then the Nonsuit of the one shall not be the Nonsuit of the other.

Fitzb. N. B. 128.
1 *Inst.* 139.

The Consequence of this Judgment is, that, notwithstanding the Severance of one or more who did not appear or made Default, the other Plaintiff or Plaintiffs in the Action may proceed in the Suit.

(B) By Whom a Judgment of Severance may be given.

THE Justices of *Nisi prius* have no Power to give a Judgment of Severance; for this can only be done by the Justices of that Bench where the Record is.

Bro. Summ. and Sev. pl. 10. 2 *Roll. Abr.* 489.

(C) Where a Summons must issue before a Judgment of Severance can be had

1 *Inst.* 139.
Bro. Summ.
and Sev. pl.
 10. 2 *Roll.*
Abr. 488.

WHERE two or more are Plaintiffs in an Action, and one of these has not appeared, he must be summoned before Judgment of Severance can be given against him: For it is a general Rule, that a Nonsuit is in no Case peremptory before Appearance, because a Writ may have been purchased in the Plaintiff's Name without his Privity.

Bro. Summ.
and Sev. pl. 10.
 10 *Rep.* 135.
Hard. 317.

But if two joint Plaintiffs have both appeared, and afterwards one makes Default, the Court may, without issuing any Summons, immediately give Judgment of Severance.

(D) At what Time Judgment of Severance must be prayed.

Cro. Ja. 117.
Blunt and
Snedstone.

NO Judgment of Severance can be given in a Writ of Error, unless it is prayed before the Defendant has pleaded in *Nullo est erratum*.

2 *Lilly Pr.*
Reg. 663.

But such Judgment may be after Joinder in the Assignment of Error.

(E) Who may have a Judgment of Severance.

Bro. Summ.
and Sev. pl. 17.

IF four are Joint Tenants, and two disseise the other two, the two, who are disseised, may bring Assise in the Name of the four; and the other two may be summoned and severed.

5 *Mod.* 150,
 151. *Pullen*
and Palmer.

So Severance may be in Avowry by Joint Tenants, because they must join in such Action.

Noy 1. Farmer
and Downes.

But where two Joint Tenants had acknowledged a Statute, upon which their Land was taken in Execution, and after, upon the Invalidity of such Statute, they joined in bringing an *Audita querela*, it was held that no Severance could be; for, the Wrong done to one by the Execution of the Land being no Wrong to the other, they ought not to have joined, but each ought to have brought his *Audita querela*.

2 *Inst.* 197.
 5 *Mod.* 11.

Tenants in Common are not in general intitled to Judgment of Severance, for, as their Rights are distinct, they are not obliged to join in an Action: but they may have it in *Quare impedit*; because, as an Advowson is a Thing which cannot be divided, they must join in an Action for the Recovery thereof.

1 *Inst.* 164.

If two or more Parceners have joined in an Action, for recovering the Possession of their Ancestor, Severance may be; because in such Action they could not avoid joining.

1 *Inst.* 164.

So if a Man having Issue two Daughters is disseised, and the Daughters die leaving Issue, their Issue may have Judgment of Severance: For, as one Right descended from one Ancestor, they must join in a *Præcipe*; and it makes

makes no Difference, whether the common Ancestor, seeing he was out of Possession, died before the Daughters or after; for in both Cases the Issue must make themselves Heirs to the Person who was last seised.

But if the Daughters in this last Case had been actually seised, and were afterwards disseised, the Issue shall not have Severance, because, as several Rights descended to them from several Ancestors, they ought not to join in a *Præcipe*.

Judgment of Severance may be in an Action of Trespass by Executors for taking the Goods of their Testator, because, as they in representing him make but one Person, they must all join in such Action.

So Severance may be in a Writ of Error, if the Persons who have joined in it were under a Necessity of joining in such Writ of Error.

But no Judgment of Severance can be given in any Case, where such as might have had separate Actions have joined in one; for it was their Folly so to do.

If four Joint Tenants or Tenants in Common bring *Quare Impedit*, and one varies from the rest in making Title to the Advowson, no Severance shall be, but the Writ shall abate; for they ought not to have joined in one Action unless their Title had been the same.

A. B. and *C.* being jointly seised of certain Premises, made a Lease thereof to *D.* for Life; and afterwards *B.* and *C.* released to *A.* In an Action of Waste by *A.* the Lease was pleaded by *D.* in Abatement; and it was insisted for him, that *B.* and *C.* ought to have joined in the Action, and to have been severd: But it was held, that, as their Right was gone by the Release, *A.* might very well sue alone.

Bro. Copart. pl. 2.
1 Inst. 164.
Godolph. Orph. Leg. 1346
Carth. 61.
Salk. 3, 9.
Rep. 37.
6 Rep. 25.
Ruddock's Case.
Cro. Eliz. 892.

2 Roll. Abr. 488.
6 Rep. 25.

Bro. Quar. Imped. pl. 2.

Bro. Sum. and Sev. pl. 6.

(F) In what Actions Judgment of Severance may be.

JUDGMENT of Severance may be in Assize, Cofinage, *Quo Jure*, and all other Real Actions, in which the whole Thing demanded is to be recovered.

1 Inst. 139.
Bro. Sum. and Sev. pl. 4.
pl. 16.
Bro. Judg. pl. 144.
Fitzb. N. B. 128.
Keilw. 47.

But it cannot be in *Quid Juris clamat*; because the Tenant shall not be compelled thereby to attorn to one only.

10 Rep. 135.
Read and Redman.

Severance may likewise be in all mixed Actions.

1 Inst. 139.
Bro. Chart. de Terre, pl. 74.
Keilw. 47.

It may be in *Ejectione firme*, because the Land itself, as well as Damages, are thereby to be recovered.

Judgment of Severance may, for the same Reason, be in an Action of Waste.

Bro. Summ. and Sev. pl. 9.
2 Roll. Abr. 488.

So it may in Detinue of Charters: For, as a Warranty may perhaps be therein recovered, this is a mixed Action.

1 Inst. 286.
Bro. Chart. de Terre, pl. 74.

But it cannot be in Champerty: Since this Action, as only Damages are to be recovered by it, is altogether Personal.

Bro. Summ. and Sev. pl. 20.

It

1 *Inst.* 139. It is in general true, that Judgment of Severance cannot be in Personal
Bro. Chart. Actions.
de Terre, pl. 74.
Bro. Summ. and Sev. pl. 8. *Cart.* 191.

Gilb. Hist. C. If a Trespass is committed upon the Estate of two Joint-tenants, they
P. 196, 197. must both join in an Action; yet no Severance can be: For, as one of
Cro. Eliz. 649. these might have released the whole Damages, he may refuse to carry on a
 Suit for the Recovery of Damages.

Gilb. Hist. C. So if an Action be by two Obligees of a Bond, Judgment of Severance,
P. 196, 197. although they are both obliged to join in it, can never be; because either
Cro. Eliz. 649. of these may discharge the Debt; and the Law does not provide for a Case,
 in which one Man has, by his own Folly, put himself into the Power of
 another.

Cart. 191. But Severance may be in a Personal Action brought by two or more
Rickfield and Executors; for, although any one of these may give a Release, such Release
Udall. would be a *Devastavit* in him: But, as the refusing to join in carrying on
Wentw. Off. the Suit is no *Devastavit*, if Severance could not be, any one Executor
of Exec. 96, might, by colluding with a Debtor, prevent the Recovery of a Debt due to
 104. his Testator, without being guilty of a *Devastavit*.

Hardr. 317. If two Executors however declare in Trover for a Bond lost in the Time
Manly and of their Testator, but lay the Conversion after his Death, there can in this
Lovell. Case be no Severance; because, as the Conversion, which is the Gift of this
2 Roll. Abr. Action, was in their own Time, it is like Trespass of their own Possession,
 488. in which Severance cannot be.

1 *Inst.* 139. Judgment of Severance may be in Attaint upon a Real Action; for,
Bro. Summ. wherever it might have been in the Principal Action, it may be in Attaint
and Sev. pl. 2. upon such Action.
 pl. 7.

1 *Inst.* 139. So Severance may be in a Writ of Error, *Scire Facias*, or the like, if it
 6 *Rep.* 25. might have been in the original Action; for these, although Personal
Cro. Eliz. 649. Actions, shall follow the Nature of the Action on which they are founded.

6 *Rep.* 25. Judgment of Severance may also be in some Writs of Error, although it
Ruddock's could not have been in the first Action.
Case. Cro.

Ja. 117, 616. *Cro. Eliz.* 649.

10 *Rep.* 135. The Distinction is, that, if any thing is to be recovered by the Plaintiffs in
Read and Error, there Severance cannot be; but, where the Writ of Error is only to
Redman. discharge the Plaintiffs in it from some Burthen, there it may be.

6 *Rep.* 25.
Cro. Eliz. 649. *Cro. Ja.* 117, 616.

Cro. Eliz. 649. Where two, who are Plaintiffs in Debt on Bond, are barred by an erro-
Razing and neous Judgment, and Costs are taxed against them, if they bring Error to
Ruddock. avoid these Costs, no Severance shall be; but the Release of the one shall
 6 *Rep.* 23. bind the other; for, as they were joint Plaintiffs in the original Action to
Cro. Ja. 117, charge another, he, who now releases the Error, might then have released
 616. the original Action.

Cro. Ja. 616. But if divers are Defendants in an Action, and Judgment is against them,
Bytball and and they bring a Writ of Error to discharge themselves of the Costs and
Harris. Damages of this Judgment, Severance may be: For, although the Costs
 6 *Rep.* 25. and Damages are a meer Personal Duty, it would be very hard, that the
 10 *Rep.* 135. Release of any one, with whom the others are compelled to join in bringing
Cro. Eliz. 649. Error, should prejudice all the rest: Nay this would put it into the Power
Cro. Ja. 19, of a Plaintiff to secure himself always against a Writ of Error, nothing more
 117. being necessary than to make some Person, upon whom he can depend to
 collude with him, a Defendant in the Action.

Salk. 496. It has been held, that, if two are outlawed, the Writ of Error to re-
Symons and verse such Outlawry must be in the Name of both, and, if only one ap-
Bingos. pears,

pears, the other may be summoned and severed; and that then the Outlawry may be reversed for the Benefit of him who appears.

This Determination, if not mistaken by the Reporter, seems to have been a hasty one; for it is laid down, and in Books of the best Authority, that where four, who had been outlawed in an Appeal, brought a Writ of Error to reverse this Outlawry and two of them made Default no Severance could be: Because, as they might have had several Writs, it was their own Folly to join in one.

Judgment of Severance may be in *Audita Querela* concerning a Personalty: For, as this Action is by way of Defence; it would be very hard if the Nonsuit of one should be the Nonsuit of the other.

Severance may also be in an Action upon the Case, *Quare exaltavit stagnum per quod suum pratium fuit inundatum.*

6 Rep. 25.
Ruddock's Case.
Bro. Summ.
and Sev. pl. 11.
1 Inst. 139.
Bro. Summ.
and Sev. pl. 2.
6 Rep. 25.
Cro. Eliz. 649.
Cro. Ja. 616.
Godb. 59.
Gile's Case.

(G) Where the Writ abates, notwithstanding there has been a Judgment of Severance.

WHERE two Jointenants bring a *Scire Facias* upon a Fine levied, and one of them dies after Severance, this Writ, because it is a judicial one, shall not abate.

But if two Jointenants bring a Real Action, by original Writ, and one dies after Judgment of Severance; the Writ does abate.

So if two Parceners join in a Real Action, by original Writ; for Recovery of the Possession of their Ancestor, and one of them, after being severed, dies the Writ shall abate.

The Reason is, that in both these Cases the Survivor, who is by the Death of the other intitled to the Whole, may have an original Writ to recover the Whole: And whenever the Words of an original Writ, which when it was sued out were proper, become untrue or unfit for the Party's Case, and he may have another Writ that agrees with the real Truth of his Case, it shall, even where the Alteration is occasioned by the Act of God, abate; for the Law will not suffer a Man to recover by an original Writ, the Words of which are false or unfit for his Case.

But if the Words of a Writ become, after Severance, untrue or unfit for the Party's real Case, by some Act of his own, the Writ does not, as it does when it is from the Act of God, *ipso facto* abate, and is only abateable; because in such Case it would, if there had been no Severance, have only been abateable.

If two Parceners, however, or two Jointenants bring a *Quare Impedit*, and one dies after Severance, this Writ, notwithstanding it is an original one, shall not abate: Because, as an Advowson is a Thing of which no Division can be, the Party who proceeded in the Action would have recovered the Whole if the other had lived, and so no new Right is acquired by his Death.

10 Rep. 134.
Read and
Redman.
Cro. Car. 574.
Rex and
Dryden.
10 Rep. 134.
Cro. Ja. 19.
10 Rep. 134.
Read and
Redman.
Cro. Ja. 19.
Cro. Car. 574.
11 Rep. 45.
Godfrey's Case.
10 Rep. 134.
1 Saund. 285.

10 Rep. 134.
Read and
Redman.

1 Inst. 197.
286.
10 Rep. 134.

- 10 Rep. 135. If two join in a Writ of Error, brought to reverse a Judgment in a
Read and meer Personal Action, and one dies after Severance, this Writ, if only
Redman. brought to discharge themselves of some Burthen, shall not although it be
 6 Rep. 25. an original one abate: For, if the deceased Party had lived, he could not
Cro Eliz. 649. in this Case have released the Error.
 616.
- 1 Inst. 139. The Death of one Party after Severance in *Audita Querela*, which
Cro Eliz. 448. is an original Writ, shall not abate the Writ; because in this Action, al-
Cro. Ja. 19. though Personal, nothing can be recovered, the End of it being only to
 6 Rep. 256. get rid of some Charge to which the Plaintiffs in it are liable.
 10 Rep. 135.
- Cro Eliz 652.* If an Action of Debt be by two Executors, and one dies after Judg-
Anon. ment of Severance, the Writ, although this is a Personal Action, shall
 10 Rep. 135. not abate: For the Right of the Survivor, who might if the other
Hard. 317. had lived have recovered the whole Debt, is not thereby altered.
Wentw. Off.
of Exec. 96,
 104.
- Bro. Brief 121.* A Writ shall not abate because the Party, against whom Judgment of
 Severance has been, was an Alien; for this should have been pleaded before
 the Severance.

(H) The Consequence of a Judgment of Se- verance to the Party severed.

- Bro. Proc.* THE Power, which a Party against whom Judgment of Severance is given
 pl. 12. had over an Action, is thereby so intirely at an End, that his Name
 2 Roll. Abr. can never after be made use of in any of the Proceedings.
 489.
- Cro. Car. 420.* An Action of Debt was brought by six Executors, but three of these
Price and were afterwards severed; and Judgment was entered up in the Names of the
Parkhurst. three who had proceeded in the Suit. It was assigned for Error, that the
 2 Roll. Abr. 98. other three notwithstanding their being severed were still Executors, and
 ought to have been named in the Judgment: But the Court held, after or-
 dering Precedents to be searched, that the Judgment should only be in
 the Names of those three Executors, who had carried on the Suit after the
 Severance of the others.
- Went. Off. of* Two Executors had joined in an Action; but there was Judgment of
 Exec. 104. Severance against one of them: The other proceeded to Judgment and
 105. then died. It has been said, that, as the Survivor who had been severed was
Dal. 51. pl. no Party to the Judgment, he could not take out any Execution thereupon.
 17. 53. pl. 30.
- Godolph. Orph.* One Executor may indeed, after Judgment of Severance against him, re-
 Leg. 134. lease the Debt, for which an Action is brought in the Name of him and
Dal 51. pl. 17. another Executor, at any Time before final Judgment: But this does not
 53. pl. 30. proceed so much from any Power he has over the Action, as from an In-
Wentw. Off. terest which he still has in the Debt; and the Presumption of Law is be-
of Exec. 104. sides, that, since he is liable to answer for the Debt so released in a *Devastavit*,
 his Co-executor is not thereby injured.
- Jenk. 211.* But, if a Writ of Partition is brought in the Name of three Parceners and
 pl. 46. one is severed, he shall nevertheless recover, by the Judgment, a third Part
 of the Estate; for the End of the Suit was to make Partition of the Whole.

Supersedeas.

BY a *Supersedeas* the doing of a Thing, which might otherwise have been lawfully done, is prevented; or a Thing that has been done is, notwithstanding it was done in a due Course of Law, thereby made void.

It will be here proper to consider:

- (A) Of the different Kinds of *Supersedeas*.
- (B) Who may grant a *Supersedeas*.
- (C) Where a Writ of *Supersedeas* may be awarded.
- (D) In what Cases some other Writs are by Implication of Law a *Supersedeas*.

1. How far a Writ of second Deliverance is in itself a *Supersedeas*.
2. Where a Writ of *Habeas corpus ad faciendum & recipiendum* is an implied *Supersedeas*.
3. In what Cases a *Certiorari* is a *Supersedeas* in Law.
4. Where a Writ of Error is in itself a *Supersedeas*.

- (E) Of some Requisites which are necessary to the making a Writ of Error a *Supersedeas* in itself.

1. It must be allowed.
2. Bail must be put in to it.
3. It must be proceeded in without Delay.

- (F) To what Time a Writ of Error does as a *Supersedeas* relate.

- (G) What the Effect of a *Supersedeas* is.

- (H) How Disobedience to a *Supersedeas* may be punished.

- (A) Of the different Kinds of *Supersedeas*.

A *Supersedeas* is either express or implied.
 An express *Supersedeas* is sometimes by Writ, sometimes without a Writ. Where it is by Writ, some Person to whom the Writ is directed is thereby commanded to forbear the doing something therein mentioned;
 or,

or, if the Thing has already been done, to revoke as far as that can be done the Act.

Fitzb. N. B.
236. If an Exigent is awarded against a Man, he may have Writ directed to the Sheriff commanding him, upon the Party's finding Sureties to appear at the Return of the Exigent, that, if he has not arrested the Party, he do not arrest him, but suffer him to go in Peace; or that, if he has arrested him, he discharge him out of Custody.

Fitzb. N. B.
236. Or the Party, against whom an Exigent has been awarded, may, upon finding Sureties in the Court which has Power to grant him a *Superfedeas*, have an absolute Writ of *Superfedeas*, to the same Effect, directed to the Sheriff.

An Express *Superfedeas* without Writ is, where some Person, who has, pursuant to an Authority in him vested, made an Order for doing a Thing, does by a second Order forbid that Thing to be done.

Str. 6. The Inhab. of Pancras and The Inhab. of Rumbald.
If a Justice of Peace has made an Order by Surprise, he may, upon finding that he has made an improper Order, by a second Order supersede it.

1 *Hawk.* 154. But if the Thing ordered to be done was done before the Delivery of the second Order, it is doubtful, whether this shall, by virtue of any Words which are inserted in it, annul the Act; and it may perhaps be proper, that no express *Superfedeas*, unless it is by Writ, shall have such a retrospective Power.

That is an implied *Superfedeas*, by which, although no Writ of *Superfedeas* issues, the doing of a Thing that otherwise might lawfully have been done is prevented.

Post (D.) and (G.) A Writ of Error, a *Certiorari*, and divers other Writs have, by Implication of Law, in some respects the same Effect as a Writ of *Superfedeas*, but an implied *Superfedeas* never makes any Act void which was done before it existed.

(B) Who may grant a *Superfedeas*.

NO Writ of *Superfedeas* lies from any other Court to the Court of Chancery: But this Court may supersede its own Writs.

Fitzb. N. B.
238. If one Man hath sued out a *Supplicavit* from the Court of Chancery, for arresting another to find Sureties of the Peace, he, against whom this is granted, may have a *Superfedeas* from the same Court commanding the Sheriff to forbear to arrest him.

But a Writ of *Superfedeas* lies from the Court of Chancery to any other Court.

Bro. Superf.
pl. 5. A *Capias ad satisfaciendum* having issued from the Court of King's Bench, a *Superfedeas* was issued from the Court of Chancery commanding the Justices of that Court to surcease. This *Superfedeas* was thought by some to be contrary to Law: But *Finch*, because it was out of a higher Court, surceased, and no further Proceedings were had.

Bro. Peace,
pl. 17. Where Surety of the Peace is granted by the Court of King's Bench, if a *Superfedeas* comes from the Court of Chancery to the Justices of that Court, their Power is at an End, and the Party is, as to them, discharged.

Any Court at *Westminster* may, in Term Time, award a *Superfedeas* to any Writ or Process, which has issued from such Court; or to the Proceedings of any other Court, which has proceeded in a Matter properly conusable in the Court from whence the *Superfedeas* issues.

If a *Capias* or Exigent is awarded against any Person, he may sue forth a *Superfedeas* out of that Court which awarded it. *Fitzh. N. B.* 236.

Where a Man, who is sued in a Court Christian, obtains a Prohibition, if the Spiritual Court proceeds afterwards to Excommunication, he may have a *Superfedeas* out of the Court, from which the Prohibition was awarded. *Bro. Superf. pl. 13. Fitzh. N. B. 239.*

Heretofore a *Superfedeas* to a Writ *De excommunicato capiendo* could only be had from the Court of Chancery, unless the Court Christian had proceeded after a Prohibition: But, as every such Writ must, by virtue of the 5 *Eliz. c. 23.* at this Day be entered of Record in the Court of King's Bench before it is delivered to the Sheriff, and be returned there, a *Superfedeas* may now issue from that Court to every Writ *De excommunicato Capiendo.* *Salk. 293. Rex and Fowler.*

If an Accountant of the Court of Exchequer is impleaded in the Court of Common Pleas, the Exchequer may send a *Superfedeas* to the Justices of that Court commanding them to surcease. *Bro. Superf. pl. 38.*

The Court of Exchequer cannot, indeed, issue a *Superfedeas* directed to the Justices of the King's Bench; because the Pleas there are before the King himself: But the Record of the Court of Exchequer may be shewn to this Court, and, if the Person who is there impleaded appears to be an Accountant of the Court of Exchequer, the Court of King's Bench will dismiss the Suit. *Bro. Superf. pl. 38.*

A Plaintiff having recovered, in an Action of Debt upon a Bond, in the Court of Common Pleas, the Defendant brings Error in the King's Bench. Pending this Writ of Error, the Plaintiff brings Debt upon the same Bond in London; the Court of Common Pleas cannot issue a *Superfedeas* to this second Action: But the Court of King's Bench may. *Bro. Superf. pl. 11.*

In all other Cases, where a *Superfedeas* lies, and in these, in the Time of Vacation, a Writ of *Superfedeas* may be sued out from the Court of Chancery. *Fitzh. N. B. 236.*

By the 2 *E. 3. c. 8.* it is provided, "That it shall not be commanded, by the great nor little Seal, to disturb or delay common Right; and, though such Commandments do come the Justices shall not therefore surcease to do right in any Point."

In Trespas *vi et armis* Judgment was for the Plaintiff, and a *Capias pro rege* was awarded for the Fine due to the King. After an Exigent had been awarded, and three Counties had passed, the Defendant obtains a *Superfedeas*, under the Privy Seal, commanding the Justices to surcease all Process for the King. This *Superfedeas* was, after Argument, held not to be contrary to the 2 *E. 3. c. 8.* for, although the Fine arose upon the Suit of the Party, the King may, as no Process has been served, at his Pleasure cease the Process for his own Fine: But, if a Defendant is in such Case arrested by Process, the King shall not, till the Plaintiff is satisfied, set him at Liberty; for the Plaintiff may elect to have this for his Execution. *Bro. Superf. pl. 26. Fitzh. N. B. 238.*

An express *Superfedeas* without Writ is seldom granted by any other than the Person or Persons, who has or have made the Order which is to be superseded.

Two Justices of the Peace may, if they see reason, supersede an Order made by themselves. *Str. 6. The Inhab. of Pancras and The Inhab. of Rumbald.*

But a Court of Quarter-Sessions cannot supersede an Order made by two Justices of the Peace. *Salk. 472. The Inhab. of Oswell and The Inhab. of Woking.*

The same Justices by whom Restitution was awarded, upon an Indictment of forcible Entry or Detainer found before them, may, upon the Insufficiency of the Indictment appearing to them, supersede the same before it is executed. *1 Hawk. 154. Dy. 167. H. H. P. C. 140.*

Cro. Eliz. 915. And it has been said, that this may be done by any one or two of these *Fitzwilliams's* Justices.
Case.

1 *Hawk.* 154. It seems however to be agreed, that no other Justices, nor any other Court
Dy. 187. whatsoever, except the King's Bench, have a Power to do this.

1 *Hawk.* 128. But where one Justice of the Peace has issued a Warrant, to compel any Person
Lamb. 95, 96, to find Sureties for the Peace, any other Justice may, upon his entering into
99. a Recognizance before him, for keeping the Peace as to that Person, who has demanded the Surety of the Peace, grant a *Supersedeas* to such Warrant.

(C) Where a Writ of Supersedeas may be awarded.

Fitzb. N. B. 236. IF a *Capias* or Exigent hath issued, the Person against whom it is awarded may, whether he has or not been arrested thereupon, have a *Supersedeas*.

Fitzb. N. B. 237. But, where a Man is arrested upon a *Capias ad satisfaciendum*, no *Supersedeas* lies; because he is taken in Execution.

8 *Mod.* 306. If no Declaration is filed against a Defendant, who is in Prison, within
Henley and two Terms, he may have a *Supersedeas*: But the Plaintiff is at Liberty to
Roffe. bring a second Action, for, notwithstanding the other Action was for want
Carth. 469. of declaring in due Time superseded, the Cause of Action remains.

Bro. Superf. Two Sheep being distrained, the Owner brought Replevin, and applied
pl. 34. for a *Supersedeas*. It was said that a *Supersedeas* lies only for the Person, and not for any Chattels: But by *Lacon* it lies for both.

Fitzb. N. B. A *Supersedeas* lies to Process of Outlawry.
237.

1 *Hawk.* 128. If one Justice of the Peace has granted a Warrant, to compel any Person
Lamb. 95, 96, to find Sureties of the Peace, any other Justice may, upon his enter-
99. ing into a Recognizance before him for keeping the Peace, as to the Party who has demanded the Surety of the Peace, issue a *Supersedeas* to such Warrant.

Fitzb. N. B. Where a *Supplicavit* has issued from the Court of Chancery, to compel a
238. Man to find Sureties for keeping the Peace, he may on finding Sureties in that Court have a *Supersedeas*.

Fitzb. N. B. If a Justice of the Peace has granted a Warrant, to compel any Person
238. to find Sureties for the Peace, the Court of Chancery or King's Bench will,
Lamb. 96. on his finding Sureties, issue a *Supersedeas* to such Warrant.

A Supersedeas But by the 21 *Jac.* 1. c. 8. par. 3. after reciting, that divers turbulent and
to the Warrant contentions Persons, deservedly fearing to be bound to the Peace or good
of a Justice of behaviour by Justices of the Peace of the Counties where they dwell, do
the Peace, for oftentimes procure themselves to be bound to the Peace or good Behaviour,
compelling a Man to find. in the Court of Chancery or King's Bench, upon insufficient Sureties, or upon
Sureties for the colourable Prosecution of some Person or Persons, who will be ready at all
Peace, is not to Times to release them at their own Pleasure; whereupon his Majesty's Writs
issue without of *Supersedeas* are oftentimes directed to the Justices of the Peace, and other
a Motion in his Majesty's Officers, requiring them and every of them to forbear to ar-
Court and put- rest or imprison the Parties aforesaid; by Means whereof the said turbulent
ting in Bail. and contentious Persons misdemean themselves amongst their Neighbours
with Impunity, to the great Offence and Disturbance of their Neighbours
amongst whom they converse and live, to the Affront of the Justices of the
Peace, and to the evil Example and Encouragement of like evil-disposed
Persons, it is enacted, "That all Writs of *Supersedeas*, to be granted by or
"out of either of the Courts aforesaid, shall be void and of none Effect,
"unless

“ unless such Procefs be granted upon Motion in open Court first made, and
 “ upon such sufficient Sureties as shall appear, unto the Judge or Judges
 “ of the same Court respectively, upon Oath, to be assessed at five Pounds
 “ Lands, or ten Pounds in Goods, in the Subsidy Book at the least; and
 “ unless it shall also appear, unto the said Judge or Judges from whom
 “ such *Superfedeas* is desired, that the Procefs of the Peace, or good Beha-
 “ viour, is prosecuted by him or them desiring such *Superfedeas bona fide*,
 “ by some Party grieved, in that Court out of which such *Superfedeas* is de-
 “ fired to be so awarded and directed.”

Where a Person in a Writ of Right in a Court Baron, or in any other *Fitzh. N. B.*
 Court, vouches a Foreigner to Warranty, the Tenant who vouches may sue ^{239.}
 forth a Writ of *Superfedeas*, directed to such Court, commanding them not
 to proceed till the Warranty is determined.

If a Court Christian does, after a Writ of Prohibition has issued, proceed *Fitzh. N. B.*
 to Excommunication, and a Writ *De excommunicato capiendo* is awarded, ^{239.}
Superfedeas lies.

It has been held that no *Superfedeas* shall be granted, by the Court of ^{Sid. 181.}
 King’s Bench, to a Writ *De excommunicato capiendo* before the Writ is re- ^{Anon.}
 turned; because the Party, as the contrary cannot till then appear, may
 have been duly excommunicated for one of the Causes mentioned in the
^{5. Eliz. c. 23.}

But if, by the Entry of a Writ *De excommunicato capiendo* in the Court ^{10 Mod. 351,}
 of King’s Bench, it appears to have issued upon a Sentence of Excommuni- ^{352. Rex}
 cation for some Cause not within that Statute, the Court may grant a *Super-* ^{and Tbed.}
fedeas without waiting for the Return: else the Party, who if taken into ^{Str. 43.}
 Custody must at the Return thereof be discharged, may in the mean Time ^{Ante 669.}
 be deprived of his Liberty, by a Writ which ought not to have been
 awarded.

In a late Case a Person, who had been taken into Custody by Virtue of ^{M.S. Rep.}
 a Writ *De excommunicato capiendo*, was before the Return of the Writ, al- ^{Rex and Sta-}
 though no Defect of Cause of Excommunication appeared from the Entry of ^{phenon, Trin.}
 the Writ, admitted by the Court of King’s Bench to Bail, pending a Rule ^{28 G. 2.}
 to shew Cause why the Writ should not be superfeded.

If Plea of Trespass *vi et armis* is held in the County, the Person implead- ^{Fitzh. N. B.}
 ed may have a *Superfedeas*, with a Recital that Plea of Trespass *vi et armis* ^{239.}
 shall not be holden in a less Court, than before the King or the Justices by
 his Commandment.

If a Sheriff holds Plea of forty Shillings a *Superfedeas* lies. ^{Fitzh. N. B.}
^{239.}

And if a Man sues for an entire Debt of more than forty Shillings by ^{Fitzh. N. B.}
 divers Plaints, each under the Sum of forty Shillings, the Defendant may ^{239.}
 sue forth a *Superfedeas* to the Sheriff, commanding him not to hold Plea in
 those Plaints.

If the Constable of *Dover* holds Plea of any Thing, of which he ought not ^{Fitzh. N. B.}
 to hold Plea, a *Superfedeas* lies. ^{240.}

If a Person, who is by Privilege intitled to be sued in a certain Court, ^{Vaugh. 155.}
 is impleaded in any other he may have a *Superfedeas*. ^{Bushel’s Case.}

But where a Peer, who was in Custody by a Bill of *Middlesex*, moved ^{Sty. 177. Earl}
 for a *Superfedeas*, because being a Peer he ought not to have been arrested, ^{Rivers’s Case.}
 the Court directed him to plead his Privilege; and said they could not upon
 Motion take Notice thereof.

Wherever any Procefs has issued erroneously or improperly, it may by
 a Writ of *Superfedeas* be rendered ineffectual.

In Case for Words spoke in *London*, the Defendant justified for Words ^{Littl. Rep. 314.}
 spoke in the County of *Suffolk*. The Plaintiff replied *De injuria sua propria*, ^{Harvey’s Case.}
 and procured a *Venire facias* to *London*. A *Superfedeas* was granted in this ^{Cro. Ja. 43.}
 Case; because the *Venire facias* ought to have been for the County of
Suffolk.

If

Jenk Cent. 58. If an *Habere facias Possessionem* has issued erroneously and been executed, a *Superfedeas* will lie to restore the Possession.

Skin. 422. In general no *Superfedeas* lies where a Writ of Attaint is brought; for, a Verdict having been found upon the Oath *Duodecim legalium et proborum hominum*, the Law will not, upon so slight a ground as the bringing a Writ of Attaint, presume that it is a false one.

Bro. Superf. pl. 24.

Dy. 81.

Fitz. N. B.

237, 238.

But if a Defendant, after having been condemned in Trespas, brings an Attaint, and the Plaintiff sues out an *Elegit*, and a *Capias* is awarded for the Fine due to the King, the Defendant may have a *Superfedeas* as to the *Capias*, with a Recital that he hath brought Attaint, and that the Plaintiff hath sued forth an *Elegit*.

2 *Roll. Abr.*

493. *Moston*

and *Parriè.*

Fitz. N. B. 104.

Where an *Audita Querela* is brought, the Plaintiff therein shall, if it be founded on any Matter of Record or Writing, have a *Superfedeas* to stay Execution; but not if the *Audita Querela* is founded on Matter in *Pais*.

Bro. Superf. pl. 24. *Noy* 145. *Cro. Eliz.* 364. *Salk.* 92.

2 *Roll. Abr.*

493. *Whidner*

and *Conyers.*

Salk. 92.

Co. Entr. 88.

Bro. Superf.

pl. 35.

2 *Roll. Abr.*

492.

Popb. 132.

The Earl of

Sbrevsbury's

Case. *Dy.* 81.

A Writ of Er-

ror is no Su-

peredeas to Exe-

cutio upon any

single Bond or

Obligation un-

til Bail is

put in.

But, although the *Audita Querela* is founded upon Matter in *Pais*, if the Party who brings it has been taken in Execution, he may have a *Superfedeas* for his Body; because he is only thereby discharged for a Time, that he may the better prosecute his Suit; and Bail is put in, that, if the *Audita Querela* does not aid him, he shall be a Prisoner in Execution again.

Where a Plaintiff in *Audita Querela* is nonsuited, he shall not, if he brings a second *Audita Querela*, have a *Superfedeas*.

Wherever a Writ of Error is brought, the Plaintiff may have a Writ of *Superfedeas* to stay Execution of the Judgment.

But by the 3 *Fa. 1. c. 8.* after reciting, that his Highness's Subjects are now more commonly withholden from their just Debts, and often in Danger to lose the same, by Means of Writs of Error, which are now more commonly sued than they have heretofore been, 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 reverting of any Judgment given, or to be given, in any Action or Bill of Debt upon any single Bond for Debt, or upon any Obligation, with Condition for the Payment of Money only; or upon any Action or Bill of Debt for Rent; or upon any Contract; in any of the Courts of Record at *Westminster*, or in the Counties of *Palatine of Chester, Lancaster, or Durham*, or in the Courts of Great Sessions in *Wales*; unless such Person or Persons, in whose Name or Names such Writ of Error shall be brought, with two sufficient Sureties, such as the Court wherein such Judgment is or shall be given shall allow of, shall first, before such Stay made or *Superfedeas* be awarded, be bound unto the Party, for whom any such Judgment is or shall be given, by Recognizance to be acknowledged in the same Court, in double the Sum adjudged to be recovered by the said former Judgment, to prosecute the said Writ of Error with Effect, and also to satisfy and pay, if the said Judgment be affirmed, all and singular the Debts, Damages and Costs, adjudged or to be adjudged upon the former Judgment, and all Costs and Damages to be awarded for the same delaying of Execution."

Cro. Fa. 352.

Goldsmith and

Platt.

Sid. 368.

The Defendant an Executrix pleaded *Plene administravit*, and there was Judgment against her. On her bringing a Writ of Error, it was moved that she should not have a *Superfedeas* unless Bail was put in as is required by the 3 *Fa. 1. c. 8.* but the Court replied, that the Statute only intends that Bail should be in Cases, where the Judgment is against the Party himself, or where it is general against Executors; But where the Judgment is Special, that Execution shall be of the Goods of the Testator, and Damages only

de bonis propriis, it is not reasonable, nor the Intent of that Statute, that the Party ſhould be obliged to find Sureties to pay the entire Condemnation with his own Goods. And *Coke* ſaid, it had been ruled according to this Difference in the Common Bench when he was there.

It has been held, that no Bail is neceſſary, where a Writ of Error is brought on a Judgment obtained upon a Bond for Payment of Money upon a Bottomree Contract; for ſuch Bonds are not within the Act of 3 *Ja.* 1. c. 8. Shew. 14. Garret and Dandy. Com. 322.

But in a later Caſe it is laid down, that, if the Contingency has happened, a Bottomree Bond is in every reſpect a Bond for the Payment of Money only, and Bail muſt be put in to Error on a Judgment obtained upon ſuch a Bond. Sira. 476. Pitt and Cony.

A Bond was to pay Money and to do other collateral Acts. It was held, although the Breach aſſigned was only the Non-payment of the Money, that this was not within the Statute, which relates to Judgments upon Bonds for the Payment of Money only. Carth. 29. Gerrard and Danby.

But, where the Condition of a Bond was for the Payment of 500 *l.* at ſuch a Day, being the ſame mentioned in certain Indentures, it was held that Bail ought to be given, for the material Part of this Condition is the Payment of the Money, and the other Words are only added to ſhew that this Bond, and the ſaid Indentures are both Securities for one and the ſame Sum of 500 *l.* Sira. 959. Desbordei and Horſey.

By the 13 *Car.* 2. *ſt.* 2. c. 2. *par.* 9. after reciting the 3 *Ja.* 1. c. 8. and that divers other Caſes, within the ſame Miſchief, are not provided for thereby, it is enacted, “ That no Execution ſhall be ſtaid in any of the Courts therein mentioned, by any Writ or Writs of Error, or Superſedeas thereupon, after any Verdict and Judgment thereupon obtained, in any Action of Debt grounded upon the Statute made in the ſecond Year of the Reign of *Edward* the Sixth, for not ſetting forth of Tithes, nor in any Action upon the Caſe upon any Promiſe for the Payment of Money, Actions *ſur Trover*, Actions of Covenant, Detinue, and Treſpaſs, unleſs ſuch Recognizance, and in ſuch Manner as by the ſaid Act is directed, ſhall be firſt acknowledged in the Court where ſuch Judgment is given.” The Proviſion of 3 *Ja.* 1. c. 8. extended to ſome other Caſes.

By the 16 & 17 *Car.* 2. c. 8. *par.* 3. it is enacted, “ That no Execution ſhall be ſtaid, in any of the Courts mentioned in a Statute made in the third Year of the Reign of *James* the Firſt, by Writ of Error, or Superſedeas thereupon, after any Verdict and Judgment thereupon, in any Action Personal whatſoever, unleſs a Recognizance, with Condition as in the ſaid Statute is directed, ſhall be firſt acknowledged in the Court where ſuch Judgment ſhall be given: And that in Writs of Error to be brought upon any Judgment, after a Verdict in any Writ of Dower or in any Action *Ejeſſione Firme*, no Execution ſhall be thereupon or thereby ſtaid, unleſs the Plaintiff or Plaintiffs, in ſuch Writ of Error, ſhall be bound unto the Plaintiff, in ſuch Writ of Dower or Action of *Ejeſſione Firme*, in ſuch reaſonable Sum as the Court, to which ſuch Writ of Error ſhall be directed, ſhall think fit, with Condition, that if the Judgment ſhall be affirmed in the ſaid Writ of Error, or that the ſaid Writ of Error be diſcontinued in Default of the Plaintiff or Plaintiffs therein; or that the ſaid Plaintiff or Plaintiffs be nonſuit in ſuch Writs of Error, that then the ſaid Plaintiff or Plaintiffs ſhall pay ſuch Coſts, Damages and Sum or Sums of Money, as ſhall be awarded upon or after ſuch Judgment affirmed, Diſcontinuance, or Nonſuit had.” The ſame Proviſion extended to all Personal Actions.

But by *par.* 5. it is provided, “ That this Act, nor any Thing therein contained, ſhall extend to any Writ of Error to be brought by any Executor; nor unto any Action popular, nor unto any other Action, which is or hereafter ſhall be brought upon any penal Law or Statute, except Actions of Debt for not ſetting forth of Tithes; nor to any Indictment, Some Actions, &c. excepted out of this Act.

“ Presentment, Inquisition, Information or Appeal ; any Thing herein before expressed to the contrary thereof in any wise notwithstanding.”

Bro. Superf.
pl. 35.
Bro. Err.
pl. 55.
Latch 57.
1 Vent. 100. It is in general true, that no *Superfedeas* can be had upon a second Writ of Error in the same Court, after the Plaintiff in Error has been nonsuited in one Writ of Error ; or it has abated by the Act of the Party, or has been quashed.
1 Mod. 285. Str. 880, 1015.

2 Roll. Abr.
492. Smith
and Bowles.
1 Vent. 100. But, if a Man brings Error in the Exchequer Chamber of a Judgment in the King's Bench before the Judgment is signed, he may bring a second Writ of Error, and have a *Superfedeas* upon that ; for, the first being a Nullity because brought too early, the second is to be considered as the first.

Latch 57.
Crouch and
Haine.
Bro. Err.
pl. 55. pl. 140. So where a first Writ of Error abates by the Act of God ; or for want of Form ; or in any way not by the Act of the Party, a *Superfedeas* may be upon a second.

1 Vent. 31.
Wortley and
Holt.
2 Lev. 93. It was formerly held, that if a Writ of Error in Parliament had abated by a Prorogation, and a second Writ was brought in the next Session, no *Superfedeas* could, if a Term had intervened, issue upon this last ; although the first did not in this Case abate by the Act of the Party.

1 Vent. 266.
Lord Eure and
Turton.
2 Lev. 93. But a Rule was made, about the Year 1674, in the House of Lords, that all Causes there depending shall not be discontinued by a Prorogation.

Burb. 131.
Wright and
Grove.
Trin. 9 G. 1. It has long since the making of this Rule been insisted, that, although a Cause is not discontinued by a Prorogation, a Writ of Error does thereby abate ; and a Motion was made, in the Court of Exchequer, for Leave to take out Execution in such a Case : But the Motion was denied ; and *per Cur. absente Price B.* If the Writ is abated by the Prorogation, you may take out Execution without applying to the Court, if it does not, we cannot give leave to do it. What the House of Lords do, in their judicial Capacity, goes over from Session to Session, as Matters below do from Term to Term.

1 Barnes 273.
Sherwin and
Bowes. Upon the Reversal of a Judgment by Writ of Error, the Defendant, who was in Custody, obtained a Writ of *Superfedeas* : But, before she could get it allowed, she was charged with a new Declaration at the Suit of the same Plaintiff. Application was hereupon made to the Court, and she was ordered to be discharged. Being arrested a second Time, for the same Debt that the first Action had been brought, the Court was moved, that she might, upon entering a Common Appearance, have a *Superfedeas* for her Discharge. *Wills Ch. J.* and *Comyns J.* were of Opinion that, as she had had the Benefit of the *Superfedeas* in the first Action, which was at an End by the Reversal of the Judgment, the Plaintiff was now at Liberty to proceed in a second. *Denton J.* and *Fortescue J.* were of Opinion, that she ought to be discharged upon entering a Common Appearance. The Court being thus divided, no Rule was made.

(D) In What Cases some other Writs are by Implication of Law a Superfedeas.

2 Roll. Abr.
493. pl. 4. IT has been laid down, that an *Audita Querela* upon a Statute shall, by Implication of Law, be a *Superfedeas* of Execution, although no Writ of *Superfedeas* issues.

But

But the Law seems in this Case to be mistaken: For it is clear from ^{2 Roll. Abr.} other Books that an *Audita Querela* is not a *Superfedeas* in itself; and that ^{493. *Moffet* and *Parrie*.} unless it be founded upon Matter of Record or Writing no *Superfedeas* lies ^{*Fitz. N.B.* 104.} thereupon. ^{*Bro. Superf.*}

^{*pl. 24. Cro. Eliz.* 364. *Salk.* 92.}

1. How far a Writ of second Deliverance is in itself a Superfedeas.

A Plaintiff in Replevin was nonsuited, and the Defendant had Judgment *De retorno habendo*; and a Writ issued to inquire of his Damages. ^{*Latch* 72.} A Writ of second Deliverance being afterwards brought by the Plaintiff, it ^{*Anon.*} was held, that this was a *Superfedeas* as to the Return but not to the ^{*Goldb.* 195.} Writ of Enquiry.

2. Where a Writ of Habeas Corpus ad faciendum & recipiendum is an implied Superfedeas.

A Writ of *Habeas Corpus ad faciendum et recipiendum* so supercedes the ^{*2 Roll. Abr.*} Power of the Court to which it is directed, that all Proceedings, after it is ^{493. *Johnson* and *Ellis*.} served and before a *Procedendo* is awarded, are erroneous. ^{*Cro. Eliz.* 916.}

^{*Cro. Car.* 261. *Salk.* 352. *1 Mod.* 195.}

By this Writ, the Person of the Defendant being thereby removed out of its Jurisdiction, the Proceedings in an inferior Court are not only at an End ^{*Skin.* 244.} but they are also void; for new Bail must be put in, and all the Proceedings ^{*Dorington* and *Edwin.*} in the Superior Court must be *de novo*.

But by the 21 *Ja.* 1. c. 23. *par.* 2. it is enacted, " That no Writ of *Habeas Corpus*, or any other Writ, to be sued forth out of any Court, having or pretending to have Power to award such Writ, to remove or stay any Action, Bill, Plaint, Suit or Cause, brought, commenced or depending, in any Court or Courts of Record, within any City, Liberty, Town Corporate or elsewhere, which shall have Jurisdiction, Power or Authority, to hold Plea in that Action, Bill, Plaint, Suit or Cause, the same Cause of Action, Bill, Plaint or Suit, arising or growing within the said City, Liberty, Town Corporate or Jurisdiction, shall be received or allowed by the Steward or Stewards, Judge or Judges, or Officer or Officers of the Court or Courts, wherein and to whom any such Writ shall be directed and delivered; but that he and they shall and may proceed in the said Cause, as though no such Writ was sued forth or delivered to him or them, except the said Writ be delivered to the Steward or Stewards, Judge or Judges, Officer or Officers of the said Court, before Issue or Demurrer joined in the said Cause, so depending in any such Court of Record, so as the said Issue or Demurrer be not joined within six Weeks, next after the Arrest or Appearance of the Defendant or Defendants to such Action."

By *par.* 3. it is enacted, " That if any Action, Bill, Plaint, Suit or Cause, which shall be brought, commenced or depending, in any Court of Record, in any City, Liberty, Town Corporate or elsewhere, which shall have Jurisdiction, Power or Authority to hold Plea in that Action, Bill, Plaint, Suit or Cause, shall be removed or stayed by any Writ of *Habeas Corpus* or other Writ, that if afterwards the same Action, Bill, Plaint, Suit or Cause, shall be remanded or sent back again, by any Writ of *Procedendo* or other Writ whatsoever; that then the said Action, Bill, Plaint, Suit or Cause, shall never afterwards be removed or stayed, before Judgment, by any Writ whatsoever, to be sued forth out of any

" of

“ of his Majesty’s Courts; any Law, Statute, Custom, Usage or Restraint, to the contrary thereof in any wise notwithstanding.”

No Suit, if for more than the Value of five Pounds, to be removed out of an inferior Court.

“ By *par. 4.* it is enacted, “ That if in any Action, Bill, Plaint, Suit or Cause, not concerning any Freehold or Inheritance, or Title of Land, or Lease or Rent, which shall be brought, commenced or depending, in any such Court of Record, in any City, Liberty, Town Corporate or elsewhere, it shall appear, or be laid in the Declaration, that the Debt, Damages, or Thing demanded, doth or shall not amount to or exceed the Sum of five Pounds; that then such Action, Bill, Plaint, Suit or Cause, shall not be stayed or removed into any of his Majesty’s Courts whatsoever, by any Writ or Writs whatsoever, other than by a Writ of Error or Attaint; any Law, Statute, Usage, Custom or Restraint, to the contrary in any wise notwithstanding.”

This Act only to extend to such Courts of which a Barrister is Judge or Assistant Judge.

“ But by *par. 6.* it is provided, “ That this Act shall extend only to such Courts of Record, and for such Time only, as there shall be an utter Barrister, of three Years standing at the Bar, of one of the four Inns of Court, that is or shall be Steward, Under Steward, or Deputy Steward, Town Clerk, or Judge, or Recorder of the same inferior Court; or that shall be Assistant from Time to Time to such Judge of such inferior Court, as shall not be an utter Barrister as aforesaid and there present, in which such Action, Bill, Plaint, Suit or Cause, shall be brought, commenced or depending, and not of Counsel in any Action, Bill, Plaint, Suit or Cause, then depending in the same inferior Court.”

Cro. Car. 79. Clapham’s Case. A *Habeas Corpus* being awarded to the Court of *Guildford* in *Surry* after Issue joined, and this not joined till more than six Weeks after the Action brought, the Judge refused to allow it: But the Proceedings after were held to be void, and a *Superfedeas* was awarded. First because, as it was an Action of Debt upon a Bond for 200*l.* not made within the Vill, the Cause of Action did not arise within the Vill, and so was not within the

21. *Ja. 1700. c. 23.* Secondly because, as the Proceedings were before the Town Clerk, who was Attorney and not an utter Barrister, the said Act did not extend to this Case.

3. Where a Certiorari is an implied Superfedeas.

Salk. 148. Croft and Smith. A *Certiorari*, by force of these Words *coram nobis terminari volumus et non alibi*, supercedes all subsequent Proceedings, whether they are before or after the Return thereof, and although the Record, intended to be certified, is never certified.

Cro. Car. 261. Salk. 148. 2 Hawk. 291.

1 *Keb. 93. Rex and Spelman. Moor 73.* It has been held, that the issuing of a *Certiorari* is a *Superfedeas* to the inferior Court, whether it be ever delivered or not, in the same Manner as the suing out a *Superfedeas* out of the Court where a Record is, which is an Appearance upon Record, will avoid an Outlawry pronounced after, although the Writ of *Superfedeas* was not delivered to the Sheriff before the *Quinto exactus*.

Cro. Eliz. 915. Fitzwilliam’s Case. Cro. Jac. 282. 6 Mod. 61. But it is laid down in other Books, and it seems to be the better Opinion, that no *Certiorari* is a *Superfedeas*, until it is delivered to the Court or Person to whom it is directed.

Salk. 144. Rex and North. 6 Mod. 61. And in some Cases it is laid down, that if a *Certiorari*, for removing an Indictment before Justices of Peace, is not delivered before the Jury are sworn for the Trial of it, the Justices may proceed.

By the 21 *Ja. 1. c. 8. par. 7, 8.* it is enacted, “ That every Writ of *Certiorari*, for the Removal of any Indictment of Riot, Forcible Entry, or Assault and Battery, found before the Justices of the Peace at their Quarter-Sessions of the Peace, or otherwise, shall be delivered at some Quarter-Sessions in open Court, and that, in Default thereof, it shall be lawful for the said Justices to proceed to the Trial of such Indictment; any such Writ of *Certiorari* to remove the same Indictment notwithstanding.”

A Certiorari, for removing some Indictments from the Quarter-Sessions, is no Superſedeas unless delivered in open Court.

A Recognizance was also ordered by this Act to be entered into before the Allowance of a *Certiorari*: But it is unnecessary to mention the Terms thereof; because, by the 5 & 6 *W. & M. c. 11.* which extends to all Indictments found at the General or Quarter Sessions of the Peace, a Recognizance to the same Effect, but in a larger Sum, and with some new Conditions, is to be entered into before the Allowance of a *Certiorari*.

By this last mentioned Act *par. 2.* it is enacted, “ That all Parties who have been indicted shall, before the Allowance of a *Certiorari* for removing any Indictment or Presentment from the General or Quarter Sessions of the Peace, find two sufficient Manucaptors, who shall enter into a Recognizance, before one or more Justices of the Peace of the County or Place, in the Sum of twenty Pounds, with Condition to appear at the Return of such Writ, and plead to the said Indictment or Presentment, in the Court of King’s Bench; and, at his and their own Costs and Charges, to cause and procure the Issue, that shall be joined upon such Indictment or Presentment, or any Plea relating thereunto, to be tried at the next Assizes, to be held for the County wherein the said Indictment or Presentment was found, after such *Certiorari* shall be returnable, if not in the Cities of *London* or *Westminster* or in the County of *Middlesex*; and, if in the said Cities or County, then to cause or procure it to be tried the next Term after that 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 appointed by the Court of King’s Bench, then at such other Time; and to give due Notice of such Trial to the Prosecutor or his Clerk in Court; and that the said Recognizance shall be certified into the Court of King’s Bench, with the said *Certiorari* and Indictment, to be there filed; and the Name of the Prosecutor, or some publick Officer, to be indorsed on the back of the said Indictment; and if the Person prosecuting such *Certiorari*, being the Defendant, shall not procure such Manucaptors to be bound in a Recognizance as aforesaid, the Justices of the Peace may and shall proceed to the Trial of the said Indictment, at the said Sessions, notwithstanding the Delivery of such Writ of *Certiorari*.”

A Certiorari by a Defendant, for removing any Indictment from the Quarter-Sessions, is no Superſedeas without a Recognizance.

By the 8 & 9 *W. 3. c. 33. par. 2.* it is enacted, “ That the Party or Parties prosecuting any *Certiorari*, to remove any Indictment or Presentment from the Quarter or General Sessions of the Peace, may find two sufficient Manucaptors, who shall enter into a Recognizance, before any one of his Majesty’s Justices of the Court of King’s Bench, in the same Form and under the same Condition as is required by the said Act, whereof Mention shall be made on the back of such Writ under the Hand of the Justice taking the same, which shall be as effectual and as available to stay or superſede any further Proceedings upon any Indictment or Presentment, for the Removal of which the said Writ of *Certiorari* was granted, as if the Recognizance had been taken before any one of the Justices of the Peace of the County or Place, where such Indictment was found or Presentment made; and also it shall be added to the Condition of every Recognizance, taken by virtue of this Act and the Act made in the fifth and sixth Years of the Reign of King *William* and the late Queen *Mary*, that the Party or Parties, prosecuting such Writ of *Certiorari*, shall ap-

The Recognizance may be taken by one of the Justices of the King’s Bench.

- “pear from Day to Day in the Court of King’s Bench, and not depart until he or they shall be discharged by the said Court.”
- A *Certiorari*, for removing a Conviction for Deer-stealing, is no *Superfedeas* without Security to the Prosecutor for Payment of Costs. By the 3 *W. & M. c. 10.* intituled, *An Act for the more effectual Discovery and Punishment of Deer-stealers, par. 6.* it is enacted, “That no *Certiorari* shall be allowed, to remove any Conviction made, or other Proceeding of, for, or concerning, any Matter or Thing in this Act, unless the Party or Parties, against whom such Conviction shall be made, shall before the Allowance of such *Certiorari*, become bound to the Person or Persons prosecuting in the Sum of fifty Pounds, with such sufficient Sureties as the Justice or Justices of the Peace, before whom such Offender was convicted, shall think fit, with Condition to pay unto the said Prosecutors, within one Month after such Conviction confirmed or a *Procedendo* granted, their full Costs and Damages, to be ascertained upon their Oaths; and that, in Default thereof, it shall be lawful for the said Justice or Justices, and others, to proceed to the due Execution of such Conviction, in such Manner as if no *Certiorari* had been awarded.”
- A *Certiorari*, for removing a Conviction for destroying Game, is no *Superfedeas*, without Security to the Prosecutor for Payment of Costs. By the 4 & 5 *W. & M. c. 23.* intituled, *An Act for the more easy Discovery and Conviction of such as shall destroy the Game of this Kingdom, par. 7.* it is enacted, “That no *Certiorari* shall be allowed, to remove any Conviction made, or other Proceeding of, for, or concerning, any Matter or Thing in this Act, unless the Party or Parties, against whom such Conviction shall be made, shall before the Allowance of such *Certiorari*, become bound to the Person or Persons prosecuting in the Sum of fifty Pounds, with such sufficient Sureties as the Justice or Justices of the Peace, before whom such Offender was convicted, shall think fit; with Condition to pay unto the said Prosecutor, within one Month after such Conviction confirmed or a *Procedendo* granted, their full Costs and Charges, to be ascertained upon their Oaths; and that, in Default thereof, it shall be lawful for the said Justice or Justices, and others, to proceed to the due Execution of such Conviction, in such Manner as if no *Certiorari* had been awarded.”
- No *Certiorari*, for removing an Order of Justices, is a *Superfedeas* without a Recognizance for Payment of Costs. By the 5 *G. 2. c. 19. par. 2.* after reciting, that divers Writs of *Certiorari* have been procured, to remove Judgments or Orders of Justices of Peace into his Majesty’s Court of King’s Bench at *Westminster*, in hopes thereby to discourage and weary out the Parties concerned in such Judgments and Orders by great Delays and Expences; it is enacted, “That no *Certiorari* shall be allowed to remove any such Judgment or Order, unless the Party or Parties prosecuting such *Certiorari*, before the Allowance thereof, shall enter into a Recognizance with sufficient Sureties, before one or more Justice or Justices of the Peace of the County or Place, or before the Justices at their General Quarter-Sessions or General Sessions, where such Judgment or Order shall have been given or made, or before any one of his Majesty’s Justices of the said Court of King’s Bench, in the Sum of fifty Pounds, with Condition to prosecute the same, at his or their own Costs and Charges with Effect, without any wilful or affected Delay, and to pay the Party or Parties, in whose Favour and for whose Benefit such Judgment or Order was given or made, within one Month after the said Judgment shall be confirmed, their full Costs and Charges, to be taxed according to the Course of the Court where such Judgment or Order shall be confirmed; and in case the Party or Parties prosecuting such *Certiorari* shall not enter into such Recognizance, or shall not perform the Conditions aforesaid, it shall and may be lawful for the said Justices to proceed, and make such further Order or Orders, for the Benefit of the Party or Parties for whom such Judgment shall be given, in such Manner as if no *Certiorari* had been granted.”
- 2 *Roll. 492. Anon.* It has been said, that a *Certiorari*, for removing a Recognizance to appear at the next General Assizes, and in the mean Time to be of good Behaviour, is a *Superfedeas* to the Obligation of such Recognizance.

But

But it is laid down in divers other Books, that, although the Recognizance is in such Case removed by the *Certiorari*, the Defendant is bound to appear; and that in Default of Appearance it shall be forfeited.

Cro. Ja. 482.
Roffe and Pye.
Yelv. 207.
1 *Bullstr.* 156.
2 *Hawk.* 294.

4. Where a Writ of Error is in itself a Superfedeas.

A Writ of Error is to many Purposes a *Superfedeas* in itself, although no Writ of *Superfedeas* does, as it always may do, issue thereupon.

Cro. Ja. 534.
Bishop of Offo-
ry's Case.
Godb. 439.

This is partly from Necessity and partly from the Reason of the Thing.

Where the Record is, as is usually the Case, removed by the Writ of Error, it is necessarily a *Superfedeas*; for, as the Record is gone, the Hands of the Justices are so closed that they cannot award Execution.

Bro. Exec. pl.
68. *Bro. Superf. pl.* 16, 17.
Cro. Ja. 534.
Shinn. 422.

And when the Record is not removed, it would be unreasonable if the Law should suffer a Writ of Error to be brought, the Consequence of which may be the Reversal of the Judgment it is brought upon, and suffer the very same Judgment, pending this Writ of Error, to be proceeded upon.

Some of the Parties Names being left out of a Writ of Error, Execution was taken out upon the Judgment, the Plaintiff being advised that the Record was not removed by such erroneous Writ of Error: But the Court was of Opinion, that, although the Record was not thereby removed, it so bound up the Cause that Execution ought not to have issued. Such a Mistake may be a good Reason to quash the Writ of Error: But an erroneous Writ of Error is till quashed a *Superfedeas*.

1 *Mod.* 28.
Hughes and Underwood.

A second Writ of Error is not in general a *Superfedeas* in itself: but whenever a Writ of *Superfedeas* will lie, upon such second Writ of Error, it is.

Ante page
674.

But a Plaintiff, who has signed Judgment in a real Action, may, if his Entry was lawful without the Judgment, enter notwithstanding a Writ of Error is brought: For he does not enter by Force of the Judgment; and the Writ of Error shall not put him into a worse Condition than he was in before.

12 *Mod.* 398.
Badger and Floyd.

A. recovers in Debt against *B.* and sues out a *Capias ad satisfaciendum*, to which the Return is *Non est inventus*. Hereupon he sues out a *Scire facias* against the Bail, and upon the Return of this a second *Scire facias*. If before the Return of this second *Scire facias*, *B.* brings Error of the Judgment against him, this shall be no *Superfedeas* to the Proceedings against the Bail; for the Proceedings in the two Cases are by distinct Originals.

2 *Roll. Abr.*
491. *Lock and Tillard.*
2 *Roll. Abr.*
490.

So if a Man, after recovering against *J. S.* proceeds to Judgment upon a *Scire facias* against his Bail, and the Bail bring Error, this shall not supersede Execution upon the Judgment against *J. S.*

2 *Roll. Abr.*
491. *C. pl.* 5.

But, if a *Scire facias* is brought to have Execution upon a Judgment, a Writ of Error, brought upon that Judgment, shall be a *Superfedeas* to the Proceedings upon this *Scire facias*; because these are founded upon the same Original as the Judgment is.

2 *Roll. Abr.*
490. *B. pl.* 3.

Upon this Distinction, betwixt Proceedings founded upon the same or different Originals, it was formerly held, that, although no Writ of Execution can, pending a Writ of Error, issue upon a Judgment, an Action of Debt may be thereupon brought; because such Action is by a new Original.

Bro. Err. pl.
170. 2 *Roll. Abr.* 490. *B. pl.* 4. *Dy.* 32.

This Doctrine was however in very early Days questioned, and many Attempts have from Time to Time been made to overthrow it.

As the Record is usually removed by a Writ of Error, it was once pleaded to an Action of Debt upon a Judgment, that the Record was removed: But the better Opinion of the Court was, that notwithstanding such Removal this Action lies.

Dy. 32. *Anon.*

- Raym.* 100. In another Book it is, for the Sake of getting rid of the Difficulty which arose from the Record being removed, laid down, that an Action of Debt upon a Judgment, where it is brought before a Writ of Error, lies, but that, if Error is brought first, the Action does not lie.
- Adams and Tomlinson.*
- Skinn.* 388. In answer to this Distinction, the Case of *Limbuy* and *Langham*, which is cited by *Dolben* in a Case in *Skinner*, and mentioned in Sir *Thomas Dighton*, *Raymond*, has been relied upon; wherein it was held by all the Judges, that a Writ of Error, whether brought before or after such Action, is no *Superfedeas* to an Action of Debt upon a Judgment.
- Raym.* 100.
- Carth.* 1. At another Time a Plea in Bar was pleaded to an Action of Debt upon a Judgment. This was on a Demurrer held ill; but the Opinion of the Court of King's Bench was, that a Plea in Abatement would have been good.
- Rogers and Mayboe, Trin.*
3 *Ja.* 2.
- Carth.* 1. And in the same Term, a Plea in Abatement to such an Action was held good by the Court of King's Bench.
- Aby and Buxton, Trin.*
3 *Ja.* 2.
- Show.* 146. But another Plea of the same kind was shortly after held bad; and it was laid down, that a Plea in Abatement is as insufficient in such Case as a Plea in Bar; and that such Plea had never, except in this last Case of *Aby* and *Buxton*, been held good.
- Rottenboffer and Lentball.*
Pasch. 2 *W.*
E & M.
- Sid.* 236. At another Time a Distinction was taken, between an Action upon a Judgment of the Court of King's Bench, and one upon a Judgment of the Court of Common Pleas, or of any other Court, out of which the Record is removed by a Writ of Error; and it was held, that a Writ of Error is no *Superfedeas* to such an Action in the Court of King's Bench, because the Record, only a Transcript of it being sent, upon the bringing a Writ of Error, into the Court of Exchequer or House of Lords, remains in Court: But a Doubt was made, if such Action would lie in the Court of Common Pleas.
- Adams and Tomlinson, Hil.*
16 *Car.* 2.
1 *Lev.* 153.
1 *Mod.* 121.
Str. 837.
- But, this Distinction, which would have been prejudicial to the Court of Common Pleas, was contrary to what had been laid down in divers Books.
- As long ago as the seventh Year of *Henry* the Sixth it had been held, that an Action would lie in the Common Pleas, upon a Judgment of that Court, notwithstanding a Writ of Error was brought.
- 4 *H.* 6. 31.
Bro. Exec. pl.
68. 18 *E.* 4.
6. b.
- And in divers Cases it had been held, that a Writ of Error is only a *Superfedeas* so far as to bind the Hands of the Court that no Execution can be awarded upon a Judgment.
- 2 *Roll. Abr.*
491. *D. pl.* 3.
1 *Lev.* 153.
12 *Mod.* 391.
- Upon the Strength of these Authorities it was, not many Years after the Doubt made in the Court of King's Bench, resolved in the Court of Common Pleas, that, although the Record is removed, an Action of Debt upon a Judgment would lie there.
- 3 *Lev.* 397.
Gale and Hill.
Pasch. 6 *W.*
E & M.
- But at length Courts of Justice, who had been long dissatisfied with such Actions, hit upon a Method of preventing the Effect of an Action of Debt brought, pending a Writ of Error, upon a Judgment. This was, and indeed there was no other Way of doing it, without at once determining contrary to a great Number of Cases, by making a Rule that, on giving Judgment in such Action, Execution should be stayed till the Writ of Error was at an End.
- Skin.* 388. This Practice seems to have been introduced early in the Reign of *Anne*: For in the fifth Year of the Reign of *William* and *Mary*, *Holt*, Ch. J. and the whole Court held with great Reluctance, that such an Action did lie; and no Notice is there taken of any Method to render it ineffectual.
- Granville and Dighton.*

But in a Case, which was in the fifth Year of Queen Anne, the Law is said to be settled, that a Writ of Error is a *Superfedeas* to all Proceedings whatsoever upon a Judgment. 11 Mod. 78. Anon.

There is certainly an Inaccuracy in this Book; for it appears from much later Cases that, unless Application is made to the Court to stay the Proceedings, an Action of Debt upon a Judgment may not only be brought, pending a Writ of Error, but that Execution may be taken out upon the Judgment obtained in such Action. 1 Barn. 140. Humphry's and Daniel, East. 9 G. 2. Ibid. 143. Clark's and Physick, M. 13 G. 2.

This being so, it could not, in the fifth Year of Queen Anne, have been settled Law, that a Writ of Error supercedes all Proceedings upon a Judgment: But it was probably about that Time settled, that where a Writ of Error is brought the Court will, upon Application and giving Judgment in an Action of Debt upon the Judgment, order Execution in such Action to be stayed, until the Writ of Error is determined.

(E) Of some Requisites which are necessary to the making a Writ of Error a Superfedeas in itself.

A Writ of Error may be good to other Purposes: But it is not a *Superfedeas* in itself, unless certain Requisites have been complied with.

1. It must be allowed.

It has been held, that a Writ of Error is a *Superfedeas* from the Time of sealing it. 1 Mod. 28. Hughes and Underwood. 1 Vent. 30. 1 Keb. 12.

But the better Opinion is, that a Writ of Error is no *Superfedeas* until allowed by the Clerk of the Errors, except Notice of such Writ being sued out is given to the Defendant in Error. Salk. 321. Perkins and Woolaston. 1 Vent. 255. 1 Mod. 112. 6 Mod. 130. Popb. 132. 8 Mod. 147.

As no Writ of Error can be allowed until signed by the Chief Justice to whom it is directed, if he dies before the signing of it it is no *Superfedeas*. Sid. 268. Allen and Sharw. 1 Barn. 139.

Notice to the Defendant of a Writ of Error being brought is only a temporary *Superfedeas*: For, if the Writ of Error is not allowed within four Days after suing it out, Execution may notwithstanding such Notice be taken out. 1 Mod. 112. Lampiere and Mereday. 1 Vent. 255. 2 Keb. 129.

The Allowance of a Writ of Error, although no actual Notice be given, makes it a *Superfedeas*: But, although it is from the Time of Allowance a *Superfedeas*, an Attorney, who sues out Execution after the Allowance, is not guilty of a Contempt unless he has had actual Notice thereof. Salk. 321. Perkins and Woolaston. 6 Mod. 130. 2 Roll. Abr. 492. 1 Vent. 30. Rep. of Praet. in C. B. 35, 39. Str. 632. 1 Mod. 148.

Other Writs of Error are allowed of Course, by the Clerk of the Errors: But a Writ of Error *coram vobis* cannot be allowed without Leave of the Court obtained upon Motion. Ser. 949. Horne and Bussel. 1 Vent. 207.

2. Bail must be put in to it.

³ *Ja. 1. c. 8.* In all Cases, where Bail must be put in before a Writ of *Superfedeas* can be had upon bringing a Writ of Error, Bail must be put in before such Writ of Error is a *Superfedeas* in itself.

¹³ *Car. 2. ff. 2. c. 2. 16 & 17*

^{Car. 2. c. 8.}

Ante 672, 673.

² *Keb. 129.*

Warcop and Pallavicine.

¹ *Keb. 690.*

The Dean of St. Paul's and Capel.

³ *Lev. 312.*

¹ *Barn. 138,*

^{139.} *Mason and Simmonds.*

⁸ *Mod. 80.*

^{Str. 527.}

^{Salk. 97.} *Tilly and Richardson.*

⁸ *Mod. 80.*

^{Str. 527.}

³ *Ja. 1. c. 8.*

Sed per Cur'.

Bail to a Writ of Error must be put in within four Days after it is allowed, else it is no longer a *Superfedeas*.

Execution having been taken out, after special Bail was put in to a Writ of Error, because no Notice was given of the Bail being put in, a *Superfedeas* was granted to this Execution; *Et per Cur'*: The putting in of Bail, if no Exception is taken thereto, is sufficient to stay Execution. The giving of Notice is not of Necessity; and is only done for the Sake of making the Party, who afterwards takes out Execution, liable to be proceeded against for a Contempt.

In an Action against five Defendants, Damages of twenty Pounds were given upon a Trial against four of them, and five Shillings against the other, who had suffered Judgment to go by Default. A Writ of Error was brought by the four, in the Name of him against whom the Judgment by Default was; and as he was not obliged to put in Bail none was put in: But the Court gave Leave to take out Execution notwithstanding this Writ of Error.

Error was brought in the King's Bench of a Judgment in the Common Pleas; and the Judgment was affirmed. Upon bringing Error afterwards in Parliament, it was insisted, that no new Recognizance was required by the ³ *Ja. 1. c. 8.* *Sed per Cur'*: The first Recognizance does not include the Payment of Cofts to be assessed in the House of Lords; and therefore a new Recognizance ought, within the Intent of that Statute, to be entered into. It is not the Business of this Court to enquire, whether Bail was or was not put in to the first Writ of Error? For the Want of Bail does not hinder the Proceedings upon a Writ of Error, and only prevents it from being a *Superfedeas*.

3. It must be proceeded in without Delay.

^{Sid. 44.} *Anon.* A Motion was made in *Michaelmas* Term, that the Return of a Writ of Error, brought upon a Judgment of the Court of King's Bench, which was made returnable in the Exchequer in the *Hillary* Term following, might be shortened; or that the Court would award Execution. As to the first Point the Court said, that, as the Writ had issued from the Court of Chancery, they had no Power to make any Alteration in it. As to the second, that the Law is open to all Men; and, if the Return be as suggested, there is no Doubt but Execution may be taken out: For, where a Writ of Error is sued out with a long Return, it is no *Superfedeas*.

¹ *Ventr. 31.* Upon this Principle it has been held, that a Writ of Error returnable *ad proximum Parliamentum* is no *Superfedeas*; and that, if a Term intervenes, Execution may notwithstanding such Writ be taken out.

^{Wortly and Holt. 2 Lev. 93.} If there be too long a Day between the Teste and the Return of a Writ of Error, or if the Plaintiff in Error does not remove the Record before the Day of the Return, Execution may be taken out; for it plainly appears, that this Writ of Error is brought merely for Delay.

^{Sid. 454.} A Writ of Error being brought in Parliament, returnable the first Day of the Session, the House was moved, that, if the Plaintiff in Error did not transcribe the Record within eight Days, Execution might be taken out. A Rule was made to shew Cause: But it was after discharged; for as, by the

^{Jenk. 93. pl. 80.} Order

^{2 Roll Abr. 491.}

^{Com. 420.}

^{Barnes and Orway.}

²

Order of the House of the 13th Day of July 1678, fourteen Days, after the beginning of the Session in which such Writs are returnable, are given to transcribe the Record, it is not reasonable, that the Plaintiff in the Original Cause should take out Execution within that Time.

But, where the Record was not transcribed within the fourteen Days, it *Bunb. 69:* was ordered, upon Motion of the Defendant in Error, that the Record *Frost and* should be transcribed in eight Days, and certified into Parliament, or that *Darwin.* the Defendant in Error might be at Liberty to take out Execution.

(F) To What Time a Writ of Error does as a Superfedeas relate.

ALTHOUGH the Teste of a Writ of Error is before the Judgment is *1 Mod. 112:* given, it is good, provided the Judgment be given before the Return *Anon.* of it, to remove the Record; and whenever the Judgment is entered, it has *1 Barn. 131:* Relation to the first Day of the Term, so that a Writ of Error, returnable the first Day of a Term, will remove the Record of any Judgment entered in that Term or the following Vacation.

A Writ of Error being returnable on the Effoin Day of Hilary Term, *1 Barn. 134:* and final Judgment not being signed till three Days after the Effoin-Day, the Plaintiff, apprehending that the Record of the Judgment was not removed *White and* by this Writ of Error, took out Execution: But it was set aside with Costs; *Morgan.* for, as the Judgment relates to the Effoin-Day and the Court will not make a Fraction of a Day, this Record was well removed.

The Plaintiff having obtained a Verdict at an Assizes in the long Vacation, *3 Lev. 312:* the Defendant brought a Writ of Error, which was allowed and Bail put in on *Smith and* the 24th of the October following. The Plaintiff on the 27th Day of *Cave.* October entered Judgment generally, took out Execution Teste the first Day of *Hob. 329.* the Term, and had it executed before any Notice was given him of the Writ *8 Mod. 148:* of Error: But Restitution was awarded, for, by the Allowance and putting in of Bail to the Writ of Error, the Hands of the Court are so closed, that the Execution, although no Notice was given, is void. The Judgment does indeed here, the Entry being general, relate to the first Day of the Term, *viz.* The 23d Day of October, and the Execution is of the same Date, so that both are antecedent to the Allowance of the Writ of Error, which was on the 24th Day of October: But, as the Judgment is founded upon a Verdict in the Vacation, it could not, by the Rules of the Court, be entered up till the *Quarto die post, viz.* till the 27th of October, before which Day the Writ of Error was allowed.

Execution having been taken out upon a Judgment signed in Trinity Va- *1 Barn. 131:* cation, after the Return of a Writ of Error returnable *tres Trin.* it was set *Warwick and* aside with Costs; *Et per Cur:* The Plaintiff could not regularly sign his Judg- *Figg.* ment, and take out Execution thereon, till the Michaelmas Term following; because, as this Judgment, although signed in the Vacation, relates to the first Day of the preceding Term, it was signed before the Return of the Writ of Error, and consequently the Writ of Error was a Superfedeas to the taking out of Execution.

A Plaintiff did not sign his Judgment till after the Return of a Writ of *Rep. of Pr. in* Error. The Court, on hearing his Matter fully debated, declared that the *C. B. Harding* Plaintiff might sign his Judgment when he pleased, and that, it not being *and Avery,* signed till after the Return thereof, the Writ of Error did not attach *M. 2 G. 2:* upon it.

Rep. of Pr. in C. B. 71. *Duffield and Warden, East.* 5 G. 2. It is however said, that, where the Plaintiff, who had been called upon to do it, delayed to sign his Judgment until the Writ of Error was returned, the Court ordered him to pay the Defendant his Costs, and sue out a new Writ of Error at his own Expence. But the Reporter cites the last Case of *Harding and Avery*, and says *Quere tamen*; for it does not appear, that the Plaintiff has in this Case at all misbehaved himself.

(G) What the Effect of a Superfedeas is.

Cro. Ja. 379. *Withers and Henley.* 3 *Bull.* 97. 1 *Roll. Rep.* 241. *Fitzh. N. B.* 236. **I**N Demurrer, to an Action of false Imprisonment against a Sheriff, it was insisted, that, if the Sheriff has arrested a Man, by virtue of a *Capias* or an Exigent, before a Writ of *Superfedeas* is delivered to him, he is not bound, as the Arrest was lawful, to discharge him upon the Delivery of such Writ, but that he may return the Writ, by virtue of which he arrested him, and the Prisoner together with the *Superfedeas* for the Court to do as they think proper: But all the Court held, that the *Superfedeas* was as obligatory upon the Sheriff to discharge the Person arrested, as the first Process was to arrest him; and that, as he did not obey it, he is liable to an Action of false Imprisonment.

1 *Ventr.* 2. *Anon. Fitzh. N. B.* 237. *Jenk.* 92. *pl.* 80. *Jenk.* 92. *pl.* 89. But, if a *Capias ad satisfaciendum* has issued upon a Judgment, and the Defendant is taken into Custody, the Sheriff is not obliged to discharge him, although a *Superfedeas* is delivered or he has Notice of a Writ of Error; because he is in this Case taken in Execution.

If the Person however, who is taken in Execution by virtue of a *Capias ad satisfaciendum*, has a *Superfedeas* in his Pocket, and delivers it immediately upon being arrested, he shall be discharged; for *Quæ sunt incontinenti inesse videntur*.

1 *Barn.* 261. *Peachy and Borves.* After the Reversal of a Judgment by Writ of Error, the Defendant, who was in Custody, sued out a Writ of *Superfedeas*. Before she could get it allowed, the same Plaintiff charged her with a new Declaration: But she was, notwithstanding this Declaration, discharged by a Rule of Court.

1 *Ventr.* 30. *Cotton and Daintry.* *Rep. of Pr. in C. B.* 35, 39. If Goods are taken in Execution, after the suing out a Writ of *Superfedeas* or the Allowance of a Writ of Error, the Court, although the former was not delivered to the Sheriff nor any Notice given to him of the latter, will order a Restitution of the Goods; or, if they have been sold, the Money to be brought into Court.

2 *Roll. Abr.* 491. *Sare and Shelton.* It has been held, that, if Goods are seized by virtue of a *Fieri facias*, but before Sale of them the Defendant brings Error, and delivers a *Superfedeas* to the Sheriff, he shall have his Goods again; for that the Property is not altered by such Seizure.

2 *Roll. Abr.* 492. *D. pl.* 6. *Ibid.* 493. *H. pl.* 2. *Dy.* 98. *Yelv.* 6. But this Case does not seem to be Law; for it is laid down in many Books, that, if an Execution is began to be executed, it shall notwithstanding the Delivery of a *Superfedeas* or the Allowance of a Writ of Error proceed. 1 *Ventr.* 255. *Salk.* 323. *Ld. Raym.* 990.

Cro. Eliz. 597. *Charter and Peter.* A Sheriff had seized Goods by virtue of a *Fieri facias* upon a Judgment of the Court of King's Bench: But the Record was, before the Sale of them, removed by a Writ of Error into the Exchequer Chamber, and a *Superfedeas* was awarded. Upon the Return of the Sheriff to the *Fieri facias*, that he had seized the Goods, and that they remained in his Hands *pro Defectu Emptorum*, Restitution was prayed for the Defendant: But all the Court held, that, as the Sheriff had began to make Execution before the *Superfedeas* was delivered to him, a *Venditioni exponas* shall be awarded to perfect

perfect it; and, although the Plea Roll is removed by the Writ of Error, this may be awarded from the Return of the *Fieri facias* which is filed.

If a Writ of Execution, however, has issued contrary to a Rule of Court, *Jenk.* 93. or upon a Judgment entered up before it was pronounced, it shall, although *pl.* 80. it has been executed, be set aside *quia improvide emanavit*.

Where a Man, who has been taken in Execution and his Lands extended upon a Statute Merchant, brings an *Audita querela*, his Person shall be discharged by a *Superfedeas*: But, as this is only to give him an Opportunity to prosecute his *Audita querela*, he shall if that does not aid him be taken into Custody again. *2 Roll. Abr.* 493. *Whidnet and Conyers.*

(H) How Disobedience to a *Superfedeas* may be punished.

IF a Sheriff or other Officer detains a Person in Custody, who is arrested by virtue of a *Capias* or an Exigent, after a Writ of *Superfedeas* is delivered to him, an Action of false Imprisonment lies. *Cro. Ja.* 379. *Wythers and Henley.* *1 Roll. Rep.* 241. *3 Bulstr.* 917. *Fitzb. N. B.* 236.

But none lies for detaining a Man who is arrested upon a *Capias ad satisfaciendum*: Because he is taken in Execution. *1 Ventr.* 2. *Anon. Fitzb. N. B.* 237. *Jenk.* 92. *pl.* 80.

A Judge of an inferior Court is liable to be punished for a Contempt, if he proceeds in a Cause after the Delivery of a *Habeas Corpus*, or Notice of the Allowance of a Writ of Error. *2 Hawk.* 151.

So is a Sheriff for proceeding in any Cause, in his County Court, after the delivery of a Writ of *Superfedeas*. *Fitzb. N. B.* 14. *Fitzb. Replev.* 31.

So is the Judge of a Spiritual Court, if he proceeds in a Cause after Notice of a Rule to shew Cause why a Prohibition should not go. *2 Jones* 47. *Wainwright's Case.* *2 Hawk.* 151.

Justices of the Peace, or Commissioners of Sewers, are liable to be punished by an Attachment for a Contempt, if they proceed in any Matter before them after the Delivery of a *Certiorari*. *Moor* 677. *Fitzwilliams's Case.* *1 Mod.* 44. *Cro Eliz.* 915. *2 Hawk.* 251.

A Sheriff, who takes any Person or the Goods of any Person in Execution, after the Delivery of a Writ of *Superfedeas*, or Notice of the Allowance of a Writ of Error, is liable to be punished for his Contempt. *1 Ventr.* 30. *Cotton and Daintry. Rep. of Pr. in C. B.* 35.

If an Attorney takes out Execution, after Notice of the Allowance of a Writ of Error, he is guilty of a Contempt. *1 Barn.* 275. *Hannot and Farrettes. Rep. of Pr. in C. P.* 35.

Surety of the Peace.

SURETY of the Peace is a Recognizance to the King, taken by a competent Judge, for keeping the Peace.

In treating of this the following Order shall be observed.

- (A) In what Cases a Justice of Peace may ex Officio take Surety of the Peace.
- (B) Who may require Surety of the Peace.
- (C) Against whom Surety of the Peace may be demanded.
- (D) In what Cases Surety of the Peace ought to be granted.
- (E) Of the Manner of granting Surety of the Peace from the Court of Chancery.
- (F) How Surety of the Peace is granted by the Court of King's Bench.
- (G) Of the Manner of granting Surety of the Peace by a Justice of the Peace.
- (H) Of the Forfeiture of a Recognizance for keeping the Peace.
- (I) In what Manner a Recognizance for keeping the Peace may be discharged.

(A) In What Cases a Justice of the Peace may ex Officio take Surety of the Peace.

Lamb. 77, 78.
Bro. Peace,
pl. 7, 8.
1 Hawk. 126. **A** Justice of the Peace may, according to his Discretion, bind all those to keep the Peace, who, in his Presence, shall make any Affray, or shall threaten to kill or beat any Person, or shall contend together with hot Words; and all those who shall go about with unusual Weapons or Attendants, to the Terror of the People; and all such Persons as shall be known by him to be common Barrators; and all who shall be brought before him by a Constable, for a Breach of the Peace in the Presence of such Constable; and all such Persons who, having been before bound to keep the Peace, shall be convicted of having forfeited their Recognizance.

I

(B) Who

(B) Who may require Surety of the Peace.

ALL Persons under the King's Protection, being of *sane* Memory, whether they are natural born Subjects or Aliens; good Subjects or attainted of Treason or some other Crime, have a Right to demand Surety of the Peace. *Lamb. 78. 79, 80. Hawk. 126.*

But it has been questioned whether Jews, Pagans, or Persons attainted of *Premunire* have a Right to it? *Lamb. 80. Hawk. 126.*

A Wife may demand Surety of the Peace against her Husband, if he threatens to beat her outrageously, or to kill her. *Fitz. N.B. 80. Lamb. 80. 2 Lev. 128. Hawk. 127.*

A Woman exhibited Articles of the Peace, stiling herself the Wife of the Defendant, setting out Acts of Cruelty, and the Pendency of a Suit in the Ecclesiastical Court for the Restitution of Conjugal Rights. When the Defendant came to put in Bail, he insisted, that the Recognizance should not be taken so as to carry with it any Admission of the Marriage: And the Court ordered it to run thus; "To keep the Peace towards our Sovereign Lord the King, and all his liege People, and particularly towards *Hannab Pemm*, who hath exhibited Articles of the Peace against him the said *James Bambridge*, by the Name of *Hannab Bambridge* Wife of him the said *James*", &c. *Str. 1231. Rex and Bambridge.*

Articles of the Peace may be exhibited by a Husband against his Wife. *Str. 1207. Sim's Case. Hawk. 127.*

Surety of the Peace is usually granted at the Request of some one Person, for the Fear of one Man can scarce ever be the Fear of another; and, if it is demanded against two or more, each ought to enter into a separate Recognizance for keeping the Peace. *Pult. 13.*

(C) Against Whom Surety of the Peace may be demanded.

SURETY of the Peace may be had against every Person whatsoever, being of *sane* Memory, whether he is Peer or Commoner; Magistrate or private Person; of full Age or under Age. *Lamb. 81. Hawk. 127.*

But Infants and Females Covert ought to find Security by their Friends, and not to be bound themselves. *Hawk. 127. Lamb. 81.*

(D) In what Cases Surety of the Peace ought to be granted.

WHENEVER a Person has just Cause to Fear that another will burn his House; or do him some corporal Hurt, as by killing or beating him; or that he will procure others to do him such Mischief, he may demand the Surety of the Peace against such Person. *Lamb. 82. Hawk. 127. Str. 473.*

- Bro. Peace,*
pl. 22. It is said, that Surety of the Peace shall not be granted for fear of Imprisonment; because Damages may be recovered in an Action of false Imprisonment.
- Lamb. 83.*
1 Harwk. 127. But the better Opinion is that it may; for every unlawful Imprisonment is an Assault and Injury. The Reason given, that an Action will lie, is no more conclusive in this Case than in the Case of a Battery: For an Action will lie for a Battery; and yet there is no Doubt but Surety of the Peace may be granted for threatening to beat.
- Mo. 874.*
Sir Thomas Seymour's Case.
Godb. 215.
Fitz. N. B. 80.
1 Keb. 290.
Rex and Douglas. Surety of the Peace may be demanded by a Wife, if her Husband gives her unreasonable Correction.
- Lamb. 83.* Some Persons having made a Disturbance in a Church, and pulled the Minister, who was reading the Common Prayer, out of the Desk, an Attachment of the Peace was, on exhibiting Articles in the Court of King's Bench, issued against them.
- Lamb. 83.* But Surety of the Peace ought not to be granted to a Man for fear of Danger to his Servant, or Cattle.
- Dalt. 265.* It has however been said, that a Man may have the Surety of the Peace against one who threatens to hurt his Wife or Child.
- Dalt. 266.* The Surety of the Peace ought not to be granted for any past Battery, unless there is a Fear of some present or future Danger: But the Offender must in such Case be punished by Action or Indictment.
- 6 Mod. 132.*
The Queen and Lane The Demand of the Surety of the Peace ought to be soon after the Cause of Fear; for the suffering much Time to pass, before it is demanded, shews that the Party has been under no great Terror.

(E) Of the Manner of granting Surety of the Peace from the Court of Chancery.

Fitz. N. B.
79, 80.

AT the Common Law it was sufficient, in order to obtain Process for Surety of the Peace from the Court of Chancery, if the Party who demanded it made Oath, that he was in Fear of some corporal Hurt, and that he did not crave the same out of Malice, but for the Safety of his Body.

All Process of the Peace to be void, if granted without Motion in Court and exhibiting Articles of the Peace.

But by the 21 *Ja. 1. c. 8.* after reciting, that divers turbulent and contentious Persons, some out of Malice, and others in hope of Gain by way of Composition, do oftentimes upon their corporal Oaths, or otherwise upon false Suggestions and Surmises, procure Process of the Peace or good Behaviour, out of his Majesty's Courts of Chancery and King's Bench, against divers of his Majesty's quiet Subjects, whose Dwellings and Abodes are, for the most part, in Countries far distant and remote from the said Courts, to their intolerable Trouble and Vexation, whereas they might, upon good Cause shewed, receive Justice at the Hands of the Justices of the Peace in the Counties where they dwell, it is enacted, " That all Process of the Peace or good Behaviour, to be granted or awarded out of the said Courts, or either of them, against any Person or Persons whatsoever, at the Suit of or by the Prosecution of any Person or Persons whatsoever, shall be void and of none Effect, unless such Process shall be so granted, or awarded, upon Motion first made before the Judge or Judges of the the same Courts respectively, sitting in open Court; and upon Declaration in Writing, upon their corporal Oaths, to be then exhibited unto them, by the Parties which shall desire such Process, of the Causes for
" which

“ which such Proceſs ſhall be granted or awarded, by or out of the ſaid
 “ Courts reſpectively, and unleſs that ſuch Motion and Declaration be men-
 “ tioned to be made upon the back of the Writ, the ſaid Writings there
 “ to be entered and remain of Record: And if it ſhall afterwards appear to
 “ the ſaid Courts, or either of them reſpectively, that the Cauſes expreſſed
 “ in ſuch Writings, or any of them be untrue, that then the Judge or
 “ Judges of the ſaid Courts, or either of them reſpectively, ſhall and may
 “ award ſuch Coſts and Damages unto the Parties grieved, for their or any
 “ of their wrongful Vexations in that Behalf, as they ſhall think-fit; and
 “ that the Party or Parties ſo offending ſhall or may be committed to Priſon by
 “ ſuch Judge or Judges, until he or they pay the ſaid Coſts and Damages.”

When Articles of the Peace are exhibited in the Court of Chancery, and *Fitz. N. B. 80.*
 Oath is made that the Surety of the Peace is not craved by the Party through
 Malice, but for the Safety of his Life, a Writ of *Supplicavit* iſſues; directed
 to the Juſtices of the Peace generally, or to ſome one Juſtice of the Peace,
 or to the Sheriff, commanding them or him to take Security in the Sum
 thereon indorſed, and, if the Party refuſes to find ſuch Security, to commit
 him to the next Gaol, until he does find ſuch Security.

Where the Writ is directed to the Sheriff, he may iſſue a Precept to a *Ero. Offic.*
 Bailiff to arreſt the Party, but only himſelf can take the Security or make a *pl. 39.*
 Return to the Writ; for the Power given by the Writ, it being a judicial *Fitz. N. B. 81.*
 one, cannot be aſſigned over.

If the Writ is directed to the Juſtices of the Peace generally, only he to *Bro. Peace,*
 whom it is delivered can grant a Warrant to compel the Party to find Sure- *pl. 9.*
 ties. The Warrant muſt alſo be returnable before him alone; for he alone *Lamb. 107.*
 can take the Recognizance and make Return to the Writ.

The Recognizance muſt, in this Caſe, be in ſuch Sum as is indorſed *1 Hawk. 129.*
 upon the Writ of *Supplicavit*. *Lamb. 101.*

This is ſometimes very large. A Writ of *Supplicavit* was once indorſed *2 Will. 202.*
 in the Sum of 4000 *l.* *Clawering's*
Caſe.

If no Return is made to the Writ of *Supplicavit*, the Party who ſued *Fitz. N. B. 81.*
 it out may have a *Certiorari*, directed to the Perſon who ought to make *1 Hawk. 129.*
 a Return, commanding him to certify the Writ of *Supplicavit*, and what *Lamb. 108,*
 has been done thereupon. *109.*

When a Writ of *Supplicavit* has iſſued from the Court of Chancery *Fitz. N. B.*
 againſt any Perſon, he may by himſelf, or ſome Friend, come into the *81, 238.*
 Court of Chancery, and find Sureties there that he will not do any harm to
 him who hath ſued out the Writ; and thereupon he ſhall have a Writ of
Superſedeas, reciting the Writ of *Supplicavit* and the Security given, directed
 to the Juſtice or Juſtices of the Peace, or to the Sheriff, commanding that
 they ſurceaſe to arreſt him, or compel him to find Sureties, and, if they have
 arreſted him for that Cauſe and no other, that they deliver him.

(F) How Surety of the Peace is granted by the Court of King's Bench.

AT the Common Law the Oath of the Party was a ſufficient Ground *Fitz. N. B.*
 for the Court of King's Bench to grant the Surety of the Peace; but *79, 80.*
 this cannot, ſince the Statute made in the twenty-ſiſt Year of the Reign *Ante page 698.*
 of King James the Firſt, be done, unleſs Articles of the Peace are exhibited
 in this Court upon Motion in open Court.

Mullineux, who had been taken into Cuſtody by a *Supplicavit* out of the *Skin. 61.*
 Court of Chancery, being brought by a *Habeas Corpus* before Jones Juſtice *Mullineux's*
 VOL. IV. 8 N of *Caſe.*

of the King's Bench, he was bound by a Recognizance to appear in the Court of King's Bench the first Day of the next Term. He appeared at the Time; and the Court was moved, that the Articles exhibited in the Chancery might be read, and that he might enter into a Recognizance: But it was refused, *Et per Cur'*: The Record is not before us, but, if the Witnesses who swore to the Articles in Chancery, had been here and had sworn Articles to the same Effect in Court, we could have taken Security for the Peace.

*Comb. 427.
Russell's Case.
Fitzb. N.B. 79.*

When Articles of the Peace are exhibited in the Court of King's Bench, and Oath is made, that the Party does not crave the Security of the Peace out of Hatred or Malice, but merely for the Preservation of his Life and Person from Danger, an Attachment of the Peace issues to the Sheriff, commanding him to take a Bond for the Appearance of the Party at the Return of the Writ, to put in Bail to the Articles in this Court; and, if such Bond is not given, to commit the Party to the next Gaol.

*6 Mod. 132.
The Queen
and Lane.*

When the Party, against whom Articles of the Peace are exhibited, comes into Court to put in Bail, the Articles must be read to him.

*Str. 1202.
Lord Vane's
Case.*

Articles of the Peace having been exhibited against Lord *Vane*, and Process of the Peace having issued upon them, it was insisted, when he came to put in Bail, that the Facts charged were not a sufficient ground for demanding Surety of the Peace; or, if sufficient, that the Facts were false, and Affidavits were offered to disprove them. The reading of these Affidavits was opposed, and it was said, that the Course of the Court had always been to give such Credit to the Oath of the Party as to order Security: But it was admitted, that the Court might review the Articles, and hear any Objections arising upon the Face of them. *Per Cur'*: This is all we can do, the other was never attempted before; and we must adhere to the Course of the Court, by taking the Articles to be true. Upon reviewing these Articles, the Court was of Opinion, that the Facts, as stated, were a sufficient Ground for granting the Surety of the Peace, and Security was given.

*M. S. Rep.
Rex and Sir
Thomas Allen,
Bart. and
others, Hil.
32 G. 2.*

Robert Parnel having exhibited Articles of the Peace against Sir *Thomas Allen*, Bart. and three others, an Attachment of the Peace issued against them. Before Bail was put in, *Parnel*, in a Petition to the Court, recited some of the Facts sworn to in the Articles, and endeavoured to explain them. Hereupon the Counsel for the Defendants moved for a Rule to review the Articles, and some Affidavits were read to contradict the Facts therein charged. Upon reading this Petition, and these Affidavits, in which the Facts were flatly contradicted by five or six Persons, a Rule was made to shew Cause, why the Articles should not be reviewed, and that *Parnel* should attend upon the Day for shewing Cause. He did attend, and the Court was, upon the whole, so satisfied of his having been guilty of Perjury, that he was immediately committed for wilful and corrupt Perjury; and a Rule was made, that all farther Proceedings upon the Articles should stay. The Rule was pronounced in these Terms, and not to take the Articles off the File, in order to give the Defendants an Opportunity, which could not otherwise have been done, of prosecuting *Parnel* for Perjury.

*M. S. Rep.
Rex and Ben-
net and others.
Easf. 32 G. 2.*

Articles of the Peace having been exhibited, by *John Brown*, against *Hannah Bennett*, and three others, a Rule was, upon reading the Affidavits of the Defendants, made to shew Cause, why these Articles should not be reviewed. In these Affidavits it was sworn, that the Defendants did not know any such Person as *Brown* the Articulant, and, besides other strong Facts sworn to, it was suggested, that this was a Contrivance of the Defendant *Bennett's* Husband to oppress her. No Cause being shewn, the Articles were ordered to be taken off the File.

*Str. 835.
Rex and
Lowis.*

A Motion being made for a *Mandamus* to three Justices of the Peace in the County of *Brecon*, to take Security upon Articles of the Peace exhibited in the Court of King's Bench, an Affidavit was produced, that the Defendant,

who lived in that County, was seventy Years of Age and unable to travel, and *Seymour's Case*, *M. 6 Ann.* was cited. A *Mandamus* was in this Case granted.

In a late Case a Motion of this Kind was refused; and by *Denison*, J. *M. S. Rep. Rex and Sroud, Mich. 29 G. 2. Comb. 427.* such a *Mandamus* has of late Years been granted but once, in the *King and Lewis*; and there the Court had great Doubt, although the Circumstances of that Case were very peculiar, as to the granting it.

It is a very great Grievance, that it should be in the Power of one Man to compel another, who lives perhaps in the most remote Part of *England*, to appear and put in Bail to Articles of Peace exhibited in the Court of King's Bench, when he might have had the Surety of the Peace from a neighbouring Justice; and it was the Opinion of the Court of King's Bench many Years ago, that this Mischief, although not provided against by the enacting (a) *Ante page 698.* Clause of that Statute, is within the Equity of the (a) 21 *Ja. 1. c. 8.*

Upon a Motion, on the Behalf of *Russel*, to exhibit Articles of the Peace *Comb. 427. Russel's Case.* against seven or eight Persons, who lived at *Nottingham, Holt*, Ch. J. said then we shall give seven or eight Persons the Trouble to come up to put in Bail, why did you not go to the Justices of the Peace in the County? The Complainant answered, I could not have had Justice there, they are Relations. Hereupon the Motion was granted, *sed hesitanter.*

It has not of late Years been the Practice, of the Court of King's Bench, to refuse the receiving of Articles of the Peace, where the Charge contained in them is sufficient for craving the Surety of the Peace: But it seems, as if that Court is now come to a Resolution of putting a Stop to this Vexation of the Subject: For in a very late Case, where a Motion was made by *Borough*, to exhibit Articles of the Peace against *Wait*, the Court, it appearing that *Wait* lived at the *Devizes*, and that *Borough* had not endeavoured to obtain the Surety of the Peace in the County, unanimously refused the Motion; and by Lord *Mansfield*, Ch. J. Apply to the Magistrates of the County, and if Surety of the Peace is not granted you, come here again. *M. S. Rep. Borough's Case, East. 32 G. 2.*

When Surety of the Peace is granted by the Court of King's Bench, if a *Bro. Peace; Superfedeas* comes from the Court of Chancery, to the Justices of that Court, *pl. 17.* their Power is at an End; and the Party is as to them discharged.

(G) Of the Manner of granting Surety of the Peace by a Justice of the Peace.

A Justice of the Peace may grant the Surety of the Peace under the Authority of the Commission of the Peace, by which he is empowered; *Lamb. 36.*
 “ To cause to come before him all those, who to any one or more of our
 “ People, concerning their Bodies or the firing of their Houses have used
 “ Threats, to find sufficient Security for the Peace or their good Behaviour,
 “ towards us and our People, and if they shall refuse to find such Security,
 “ then them in our Prisons, until they shall find such Security, to cause to
 “ be safely kept.”

Whenever Oath is made before a Justice of the Peace by any Person, *Lamb. 83. Fitzb. N.B. 79. Hawk. 127.* that he is actually under Fear that another will burn his House, or do or procure to be done to him some corporal Hurt, and that he does not crave the Surety of the Peace through Malice, but for the Safety of his Life, the Justice is bound to grant it.

But if the Surety of the Peace is desired against a Peer, the safest Way is *Hawk. 127. Lamb. 81.* to apply to the Court of Chancery or King's Bench.

If

Bro. Mainpr. If the Person, against whom it is demanded, be present, the Justice of the Peace may commit him immediately, unless he offers Sureties; and *a fortiori* he may be commanded to find Sureties, and be committed for not doing it.

Lamb. 85. But, if he is absent, a Warrant for committing him cannot be granted, till a Warrant has issued commanding him to find Sureties; and this Warrant, which must be under Seal, ought to shew the Cause for which it is granted and at whose Suit.

5 Co. 59. The Justice of the Peace, who grants this last mentioned Warrant, may in this Case make it special for bringing the Party before himself only, for, as he has most Knowledge of the Matter, he is best qualified to do Justice in it.

Bro. False Impr. pl. 11. But, if the Warrant be in general Terms to carry the Party before any Justice of the Peace, the Officer, who executes it, has his Election to carry him before what Justice he pleases, and may carry him to Gaol, by virtue of the same Warrant, if he refuses to find Sureties before such Justice; for the Warrant has these Words in it, *if he shall refuse to find Security, &c.*

Lamb. 95, 96, 99. If one, however, who apprehends that the Surety of the Peace will be demanded against him, finds Sureties before any Justice of the Peace of the same County, either before or after a Warrant is issued against him, he may have a *Supersedeas* from such Justice; and this shall prevent or discharge him from an Arrest, under the Warrant of any other Justice, at the Suit of the same Party, for whose Security he has found such Sureties.

Fitzb. N. B. 238. A *Supersedeas* may also be had, to a Warrant granted by a Justice of the Peace, upon finding Sureties in the Court of Chancery or King's Bench.

A Supersedeas to the Warrant of a Justice of the Peace, for compelling a Man to find Sureties for the Peace, is not to issue without a Motion in Court and putting in Bail. But by the 21 *Jac. 1. c. 8. par. 3.* after reciting, that divers turbulent and contentious Persons, deservedly fearing to be bound to the Peace or good behaviour, by Justices of the Peace of the Counties where they dwell, do oftentimes procure themselves to be bound to the Peace or good Behaviour, in the Court of Chancery or King's Bench, upon insufficient Sureties, or upon colourable Prosecution of some Person or Persons, who will be ready at all Times to release them at their own Pleasure; whereupon his Majesty's Writs of *Supersedeas* are oftentimes directed to the Justices of the Peace, and other his Majesty's Officers, requiring them and every of them to forbear to arrest or imprison the Parties aforesaid; by Means whereof the said turbulent and contentious Persons misdemean themselves amongst their Neighbours with Impunity, to the great Offence and Disturbance of their Neighbours amongst whom they converse and live, to the Affront of the Justices of the Peace, and to the evil Example and Encouragement of like evil-disposed Persons, it is enacted, "That all Writs of *Supersedeas*, to be granted by or out of either of the Courts aforesaid, shall be void and of none Effect, unless such Procefs be granted upon Motion in open Court first made, and upon such sufficient Sureties as shall appear, unto the Judge or Judges of the same Court respectively, upon Oath, to be assessed at five Pounds Lands, or ten Pounds in Goods, in the Subsidy Book at the least; and unless it shall also appear, unto the said Judge or Judges from whom such *Supersedeas* is desired, that the Procefs of the Peace, or good Behaviour, is prosecuted by him or them desiring such *Supersedeas bona fide*, by some Party grieved, in that Court out of which such *Supersedeas* is desired to be so awarded and directed."

Lamb. 100. The Recognizance for keeping the Peace, which a Justice of the Peace takes upon a Complaint below, is to be regulated, as to the Number and Sufficiency of the Securities, the Largeness of the Sum, and the Time it is to continue in force, by the Discretion of such Justice.

1 Hawk. 129. It has been said that a Recognizance taken by a Justice of the Peace, to keep the Peace as to *A. B.* for a Year, or for Life, or without expressing any certain Time which shall be intended to be for Life, although no

Time

Time or Place is fixed for the Party's Appearance, or he is not bound to keep the Peace as to all the King's Liege People, is good.

But it seems to be the safest Way, to bind the Party to appear at the next Sessions of the Peace, and in the mean Time to keep the Peace as to the King, and all his Liege People, and especially as to the Party, who has demanded the Surety of the Peace.

By the 3 *H. 7. c. 1.* it is enacted, "That every Justice of the Peace within this Realm, that shall take any Recognizance for keeping of the Peace, shall certify, send, or bring the same Recognizance at the next Sessions of the Peace, where he is or hath been Justice, that the Party so bound may be called."

next Sessions of the Peace.

If one of the Sureties of a Man who is bound to keep the Peace dies, he shall not be obliged to find a new Surety; for the Executors, or Administrators, of him who is dead are bound by the Recognizance.

*Lamb. 113.
Bro. Peace,
pl. 17.
1 Hawk. 129.*

(H) Of the Forfeiture of a Recognizance for keeping the Peace.

By the 3 *H. 7. c. 1.* it is enacted, "That if the Party, who is called at a Sessions of the Peace, upon a Recognizance for keeping the Peace, makes Default, his Default shall be then and there recorded, and the same Recognizance, with the Record of the Default, be sent and certified into the Chancery, or afore the King in his Bench, or into the King's Exchequer."

If a Party does not appear at the Sessions, his Recognizance is to be estreated.

He who is bound to keep the Peace, and to appear at the Sessions, must appear there and record his Appearance, otherwise his Recognizance is forfeited. And, although the Party, who craved the Surety of the Peace, comes not to pray that it may be continued, the Justices may in their Discretion order it to be continued till another Sessions.

*Bro. Peace,
pl. 17.
Lamb. 109.*

But, if an Excuse, which is by the Court judged to be a reasonable one, is given for the Non-appearance of a Party, it seems that the Court is not bound peremptorily to record his Default, but may discharge the Recognizance or respite it till the next Sessions.

1 Hawk. 130.

A Recognizance for keeping the Peace may be forfeited by any actual Violence to the Person of another, whether it be done by the Party bound, or others by his Procurement.

*Lamb. 115,
127.
Bro. Peace,
pl. 20.
1 Hawk. 130.*

In support of a Rule to stay Proceedings in a *Scire facias*, upon a Recognizance for keeping the Peace, it was said, that the Assault, which had been made, was not upon him at whose Request the Surety of the Peace was granted, but upon another Person. It was held that this makes no Difference; and the Rule was discharged.

*MS. Rep.
Rex and Stanley,
and his
Bail, Trin.
27 G. 2.*

But a Recognizance for keeping the Peace is not forfeited, where an Officer, having a Warrant against one who will not suffer himself to be arrested, beats or wounds him in the Attempt to take him.

*Lamb. 128.
1 Hawk. 130.*

So it is not forfeited, if a Parent in a reasonable Manner chastises his Child; a Master his Servant, being actually in his Service at the Time; a Schoolmaster his Scholar; a Gaoler his Prisoner; a Husband his Wife.

*1 Sid. 176,
177.
Lamb. 127,
128. Heil.
149, 150.*

1 Hawk. 130. Fitzb. N.B. 80.

- Ante Vol.* 1. And, without enumerating all the actual Assaults, which a Man may
 151. make upon the Person of another, and not forfeit a Recognizance for keeping
 the Peace, it may be laid down as a Principle, that such a Recognizance is
 not forfeited by any Assault, which could have been justified in an Action,
 or upon an Indictment, for the Assault.
- Lamb.* 115. It has been held, that a Recognizance for keeping the Peace may be for-
 1 *Hawk.* 130. feited by any Treason against the Person of the King, or by any unlawful
 Assembly *in terrorem populi*.
- Lamb.* 115. Words, which tend directly to a Breach of the Peace, as challenging a
 1 *Hawk.* 130. Man to fight, or threatening to beat one who is present, amount to a For-
 1 *Cro. Eliz.* 86. feiture of such Recognizance.
- Lamb.* 115. A Recognizance is likewise forfeited by threatening to beat a Person who
 is absent, if the Party, who has so threatened, does afterwards lie in wait
 to beat him.
- Cro. Car.* 498. But it is not forfeited by Words of Heat or Choler, as the calling a Man
 1 *Hawk.* 130. Knave, Liar, or Rascal: For, although such Words may provoke a hasty
ward and his Man to break the Peace, they do not directly challenge him to do it;
Bail. nor does it appear, that the Speaker intended to carry his Resentment
 1 *Hawk.* 130. any farther.
- Cro. Eliz.* 86. Nay it has been held, that a Recognizance for being of good Behaviour
 1 *King's Case.* shall not be forfeited for such Words; and *a fortiori* one for keeping the
Mo. 249. Peace shall not.
 1 *Hawk.* 130.
- Cro. Jac.* 598. Such Recognizance shall not be forfeited by a Trespass on the Lands
 1 *Hawk.* 193. or Goods of another, unless it is with Force.
- Dalt.* 284. A Man shall not forfeit a Recognizance for keeping the Peace, who
 1 *Hawk.* 131. does a Hurt to another in playing at Cudgels, or such like Sport, by Con-
 sent; for these Sports, which tend to promote Activity and Courage, are
 lawful.
- Bro. Cor.* 229. But he, who wounds another in fighting with naked Swords, forfeits his
 1 *Hawk.* 131. Recognizance, because no Consent, nor even the Command of the King,
 can make so dangerous a Diversion lawful.
- 1 *Hawk.* 131. If a Soldier hurts another Soldier, by discharging his Gun in exercising
Hob. 134. without sufficient Caution, it is no Forfeiture of a Recognizance for keeping
 2 *Roll. Abr.* the Peace, for, although he would be liable in an Action for the Damage
 548. occasioned by his Negligence, this, it not being a wilful Breach of the Peace,
 is not within the Purport of the Recognizance.
- 1 *Hawk.* 130. A Court of Quarter-Sessions cannot in any Case proceed against the Par-
 ties, for a Forfeiture of a Recognizance for keeping the Peace: But the Re-
 cognizance must be sent into some of the King's Courts in *Westminster-*
Hall.
- 1 *Roll. Abr.* All Proceedings upon a forfeited Recognizance must be by *Scire facias*;
 900. *Perrow's* and not by Indictment; because, where a *Scire facias* is brought, the Parties
Case. have an Opportunity of pleading any Matter in their Discharge.
Cro. Ja. 598.
 1 *Hawk.* 130.
Ante 414.

(I) In what Manner a Recognizance for keeping the Peace may be discharged.

- Saw.* 53. IF the Party who is bound to keep the Peace dies, the Sureties may,
Halfhide's upon shewing this, be discharged from the Recognizance.
Case.
 1 *Lev.* 235. So if the Party who has required the Surety of the Peace dies, the Recog-
 1 *Hawk.* 129. nizance may be discharged.

But

But the Release of the Party, at whose Complaint it was taken, is no Discharge of a Recognizance; for, as the Recognizance is to the King and not to him, it is not in his Power to discharge it. *Bro. Peace, pl. 17. Lamb. 111.*

A Husband was bound to keep the Peace for a Year, upon Articles exhibited in the Court of King's Bench by his Wife. A Motion being made to discharge the Recognizance, upon a Suggestion that the Wife was thereto consenting, it was denied by the Court: And *per Holt, Ch. J.* How can we discharge this Recognizance, before the Condition of it is performed? *11 Mod. 109. The Queen and Lord George Howard.*

A Release however from the Party, at whose Complaint it was taken, may, if no Time for its Continuance is mentioned in the Recognizance, be an Inducement to a Court to discharge it. *1 Hawk. 129. 11 Mod. 109.*

The Demise of the King is a Discharge of a Recognizance for keeping the Peace; for, the Condition being *servare pacem Nostram*, his Successor cannot take Advantage of a Breach thereof. *Bro. Peace, pl. 15. 1 Hawk. 129.*

After such Recognizance is forfeited, the King may pardon the Forfeiture: But he cannot release the Condition before it is broken; because the Party, at whose Complaint it was taken, has an Interest therein. *Bro. Recogn. pl. 22. Bro. Chart. de pard. pl. 24. 1 Hawk. 129. 2 Hawk. 392.*

It has been held, that, if a Recognizance for keeping the Peace is removed by a *Certiorari*, the Obligation to appear upon such Recognizance thereby discharged. *2 Roll. Abr. 492. F. pl. 1. pl. 2. Dalt. 278.*

But this would be highly inconvenient; and the better Opinion seems to be, that a *Certiorari* is no Discharge to the Appearance upon such Recognizance. *Cro. Ja. 282. Rose and Pye. Yelv. 207. 2 Hawk. 294.*

If no Time, for the Continuance of a Recognizance for keeping the Peace, is therein mentioned, it is perhaps in the Power of the Court, in which it was taken, or to which it has been certified, to discharge it at their Discretion.

The usual Practice of a Court of Quarter-Sessions is to continue a Recognizance for keeping the Peace from Sessions to Sessions, until the Court thinks proper to discharge it.

It is the constant Course of the Court of King's Bench, to take a Recognizance for twelve Months, and, if no Indictment is within that Time preferred against the Party bound to keep the Peace, it may at the Expiration thereof be discharged. *12 Mod. 251. Anon. Str. 835.*

This seems also to be the Practice of the Court of Chancery; for, upon a Motion to discharge a Writ of *Supplicavit*, it was refused; and by Lord *Macclesfield*, Chancellor: This Application is too early; let the Party stay till the Year is out, and behave himself quietly all that Time. *2 Will 202. Clavering's Case.*

Surety of the good Behaviour.

SURETY of the good Behaviour is a Recognizance to the King, taken by a competent Judge, for being of good Behaviour.

This does, in all Respects, so resemble a Recognizance for keeping the Peace, that to go into a particular Consideration thereof it would be little more than a Repetition of what has been said under the Title *Surety of the Peace*.

But, as Surety of the good Behaviour may be sometimes demanded where Surety of the Peace cannot, and as the Recognizance taken in the former Case is more easily forfeited, than that which is taken in the latter, it will be proper to shew,

- (A) In what Cases Surety of the good Behaviour may be demanded, where Surety of the Peace cannot.
- (B) What will amount to the Forfeiture of a Recognizance for being of good Behaviour, which would not have been a Forfeiture of one for keeping the Peace.

(A) In What Cases Surety of the good Behaviour may be demanded, Where Surety of the Peace cannot.

Pult. 18. **S**URETY for keeping the Peace is usually granted at the Request of some one Person: But Surety of the good Behaviour may be granted at the Request of divers Persons.

Persons not of good Fame to find Security for their good Behaviour. By the 34 *E. 3. c. 1.* Justices of the Peace are impowered, “to take of all them that be not of good Fame, where they shall be found, sufficient Surety and Mainprize towards the King and his People.”

4 *Inst.* 181. It has been laid down, that the Words in this Statute, *them that be not of good Fame*, extend only to such Persons as are defamed, or justly suspected, to have formed a Design of breaking the Peace, and not to other Misbehaviours.

Lamb. 115, 116, 117. But this Construction seems much too narrow: For these Words do, in the common Acceptation of them, as properly include Persons of a scandalous Behaviour in other Respects, as those who give just Cause of Suspicion that they intend to break the Peace; and it seems always to have been
the

1 *Harok.* 132.

the better Opinion, that a Man may be bound to the good Behaviour for many Things, which are only contrary to good Manners.

As a good deal is by the Words *them that be not of good Fame*, which are Words of great Latitude, left to the Discretion of the Magistrate, it seems, that he has a Power to demand Surety of the good Behaviour of those who sleep in the Day, and go abroad in the Night; of such as keep suspicious Company; and of such as are generally suspected of being Robbers, &c. and of Eves-droppers, common Drunkards, and of all others, whose Misbehaviour may be reasonably intended to bring them within the Meaning of this Statute.

But a Justice of the Peace cannot bind a Person to be of good Behaviour upon a general Information.

Surety of the good Behaviour may be granted for Words, which tend to disturb or deter any inferior Officer, as a Constable, in the Execution of his Office.

It may also be granted for Words of Contempt spoke to an inferior Magistrate, as a Justice of the Peace, or a Mayor, although he is not in the actual Execution of his Office.

But it cannot be granted for the Words, Rascal; Knave, Teller of Lies, or Drunkard; for these are only Words of Choler.

If one Man, however, calls another Liar in *Westminster-Hall*, or before any great Concourse of People, he may be bound to the good Behaviour.

The Author of an obscene Book is liable to be bound to his good Behaviour, as a scandalous Person of evil Fame.

Surety of the good Behaviour may be demanded of one who haunts Bawdy-houses, and of one who keeps Women of bad Fame in his House, and of all lewd Persons.

If a Person, who has no visible Means to enable him so to do, lives at an extravagant Rate, he may be called upon to find Sureties for his good Behaviour.

If a Man is guilty of exciting the People to Disobedience of the Law, he may be compelled to find Sureties for his good Behaviour.

A Woman may demand the Surety of the good Behaviour against her Husband, if he is guilty of ill Usage to her.

He who lies in wait, to obstruct any Person from coming to a Court of Justice, may be bound to his good Behaviour.

If J. S. offers a Woman Money, to buy Medicines to destroy a Child with which she is pregnant, he may be bound to the good Behaviour.

Surety of the good Behaviour is, by divers Statutes, directed to be taken of the Offenders against such Statutes: As by the 1 M. st. 2. c. 3. of such as have been guilty of disturbing any licensed Preacher.

By the 5 Eliz. c. 21. of such as have been guilty of unlawful Fishing, Hunting, &c. in the Grounds of another.

By the 23 Eliz. c. 1. of such as neglect to come to Church for the Space of one Month.

By the 1 Ja. 1. c. 13. of such as have been guilty of unlawful hunting, or of stealing Deer or Conies.

When any Person has been convicted of a Misdemeanor, one Part of the Judgment frequently is, that he shall find Sureties for his good Behaviour for a certain Time.

(B) What Will amount to the Forfeiture of a Recognizance for being of good Behaviour, Which would not have been a Forfeiture of one for keeping the Peace.

- Palm.* 129. *Stamp and Hyde.* IT has been laid down, that any of those Causes, for which a Man becomes liable to be bound to the good Behaviour, is a Forfeiture of his Recognizance.
- Cro. Car.* 449. *Rex and Heyward.* But this is denied to be Law, and it seems very unreasonable; for the Good of the Publick may make it proper, in many Cases, to compel a suspected Person to enter into a Recognizance for being of good Behaviour: But it would be extremely hard, if such Recognizance should be forfeited, before the Party has been guilty of some actual Misbehaviour.
- Palm.* 129. *Stamp and Hyde.* A Recognizance for being of good Behaviour is forfeited by the Speaking of seditious Words.
- Cro. Car.* 499. *1 Hawk.* 133.
- 2 Roll. Rep.* 199. *Stamp and Hyde.* Surety of the Peace is not forfeited by threatening Words, unless the Party threatened is present: But Surety of the good Behaviour is, although the Party, concerning whom they are spoke, is not present.
- 1 Hawk.* 130. *Cro. Eliz.* 86. *King's Case.* But it is not forfeited by any Words of Heat or Choler, as Knave, Rascal, Liar, or Drunkard.
- Mo.* 249. *2 Roll. Rep.* 150, 228. *Palm.* 130. *1 Hawk.* 133. If Words, however, of Heat or Choler are spoke concerning or to a Justice of the Peace, in the actual Execution of his Office, it is such a Misbehaviour as amounts to the Forfeiture of a Recognizance; for the publick Good requires, that Magistrates should be treated with Respect.
- Lamb.* 116. *2 H. 7.* 2 B. A Recognizance for being of good Behaviour may be forfeited by the Number of a Man's Attendants, or by his or their Harnes, although there is no Breach of the Peace.
- 2 Leon.* 166. *Crabbe's Case.* *Godb.* 622. If one bound to be of good Behaviour is arrested upon Suspicion of Felony, and makes his Escape, it is a Forfeiture of his Recognizance: *Et per Cur'*: Although the Arrest was tortious, and no Felony had been committed, yet the Recognizance is forfeited by the Escape, which is a Misbehaviour, for it is the Duty of every Man to stand to the Law, and answer to every Thing he is charged with.
- Lamb.* 118. When a Recognizance for being of good Behaviour is, pursuant to the Direction of any Statute, entered into by a Person who has been guilty of something prohibited by such Statute, the being afterwards guilty of another Offence, against the same Statute, is a Forfeiture of the Recognizance.
- Cro. Ja.* 412. *Rex and Hutchins.* In a *Scire facias*, upon a Recognizance for being of the good Behaviour, the Breach assigned was, that the Party bound had assaulted and beat *J. S.* but it was not laid to have been done *vi & armis*; and for this Cause the Judgment was arrested.

John Adams
Library.



IN THE CUSTODY OF THE
BOSTON PUBLIC LIBRARY.



SHELF N^o

ADAMS

52.2

v. 4

