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A

# General Abridgment

OF

# LAW and EQUITY

Alphabetically digeſted under proper TITLES

WITH

NOTES and REFERENCES

to the WHOLE.

*By* CHARLES VINER, *Eſq;*

*Favente Deo.*

ALDERSHOT *in* Hampſhire *near* Farnham *in* Surry:

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A

# TABLE

OF

The ſeveral TITLES, with their Diviſions and Subdiviſions,

## Evidence.



Apprentices

# A TABLE of the ſeveral TITLES,



For

# With their Diviſions and Subdiviſions.

# A TABLE of the ſeveral TITLES, &c.

## (A) Witneſs. Who may be.

1. IT is a good Challenge to the Witneſs to ſay, that he *was one of the Accuſers*, quod nota. Br. Corone. pl. 219. cites 4 M 1.

2. Oftentimes a Man may be challenged to be of a Jury, that cannot be challenged to be a Witneſs; And therefore though the Witneſs be of *neareſt Alliance, or Kindred, or of Counſel*, or *Tenant, or Servant* to either Party, (or any other Exception that maketh him *not infamous*) or to *want Underſtanding, or Diſcretion, or a Party in Intereſt*) though it be proved true, ſhall not exclude the Witneſs to be ſworn, but he ſhall be ſworn, and his Credit upon the Exceptions taken againſt him left to thoſe of the Jury, who are Tryers of the Fact, inſomuch as ſome Books have ſaid, that though the Witneſs named in the Deed be named a *Diſſeiſor* in the Writ, yet he ſhall be ſworn as a Witneſs to the Deed. Co. Lit. 6. b.

3. An *Infidel* cannot be a Witneſs. Co. Lit 6. b.

4. A Perſon that is *infamous*, as if he be attainted of a *falſe Verdict*, or convicted of *Perjury*, or of a *Præmunire*, or of *Forgery*, upon the Stat. 5 Eliz. cap. 14. and not upon the Stat. 1 H. 5. cap. 3. or *convict of Felony*, or by Judgment *loſt his Ears*, or *ſtood upon the Pillory*, or Tumbrel, or been ſtigmaticus branded, &c. Whereby they become Infamous for ſome Offences, quæ ſunt minoris Culpæ ſunt majoris Infamiæ. Co. Litt. 6. a. b.

5. A *Jew* may be a Witneſs, being ſworn on the old Teſtament. 2 Keb. 314. pl. 23. Hill. 19 & 20 Car. 2. B. R. Robeley v. Langſton.

6. A *Peer* produced as a Witneſs ought to be Sworn. 3 Keb. 631. Earl of Shaftsbury v. Digby.

7. An *Approver* or an *Accomplice*, may be a Witneſs till he is indicted. Law of Evid. 51. cap. 4. cites State Trials, 1 Vol. 606. 619. 782. 2 Vol. 377. 492. 3 Vol. 117. 136. 4 Vol. 10.

8. Where the *Diſability* is only the *Conſequence* of the Judgment, the King may pardon it; But where the Diſability is *part of the Judgment* itſelf, the King's Pardon will not take it away; Therefore if a Man be convicted of Perjury on the Statute, the King's Pardon will not reſtore; For it is not a Conſequence but part of the Judgment, viz. Quod impoſterum non ſit receptus ut Teſtis; cites Co. Ent. 368. But a Pardon by Act of Parliament will reſtore him in that Caſe; Per Holt Ch. J. 2 Salk. 689. pl. 1. Paſch. 7 W. 3. B. R. in Caſe of the King v. Crosby.

Ibid. ſays, Quod Nota. Quære of a Perjury at Common Law; And if the Law be the ſame; For there the Diſability is only a Conſequence and not Part of the Judgment; otherwiſe if a Jury be Convict in an Attaint, and cites Roſt. 56. a.

9. No *Quaker* or reputed Quaker ſhall be be qualified to give Evidence in any Criminal Cauſe, by Virtue of the Statute 7 & 8 W. 3. cap. 34.

10. 4 *and* 5 *Annæ* 16. *All Witneſſes who ought to be allowed good Witneſſes upon Trials at Law ſhall be deemed good Witneſſes to prove any Nuncupative Will.*

11. One being produced to be an Evidence againſt the Appellee, who was *under* 12 *Years of Age*, and the Appellee's Counſel objected

to him for that Reaſon, and beſides they ſaid he had *taken Money*. Holt Ch. J. ſaid, that if he *knew the Danger of an Oath*, he might be an Evidence; And that appearing he was admitted. 11 Mod. 228. B. R. pl. 2. Trin. 8 Ann. Young v. Slaughterford.

## (B) Witneſſes. Who Feme in the Caſe of her Baron. Or Baron in Caſe of his Feme.

1. IT is informed, that C. *one of the Defendants, examined his own Wife* as a Witneſs; It is therefore *ordered, the Plaintiff may take a Subpœna againſt her on his Behalf*, and if C. will not ſuffer her to be examined on the Plaintiff's Party, then her Examination on the ſaid C's Party is ſuppreſſed. Cary's Rep. 135. cites 22 Eliz. Bent and Allet contra Colſton.

2. Wife examined to diſcover her *Husbands deceit*. Toth. 158. cites 38 Eliz. Lake v. Dean.

3. The Wife to be examined as a *Witneſs*. Toth. 149. cites 41 Eliz. h. b ſo. 10. Preſton v. Powel.

4. A Feme Covert cannot be a Witneſs *againſt her Husband*, Quia ſunt animæ duæ in una carne; For it would be, if admitted, an Occaſion of perpetual Diſſention between Man and Wife. Co. Lit. 6. b. cites Sir James Crofts Caſe.

5. A Wife not to be examined againſt her Husband, Toth. 160. cites 10 Jac. Holman v. Audley.

6. The Court was moved, to know whether the *Wife of a Bankrupt* can be examined by the Commiſſioners upon the Statute of Bankrupts? And they were of Opinion, ſhe could not be examined, for the Wife is not bound, in caſe of *High Treaſon*, to diſcover her Husband's Treaſon, altho' the *Son* be bound to reveal it; Therefore by the Common Law ſhe ſhall not be examined. Brownl. 47. Paſch. 10 Jac. Anon.

7. 21 *Jac.* 19. *S.* 6. *The Commiſſioners ſhall have Power to examine the Wife of a Bankrupt upon Oath for the Diſcovery of his Eſtate, Goods and Chattles, and ſuch Wife refuſing to appear, or to anſwer Interrogatories, ſhall incur the ſame Penalties as are provided againſt other Perſons in the like Caſes.*

8. If a *Privy Counſellor* be to be examined in the Star-Chamber, if the Privy Counſellor ſaid, that the *Defendant related* that *to him as a Privy Counſellor*, and not otherwiſe, the Counſellor is not bound to anſwer further to any Thing than the Defendant hath related to him. Noy. 154. Anon.

9. In *Ejectment*, the *Plaintiff made Title to his Leſſor* to the Lands in queſtion, *as Son and Heir of Jerome Jacques, and Hannah his Wife, in right of Hannah.* The *Defendant gave in Evidence, that Jerome Jacques was married, before he was married to Hannah; And the Woman*, to whom it was ſuppoſed he was married before, *was produced* at the Trial, Summer Aſſizes 13 W. 3. at Maidſtone, *to prove this Marriage.* The Counſel for the Plaintiff approved her Teſtimony, becauſe ſhe ſwore for her Advantage, viz. to have a Husband, the Husband then being living. But nevertheleſs, Gould Juſtice of B. R. then Judge of Aſſize, admitted her Teſtimony. But afterwards the ſame Cauſe, upon the ſame Title, between the ſame Parties, was tried before Holt, Chief Juſtice at the Aſſizes in March at Maidſtone, 1 Ann. and he *refuſed*, after

after Debate, *to admit the former Wife to be a Witneſs* for this Purpoſe; *But, upon other Evidence, the former Marriage was proved* to the Satisfaction of the Jury, being Gentlemen, whereupon they found a Verdict for the Defendant. But in the former Trial before Gould Juſtice, the Jury found a Verdict for the Plaintiff, 2 Ld. Raym. Rep. 752. 1 Ann. 1701-2. Broughton v. Harper.

10. A *Woman was indicted* upon the Statute 1 Jac. cap. 11. *for marrying a ſecond Husband, the firſt being alive.* Upon Not guilty pleaded, the *firſt Husband was produced to prove the Marriage*; But the Court totally refuſed to admit his Evidence, and ſaid, that he could not be a Witneſs againſt his Wife, nor ſhe againſt her Husband, becauſe it might occaſion implacable Diſſenſion in any Caſe but Treaſon; and they denied the Lord *Audley*'s Caſe in Hutt. 116. to be Law. Raym. 1. Mich. 12 Car. 2. B. R. Mary Grigg's Caſe.

Brownl. 41. Paſch 10 Jac. Anon. ſays, the Wife is not bound to diſcover the Husband's Treaſon, tho' the Son be bound to reveal it;

And therefore by the Common Law ſhe ſhall not be examined.

11. A *Woman is not bound to be ſworn, or to give Evidence againſt another, in caſe of Theft, &c. if her Husband be concerned*, tho' it be material againſt another, and not directly againſt her Husband. 2 Hale's Hiſt. Pl. C. 301.

12. If a Feme Covert acknowledge a Thing at a Trial, which is *for the preſent Advantage of her Husband, but* is for *her own future Diſadvantage*, yet this is no good Evidence to a Jury. Mich. 23. Car. B. R. For her Husband's preſent Advantages are her's alſo, and is more look'd upon than her future Diſadvantage. L P. R. 550.

13. In an Information for a Cheat, Baronard Feme were diſcharged of a *Judgment entered into* by the Feme (to a Matchmaker on Payment of 100 *l.* which he retook of her again preſently in another Room) upon the Evidence of *the Wife*. Sid. 431. pl. 20. Mich. 21 Car. 2. B. R. King v. Parris & al.

Vent. 49 Parris's Caſe, the S. C. and ſhe was ſworn by the Opinion of three Juſtices contra Twiſden, this Suit being for the King.—— Keb. 57. pl. 84 S. C. accordingly—— 12. Mod. 340. cites S. C. that ſhe was received as a Witneſs to convict one upon an Information, for a Practice for drawing her in, when ſole, to give Warrant of Attorney for confeſſing a Judgment upon an unlawful Conſideration, whereby Execution was ſued againſt Husband. And Holt ſaid, that tho' a Feme Covert could not by Law be a Witneſs for or againſt her Husband, yet in the Lord Audley's Caſe, it being a Rape upon her Perſon, ſhe was received to give Evidence againſt him.

14. A *Woman forcibly married* contrary to 3 H. 7. cap. 2. ſhall be admitted to *give Evidence againſt her Husband.* Reſolved 1 Vent. 243. Trin. 25 Car. 2. B. R. Brown's Caſe.

3 Keb. 193. pl. 427. the King v. Brown, S. C. and the Husband was found guilty and executed.

15. Feme *de facto*, but not de jure, as by being forcibly married, was allowed to be a Witneſs againſt ſuch Baron, for whatſoever was done while ſhe was under that Violence was not to be expected. Vent. 244. Trin. 25 Car. 2. B. R. John Brown's Caſe.

16. The Wife *Executrix* to her Husband, married a ſecond Huſband. A *Bill is exhibited* againſt them *to diſcover the Truſt*; The *Huſband and Wife diſagreed* in the Matter, and *put in ſeverally their Anſwers*; The *Husband denied the Truſt, but the Wife confeſſed it.* The Cauſe proceeded to hearing, and the *Plaintiff proved the Truſt only by one Witneſs*, which the Plaintiff inſiſted on, with the Wife's Confeſſion, to be ſufficient, the Matter being but in that wherein ſhe was concern'd as Executrix. But the Bill was diſmiſſed, quia the *Wife's Anſwer ſhall not bind the Husband*; Ex relatione Sir John Churchill and Serjeant Rawlinſon. Chan. Caſes, 39. Trin 32. Car. 2. Anon.

17. In an *Indictment* proſecuted by the Husband *for ſeducing away* his Wife, and *keeping her ſometime in Adultery*, the Wife was admitted

to

to be a Witneſs againſt the Defendant coram Juſtice Wyndham at Lent Aſſizes at Aylesbury, and the Defendant found guilty. She may be a Witneſs to prove a Cheat upon her and her Husband. L. E. 55. pl. 12. cites T. p. Pais, 160.

18. The *Plaintiffs were Infants*, and the *Children of the Defendant's Wife by a former Husband*; Their Bill was *to have an Account of the Eſtate left them by their Father*, and of the Produce thereof. Upon the Hearing it was referred to an Account, and the *Defendant and his Wife were* to be *examined on Interrogatories* for Diſcovery of the Eſtate; The Wife being at Variance with the Husband, and living apart from him, upon her Examination, made the Eſtate of the Plaintiffs (who were her Children) as great as ſhe could, and thereupon to fix the Charge upon the Husband. The Plaintiffs, upon a Petition to the Maſter of the Rolls, obtained an Order to examine the Wife as a Witneſs againſt the Husband de bene eſſe, and the Maſter upon her Evidence, had charged the Husband with ſeveral Sums of Money, as Intereſt, and Produce of the Infants Eſtate; But now, upon Exceptions to the Report, the *Lord Chancellor diſallowed her Evidence, and declared the Wife could not be a Witneſs againſt her Husband.* 2 Vern. 70. pl. 11. Trin. 1683. Cole v. Gray.

19. Queſtion was, Whether one who had been *Attorney for Defendant* ſhould be compelled to be a Witneſs; and Darnell ſaid, this being a criminal Matter he ſhould, but not ſo in a civil Matter. But Pratt ſaid, that if he be ſworn, we muſt ask him his whole Knowledge, and perhaps he cannot diſcover that without *charging himſelf*, for if one's Declaration generally may be made Uſe of againſt him, a fortiori what he ſays upon Oath ſhall; and this ſeemed to weigh with the Court. But Holt ſaid, he was of Opinion againſt his Brothers ſome Years before, in the Caſe of one Holford, that any thing an Attorney knew, *otherwiſe than quatenus an Attorney*, he ought to declare. But his Brothers held, an Attorney ought not upon any Account to be received to reveal his Client's Secrets; And Holt ſaid, if a Client bring a forged Deed to *Counſel*, the Counſel ought to proſecute him, and that he had known ſuch a Thing done. 12 Mod 341. Mich. 11 W. 3. in Caſe of the King v. Warden of the Fleet.

20. Per Holt, at Niſi Prius; I have known it ruled, that a *Legatee* ſhould not be a Witneſs *to prove Aſſets* in the Hands of Executors *in Debt by a Creditor*; And it has been an old Exception, but I ſee not the Reaſon of it, for he ſwears to leſſen the Aſſets, and the Legatee was ſworn. 12 Mod. 385. Paſch. 12 W. 3. Anon.

21. Treſpaſs for an *Aſſault upon the Plaintiff's Wife, and getting her with Child*, and what the Wife declared in her Labour, rejected to be Evidence. 12 Mod. 375. Paſch 12 W. 3. Adams v. Arnold.

22. *Debt by Husband*, and it appearing to have become *due to his Wife as a ſeparate Dealer, a Diſcourſe of the Eſtate's concerning it*, was given Evidence for Defendant. Anuente Holt. Mich. 13 W. 3. Anon.

23. In an Action of *Aſſault and Battery* brought *by the Husband* againſt the Defendant *for an Intent to raviſh his Wife*, ſhe was admitted an Evidence, which Holt ſaid, it was becauſe the Wife cannot give any Conſent, tho' it be not Felony. 11 Mod. 224. pl. 19. Paſch. 8 Ann. B. R. Anon.

24. And Holt ſaid, that *A. having laid 5 l. of the Event of the Cauſe*, was no Objection to the *Wife of A.* being *admitted* to be an Evidence, becauſe it ſhall not be in the Power of a third Perſon to diſqualify one who otherwiſe would be a good Evidence, and thereupon ſhe was admitted to give Evidence. 11 Mod. 224. pl. 19 Anon.

28. Feme

28. Feme allowed to be a Witneſs againſt her Husband, *as to a Moiety of Monies borrowed by her on Bond, and placed out on a Mortgage, which he claimed*, tho' himſelf had given it to the Concealment of the Marriage, as the Wife had done; And therefore, and becauſe her Evidence was alſo ſupported by the Evidence of the Mortgagor, and ſhe having tranſacted and appeared throughout the whole Affair as a Feme ſole, the Moiety of the Mortgage-Money was decreed to the Plaintiff (who lent the Feme ſo much) with Coſts. Abr. Equ. Caſes, 226. Hill. 1719. Rutter v. Baldwin.

29. In the Caſe of **Rutter v. Baldwin**, Hill. 1719. the Court agreed clearly that the Wife ſhall never be admitted by an Anſwer or otherwiſe as Evidence to *charge her Husband*; As where a Man *marries a Widow Executrix*, &c. her Evidence ſhall not be allowed to charge her ſecond Husband with more than ſhe can prove to have actually come to her Hands. Abr. Equ. Caſes, 227. pl. 15.

30. In an Indictment againſt Lord *Audley*, for *aſſiſting another to commit a Rape on his Wife*, ſhe was admitted to be a Witneſs againſt him. Hutt. 115.

But ſee Tit. Trial (H. f) pl. 4. and the Notes there.

## (C) Witneſſes. Who. Perſons intereſted by Accident.

1. A *Subſcribing Witneſs* to Livery and Seiſin on a Feoffment afterwards became *Tenant at Will* of the ſame Land. Yet he was allow'd to be a good Witneſs. Buls. 202. Paſch. 10 Jac. Anon.

2. *Feoffees in Truſt* to be examined as Witneſſes. Toth. 168. in Hill. 1 Car. Mildmay v. Com. Warwick.

3. *Feoffees for a Town nor Recorder* to be examined but for *Matter of Fact*. Toth. 168. Trin. 2 Car. Clotworthy v. Hunt.

4. In an Information for *Forgery*, no Man that is or may be a *Loſer by the Deed*, or who may receive any Benefit or *Advantage by the Verdict* being found againſt the Defendant ſhall be a Witneſs. 3 Salk. 172. pl. 4. Watt's Caſe. Hardr. 331. pl. 7. Trin. 15 Car. 2. in Scacc. S. C.

5. An Executor may be a Witneſs in a Cauſe concerning the Eſtate *if he has not the Surpluſage given him* and ſo I have known it adjudged. P. Hales. 1 Mod. 107. pl. 1 Paſch. 26 Car. 2 B. R. Fountain v. Cook.

6. Several Perſons were examined as Witneſſes no ways concern'd in Intereſt, and the Cauſe hear'd, and Iſſues directed to be tried, but the Trials were not carried on, and the Cauſe ſlept many Years, and after abated; and then thoſe *Perſons who had been examined as Witneſſes became Heirs at Law*, and thereby intereſted in the Matter; the Cauſe was revived and reheard, and the ſame Iſſues directed to be tried; And the Perſons who had been ſo examined (being now Plaintiffs) prayed to have an Order, that their Depoſitions taken when they were diſintereſted might be read as Evidence at Law for themſelves; And my Ld. Keeper order'd accordingly, and likened it to the Caſe, where one is the only, or only ſurviving Witneſs to a Deed, becomes after the Party intereſted, his Hand may be proved at Law; ſo if a Witneſs to a Deed becomes blind. Then the Cauſe proceeded to Trial at Bar in C. B. where the whole Court held theſe Depoſitions could not be read without Conſent, the Parties being living; but the Defendant conſented, and had a Verdict for him; and the Plaintiff obtained a new Trial, and then would have had the ſame Order; but my Ld. Keeper ſaid, ſince the Judges had reſolved other-

wife, he could not take upon him to make that Evidence which was not, and therefore only ordered they ſhould be read in Evidence, as by Law they might. Abr. Equ. Caſes, 224. Trin. 1702. Holcroft v. Smith.

Williams's Rep. S. C. ſays, that this Point was cited by Serjeant Hooper, as what had happen'd in his own Experience; and that the Court allowed Evidence to prove the Plaintiff's Hand, he himſelf being diſabled as much as if he was dead.

7. The only living *Witneſs to a Bond* was *made Executor* by the Obligee, it has been ruled at Law that the Executor ſhall be allowed to prove the Hands of the Witneſſes. 2 Vern. 700. Mich. 1715. in caſe of Goſſe v. Tracy.

## (D) Trial. Witneſſes.

### What Perſons may be, as Executors, Truſtees, Guardians, &c.

Ibid. pl. 6. cites 9 H. 6. S. S. C. — Ibid. pl. 7. cites 9 H. 6. 58 S. P. — Ibid. pl. 17 cites 19 H. 6. 35. S. P.

1. IN *Debt by 2 Executors they counted of Arrearages of Account made in the time of the Teſtator. The Defendant tendered his Law that he owed them nothing, and prayed that they be examined*; but the Court held that they ſhould not be examined of another's Act, but otherwiſe of an Attorney, becauſe he might have been informed from his Maſter, &c. Br. Examination pl. 5. cites 3 H. 6. 46.

2. It is a prinipal *Challenge to a Juror, that he was an Arbitrator before in the ſame Cauſe*, becauſe it is intended, that he will incline to that Party to which he inclined before; but *contrary* is it *of a Commiſſioner*, becauſe he is elected indifferent. P. Cook Ch J. ſaid (nullo contradicente.) Godb. 193. pl. 276. Trin. 10 Jac. B. R. Sir Francis Forteſcue v. Coake.

3. One Gates an *Executor* was produced to *prove the Will as a Witneſs*, to which Exception was taken becauſe of his Executorſhip; but it was anſwered, that he *had fully adminiſtred*. To which it was replied, that afterwards *Aſſets might come to his Hands*; but the Court reſolved, that it would not be preſumed to bar his Teſtimony, which was allowed in the principal Caſe, being in Ejectment. Tr. per. Pais, 162. cited by Glyn Ch. J. in the Caſe of Brereton and Tatum. Mich. 1656 B. R. as the Ld. Chandois's Caſe, in which he was of Counſel, and took the Exception.

4. *Truſtees* ſhall not be examined as Witneſſes *one againſt another* Toth. 285. cites Sherborne v. Foſter and Townly. 7 Car.

Hard 351. pl. 7. Trin. 15 Car. 2. Wats's Caſe, S P.—2 Keb. 128 pl 32. S. C and by Sid. 315. pl. 33. Mich. 18 Car. 2. B. R. Stevens v. Gerrard. So if he be *in Poſſeſſion of the Land itſelf*, if it be *only as a Servant*. 1 Sid. 315. S. C.

5. A *Truſtee* may be a Witneſs if *he will releaſe his Truſt* but *not if he has conveyed it over*, altho' for the King in an Information of Forgery. Maynard and Finch a Witneſs was admitted in C. B. to prove a Codicil of the Ld. Rutland's Will, upon a Releaſe of his Intereſt made while the Jury were at the Bar; and Twiden ſaid, that in a Kentiſh Cauſe at the Bar he cauſed a Releaſe but the Day before the Trial, and it was admitted good; but Windham ſaid, that ſuch are left to the Jury as to the Credit. ——

6. In a Trial at Barr *to avoid a Patent*, a *Deputy to the Party* that would avoid the Patent was allowed by three Juſtices againſt one, to be a Witneſs, becauſe the Suit was between the King and the Patentee. Mod. 21. pl. 56. Mich. 21 Car. 2. B. R. Owen Hanning's Caſe.

7. A

7. A *Truſtee* cannot be a Witneſs concerning the Title of the ſame Land, becauſe the Eſtate in Law is in him. L. E. 63. pl. 30. cites. T. P. Pais, 224.

8. A *Truſtee* may be a Witneſs againſt Ceſtui que Truſt; Per Hale. Twiſden dubitavit, L. E. 63. pl. 31. cites Trials per Pais, 229.

9. A *Guardian in Scrage* ſhall be admitted to be a Witneſs for the Infant; becauſe he is accountable. Tr. Per Pais. 228. And 7th Edition 536.

10. In Evidence to a Jury at Barr, a ſpecial Iſſue by Rule of Court was directed to try the Cuſtom of Lady Percie's Manor of Weſtwood in Cumberland, *whether Fines* on the Tenants *on the Lord's Death be due* to the Heirs or Succeſſors of the Lord during his Minority. The Defendant excepted to the *Steward*, that he had Fee on Admiſſion; Sed non allocatur, and he was ſworn. L. E. 79. pl. 74. cites 3 Keb 90. Pl. 31. Mich. 24. Car. 2. B R. Champian v. Atkinſon.

11. S. had laid himſelf to be ſole Proprietor of a Ship and Tackle, &c. and the Witneſs ſwore at the *Time of the Action* brought, that he he *was equally concerned* in every Thing, *but long ſince had ſold his Intereſt, ſo* that now he was not one *Farthing concerned in the Conſequence of the Cauſe*; yet the Court held, that he was no competent Witneſs. Skin. 174. pl. 4. Paſch. 36. Car. 2. B. R. Sandys v. Cuſtom-houſe Officers.

12. An *Executor* may be a Witneſs in a Cauſe concerning the Eſtate, if he has not the Surpluſage given him by the Will; Per Hale Ch. J. And he ſaid he had known it ſo adjudged. Mod. 107. pl. 1. Paſch. 26 Car. 2. B. R. Fountain v. Cook.

13. An *Executor* was admitted to *prove the Revocation of a Legacy*, though he had proved the Will, for at the Time of proving the Will he only ſwears he believes it to be the laſt Will, and at that Time he might not know of the Revocation. Vern. 20. pl 12. Mich. 1681. Jervois v. Duke.

14. In *Debt upon Bond*, brought *by* J. S. *Sheriff* of the County &c. The Defendant *pleaded, that the* ſaid *Bond was acknowledged by J. N. to the Plaintiff, for the Office of Under-Sheriff, and that he was Surety* in the ſaid Bond; *and* then he *pleaded the* Statute of *5 & 6. Ed. 6. cap. 16. againſt buying and ſelling Offices, &c.* And upon the Trial *A. was produced as a Witneſs, to give an Account upon what Occaſion this Bond was acknowledged*, &c. And Holt Ch. J. before whom the Cauſe was tried Mich. 5 W. & M. at the Sittings for Middleſex, refuſed to admit A. to be a Witneſs, becauſe it appeared that he was *privately intruſted by both Parties to make the Bargain, and to keep it ſecret.* And (by him) a *Truſtee ſhall not be a Witneſs, in Order to betray the Truſt.* Ld. Raym. Rep. 733. Anon.

15. In an Action of *Aſſault and Battery* brought *by the Huſband* againſt the Defendant *for an Intent to raviſh his Wife*, ſhe was admitted an Evidence, (which Holt Ch. J. ſaid, it was becauſe the Wife cannot give any Conſent, though it be not Felony. 11 Mod. 224 pl. 19. Paſch. 8 Ann. B. R. Anon.

16. *And* Holt held, that *A. having laid 5 l. of the Event of the Cauſe*, was no Objection to the *Wife of A.* being *admitted* to be an Evidence; becauſe it ſhall not be in the Power of a third Perſon to diſqualify one who otherwiſe would be a good Evidence; and thereupon ſhe was admitted to give Evidence. 11 Mod. 224. pl. 19. Anon.

17. Holt Ch. J. ſaid, that barely being *a Factor*, does not incapacitate a Man for being an Evidence in a Cauſe, otherwiſe if he be intereſted. 11 Mod. 226. pl. 23. Paſch. 8 Ann. B. R. Maſon v. Hogſden.

18. A *Truſtee* has been examined as a Witneſs; Per Anthony Keck. 3 Ch. R. 22. A Grantee, when he appears to be a bare Truſtee is a good Evidence to prove the Execution of the Deed to himſelf. Wms's. Rep 290. Mich. 1715. ſays it was ſo declared in the Caſe of Goſs v. Tracey.

19. *Truſtee*

19. *Truſtee* frequently *allowed* a Witneſs *in Equity*; Per Maſter of the Rolls. Mich. 7 Geo.

20. A *Truſtee* ſhall not be allowed to be examined as a Witneſs in a Cauſe wherein he is *ordered to account*. Barnard. 416. Hil. 1740. in Caſe of Smith v. the Duke of Chandois.

21. In Caſe of a Bill brought by *Prochein Amy*, the Prochein cannot be a Witneſs, becauſe he is liable to pay Coſts. Mich. 1738. B. R. Per Chapple J. in Caſe of Milward v. Sterling.

## (E) Witneſſes. Perſons influenced by Kindred.

Co. Litt. 6. b. S. P.

1. BEING *Couſin* to the Party is no Exception *to hinder his Evidence* in our Law, Per Hutton; to which all agreed. Het. 137. Paſch. 5 Car. C. B. in Moor's Caſe.

## (F) Witneſſes. Who may be. Perſons Intereſted.

1. BY Roll Ch. J. upon a Trial, although one who is a *Legatee* by a Will may *not* be admitted for a Witneſs *to prove that Will*, *yet he may* be examined *to prove a Deed* or other Thing, *which has not Relation to the Will*, *in reſpect of the Intereſt which he claims by the Will*. Sty. 370. Paſch. 1653. Anon.

2. *In* an *Action upon the Statute of Winton*, *if the Iſſue be whether the Place of the Robbery be within the Hundred or not*, no Inhabitants of Land within that Hundred may be a Witneſs, but the *Owners* of the Land, and not inhabiting may. 2 Sid. 2. Mich. 1657. Oliver v. Wallington Hundred.

3. A Witneſs who ſubſcribed his Name to a Feoffment was produced *to prove Livery and Seiſin*, *and though he had afterwards an Eſtate at Will in Part of the Land*, yet he is a good Witneſs to prove Livery and Seiſin, this being in Affirmance of the Feoffment; Per Fleming Ch. J. and the whole Court. Bulſt. 202. Paſch. 10 Jac. Anon.

4. A *Feoffment* in Fee was made to the Uſe of J. S. and *two Witneſſes* were *ſubſcribed to prove the Livery of Seiſin*. Afterwards *one of the Witneſſes had an Eſtate at Will made to him of the ſaid Land*, and he being produced to witneſs the Execution of the Feoffment by Livery of Seiſin, was excepted againſt, becauſe he was now a Party intereſted in Part of the Land, and ſo his Oath was to make his own Eſtate good. But this Exception was diſallowed by the whole Court, and that he might well be ſworn as a lawful Witneſs to prove the executing of a Feoffment by Livery and Seiſin, this being in Affirmance of the Feoffment, and he was ſworn, and his Teſtimony received and allowed; Per Fleming Ch. J. and tot. Cur. Bulſt. 202. Paſch. 10 Jac. Anon.

So a Witneſs was admitted to prove a Leaſe of Ejectment, though he had the Inheritance in the Lands let, becauſe both Plaintiff and Defendant claimed under the ſame Perſon. Sty. 482. Hox v. Swan.

5. If one produced as a Witneſs *had Part of the Lands in Queſtion*, and had *diſpoſed of them after Notice of Trial*, although the Sale was bona fide, yet ſhall not his Evidence be received; for if the Title he has made be diſaffirmed, an Action lies againſt him; but if ſuch *Witneſs claims an Eſtate for Life or Years in Part of the Land paramount*, *both their Titles*, he may be received as an Evidence. Sid. 51. 1 Keb. 134. Mich. 13 Car. 2. Wickes v. Smallbrooke.

6. A *Prebendary makes a Leaſe of a Rectory to his Son*, with uſual Covenants. In a Suit by the Son againſt A. claiming by an antient Leaſe and in Poſſeſſion, the *Father (being then made Biſhop of the ſame Diocеſs* in which) is allowed to be ſworn. Sid. 75. pl. 6. Paſch. 14 Car. 2. B R. Gie v. Ryder.

7. In caſe of *Forgery, Perjury and Uſury*, the Perſon griev'd ſhan't be receiv'd as a Witneſs, becauſe he may have Advantage by the Verdict. Hard. 332. pl 7 Trin. 15 Car. 2. in Scac. in Watts's Caſe.

8. A *Legatee after Receipt of the Legacy, without giving any collateral Security for Re-payment*, will not be compelled by Bill in Chancery to make Re-payment, *but if paid pending ſuch Bill*, whereby to let in his Teſtimony *without any Decree*, he is no ſufficient Witneſs; But the Payment being before, the Court would not admit any Exception, ſo much as to her Credit, Et juratur. Keb. 651. pl. 26. Hill. 15 & 16 Car. 2. B R. Payton v. Humphryes.

9. *Legatee or Deviſee of an Annuity*, may be a Witneſs to prove the Will, if he hath given an *Acquittance* of the Legacy, *or releaſed* the ſaid Annuity notwithſtanding that this be done pending the Action; And *tho' it be ſealed in Court* when that Cauſe is trying, yet the Party ſo releaſing is a good Witneſs; Per Curiam. Sid. 315. pl. 33. Mich. 18 Car. 2. B. R. Stephens v Gerrard.

10 In *Trover by Aſſignees of Commiſſioners of Bankrupts*, the Defendant excepted to a *Witneſs*, becauſe he *was a Creditor*, and may come in before a Diviſion made; But *after* 4 *Months after any Dividend, he is a good Witneſs*; For no other Dividend ſhall be intended, but here as no Diviſion being made, he was ſet aſide. 2 Keb. 348. pl. 31. Paſch. 20 Car. 2. B. R. Bents v. Mico.

11. In a Trial at Bar to avoid a Patent, a *Deputy to the Party* that would avoid the Patent was allowed by 3 Juſtices againſt 1 to be a Witneſs, becauſe the Suit was between the King and the Patentee. Mod. 21. pl 56. Mich. 21 Car. 2. B R. Owen Hanning's Caſe.

12 In an Action of *Deceit for forging a Will*, a *Legatee was* allow'd and *ſworn as a Witneſs* in the Trial *for the Forgery*; For this makes nothing to the Probate of the Will, or Recovery of the Legacy in the Spiritual Court, nor do they take Notice of it Try. per Pais, 240.

13. A ſpecial *Iſſue* was directed *to try the Cuſtom of a Manor, whether a Fine on the Lord's Death be due to the Heir of the Lord* during his Minority; Exception was taken to the *Steward's* being admitted a Witneſs, becauſe he *had a Fee on Admiſſion*; Sed non Allocatur, and he was ſworn. 3 Keb. 90. pl. 31. Mich. 24 Car. 2. B. R. Champian v. Atkinſon.

14. A *ſmall Legatee* has been ſworn to prove a Will. Arg. Vent. 351. Mich. 32 Car. 2.

15. In Ejectment upon a Trial at Bar, the Title of the Leſſor of the Plaintiff was upon the *Grant of a Rent, with a Clauſe of Re-entry for Non-payment*. The *Defendant produced the Executor of the Grantor as a Witneſs*; It was objected, that he ought not to be admitted, becauſe the *Grantor had covenanted for himſelf and his Heirs to pay it*; And that the Executor being bound to pay it was no competent Witneſs; But it was inſiſted on the other Side, that this Covenant annexed to a Real Eſtate, would bind the Heir only, and not the Executor. But the whole Court were againſt it; But then *it was proved, that he had fully adminiſtred the Inventory*; But the Plaintiff giving a farther Charge to maintain his Title, that Witneſs was ſet aſide. Vent. 347. Hill. 31 & 32 Car. 2. B. R. Cook v. Fountaine.

16. In an Information for Forgery, and for *publiſhing a forged Deed knowing it to be forged*, it was adjudged upon a Conference with the

Judges of B. R by a Baron of the Exchequor, that *no Perſon who is or may be a Loſer* by the Deed, *or may receive any Benefit* or Advantage *by the Verdict being found againſt the Defendant ſhall be a Witneſs.* 3 Salk. 172. pl. 4. Watts's Caſe.

An Executor may be a Witneſs in a Cauſe concerning the Eſtate, if he be not reſiduary Legatee.

17. An *Executor* was admitted to *prove the Revocation of a Legacy*, tho' he had proved the Will, for at the Time of proving the Will, he only Swears he believes it to be the laſt Will; And at that Time he might not know of the Revocation. Vern. 20. pl. 12. Mich. 1681. Jervois v. Duke.

Per Hale at a Trial at Bar. 1 Mod. 107. Fountain v. Cook.

S. P. cited by Lord Keeper, as order'd accordingly. Vern. 308. in pl. 300. Hill. 1684.

18. If a Man *promiſe* another that if he recover the Land, the other *ſhall have a Leaſe of it*, he is no good Witneſs. Per Twiſden J. 1 Mod. 21. pl. 12 Mich. 1681. Owen Hanning's Caſe. Or a Sum of *Money*. 3 Mod 85. Mich. 1 Jac. 2. B R. Hicks v. Gore.

19. Bailiffs that ſerved *an Execution in breach of an Injunction*, find Money hid in the Houſe and carry it away; Ordered, that the Party at whoſe Suit the Execution was taken out, ſhould make *Satisfaction* for all Damages which the Plaintiff ſhould ſwear he had ſuſtained. Per Finch C. and North K. confirmed the Order, and *in odium ſpoliatoris*, allowed the Oath of the injured Party as ſufficient to charge the wrong Doer. Vern. 207. pl. 203. Mich. 1683. Childerns v. Saxby.

Vent. 351. S. P. obiter. —2 Show. 47. Arg. S. P.

20. It is the conſtant Practice not to permit one that has *laid a Wager as to a Matter in Diſpute* to be a Witneſs; But *if he has confeſs'd the Wager loſt, and has paid it*, it ſhall be intended to be duly paid, and therefore ſhall be intended to be duly paid, and for that Reaſon ought to be admi red a Witneſs. 3 Lev. 152. Mich. 35 Car. 2. C. B. Reſcous v. Williams.

21. It is uſual where a Man is a *Legatee*, if it was an inconſiderable Legacy, as 5 s. (or 5 l. to a Man of Quality) that he ſhould nevertheleſs be a Witneſs to *prove the Will*, per Ld K. North. Vern. 254. pl. 246. Mich. 1684. in Caſe of Corporation of Sutton Coldfield v. Wilſon.

22. Tenant that has nothing but a *Kiddel* (i. e.) a Wear in the Sea, between High and Low Water Mark, may be a Witneſs to prove if there be a *Cuſtom to cut Trees without Licence* or not. 2 Sid. 9. Mich. 1657. in Caſe of Chamberlain v. Drake.

23. A *Patron* cannot be a Witneſs to maintain the Title of his Clerk in Ejectment. 4 Mod. Arg. 17. Paſch. 3 W. & M. in B. R. in Caſe of Jones v Beau.

24. *In an Ejectment, a Patron* is never permitted to be a Witneſs to maintain the Title of his Clerk. 4 Mod. 17. Paſch. 3 W. & M. in B. R. in Caſe of Jones v. Beau.

25. Upon *Capture of a Prize*, one Part was agreed to belong to the Maſter, and the other two Parts to the Owners; The Maſter diſpoſed of one hundred Cheſts of Lemons to A. B. they bring Account againſt A. B. and upon Evidence at Guild-Hall *a Mariner was allowed to be ſworn, though it appeared that he was to have a third Part of the Maſter*; For per Holt Ch. J. the Maſter is accountable to the Mariners for their Share, which they ſhall recover of the Maſter, whether he recovers in this Action or not. Skin. 403. Mich. 5 W. & M. in B. R. pl. 38. Anon.

26. Where a Man makes himſelf a Party in Intereſt after a Defendant has Intereſt in his Teſtimony, he may not by this deprive the Plaintiff

Plaintiff or Defendant of the Benefit of his Teſtimony. As if a Man be a *Witneſs of a Wager, &c.* and after bets, this ſhall not be a Reaſon to except againſt his being ſworn to prove the Wager. Skin. 586. pl. 5. Trin. 7 W 3 ruled by Holt Ch. J. at Niſi Prius in Middleſex. Barlow v. Vowell.

28. *Bankrupt* ſhall not be a Witneſs *to prove an Act of Bankruptcy*, and ſaid to be refuſed; Per Raymond Ch. J. But he admitted a Bankrupt *to give Evidence as to the Time of the Act of Bankruptcy*; His *Wife* ſhall neither be a Witneſs for or againſt him to prove Act of Bankruptcy ——And 27 Jan. in Canc. per Ld. Ch. Egleſham v. Haines. 1ſt. That the *Creditor of a Bankrupt* was not a Witneſs, becauſe he ſwears to increaſe his own Dividend, whether more or leſs. 2dly. So it is in Caſes of Commons and Boundaries (that is) to enlarge either. 3dly, That an *Iſſue in Tail in Life of his Father* may be a Witneſs, becauſe he has but a Poſſibility; But a *Remainder-man after Eſtate Tail* is no Witneſs. 4thly, In this Caſe, the Objection was againſt a Man who was a Purchaſor, i. e. the *Son of the Bankrupt, who claimed under Settlement which was in Diſpute*, (ut dicitur) ſed ſub Judice, and not determined whether good or bad; But his Depoſition was read, becauſe it is but a Poſſibility of an Intereſt which may affect him, if Effects ſufficient, the Settlement is good between him and the Bankrupt; and this is uncertain how the Effects may hold out, and whether good againſt the Creditors not determined Upon Examination, upon a voir dire, if the Party believes or admits he is intereſted, or if he denies it, and it is proved upon him, he is no Witneſs, but in the preſent Caſe the Objection only goes to his Credit. Ex relatione magiſtri Cruwys.

29. An *Heir at Law may* be a Witneſs concerning the Title of the Land, but the Remainder-man cannot, for he hath a preſent Intereſt, but the Heirſhip is a meer Contingency. Coram Treby Ch. J. 1 Salk. 283. pl. 13. Mich. 10 W. 3. Smith v. Blackham.

30. Upon Trial of an *Information for a Cheat*; The Fact was, that the *Defendant had a Promiſe of a Note for 5 l.* from his Mother in Law, *and by ſome Slight he got her Hand to a Note of* 100 *l.* Et per Holt Ch. J. the Mother cannot be a Witneſs, being concerned in the Conſequence of this Suit, which is a Means to diſcharge her of the 100 l. for though the Verdict upon this Information cannot be given in Evidence in an Action upon the Note, yet we are ſure to hear of it to influence the Jury. 1 Salk. 283. pl. 12. Mich. 10 W. 3. at Guild-Hall. The King v. Whiting.

Ld. Raym. Rep. 396. S. C. ruled by Holt Ch. J. accordingly.—And Holt Ch. J. ſaid, that he could not diſtinguiſh this Caſe from the Caſe of Perjury or Forgery, where the Party whoſe Intereſt is defeated or prejudiced by the Deed &c. is no Evidence to prove the Perjury or Forgery. 1 Salk. 283. and Ld. Raym. Rep. 396. ut ſupra.

31. Tennant in Tail, *Remainder in Tail*, he in Remainder cannot be a Witneſs concerning the Title of theſe Lands; for he has an Intereſt, ſuch as it is. 1 Salk. 283. pl. 13. Mich. 10 W. 3. Coram Treby Ch. J. in Caſe of Smith v. Blackham.

32. A *Will of Lands* was *atteſted by three* Witneſſes, whereof the *Deviſee was one*; Adjudged that he is no good Witneſs with reſpect to this Deviſe. Carth 514. Hill. 11 W. 3. B. R. Hilliard v. Jennings.

33. A *Legatee* may be a *Witneſs againſt a Will*, becauſe he ſwears againſt his Intereſt, but not a Witneſs for the Will, becauſe he is preſumed to be partial in ſwearing for his own Intereſt. 2 Salk. 691. pl. 5. in Canc. Oxenden v. Penrice.

34. In

34. In Order to a new Trial, an Affidavit was read, that *one of the Witneſſes had declared that he had got a Guinea to ſtifle the Truth*, Gould J. ſaid, that an Affidavit of him who had the Guinea were ſomething, but his Saying is nothing. A *Witneſs's laying a Wager in the Cauſe is no Hindrance to his being a Witneſs*; For the other has an Intereſt in his Evidence, which he cannot deprive him of. 7 Mod. 31. Trin. 1 Ann. B. R. George v. Pierce

35. A *blank Indorſee* of a *Bill of Exchange* is a good Witneſs in Trover for the ſaid Bill of its Delivery by him to the Drawee's Brother, &c. 1 Salk 130. pl. 15. Paſch. 2 Ann. B. R. Lucas v. Haynes.

36. In Action for running over the Plaintiff's Barge with his Ship, Holt Ch. J. would not ſuffer the *Pilot* to be a Witneſs, becauſe he was anſwerable, if faulty in ſteering, to the Maſter. 1 Salk. 287. pl. 22. Hill. 2 Ann. Martin v. Hendrickſon.

37. Where a Witneſs confeſſeth himſelf intereſted, the Party ſhall never be let in to ſupport his Teſtimony; and this, howſoever it appears, a *Decree was* made in Canc. *on the Teſtimony of a Witneſs*, but while a Petition was depending for a Rehearing, a *Bill was preferred* againſt him, *and his Anſwer confeſſeth himſelf to be intereſted*, and now his Anſwer was read againſt him. Objected, that the Diſcovery was not by proper Means, but the Witneſs ought to have been examined to theſe Points, upon Interrogatories at the Communication, or otherwiſe Articles ought to be exhibited againſt him upon Facts which ought to be proved againſt him ſed non allocatur, for this could not be diſcovered otherwiſe. Articles may be granted to examine the Competency of a Witneſs as well as to his Credit; Perhaps the Party might have demurred to this Bill, it being to make himſelf a Criminal, but if a Man will anſwer ſuch Things as he need not, it is reaſonable the other Party ſhould take Advantage of it. Canc. Mich. 3 Ann. Coram Ld Keeper Maſter of the Rolls, Holt Ch. J. and Powel J. The Fact here confeſſed, was, that he had given Security for Half of the Land to one of the Parties in Caſe that Party recovered, which he accordingly did do at the Rolls on the Teſtimony of that one Witneſs.

Equ abr. 224. pl. 4. S. C. and S P.—

38. Tho' a Witneſs is examined an Hour together at Law, if in any Part of his Evidence it appears that he was a *Party intereſted*, the Court will direct the Jury that he is no Witneſs, nor any Regard to be had to his Evidence; per Wright K. 2 Vern. 464. pl. 424. Mich. 1704. Needham v. Smith.

39. A *Witneſs was examined before the Hearing whilſt ſhe was intereſted, but after the Hearing ſhe releaſed her Intereſt*, and was examined again before the Maſter. Lord Keeper allowed the Depoſitions before the Maſter to be read. 2 Vern. 472. pl. 430. Mich. 1704. Callow v. Mime.

40. Upon Appeal from the Rolls, it was objected to the Evidence of a *Witneſs* examined in the Cauſe, and read at the Hearing at the Rolls, that ſince the Hearing in anſwer to a Bill exhibited againſt him, he had *confeſſed, that on the Day on which he was to be examined as a Witneſs, the Plaintiff gave him a Bond, that if the Plaintiff recovered the Land* in queſtion, *he would convey Part of it to the ſaid Witneſs*. The Lord Keeper, aſſiſted by Holt, C. J. and Powell, J. were of Opinion, that the Anſwer ought to be read, to take off his Evidence. 2 Vern. 463. pl. 424. Mich. 1704. Needham v. Smith.

41. In *Debt upon a joint and ſeveral Bond againſt one* of the Obligors, *the other can be no Witneſs*, for theſe Perſons are ſuppoſed to be intereſted, tho' they cannot have any Benefit by any Verdict given.

In

In case of *Burglary or Robbery*, where the *Prosecutor is intitled to 40 l. by late Acts*, &c. he may be a Witness; for these Acts do not alter the Nature of the Evidence before, and are Advantages given to encourage Persons to prosecute; And in Robbery the Examination of the Party robbed is Evidence *propter necessitatem rei*, because there can be no other Person. Parker, Ch. J. said, that he would have allowed, if all the Seamen had made an Insurance, the Testimony of any of them; But there the Objection was not against the Master, as Master, but as he had another Interest.

In case of the Arrival of a Ship, upon an *Action for Seamen's Wages*, the Seamen may be Witnesses one for another, or else Witnesses must very often be brought from beyond Sea.

In the Case of Bath and Montague, after the Trial there were *several Indictments of Perjury* preferred, for that the Witnesses swore that Sir J. C. was at . . . . in 1701. and *when one of these came to be tried, the others* that were indicted *were admitted as Witnesses.*

In an *Action for negligent keeping of Fire*, any who are *Sufferers* thereby shall not be Witnesses, tho' the Verdict in one Action could have no Influence in another.

In an Action *against an Innholder for Goods stollen*, the *Party himself* cannot be a Witness, tho' it may be he had no Servant with him; Per Eyre, J.

In case for *Policy of Insurance*, the Plaintiff at the Trial *produced the Master to prove that the Ship was taken by the French*; Obj. And the Master being asked, said that *he had another Policy with another Person on the same Ship*, and therefore it was insisted that he could be no Witness, because a Party interested, and so not competent to prove that the Ship was taken; And on a Case made, it was resolved in B. R. that he was no Witness; Parker, Ch. J. said that he had put the Case to all the Judges, and they were of the same Opinion. Pasch. 11 Ann. B. R. Johnson v. Haydon.

42. The Matter in *Issue was, which was the Charter by which the Corporation* of the Town of Bewdly *was to act*; *Whether by the ancient one, or one of a later Date?* Evidence brought to establish the ancient Charter was excepted against, as being a *Mortgagee under the old Corporation*, which they proved by an Answer of his to a Bill in Chancery. But this Answer being so uncertainly penned, as that it might be true, and yet his Mortgage of such a Nature, as not to prevent his Evidence, it was insisted that he might be called to explain the Ambiguity of his Answer; and the Court was of Opinion he might, since his Answer depended upon his Veracity, as much as the Evidence he could then give; And if the one be to be credited, why not the other? But afterwards his Evidence was rejected upon another Consideration, viz. That, in his Answer, he lays the whole Stress of his Defence upon the Matter then in Issue, viz. the subsisting of the present Corporation. 10 Mod. 151. 152. 12 Ann. B. R. Corporation of the Town of Bewdley.

43. On convicting a Person unqualified for keeping a Greyhound before Justices of Peace, the *Informer* cannot be a Witness to prove the Fact. Pasch 12 Ann. B. R. the Queen v. Cooper.

44. Suppose one gives or *promises a Witness Money if the Cause go on that Side*, he cannot be admitted to give Evidence; Per Holt, Ch. J. 11 Mod. 228. Young v. Slaughter.

45. Plaintiff brought an Action of *Trover* against Defendant for Lace, and *produced one Floyer as a Witness*, upon which the Defendant called one to prove that the *Plaintiff's Testatrix had declared that Floyer was her Partner* as a Pawnbroker, *but that it was not known, because she made use of him sometimes as an Evidence*; Upon which Floyer was re-

jected, it being to enlarge the Teſtatrix's Eſtate. Vaughan, Executor of Hilton v. King, Ch. J. at Guildhall. Hill. 6 Geo.

46. *One that had inſured upon the ſame Ship, tho' not to the ſame Place*, ſhall not be admitted an Evidence, the Ship being loſt within the Compaſs of that Inſurance, coram King, Ch. J. Hill. vac. 6 Geo. apud Guildhall.

47. *Action by Drawee on Bill of Exchange againſt the Drawer for Non-payment by the Acceptor, Defendant inſiſted that the Acceptor was broke, and the Plaintiff did not give him ſufficient Notice of it*, by which he was damaged, which ought to be abated him in Damages, and *would have called the Acceptor to prove this*; But Prat, Ch J. would not allow him to be a Witneſs, becauſe, if the Plaintiff recovered ſmall Damages againſt the Defendant, the Acceptor would have the Benefit of it. Paſch. 8 Geo. Mitchel v. Conaway.

48. In *Action for Fees* a *Perſon* was called *who had a like Demand upon Defendant* with Plaintiff, but it being only to *prove Earl Marſhal's Hand*, and not to the Merits of the Demand, he was allowed for that Purpoſe. At Niſi Prius coram Pratt, Ch. J. Mich. 8 Geo.

49. A *Grantee, where he appears to be a bare Truſtee*, is a good Witneſs to *prove the Execution of a Deed to himſelf*. Wms's. Rep. 290. Mich. 1715. in Caſe of Goſs v. Tracey.

50. In Caſe of a *Preſcription for a Way through a Gate to an Acre of Land in a common Field, over Defendant's Part thereof near the Gate. A Perſon who had an Intereſt in the Field, and claimed a Way through this Gate* into the common Field *to his Part thereof*, tho' as ſoon as the Parties came within the Gate ſome went one Way ſome another, yet in regard this was a common Intereſt to all the Proprietors, as in Caſe of a Commoner, and the *Witneſs ſaid, if this was ſtopt up at the Gate it would be great Inconvenience, he was ſet aſide*; Per Pratt, Ch. J. at Weſtminſter Sittings, Paſch. Vac. 1721.

51. *A bare Truſtee is* a good Witneſs for his ceſtui que Truſt, *but not an Executor in Truſt*, as he is *liable to be ſued by Creditors, and to anſwer Coſts*. 3 Wms's Rep. 181. Paſch. 1733. Croft v. Pyke.

52. *A. and B.* were *jointly committed* in Execution *at the Suit of the Crown*. In an Action brought againſt the Warden for ſuffering A. to eſcape. *B was produced as a Witneſs to prove the voluntary Eſcape*. It was objected, that this tended to diſcharge B. as againſt the Warden, who could not detain him, having ſuffered A. who was jointly in Execution with him to eſcape, and that therefore he was intereſted in the Event of this Suit; But it was anſwered, that a Verdict in this Cauſe could be no Evidence in an Action of falſe Impriſonment, &c. to be brought againſt the Warden, and the Teſtimony of B. was received. Gibb. 80, 81. Trin. 2 & 3 Geo. 2. at the Sittings in the Exchequer, coram Pengelly, Ch. B. The King v. Huggins.

53. Juſtice Powys declared, that it had been ſolemnly agreed by the Judges, that where *a Perſon had a Legacy given, and did releaſe it, he was a good Witneſs to prove the Will, ſo if it was paid him in caſe of a pecuniary Legacy*; *But* if it was a *ſpecifick Legacy*, tho' it was delivered to him, yet will not ſuch be a Witneſs, becauſe if the Will be ſet aſide, an Action of Trover would lie againſt ſuch by the Adminiſtrator. Autumn Aſſ. at Brentwood 1720.

(G) Wit-

## (G) Witneſſes. Who may be. Intereſted Perſons, as Members of a Corporation Community, &c.

1. IF one or 2 *particular Inhabitants of a Town where all claim Common be ſued* concerning their Common, *thoſe not ſued ſhall not be Witneſſes* for thoſe ſued, becauſe it is in Defence of their own Right and Title which is one way or other decided by the event of this Trial. *So* it is *in caſe of a Modus Decimandi* and the like; wherein it is ordered many times per Cur. for avoiding unneceſſary multiplicity of Suits, that in one Man's Caſe a Trial may be had for all. Hob. 91. 92. Paſch. 14 Jac. in the Starr Chamber, Ld. Howard v. Bell, where the Tenants of a Mannor joined to defend a Cauſe againſt their Lord who ſuppoſed all their Eſtates to be void in Law.

One Commoner cannot be Evidence to the Right of Common in an Action brought by another; For the Right is intire and he Swears a Title to himſelf. Skin. 174. pl. 4. Paſch. 36 Car. 2. B. R. in Caſe of Sandys v. The Cuſtom Houſe Officers.

2. An Action was brought by the Corporation of the Weavers of Norwich for a Penalty againſt a Weaver for working at his Trade in Harveſt time. And Atkins J. allowed one of the Corporation to be a Witneſs tho' one moiety of the Penalty was due to the Corporation, Try. per Pais 162. Lent Aſſizes 1657.

3. Upon Evidence to a Jury at a Trial at Bar, it was agreed that where the *Teſtator deviſed Lands to W. R. for Life, Remainder to the Miniſter and Church Wardens of a Pariſh for the Maintenance of the Poor for ever*, any of the *Pariſhioners* of the ſame Pariſh may be a Witneſs to prove this Deviſe; 2 Sid 109. Mich 1658. B. R. Townſend v. Row. Ibid. cites the Caſe of Eaſt Greenwich S. P.

4. Upon a Trial at Bar upon an Iſſue directed out of Chancery, *whether all the Manor of S. H. is within the County of Stafford*; Exception was taken to ſome Witneſſes who were produced to prove the manor Houſe of S. H. to be in the County of Salop, becauſe they were of that County themſelves; but it was Ruled, that *any Perſon of the County, if he is not within the Hundred where this Maunor is, might be a Witneſs*; For as the County Taxes, every Hundred pays its Proportion; but as to the Hundreds there are particular Charges. But it being proved afterwards that there was a *General Tax in each County for maintenance of the Suit* and therefore *no one who was charged thereto may be a Witneſs*. Sid. 192. pl. 21. Paſch. 16 Car. 2. B. R. The County of Salop v. the County of Stafford.

5. On an *Information for a Riot* and Miſdemeanor *in chuſing a Mayor*, the Cauſe was tried at Bar, and *no Evidence was given againſt 2 of the Defendants*; and thereupon *they were allowed* to be Sworn *as Witneſſes for the other Defendants*, tho' it was objected that they were of the ſame Corporation; and that they defended the Suit at their own Charge, but this was not well proved. Sid. 237. Hill. 16 & 17 Car. B. R. The King v. Beder. And per King Ch J. at Bodmyn Aſſizes, 1718. If ſeveral are Indicted for a Treſpaſs &c. and there is no Evidence againſt one of them he ſhall be admitted as an Evidence for the reſt.——And in ſuch Caſe Holt Ch. J. ordered a Felon at the Old Baily to be brought from the Bar, and to be Evidence againſt Perſons indicted with him

6. On Evidence to a Jury at Bar in *Ejectment*, the Defendant challenged a *Witneſs* produced by the Plaintiff *to prove a Leaſe made by the Dean*

*Dean and Six Residentiaries of Herford*, under whom he claimed, because tho' the Witness *was a Prebendary at large and a distinct Body, yet as one of the General Corps he had Power to assent*, which the Court held to be sufficient to set him aside tho' he has no Interest. 2 Keb. 126, pl. 79 Mich. 18. Car. 2. B. R. Smith v. Rawlins.

7. The Defendants were severally *Convicted of Deer Stealing* upon the 3 and 4. W. 3. c. 10. Exception was taken to both the Convictions because *the Persons upon whose Testimonies the Defendants were convicted appeared to be of the same Parish* where the Facts were committed *and so might be entitled to part of the Penalty*, and consequently not indifferent and Credible Witnesses; but over ruled per tot. Cur. because the Justice of Peace has averred them to be Credible Witnesses, and it does not appear that they were of the Poor of the Parish. Mich. 5 Geo. B. R. The King v. Wilford and Savage.

8. In Case on *Assumpsit and Indebitatus* to pay *Toll* of one half-penny for every Frail of Raisins, and Four-pence for every Tun of Oil &c. For which the City prescribed by the Name of *Water Bailage* to be taken of *all not Freemen*, that bring such Wares by Water to be sold to the City; On not Guilty pleaded and trial at Bar, Maynard excepted to a Witness for the City, because a *Freeman*; sed Non allocratur; albeit he were disallowed for this Cause in the Exchequer, because albeit the Action be brought by the Mayor and Commonalty, the *Benefit being only to the Sheriffs*, the Immunity of Citizens is not in Question. 2 Keb. 295 pl. 84. Mich. 19 Car. 2. B. R. Mayor and Commonalty of London v. Gold.

2 Keb. 713. pl 92. Barret v. the Hundred of Stoke S. C. ruled accordingly.

9. In an *Action against a Hundred* upon the *Statute* of *Hue and Cry* some *House-keepers appeared as Witnesses who said they were poor and paid no Taxes nor parish Duties*; but the Court with taking the Opinion of C. B. held that they were not good Witnesses because when the Money recovered against the Hundred should come to be levied they might be worth something. Mod. 73. pl. 30. Mich. 22 Car. 2. B. R. Anon.

10. In a Dispute about the *Toll of a Market*, the Town pretending to be Incorporated and to have a Right to the Toll, it was resolved that no *Burgh-Holder* can be a Witness for the Town; Vent. 212. Pasch. 24 Car. 2. Anon.

* See tit. Trial (H) pl. 3. and the Notes there.

11. In an Action on the *Case* against the Town of Uxbridge *for taking Toll* on Thursday Market, it was said no Uxbridge Man of the pretended Corporation can be a Witness, * and so by Hale Ch. J. it was ruled in Case of the London Hawkers; And in Smith and Hancock's Case that no *Freeman* could be allowed to prove the Custom of this City that was of the Corporation, 3. Keb. 12. pl. 16. Pasch. 24 Car. 2. Cook v. Baker.

12. In *Trespass* the Defendant *Justifies as Servant to the Mayor* Aldermen and Commonalty of the City *of London*, Governors of the Hospital of Bridewell by Patent 7 Ed. 6. The Witnesses being most *Freemen* of the City, Maynard the King's Serjeant would not Consent they should be Sworn; and per Cur. in a Quo warranto they could not be Sworn, because each Member is liable to the Fine; but this being against Carter, and so a Suit against them as another Corporation viz Governors of the Hospital, this being *in another Capacity* and the *Action not in the Right, the Possession can be recovered against none but the Defendant* Carter, or such as are of the Inhabitants of Bridewell, not against any Freeman or Citizen, as such, by Hale Ch. J. and Wylde; contra by Twisden and Rainsford; but to avoid this Question, Jefferies for the City prayed Time till next Term, that in the mean Time they might before the Mayor of London in his Court at a Common Hall, as most usually, procure a *Temporary Disfranchisement* of those Witnesses

neſſes that were Freemen to enable them to be Witneſſes which the Court granted. 3 Keb. 300. pl. 35. Paſch. 26 *Car.* 2. B. R. Lord Derſet v. Carter.

13. Hale, Ch. J. in * Hancock's Caſe in the Exchequer, in a *Quo Warranto* againſt the City of London, it was agreed that none could be Witneſſes for the City of London *againſt the Hawkers*, until they were *diſfranchiſed*; for the Evidence *cannot ſurrender his Franchiſe by Conſent*, becauſe the Right was concerned, and every particular Member liable to the Fine he cautioned them ſo to do in this Caſe of *Package*, and ſo it was here in the Caſe of *Water-Bailage*. 3 Keb. 295. pl. 26. Paſch. 26 Car. 2. B. R. Corporation of London v. ———

* See tit. Trial (H) pl. 5 and the Notes there.

14. In caſe of *Water Bailies claiming 2 d. per Chaldron* for Coals Imported; all the Judges (except Jones J.) held that Freemen might be Witneſſes. 2 Show. 47. pl. 33. Paſch. 31 Car. 2. B. R. King v. Carpenter.

Information in Nature of a Quo warranto for taking 2 d. per Chaldron for all Sea Coal imported at London. The Defendants preſcribed for the Duty, and Iſſue being taken upon the Preſcription, it was tried at Bar. The Defendants produced ſeveral Citizens Freemen of London, to prove the Preſcription; to whom it was objected that they ought not to be Witneſſes. Quia in proprioa cauſa—But per Cur. it appears, that the Mayor and Sheriffs have all the Profit of the Toll; ſo that tho' the Benefit of the whole Corporation touches all the Citizens, and all Freemen are Members, yet they having no particular Profit to themſelves, they are lawful Witneſſes, for it ſhall not be intended that they would be partial and perjure themſelves for ſo ſmall and remote Advantage. And the Jury gave Verdict for the Defendants, Mic 30 Car 2. C. B. and per Scroggs Ch. J. it cannot be a general Rule that Members of Corporations ſhall be admitted or refuſed to be Witneſſes in Actions for or againſt the Corporations. But every Caſe ſhall ſtand upon its Circumſtances, to wit, if their Intereſt be ſo valuable, as it can be preſumed it may occaſion Partiality in them or not. 2 Lev. 231 Vent. 351. King v. City of London.

The Ld. K. North ſaid, that a Corporation ought to have a Town Clerk, and Under-Clerks that are not Freemen, that they may be competent Witneſſes, upon Occaſion. And he ſaid, he thought it very hard in the caſe of Water Bailage of London, that no one Freeman of the City, tho' it was not 6 d. Concern to him, could be admitted as a Witneſs. But there indeed the Fee was in Queſtion. Vern. 254. pl. 246. Mich. 1684. Corporation of Sutton Celdfield v. Wilſon.

15. In Caſe of a *Toll for a Ferry*, Watermen have been allowed to be Witneſſes. Arg. 2. Show. 47. pl. 33. Paſch. 31 Car. 2 B. R. King v. Carpenter.

16. In *Caſe for procuring a falſe Return to a Mandamus*, the Defendant produced ſeveral *Freemen* of Canterbury *to prove the Return true*; to which it was Objected, they ought not to be admitted, being Freemen of Canterbury, and a By-Law was produced, by which it was ordered, that the whole Corporation ſhould be at the Charges of the Return. The *Defendant*, to qualify theſe Witneſſes, *produced a Releaſe* he had *given* to the Corporation *of all Contributions* they were liable to on this Account; and on much Debate on a Bill of Exceptions all the Court held, that the Witneſſes ought to have been received. It was agreed, they were good Witneſſes. 2 Lev. 236 Hill. 30 & 31 Car. 2. B. R. 7 Enfield v. Hill.

2 Jo 116 S. C. ſays that by Advice of the Court to put an End to the great Heats occaſioned in the City, the Parties agreed the Matter (as he thinks) for that no

Judgment was given —— 3 Keb. 859. pl. 26. S. C. but S. P. does not appear.

17. In an *Indictment for not repairing Peterborough Bridge*; one of the County was admited to be a Witneſs. cited per Dolben J. Vent. 351. Mich. 32 Car. 2. B. R.

18. In Caſe of Duty or *Cuſtom for Goods imported*, it was held, that *Freemen* Citizens might be Witneſſes for the Defendants; for that is againſt themſelves; and Unfreemen likewiſe, that were not Traders, were

Vent. 351 The Caſe of the City of London,

concerning the Duty of Water-Bailage, S. P. held accordingly, and ſeems to be S. C.

were allowed likewiſe for the Defendant. 2 Show. 146. pl. 127. Mich. 32 Car. 2. B. R. City of London v. unfree Merchants.

19. In *Information* by Attorney General at the Relation &c. on behalf of themſelves and all Inhabitants of the Town of Warwicke &c. *relating to Charities* &c. a Perſon an *Inhabitant receiving Alms is no Witneſs*; For every Inhabitant either pays or is under a Poſſibility of Paying to Church, Poor, &c. though he pays nothing at preſent. 13 May, 1737. per Ld. Chancellor at Weſtminſter.

20. If A. B. C. D. and E. *claim Common in* a Place called *Dale, excluſively of all other Perſons*, and the *Common of A. comes in Diſpute; B. may be a Witneſs* to prove that A. has Right of Common there; Becauſe in Effect it charges himſelf viz. He admits another to have Common with himſelf; *But if* the Preſcription be, that *all the Inhabitants of Blackacre ought to have common there, one of the Inhabitants cannot* be a Witneſs to prove that another of the ſaid Inhabitants ought to have Common there; Becauſe in Effect he would ſwear to give himſelf Right of Common there. Ruled by Holt Ch. J. at Lent Aſſiſes at Wincheſter, 1697-8. Ld. Raym. Rep. 731. Hockley v. Lamb.

21. A Suit was for Money given to the Pariſhoners; None of the Inhabitants ought to be Witneſſes; For in Caſes where the *Party was concerned in Intereſt, though never ſo ſmall, have always prevailed*; and it was ſo reſolved in great Debate in the Caſe of the City of London concerning the *Water Bailiff*; Per Ld. Somers. 2 Vern. 318. pl. 305. Paſch. 1694 Dodſwell v. Nott.

22. *In all Actions to be brought in the Courts at Weſtminſter or at the Aſſiſes, for recovery of any Sums of Money miſpent or taken by Church Wardens or Overſeers of the Poor; The Evidence of the Pariſhoners other than ſuch as receive Alms ſhall be admitted.*

23. 1 *Annæ cap.* 10. *Enacts that in Informations and Indictments in any Court of Record at Weſtminſter or at the Aſſiſes or quarter Seſſions, for not repairing their Highways or Bridges, the Evidence of the Inhabitants of the Town or County, in which ſuch decayed Bridges or Highways lie, ſhall be admitted.*

24. *In all Informations on Indictments, for* not repairing decayed Bridges, *and the Highways adjoining in the Courts of Weſtminſter, or at the Aſſiſes or quarter Seſſions of the Peace; The Evidence of the* Inhabitants *of the Town, Corporation, County, Riding or Diviſion, where ſuch decayed Bridges or Highways lie, ſhall be admitted.*

25. One of the County is a good Witneſs on a Trial of an *Information againſt the Inhabitants of a County, for not repairing a publick Bridge*, though he cannot be a good Juror. 6 Mod. 307. Mich. 3 Ann. B. R. The Queen. v. the Inhabitants of the County of Wilts.

The like was done in Caſe of the City of London againſt the Hawkers. 3 Keb. 295. and in Caſe of Ld Dorſet v. Carter 3 Keb. 300.

26. The *Company* of Sadlers brought *Debt* upon the Statute of 1 Jac 1. c. 22. S. 44. againſt the Defendant; For that being a Sadler he did *make* Five Hundred *Sadles inſufficiently*, and inſubſtantially, contra formam ſtatuti, and ſo became indebted to them in the Forfeiture; This Action being now brought for the Penalty, *three of the Company were diſfranchiſed to be legal Evidence*, they declaring upon a voire dire, that they had no Aſſurance of being received again. 6 Mod. 165. Paſch. 3 Ann. B. R. The Warden and Company of Sadlers of London v. Jones.

27. Upon Iſſue joined upon a Preſcription for a *Toll*; The Defendant produced a Witneſs; The Plaintiff objected that he was a Freeman, and

and ſo intereſted; Upon which the Defendants produced a Judgment in the Mayor's Court, whereupon a Scire Facias awarded, and two Nihils returned, they had given *Judgment of his Diſfranchiſement*, but upon Inquiry, the Man ſaid he never *was ſummoned*, and knew nothing of his Diſtranchiſement; Therefore the Proceeding being irregular, Holt would not admit the Man to be an Evidence, becauſe the Judgment in the Mayor's Court may be avoided. 11 Mod. 225. pl 20. Paſch. 8 Ann. B. R. Brown v. the Corporation of London.

28. And in this Caſe it was likewiſe ſaid, per Holt Ch. J. That a *Man who uſes a Way*, may be an Evidence, *whether a Toll has been paid*; and ſo in caſe of a *Nuſance*; but if he *contributes* any Thing *towards* the *carrying on the Suit*, he cannot be an Evidence. 11 Mod. 225. 8 Ann. Brown v. the Corporation of London.

29. In caſe of *proving the Bounds of a Pariſh*, if the *Pariſhoner is* ſo poor, that he receives *Alms* he may be a Witneſs; *So* if he did not receive Alms; yet *if he did not contribute to the Parish Charges* he might alſo be a Witneſs, but if he paid he could not; Per Juſtice Powys at Brentwood, Summer Aſſiſe, 1720. Said to be agreed by all the Judges.

30. No one *living in a Hundred* ſhall be allowed an Evidence *for any Matter in Favour of the Hundred, though ſo poor*, as upon that Account to be excuſed from the Payment of the Taxes; Becauſe though he be poor at preſent, he may become rich. 10 Mod. 150. Hill. 11 Ann. Per Parker Ch. J. Queen v. Inhabitants of Hornſey.

31. In an *Action againſt the Hundred* of North-Taunton, Devon. Lent Aſſ. 1715. Pratt J. ſaid, that it had been the Opinion of all the Judges upon a late Conſultation, that ſuch *poor Inhabitants* of the Hundred as did not contribute to the Church, Poor, &c. *might be good Witneſſes*.

32. *An Action* was brought *by the Corporation* of the Weavers of Norwich, *for a Penalty againſt a Weaver for working at his Trade in the Harveſt Time*, contrary to an Ordinance by them made. And Atkins, J. allowed *one of the Corporation to be a Witneſs*, tho' the Moiety of the Penalty was due to the Corporation. Tr. Per Pais, 7th Edit. 329. Sect. 1.

33. A *Freeman* of Lynn was not allowed per Hale Ch. J. at Norfolk Summer Aſſizes 1668. to be a Witneſs to prove *the Cuſtom of Foreign bought and Foreign ſold* in that Town. Tr. Per Pais, 163. Harwich v. Twells.

34. An Action of *Debt* was brought, Summer Aſſizes Suffolk 1669, by the Town of Ipſwich, for 50 *l.* a *Fine ſet* upon one choſen *Common Councilman* (called their prime Conſtable) *for refuſing to renounce the Covenant*, &c. and the *Town Clerk* (tho' a Freeman) was allowed a Witneſs to prove Election, Refuſal, &c. and the Fine ſet which is for Neceſſity, for that none other are, or ought to be preſent at thoſe Acts. Per Rainford, J. L. E. 67. pl. 43. cites Tr. per Pais 163.

35. In an Action brought by a Commoner for his Right of Common, another *Perſon that claims a Right of Common upon the ſame Title* ſhall not be allowed to give Evidence, and yet it is certain he can neither get nor loſe in that Cauſe; For the Event of the Cauſe will no way determine his Right; But tho' he is not intereſted in that Cauſe, he is intereſted in the Queſtion upon which the Cauſe depends, and that will be a Biaſs upon his Mind. It is not his ſwearing the Thing to be true that gives him any Advantage, but it is the Thing's being true; And the Law does judge that it is not proper to admit a Man to ſwear them to be true, which it is plainly his Intereſt ſhould be true. 10 Mod. 191. Hill. 1 Geo. 1. B. R. in Caſe of Reeves v. Symonds.

36. A

36. A *Charity* was given *for cloathing ſix poor Perſons of the Pariſh of A.* Lord C. Parker would not ſuffer any of the *Inhabitants of A.* to be Witneſſes, becauſe they were intereſted, as being eaſed of the Poor Rates; And held, that a Witneſs produced, being deſcribed to be of the Pariſh of A. Yeoman, muſt be intended a Houſe-keeper, and one liable to pay Pariſh Rates, *unleſs the contrary be made appear.* Wms's Rep. 599, 600. Hill. 1719. Attorney-General v. Weybourgh.

N B. The Method of diſtranchiſing is by Information in Nature of a Quo Warranto againſt the Member, who confeſſes the Information, and thereupon the Plaintiff has Judgment to diſtranchiſe him. Wms's. Rep. 596. in a Note added at the End of the above Caſe.

37. If a *Corporation will examine any of their Members* as Witneſſes *they muſt diſfranchiſe them*, (and ſo the Courſe is) and then they make uſe of their Teſtimony; Per L. C. Parker, Wm's Rep. 595. Mich. 1719. Mayor and Aldermen of Colcheſter.

38. One Iſſue whether a *Cuſtom for Mortuary* or not, at Rumſey in Hampſhire, the *Inhabitants who received Alms were admitted* as Witneſſes at Wincheſter Aſſizes, Lent 1719. coram King, Ch. J.

39. A *Burgeſs* of Bridport no Witneſs in a Cauſe where the Queſtion was concerning a *Duty for ſetting up Tubs to ſell Corn in*, the Defendant produced a Leaſe from the Corporation. In Treſpaſs at Dorcheſter Aſſizes 1719. coram King, Ch. J.

## (H) What Perſons may be Witneſſes. Judges, Jurymen, &c.

But Ibid. the Reporter makes a Quære; For if the Witneſs is queſtioned for a falſe Oath to the Grand Jury, how ſhall it be proved if ſome of the Jury be not ſworn in ſuch Caſe.

1. THE Judge would not ſuffer a *Grand Juryman* to be produced as a Witneſs, *to ſwear what was given in Evidence to them*, becauſe he is ſworn not to reveal the Secrets of his Companions. Clayt. 84. pl. 14. 16 Car. before Foſter J. Anon.

2. Secretary Morris and Mr. Anneſley, Preſident of the Council were both *in Commiſſion for the Trial of the Priſoners*, and ſat upon the Bench; And there being Occaſion to make Uſe of their Teſtimony againſt Hacker one of the Priſoners, they both *came off from the Bench and were ſworn* and gave Evidence, and did not go to the Bench again during that Man's Trial, and it was agreed by the Court that they were good Witneſſes, tho' in Commiſſion, and might be made uſe of. Kelynge 12.

S P Per Cur. Sty. 233. Mich. 1750. B R. Bennet v. Hundred of Hartford.

3. When a *Juryman* was hearing Evidence with his Companions, was ſworn to give Evidence upon Prayer of Defendants Counſel, and he gave Evidence publickly to his Companions, and yet continued of the Jury. Sid. 133. in a Nota at pl. 3. Paſch. 15 Car. 2. B R.

4. The *Jury* may go upon Evidence *of their own perſonal Knowledge*, being returned de vicineto; Per Vaughan Ch. J. Vaugh. 147. in Buſhell's Caſe.

5. On a Trial at Bar in B. R. in Ejectment, *whether there was a proper and good Tenant to the præcipe to a common Recovery* ſuffered in Mich. Term; A Bargain and Sale was produced dated before that Term but in Fact executed afterwards; it was propoſed to prove this by Mr. Knight an Attorney, againſt whom it was objected for that

that he was an *Attorney in the Cauſe*, and he ought not be examined to diſcover the Secrets of his Clients; But it was ruled that *it was the Privilege of the Client and not the Attorney, not to be examined for* where a Counſel or Attorney is intruſted by his Client, and his Secrets are diſcovered to him, he receives them under a Truſt of Secrecy which he is not to break, neither ought he to aſſiſt the other Party; So that what the Client tells him, he ſhall not go and diſcover; But the Queſtion here is, when the Deed was executed, and whether by the Party or not, for he was concerned in paſſing this Recovery, and he preſent at the Execution of the Deed; It is an *Act of his own Knowledge*, he is to teſtify and ſhew the Truth only concerning this Deed, and any one might know this as well as an Attorney. Knight being examined ſaid, the Deed was executed about the latter End of February, or the Beginning of March. 10 Mod. 40. Mich. 10 Ann, B. R. Ld. Say and Seal's Caſe.

## (I) Witneſſes. Who. Parties.

1. IN Aſſiſe one of the Witneſſes was challenged, becauſe he was *named Diſſeiſor* et non allocatur; For he is not ſworn upon the Seiſin and Diſſeiſin, but upon the Deed, and therefore was ſworn, and yet his Saying to the Deed may excuſe the Tenant of the Diſſeiſin; And it was ſaid, that all the Witneſſes may be named in the Writ. And per Cur. Witneſſes ſhall not be challenged. Br. Teſtimoignes, pl. 8. cites 12 Aſſ. 12.

2. In Aſſize Deed was denied, and *Witneſſes* were named, one of whom was ſworn, notwithſtanding that he was *named in the Writ as a Diſſeiſor*, and notwithſtanding that he had *purchaſed the Demeſn pending the Writ*. Br. Teſtimoignes, Pl. 9. cites 12. Aſſ. 41.

3. If *one has Cauſe of Action againſt J. S. and brings Action againſt J. and ſeveral others againſt whom he has no Cauſe of Action*, and this is by Cover, to take away their Teſtimony, and it appears upon Evidence to be ſo, it was held per Cur. that the Juſtices may and ought to receive their Teſtimony; And ſo it was done in this Court, in the Caſe of one *Dymoke* and others. Sav. 34. pl. 81. Mich. 24. and 25 Eliz.

4. Nota; By Fleming Ch. J. and the whole Court, in a Trial at the Bar, where Exception was taken againſt a Witneſs, to prove the Execution of a Deed of Feoffment by Livery and Seiſin, whereby the Caſe was, A Feoffment in Fee was made to the Uſe of J. S. and two Witneſſes were ſubſcribed to prove the Livery of Seiſin; afterwards one of the Witneſſes had an *Eſtate at Will* made unto him *of Part of the Land*, and he being produced to witneſs the Execution of the Feoffment by Livery and Seiſin, was excepted againſt, becauſe he was now a Party intereſted in Part of the Land, and ſo his Oath was to make his own Eſtate good, but notwithſtanding the Exception was diſallowed by the whole Court; and it was reſolved, that he might well be ſworn as a lawful Witneſs to prove the executing a Feoffment by Livery and Seiſin, the Caſe being in Affirmance of the Feoffment. Bulſt. 202. Paſch. 10 Jac. Anon.

5. *Two are ſued*, but at the Aſſizes the Plaintiff *proceeds againſt one only*; In ſuch Caſe, he againſt whom the Plaintiff forceaſes his Suit may be allowed a Witneſs in the Cauſe. Godb. 326. pl. 418. Paſch. 21 Jac. B. R. Anon.

7. In *Treſpaſs againſt A. ſimul cum B. and C.*—B. and C. are admitable as Witneſſes, if the Plaintiff has not arreſted them, or at the moſt demanded Proceſs of the Sheriff to do it. Tr. per Pais, 335. 7th Edit. 335. cites Hill. 1651. Coram Roll.

8. *Defendants againſt whom no Evidence* is, was allowed to be Witneſſes, and ſworn. Sid. 237. pl. 4. Hill. 16 & 17 Car. 2. King v. Bedder. As in Action of *Treſpaſs* brought *againſt A. ſimul cum B. and C.* if nothing be proved againſt B. and C. *B. and C.* may be examined as Witneſſes in the Cauſe; Per Cur. Sty. 401. Hill. 1654. B. R. Page v. Cook—Clayt. 37. Creſwick's Caſe.

9. In Treſpaſs and Ejectment by F. againſt S. Exception was taken againſt a Witneſs produced to prove the Leaſe of Ejectment, becauſe he *had the Inheritance of the Lands leaſed*; But it was for the Plaintiff that the *Defendant claimed under the ſame Perſon that the Plaintiff did*, and therefore the Witneſs was admitted to be ſworn. Sty. 482. Trin. 1655. B. R. Fox v. Swann.

10. If an Action of *Battery* by Original be brought *againſt two*, and one comes in upon the Exigent, there may be a new Original brought againſt the other *ſimul cum*, and thoſe that are waived may be Witneſſes in the Cauſe; But thoſe who are declared againſt with a *ſimul cum*, cannot be Witneſſes; Per Roll. Ch. J. Sty. 404. Hill. 1654. Anon.

11. In an Action on the Caſe at Common Law, or *Bill brought by the Son on Marriage upon Agreement made by the Father, the Father may be a Witneſs*, altho' he alſo might have had the Bill or Action; By Maynard the King's Serjeant (and which was agreed by all the Bar) in Chancery. Keb. 335. pl. 6. Mich. 14 Car. 2. in the Caſe of Gee v. Spencer.

12. If an *Action* is brought *againſt two, and no Evidence* is given *againſt one*, he may be a Witneſs himſelf in the Caſe; Per Twiſden and Windham. Tr. per Pais, 7th Edit. 334. cites Mich. 19 Car. B. R.

13. In *Trover, by Aſſignee of Commiſſioners of Bankrupts*, the Defendant excepted to a *Witneſs* becauſe he *was a Creditor*, and may come in before a Diviſion made; But *after four Months after any Dividend made, he is a good Witneſs*; For no other Dividend ſhall be intended; But here, no Diviſion being made, he was ſet aſide. 2 Keb. 348. pl. 31. Paſch. 20 Car. 2. B. R. Bents v. Mico.

14. In an *Ejectment of a Rectory*, the *Grantee of the next Avoidance was not admitted to prove a Grant of the next Avoidance, altho' his Intereſt was executed by Preſentment*, tho' ſaid that Aſſignor of a Leaſe might be ſworn a Witneſs to the Aſſignment of a Leaſe, where there were no Covenants. Vent. 15. Paſch. 21 Car. 2. in Caſe of Heath v. Pryn.

15. It was moved, that a *Perſon named in the ſimul cum* might be ſtruck out, he being a material Witneſs, and it was granted. And Keeling ſaid, that if *nothing* was *proved againſt him*, he might be a Witneſs for the Defendant. Mod. 11. pl. 33. Mich. 21 Car. 2. B. R. Anon.

16. On an *Information upon the Statute of Uſury*, he *who borrows the Money* may be a Witneſs after he hath paid the Money, but not before; cited Raym. 191. by Twiſden J. to have been reſolved in one Long's Caſe.

17 If *a Man be named Defendant who is proper to be Witneſs in the Cauſe, the Plaintiff muſt by Order ſtrike out his Name before Anſwer*; But after Anſwer he may by Order examine him as a Witneſs, tho' his Name be not ſtruck out out of the Bill, if he be otherwiſe competent, as if he

he diſclaims, or has no Intereſt, or only as a Truſtee. 2 Chan. Caſes, 214. in a Nota, Hill. 27 & 28 Car. 2. in Canc. Anon.

18. In *Treſpaſs againſt ſeveral Defendants*, whereof *one who was a Witneſs for the Plaintiff, was made a Defendant by miſtake, and ſo he continued till Iſſue joined*; and then upon a Motion, his Name was omitted to the Intent that he might be a Witneſs. Sid. 441. pl. 11. Hill. 21 & 22 Car. 2. B. R. Anon.

20. In *Debt againſt an Heir upon an Obligation*, made by his Anceſtor and J. S. jointly and ſeverally; J. S. *was ſworn* as a Witneſs for the Plaintiff. Try. Per Pais. 7 Edit. 334.

21. A *Co-plaintiff, though but a Truſtee*, cannot be examined as a *Witneſs for the other Plaintiff*. But if the Plaintiff had made the Truſtee a Defendant to his Bill, then the Truſt had been upon Oath; whereas now it was only alleged in that Bill; Then the *Co-plaintiff diſclaiming all Intereſt upon Oath, might have been a good Witneſs*. Vern. 230. Hill. 1683. pl. 225. in a Nota in the Caſe of Phillips v. the Duke of Bucks.

22. Nurſe was examined as a Witneſs, though *Plaintiff to prove Service of a Decree*; And on Debate, the Depoſition allowed, and ruled that the Plaintiff's Oath was ſufficient *to convict the Defendant of a Contempt*, unleſs the Defendant ſwears quite contrary, and on Exception to a Maſter's Report, the Defendant was found in Contempt. 2 Freem. Rep. 132. pl. 159. Paſch. 1692. in Curia Canc. Nurſe v. Guillem.

23. A *Creditor* was admitted by Holt Ch. J. to *prove his Bond, and the Debt due upon it*, upon plene adminiſtravit pleaded, *he having before received it of the Adminiſtrator, and delivered up the Bond*. Ld. Raym. Rep. 745. Paſch. 8 W. 3. at Guild-hall. Kingſton v. Grey.

24. An Action was brought upon a Contract of Matrimony, and a Verdict given afterwards upon an *Information of Forgery*, the contracted Woman was ſwore as a Witneſs for the King againſt the Plaintiff, in the Action which Holt Ch. J. ſaid ſhe ought not to have been *to avoid her own Contract*, and therefore inclined to grant a new Trial; for he ſaid he was not ſatisfied that a Perſon intereſted can be Evidence in any Caſe tho' in a criminal Matter. Comb. 360. Paſch. 8 W. 3. B. R. The King v. Dean.

But Treby Ch. J. before whom a ſecond Trial was had, ſaid that tho' he paid Deference to the Judgment of B. R. yet his Opinion was that the Man and his Wife were good Evidence tho' they were intereſted, and this as well as in Caſe of an Action upon the Statute of Winton, or in an Indictment on the new Statute of clipping, the Party who is to get by the Conviction, may be Evidence againſt the Criminal. MSS. Rep. Dean v. Willis.

25. If *A. gives Bond to B.* conditioned *to pay all the Money due from C. to B.* in this Caſe *C. is a good Witneſs* to prove what is due. Lutw. 663. 665. Paſch. 9 W. 3. Ladd v. Garrard.

26. Inquiſition upon a ſpecial Commiſſion out of Chancery, found that Ford had committed *5 voluntary Eſcapes* he traverſed this Inquiſition, and upon the Trial *one who was ſuffered to eſcape (but was returned to the Priſon) was produced as a Witneſs*, it was objected, that *this was to ſave his own Bond which* he had given to be a true Priſoner, and would intitle him to an Action of falſe Impriſonment againſt the Marſhal, and compared it to the Caſe of an uſurious Bond. But per Cur. the Bond is collateral to the Eſcape, and the Conſequence of his Evidence as to that Bond is not material to diſable him from being a Witneſs.

12 Mod. 338. 339. the King v. the Warden of the Fleet, S. C. held accordingly.

Witneſs. And this is a matter privately tranſacted between the Party and the Officer, of which no one Evidence can be, and it is not like the Caſe of Uſury, for that makes the Bond void. 2 Salk. 690. pl. 3. Mich. 12 W. 3. B. R. the King v. Ford.

27. *Information* for *building Locks on the River Thames*, and it is no Exception to a Witneſs here that he *contributes to carry on the Suit*, or that this publick Nuſance was *to his private Nuſance*. 12 Mod. 615. Hill. 13 W. 3. Dom. Rex v. Clark.

In caſe of an Indictment for Battery, he that was beaten may be a Witneſs, becauſe he can reap no Benefit by the Verdict in another Suit, and the Cauſe is of ſmall Moment. Hard. 331. Trin. 15 Car. 2. in Scacc. per Cur. in Watts's Caſe.

28 In *Indictment for Oppreſſion*, *Battery*, &c. the *Party oppreſſed* may be a Witneſs; Per Holt Ch. J. 12 Mod. 512. Paſch. 13 W. 3. Anon.

29. In Caſe for *reſcuing a Perſon* arreſted on mean Proceſs at the Plaintiff's Suit. The *Party reſcued* appeared and was ſworn as a Witneſs for the Defendant, not being made Party to the Action; Which Holt Ch. J. hæſitanter allowed, becauſe he ſwore to charge himſelf, if by his Evidence he diſcharged the Defendant; But ſaid it was what he never had ſeen before, and that if the Defendant was guilty of the Reſcouſe, he could not but be particeps criminis. However he was ſworn, and *his Credit left with the Jury*. 6 Mod. 211. Trin. 3 Ann. B. R. Wilſon v. Gary.

30. If a *Man unneceſſarily makes any one a Defendant*, he thereby cuts himſelf off from the Benefit of his Evidence, it being his own Fault. But *where ſeveral are made Defendants*, it will not hinder any one of the Defendants from the Benefit of any others that are made ſo. Indeed in Caſe of *Truſtees* it is neceſſary that they be made Defendants, and therefore there the Plaintiff may have Benefit of the Evidence. 10 Mod. 19. 20. Paſch. 10 Ann. in Canc. Obiter, in Caſe of Gibſon v. Albert.

Gilb. Equ. Rep. 98. S. C. and S. P. by Mr. Vernon. — Robins's Equ. Abr. 225. pl. 8. S. C. & S. P. agreed per Cur. in Canc.

32. A *Plaintiff* in a Cauſe cannot be examined as a Witneſs, becauſe if the Cauſe miſcarries, the Plaintiffs are liable to Coſts. But a *Defendant* may, becauſe he is forced into the Cauſe and otherwiſe a Man might be deprived of all his Evidence by their being made Defendants. Ch. Prec. 411. pl. 277. Mich. 1715. Sic dictum fuit, in Caſe of Caſy v. Beachfield.

But at York Lam. 1714. coram Tracy J. Wagerers at a Horſe Race having received their Sums won, on ſuppoſition that the Race was won by the Side they betted, were admitted to give Evidence about the ſame Horſe Race.

33. On a *Wager on a Cock-Match*, none of *thoſe who betted on either Side*, ſhall be admitted Witneſſes to prove which Cock won the Battle. Wells Sum. 1710. Baron v. Bury.

34. On a Trial at Bodmyn, Coram Mountague, B. *againſt a common Carrier*, a Queſtion aroſe about the Things in a Box, and he declared that this was one of theſe Caſes, where the *Party himſelf might be a Witneſs, propter neceſſitatem rei*. For every one did not ſhew what he put into his Box.

35. *Action*

35. *Action againſt a Carrier* going between Exeter and London, *for the Loſs of a Box, in which were ſeveral Sorts of Goods* belonging to the Plaintiff a London-wholeſale Man, who uſed Exeter Fair. On the Trial a Difficulty aroſe on the *Proof of the Quantity*, i. e. Yards, &c. *as well as the Value* of ſeveral Stuffs pack'd up in the Box. * The Witneſſes not coming up to an exact and full Proof thereof, *the Goods unfold and returned to London, being uſually put up with the Shop Marks on them as was cuſtomary in ſuch Caſes*, &c. Theſe were affixed partly by Plaintiff, and partly by others; to which it was anſwered, that what the Plaintiff himſelf did at ſome diſtance of Time, not with the view of this Action, or of what happened afterwards, was of weight in this Caſe and ſome ſort of Evidence, becauſe here was no Colour of Fraud or Deceit, and Act of the Plaintiff under theſe Circumſtances, tho' in his own Affair is ſufficient to fix the Quantity of theſe Stuffs from the Marks, &c. whereupon the Jury found per Quer. Summer Aſſiſe, Exon coram Eyre J. 1719. v. Berry.

* Tho' the Servant produced as a Witneſs, could not give an Account of the meaſure of every Piece of Stuff, that remained unfold, yet their entries of what remained, tho' not actually meaſured, was allowed, becauſe the Manner and Intent of doing the Thing was to be regarded, tho' no poſitive Proof, yet could be no Fraud at the time of Packing up the Goods. Per Eyre J. Aſſize Exon.

36. Banker, Broker or Servant, the ſame as a Factor; *S. bought S. S. Stock, 500 l.* at 800 *l.* per Cent. and took it *in the Name of Rogers, and afterwards* he *deſired R. to ſell it again, which he did* do to one G. at 770 *l.* per Cent. but G. put off his accepting it from Time to Time (the Contract being 12 Sept) to 2d. Nov. when R. ſold it to another for 209 l. per Cent. and the Difference being 2805 l. was given in Damages on an Action upon this Contract againſt G. Objection at the Trial, that R. was no Witneſs. 2dly That the Action could not be brought in the Name of S. the Stock being R's in the point of Law. Per Cur. *R. is a good Witneſs becauſe* he is *no way concerned in the Event* or Conſequence of the Queſtion, nor any wiſe affected. Paſch. 7 Geo. B R. 87. **Scooling v. Gampire.** Coram Prat. Ch. J. at Guildhall Sittings, & Poſtea mov'd in Court, R. did not take any Notice of S. at the Time of the Contract. A Factor who makes a Contract in his own Name for the Benefit of the Principal, it is by Authority from him, and in Law it is the Contract of the Principal. This is a ſtronger Caſe than that of a Blackwell Factor, becauſe he is to have Commiſſion-Money out of what is recovered. Factors from the Nature of the Thing as Servants, it is neceſſary to tell who is the Owner, and to him that Buys is all one. Every Man may imploy his Friend or his Neighbour; every one that Tranſacts is for that purpoſe a Factor. He that draws a Bill of Exchange is a Merchant for that purpoſe. R. had no demand or intereſt in Queſtion.

37. On a *Trial concerning the Conſtruction of a Borough, whether any Perſon can be elected* into the Common Council, *but thoſe who are Inhabitants and hold Burgage Tenures*; One who comes within both theſe Qualifications is no Witneſs to prove the Conſtitution. But then one Mr. Lee was produced as a Witneſs for the Defendants to prove it, who was *an Inhabitant of the Borough, but* it was admitted *he had no Burgage Tenure*; Whereupon he *was allowed* by the Court to be a good Witneſs, as to the right fixing in ſuch as had held Burgage, and alſo were Inhabitants, ſince he did not attempt to eſtabliſh the Right in the Inhabitants only. 2 Ld. Raym. Rep. 1353. Eaſt. 10 Geo. Steveſon v. Neviſon.

38. Caſe *againſt a Pilot, for a Neglect of his Servant* in not carefully piloting a Ship over the Bar of Exmouth contrary to his Undertaking; the *Servant was admitted to be a Witneſs for his Maſter*. Coram Eyre Ch. B. apud caſtr. Ex. Sum. Aſſ. 1724.

And coram eodem at Wincheſter, the Driver of a Waggon was admitted to be a Witneſs for his Maſter, in an Action againſt the Maſter for overturning the Waggon, and breaking a Woman's Arm.

39. A Party ought not to be examined, though by Conſent, unleſs *the whole Matter be put to his Oath.* MSS. Tab. March 23, 1723. Charteris v. Earl Hyndford.

40. *Information on late Gaming Act* granted by Court of King's Bench, and tried at Wells Summer Aſſiſes, 1735. Coram Forteſque J. The *Loſer who was under Twenty One at the Time of Loſs*, was admitted an Evidence to prove the Fact, and afterwards on Motion in Arreſt of Judgment, the Court of B. R. were of the ſame Opinion.

## (K) Witneſſes. Who. Intereſted Perſon. Party himſelf, in Caſe of Neceſſity.

Vent. 49 Parris's Caſe. S. C held accordingly.

1. IN an *Information for procuring J. S. fraudulenter & deceptively, to give a Warrant of Attorney to confeſs a Judgment*; *J. S.* was admitted a Witneſs by three Juſtices againſt Twiſden J. the Suit being for the King. Vent. 49. Mich. 21 Car. 2. B. R. Parry's Caſe, and the Judgment was ſet aſide. Sid. 431. pl. 20. King v. Paris & al.

2. An Action of *Debt* was brought Summer Aſſiſes Suffolk, 1669, by the Town of Ipſwich, for 50 l. *a Fine ſet* upon one choſen *Common Council-man* (called their prime Conſtable) *for refuſing to renounce the Covenant*, &c. and the *Town Clerk* (though a Freeman) was allowed a Witneſs to prove Election refuſal, &c. the Fine ſet, which is, *for Neceſſity*, for that none other are, or ought to be preſent at thoſe Acts; Per Rainsford J. L. E. 67. pl. 43. cites T. per Pais, 163.

3. If an *Indictment* be againſt a Man *for not repairing a Bridge*, that is a publick Bridge, and which he is bound to repair, ratione tenuræ, it was received that in ſuch Caſes, Perſons of the County are allowed to be Witneſſes; becauſe none elſe can teſtify. 2 Show. 47. pl. 33. Paſch. 31 Car. 2. B. R. King v. Carpenter. Cro. C. 361.

And the marrying of her, ſo taken, is Felony, within the Statute and

4. *Woman taken away by Force*, was allowed to be a Witneſs as to her being taken. 4 Mod. 8. Hill 2 W. & M. in B. R. King and Queen v. Fezet.

Judgment, that the Defendants ſhould be hanged. Cro. C. 482. 484. 488. & 492. pl. 18. Mich. 13 Car. B. R. Fulwood v. Bowen.

5. Where a Man is *intereſted* in the Conſequence of that which he ſwears for, if it be ſo that the *doing the Act* which he is by his Evidence to invalidate or ſet aſide, *was a Means to obtain his Liberty* or an *Exemption from corporal Puniſhment*; he ſhall be a Witneſs, as in the Caſe of *Dureſs*, (though it be to ſet aſide his own Bond) yet it being given to obtain his Liberty, he ſhall be a Witneſs; Alſo where the *Nature of the Thing admits no other Evidence, as if* a Woman give a Note or Bond to a Man, to procure her the Love of J. S. by ſome Spell or Charm, in an Indictment for the *Cheat*, though it tends to avoid the Note, yet ſhe ſhall be a Witneſs; Per Holt at Niſi Prius. 7 Mod. 119. Mich. 1 Ann. B. R. Queen v. Sewel al. Beaus.

6. In *Caſe* by a Silk Dyer *againſt* his *Servant*, *for Money received to his Uſe*; Upon Evidence it appeared, that *A. ſending Silk to be died* by the Plaintiff, the Plaintiff ſent his Servant, the Defendant home with it, and A. paid him for every Parcel as he received it; *A.* was *produced as an Evidence, that he paid the Money to the Defendant*; But Holt would not admit his Evidence, for that would be to admit a Creditor [Debtor] to

to ſwear in Diſcharge of him. 11 Mod. 261. pl. 19. Mich. 8 Ann. B. R. Tybbald v. Tregott.

7. *And* he ſaid, that if a Man *pays Money by his Servant*, the Servant may be a Witneſs; But that is allowed for the Neceſſity of the Thing. 11 Mod. 261. Tybbald v. Tregott.

## (L) Witneſſes. Who. Parties to Frauds.

1. IF I *employ a Perſon to ſell Wool*, or other Goods for me, *and he ſells them in his Name, and as his own Goods*; yet in an Action brought in my Name for the Money, the Perſon employed may be a Witneſs. Ex. Lam. 1706.

2. A *Bankrupt* having releaſed and aſſigned all his Eſtate to the Aſſignees, may be examined as a Witneſs for them to prove a fraudulent Sale by himſelf to another; Per Cowper C. 2 Vern. 637. pl. 565. Hill 1708. Philips & al. v. Wilcox & al.

## (M) Witneſſes. Diſabled, by Crimes.

1. PERSONS that had been attainted of Felony, though pardoned, ſhall not be of a Jury or Witneſſes. 2 Bulſt. 154. Mich. 11 Jac. Brown v. Craſhaw.——Raym. 369. Collier's Caſe, and Dangerfield was admitted an Evidence.——And S. P. in Raym. 379. Ld. Caſtlemain's Caſe. Skin. 578. S. C.—— 5 Mod. 15. S. C.—— S. P. 12 Mod. 340 in Caſe of the King v. Warden of the Fleet.

2. There is a Difference where the *Diſability* is *only the Conſequence*, and where it is Part of the Judgment itſelf. In the firſt Caſe, the *King* may pardon it, but in the ſecond Caſe, the King's Pardon will not take away the Diſability. Therefore, if a Man be Convict of *Perjury on the Statute*, the King's Pardon will not *reſtore*, for it is not a Conſequence, but Part of the Judgment, quod in poſterum non ſit receptus ac teſtis. Pl. Co. Ent. 368. But a Pardon by Act of Parliament, will reſtore him, even in that Caſe. Quære of a Perjury at Common Law, and if the Law be the ſame, for theſe the Diſability, is only the Conſequence, and no Part of the Judgment; Otherwiſe if a *Jury* be *convict in Attaint*. Raſt. 86. a. cited 2 Salk. 689. Paſch. 7 W. 3. B. R. King v. Crosby.

3. A Perſon *Convict of Perjury upon the Statute, and pardoned*, cannot be a Witneſs, for the Puniſhment is Part of the Judgment, appointed by the Statute; Contra of a Conviction at Common Law, for there it is only a conſequential Diſability; therefore in the latter Caſe, the King may pardon, and that reſtores him to his Teſtimony; but in the former Caſe, he muſt reverſe the Judgment, or he cannot be reſtored; Per Cur. 2 Salk. 514. Mich. 9 W. 3. B. R. in Caſe of the King v. Grepe.

4. A *bare Conviction of Perjury*, would take away one's Evidence; becauſe *it is an infamous Crime*, not ſo of Barratry, which was not of an infamous Nature, without an *infamous Puniſhment* were inflicted, as the *Pillory*,

*Pillory, &c.* arg. But the whole Court held contra, and that it was not the Nature of the Puniſhment, but the *Nature of the Crime*, and the Conviction thereof, that created the Infamy; and per Holt Ch. J. if one be convicted of *Perjury on the Statute*, he cannot be reſtored to his Credit by the King's Pardon; for by the Statute, it is Part of the Judgment that he be infamous, and loſe his Credit, but he may be reſtored to his Credit by a *Statute Pardon*; But in Indictments of *Perjury, at Common Law*, the Infamy, is only the Conſequence of the Judgment; and therefore the Kings Pardon in ſuch Caſes, reſtores the Party to his Credit; Held upon a Trial at Bar. 2 Salk. 690, 691. pl. 3. Mich. 12 W. 3. B. R. in Caſe of the King v. Ford.

The Burning in the Hand, does make the Perſon infamous, &c

5. By Roll. Ch. J. one that has been burned in the Hand, for *Felony*, may notwithſtanding be a Witneſs in a Cauſe; for he is in a Capacity to purchaſe Lands, and his Fault is purged by his Puniſhment. Cites Sty. 388. Mich. 1753. Anon.

ſtanding in the Pillory, &c. does, becauſe it comes inſtead of Purgation at the Common Law, which ſuppoſeth he might be not guilty, notwithſtanding the Verdict; Per Hyde Ch. J. Kelynge and Wilde, Recorder. Kelynge 37, 38.

6. If a Perſon produced as a Witneſs has been *perjured, altho' no Judgment is entred* againſt him (it being in the Protector's Time, all whoſe Proceedings were diſcontinued by Alteration of the Government) yet *Evidence* to prove him perjured *may be given viva voce.* 1 Sid 51. pl. 16. Mich. 13 Car. 2. B. R. Wicks v. Smalbroke.

7. In Evidence upon a Trial at Bar, it appeared that one Alcot, one of the Witneſſes for the Defendant, was before *indicted of Perjury* in the Time of Cromwell, *and Verdict againſt him; But by the Death of Cromwell Judgment was not entred, but all Proceedings vacated*; And now the Council of the Plaintiff would offer this Verdict in Evidence to weaken the Credit of the Witneſs; But reſolved by the Court, that the ſaid Verdict is now totally deſtroyed, and cannot be given in Evidence. Raym. 32. Mich. 13 Car. 2. B. R. Fitch v. Smalbrook.

8. In Evidence on Information of Perjury it was obſerved, that *one indicted of Perjury* may be a Witneſs in the ſame Point upon Trial betwixt others till Conviction. Keb. 289. pl. 102. Paſch. 14 Car. 2. B. R. in Caſe of the King v. Dawſon; cites it as Sir Edward Powell's Caſe.

9. Hawkins having a great perſonal Eſtate, and being a Priſoner in Newgate for opprobrious Words of the Lord Mayor of London, and a little diſturbed in his Mind, made his Will, atteſted by ſeveral Witneſſes; And upon hearing the Cauſe in the Prerogative-Court, Sentence was given againſt the Will, and upon an Appeal to the Delegates, *two Records were produced to avoid the Teſtimony of two Witneſſes to the Will*, by which it appeared, that *one of them was convicted for a Libel, and the other for ſinging a Ballad againſt the Government, and both of them adjudged to the Pillory, but no Proof that they ſtood in it*; After theſe Witneſſes were examined in the ſpiritual Court, and *before Sentence given, there came a general Pardon*, by which they were pardoned; And the Queſtion now was, whether their Depoſitions taken in the Spiritual Court ſhall be admitted for Evidence; It was agreed, that if their Teſtimony was not good at the Time when it was taken, the ſubſequent Pardon would not make it good, and that the Judgment of Pillory makes the Infamy, tho' never executed; But the chief Queſtion was, whether the Judgment for theſe Crimes ſhould make them infamous, becauſe (as it was objected) *it is not from the Judgment, but from the Nature of the Crimes for which the Offenders are convicted, that the Infamy ariſes*, as for ſuch Crimes as import Deceit and Fraud, or Cheats,

Cheats, &c. And if one is convicted of cheating, yet he may be a Witneſs, if he has not Judgment of Pillory for it. And tho' Pillory infers Infamy at the Common Law, yet it imports no ſuch Thing either by the Canon or Civil Law, unleſs the Cauſe for which it is inflicted is infamous, and it is by theſe Laws that this Caſe (being concerning a Will) is to be determined, therefore *the Matter for which theſe Witneſſes were convicted, being not infamous, either by the Canon or Civil Law*, tho' they had Judgment for the Pillory, *their Depoſitions were admitted for Evidence, and the Sentence in the Prerogative-Court reverſed*, and the Will ſentenced to be good. 3 Lev. 426 Trin. 7 Will. 3. before the Delegates at Serjeant's-Inn in Fleet-Street, Chater v. Hawkins, &c.

10. If after Hearing a Witneſs is *convict of Perjury*, you may take Advantage of it on a *Rehearing*; Per Holt Ch. J. 2 Vern. 464. pl. 424. Mich. 1704. Needham v. Smith. L. E. 43. pl. 17 to 20.

11. 57 *Eliz. cap.* 9. *Sect.* 5. *No Perſon being convicted of corruptly procuring any Witneſs to commit wilfull Perjury ſhall be received as a Witneſs, and ſworn in any Court of Record, until the Judgment given againſt him be reverſed; and, upon every ſuch Reverſal, the Party grieved to recover his Damages againſt the Perſon who procured ſuch Judgment.*

## (O) Witneſſes. Diſabled, or not.

### By Crimes of a lower Sort.

1. MEN that are *branded with Infamy that they cannot be Jurors, cannot be Witneſſes*; Yet per Glyn Ch. J. and Newdegate J. Mich. 1657. B. R. *Conviction of common Barratry* does not hinder from being a Witneſs; But Maynard Serj. held ſtrongly againſt it. Tr. per Pais, 160. Anon.

2. In reſpect of a Perſon that had been *burnt in the Hand*, if it were *for Manſlaughter*, and after pardoned, it were no Objection to his Credit, for it *was an Accident which did not denote an ill Habit of Mind*; But ſecus if it were *for ſtealing*, for that would be a great Objection to his Credit even after Pardon, but the Record of Conviction ought to be produced. 12 Mod. 341. Mich. 3 W. 3. King againſt Warden of the Fleet.

3. One that has been *burnt in the Hand for a Felony* may be a Witneſs, for he is in a Capacity to purchaſe Lands, and his Fault is purged by his Puniſhment; per Roll. Ch. J. Mich. 1653. Lord Caſtlemain's Caſe, as to the Teſtimony of Dangerfield. The Burning in the Hand was quaſi ſtature Pardon as to the Felony, and as to that he was a good Witneſs Raym. 380. Trin. 32 Car. 2. B. R. & C. B. &c. per Hobert Ch. J. Trin. 26 Jac. Searl v. Williams Hob. 288. 292.

4. A Witneſs was *convict of Barretry*, and the Record produced, but the *Judgment was, to be fined 500 Merks, and to ſtand in the Pillory.* It was argued, that a bare Conviction of Perjury would take away one's Evidence, becauſe it is an infamous Crime, but not ſo of Barretry, which was not of an infamous Nature, without an infamous Puniſhment, as the Pillory. But Curia contra, that he is diſabled by the Conviction; for *it is not the Nature of the Puniſhment, but* the Nature *of the Crime, and Conviction that creates the Infamy*, 2 Salk. 690. pl. 3. Mich. 12 W. 3. B. R. the ſecond Reſolution, in Caſe of the King v. Ford.

5. A *Conviction of Barretry* renders a Man infamous, and incapable of being a Witneſs, but a general Pardon will reſtore him. 3 Salk. 264. pl. 1. Mich. 12 W. 3. King v. Weedon.

## (P) Witneſſes. Diſabled by not concurring with the Laws.

2 Hawk. Pl. C. cap. 46. S. 21. fol 433. ſays it ſeems clear at this Day, that Outlawry in a perſonal Action is not a good Exception againſt a Witneſs, as it is againſt a Juror.

1. AN *outlawed Perſon* ſhall not be ſaid to be probus & legalis homo, L. E. 48. pl. 23. cites 33 H. 6. 32 & 33 H. 6. 55. [But as to this I do not find it there. It concerns Jurors and not Witneſſes.]

2. A *Popiſh Recuſant* convicted is no Witneſs, for by 3 Jac. cap. 5. he is to be excommunicated and taken as ſuch, wherefore a Suggeſtion in a Prohibition being proved only by two Recuſants convicted, a Conſultation was granted. 2 Bulſt. 154. Mich. 11 Jac. Brown v. Craſhaw.

3. The Motion was for an Attachment for Extortion and the *Affirmation of a Quaker* was offered to be read, which was oppoſed, and the Caſe of the King v. Wich was cited, where it was refuſed in Caſe of an Information; But on the contrary was cited, Paſch. 5 Geo. 2. Powel v. Ward. Where a *Difference was made between an Attachment and an Information*; That in the latter an Affirmation is not to be allowed, but that in the former it may, Lee Ch. J. cited a Caſe where on a Motion for an Attachment, for not obeying an Award, an Affirmation was refuſed. The Court held it to be a Point of great Conſequence, as to the Conſtruction of the Statute of W. 3. of Quakers, and deſired it might be argued; But at laſt it was read by Conſent, and ſo it remains undetermined. Paſch. 11 Geo. 2. B. R. The King v. Bell.

## (Q) Witneſſes Diſabled.

### From, or at what Time.

1. ONE *indicted of Perjury may before Conviction be* admitted a *Witneſs on the ſame Point*, in a Trial *between others*. 1 Keb. 289. pl. 102. Paſch. 14 Car. 2. B. R. The King v. Dawſon.

2. If after hearing a Witneſs is *convict of Perjury*, you may take Advantage of it on a *Re-hearing*. 2 Vern. 464. pl. 424. Mich. 1704. Needham v. Smith.

(R) Wit-

## (R) Witneſſes. Diſabled by Intereſt. Enabled by ſome after Act.

1. IF a Witneſs *has part of the Land in queſtion, and he ſells* or diſpoſes of *it after* his coming to London, or at any Time after *he has notice of the Trial*, he ſhall not be admitted even tho' he ſold it, bona fide, and for a valuable Conſideration. Sid. 51. pl. 16. Mich. 13 Car. 2. B R. Wicks v. Smalbrook. Keb. 134. Fitch. Small Book.

2. *So tho' he himſelf is not Occupier* of the Land, *nor has been ſince the Writ* purchaſed *but another by his Commandment*, the Court will not admit his Teſtimony; Becauſe if the Verdict be againſt his Title, he that occupies by his Commandment may charge him in Action upon the Caſe. Sid. 51. Wicks v. Smalbrook.

3. A *Father* offered to teſtify a Deed in Purſuance and *Affirmance of a Leaſe made to his Son by himſelf*, which the Court allowed, *his Intereſt being paſſed away*. L. E. 74. pl. 61. cites 1 Keb. 280. pl. 80. Paſch. 14 Car. 2. B. R. Jay v. Rider. Vide Sid. 75.

4. *Legatee* or Deviſee of an Annuity may be a Witneſs to prove the Will, if he has *received* it or *releaſed* his Annuity, and this tho' it be after the Action commenced, at any time before Examination; ſo of a *Truſtee*, or if *one be in Poſſeſſion as Servant*. Sid 315. pl. 33. Mich. 18 Car. 2. B. R. Stephens v. Gerard. And it is ſufficient if he ſeals the Releaſe in Court, while the Cauſe is trying. Ibid. ——— 2 Keb. 128. pl. 82. S. C. held accordingly; and cited Ld. Willoughby's Caſe, where a Witneſs was admitted to prove a Codicil of the Ld. Rutland's Will upon a Releaſe of his Intereſt made while the Jury were at the Bar.

5. In a Trial at Bar in Ejectment, the Defendant claimed under a Will and offered to prove the Publication of it by B. and Exception was taken to his Evidence; Becauſe he was a *Legatee, and* alſo *had an Annuity* given him *by the Will in queſtion*, which was confeſs'd; But to enable him to be a Witneſs, an Acquittance was produced of the Legacy and a *Releaſe* of the Annuity, and the *Money was proved to be paid for both*; To which it was objected, that all this was done *pending the Action*, which Objection proved to be falſe; But per Cur. if it had been pending the Action, yet he ſhall be admitted as a Witneſs. L. E. 65. pl. 39. cites 2 Sed. 315. Mich. 18 Car. 2. B. R. Stevens v. Gerard.

6. *And* it has been adjudged that if a *Releaſe* had been *ſealed in Court whilſt the Cauſe was trying*, that the Releaſor ſhould be admitted as a good Evidence. L. E. pl. 39. cites 2 Sid. 315. S. C.

7. On the Evidence at a Trial at Bar, it appeared that the *Husband of the Mother of the* Infants *Legatees* in the Will of Michel, *took Bond* of double the Sums *to be paid when the Plaintiff* Heir at Law *did enjoy* the Lands in Queſtion againſt the Will; which per Cur. is to the Teſtimony of the Mother, and not only to her Credit; and tho' it were *releaſed* yet this being a *champertuous Intereſt* created by the Party, the Releaſe doth not enable her to be a Witneſs, as on a Releaſe of Legacy it would; that is created by Act in Law, but by Conſent ſhe was ſworn. L. E. 65. pl. 38. cites 3 Keb. 75. pl. 19. Mich. 24 Car. 2. B. R. Turnſtall, Leſſor of Greve, and Grathooke.

8. Upon a Motion in Account Judgment was had againſt Defendant quod computet. The Point was, if the Bail ſhould be allowed as Evidence

Evidence for him in Chancery, becauſe he ſwears to diſcharge himſelf if the Plaintiff prove inſolvent. The Order was by Conſent that the Defendant (now Plaintiff) *putting in another Bail*, the then Bail ſhou'd be allowed as Evidence as far as by Law he may. Fin. R. 247. Mich. 28 Car. 2. Calſham v. Spatman.

9. S. had laid himſelf to be ſole Proprietor of a Ship and Tackle, &c. and the *Witneſs* ſwore *at the Time of the Action* brought, that he *was equally concerned* in every Thing, *but long ſince had ſold his Intereſt*, *ſo* that now he was *not* one farthing *concerned in the Conſequence of the Cauſe*; Yet the Court held, that he was no competent Witneſs. Skin. 174. pl. Paſch. 36 Car. 2. B. R. Sandys v. Cuſtom-Houſe Officers.

10. *Perjury* is no more infamous now than it was at Common Law; The Difference is only that where H. is *convicted on the Statute that is part of the Judgment to be diſabled*, but *at Common Law it is only a conſequential Diſability*; Therefore *in the laſt Caſe the King may pardon*, and that reſtores him to his Teſtimony, but otherwiſe in the former; For in the Caſe he muſt reverſe the Judgment or cannot be reſtored. 9 Salk. 514. Mich. 9 W 3. B. R. in Caſe of the King v. Greepe.

11. *Original Drawer* was offered as an Evidence, in an Action upon a Bill of Exchange *to prove* that *he did not draw the Bill*, was denied, becauſe at laſt the Burden muſt fall upon him; But the Party gave him a *Releaſe in Court*, and that was ſufficient. 12 Mod. 345. Mich. 11 W. 3. Anon.

## (S) Witneſſes. Enabled by Act of the other Party.

1. *Roſs examining* a Witneſs by one Side in any Matter tending to the Merits makes him a good Witneſs for the other Side, tho' otherwiſe liable to an Exception. Vern. 254. pl. 226. Mich. 1684. Corporation of Sutton Coldfield v. Wilſon.

## (T) Witneſs. Diſabled by Suſpicion of Fraud.

1. *A. and B. two Brothers*; the *Goods of B.* in his Houſe were *taken in Execution*, A. ſuppoſing them to be his Goods brings Trover, and B. and his Wife were denied to be Witneſſes to prove them the Goods of A. tho' it were to deveſt the Property out of themſelves, becauſe it favoured of Fraud. Q. 12 Mod. 346. Mich. 11 W. 3. Anon.

(U) Wit-

## (U) Witneſſes. Who. One Offender admitted againſt another.

1. IN a Treſpaſs againſt A. one B. was admitted a Witneſs againſt him, tho', by his own Confeſſion, he was a *joint Treſpaſſer*, and by this Oath did caſt the Damages upon his Companion, and ſo in a manner freed himſelf. Clayt. 115. S. C. pl. 200. Auguſt 1647. Anon.

2. A *Debtor reſcued* was allowed as a Witneſs, his Credit being left with the Jury. 6 Mod. 211. Trin. 3 Ann. B. R. Wilſon v. Gary.

3. *Son intruſted with his Father's Caſh*, and to receive and pay Money, *gave it away to J. S.* The Son may be admitted as a good Witneſs, his Teſtimony being corroborated by other Circumſtances; Per Holt Ch. J. at Niſi Prius, 1 Salk. 289. pl. 28. Anon.

4. It has been long ſettled, that it is no Exception againſt a *Witneſs*, that he has *confeſſed himſelf guilty of the ſame Crime, if he has not been indicted for it*; For if no Accomplice were to be admitted as Witneſſes, it would be generally impoſſible to find Evidence to convict the greateſt Offenders. Alſo it hath been often ruled, that Accomplices that are indicted are good Witneſſes for the King, until they are convicted. 2 Hawk. Pl. C. 432. cap. 46. ſect. 18.

5. And it has been adjudged, that ſuch of the *Defendants in an Information againſt whom no Evidence is given*, may be a Witneſs for the others. Ibid.

6. It hath been alſo adjudged, that where *A. B. and C. are ſued in ſeveral Actions on the Statute for a ſuppoſed Perjury* in their Evidence *concerning the ſame Thing*, they may be good Witneſſes in ſuch Actions for one another. Ibid.

7. *A. and B. in Execution jointly*, they both eſcaped. The King brought Action againſt the Warden for the *Eſcape of A.* and *B.* was allowed to prove it. Gibb. 80. Trin 2 & 3 Geo. 2. at the Sittings in Scacc. coram Pengelly Ch. B. the King v. Huggins.

## (W) Witneſſes. How they may aſſiſt themſelves, or demean in giving their Evidence.

1. WHere a Witneſs ſwears to a Matter, he is *not to read a Paper* for Evidence, tho' he may look upon it to refreſh his Memory; But if he ſwears to *Words*, he may read it, if he ſwears he preſently committed it to Writing, and that theſe are very Words; Per Holt Ch. J. Cumb. 445. Trin. 9 W. 3. B. R. Sandwell v. Sandwell.

## (X) Non-Appearance. Appearance of Witneſſes compellible. How, and the Penalty thereof.

5 Eliz. 9. Sect. 12. In Debt upon this Statute, it was moved, after Verdict in Arreſt of Judgment, that the Declaration did not ſet forth

1. *IF any Perſon upon whom any Proceſs out of any Court of Record ſhall be ſerved, to teſtify concerning any Matter depending in the ſame Courts, have tendered to him, according to his Calling, his reaſonable Charges, and do not appear according to the Tenure of the ſaid Proceſs, having no lawful Impediment, he ſhall forfeit 10 l. and yield ſuch farther Recompence to the Party grieved, as any Judge of the Court, out of which the ſaid Proceſs ſhall be awarded, ſhall think fit, the ſaid Sums to be recovered by Action of Debt, &c. By the 21 Jac. 28. this Statute is made perpetual.*

that he left the Writ with Defendant; for the Statute is, if he be ſued with Proceſs; and it is not ſerving of Proceſs when the Writ is not left, altho' it be read unto the Party, and a Note left of the Cauſe, Place and Day, ſed non allocatur; For Jones, Berkeley and Croke held it to be a ſufficient ſerving of the Proceſs within the Intent of the Statute, and according to the uſual Courſe and Practice; for there may be two, three, or four Names of Witneſſes in one Writ, (and ſo there be uſually) and he cannot leave the Writ with every one of them, and it would be very chargeable unto the Subject to have ſeveral Writs for every Witneſs. 2d Exception, becauſe he ſhews that he paid unto her 12 d. for her Pains, and promiſed to pay unto her as much more, as ſhe would require, when ſhe came to be a Witneſs at Glouceſter, which is not ſufficient according to the Statue; For the Statute is, that he ſhall pay ſufficient Charges for her Travel, according to the Diſtance of the Place, and the Quality of the Perſon ſo to be paid; and the Witneſs is not bound to accept his Promiſe for the Reſidue, ſed non allocatur; for when it is alledged, that he paid unto her 12 d. and promiſed to pay the Reſidue when ſhe came to Glouceſter, and ſhe accepted thereof, ſhe is then bound to come, for ſhe hath accepted of his Promiſe for the Reſidue, otherwiſe ſhe might have refuſed, and told him ſhe would accept of his Promiſe. 3d. Exception, becauſe the Plaintiff doth not ſhew that he is damaged by her Non-Appearance, viz. that the Verdict paſſed againſt him, or that he was inforced to be nonſuited, or any other Grievance; for ſo is the Statute, that the Party grieved ſhall have his Part of the 10 l. and his farther Damages taxed by the Juſtices, before whom, &c. But Grimſton, for the Plaintiff, anſwered, that the Action being brought only for the 10 l. and not for further Damages, it is well enough; and the 10 l. is due for her Non-Appearance to the King and the Party. But all the Juſtices held, that the Declaration was ill, for this Cauſe; for there ought to be a Party grieved by the Non-Appearance, otherwiſe there is no Cauſe of Forfeiture. And ſo is the expreſs Words and Scope of the Statute; wherefore it was adjudged for the Defendant, abſente Brampſton. Cro Car. 540. pl. 4. Paſch. 15 Car. B. R. Goodwin v Anne Weſt.—Jo. 430. pl. 3. S. C. adjudged for the Defendant.—Mar. 18. pl. 43. S. C adjudged the Plaintiff nil capiat.—A FemeCovert being ſerved with Proceſs ad teſtificandum, and Charges ſufficient tendered to her. On an Action brought on this Statute, it was held, that tho' the Party is not at all damnified, yet the Penalty is forfeited; and the Feme Coverts are within the ſaid Statute; and that the Tender of the Charges ought to be to the Wife; and Judgment was given for the Plaintiff, tho' he did not ſet forth how much he was damaged. Le. 122. pl. 166. Trin. 30 Eliz. B. R. Havithlome v. Harvey.——Cro. E. 130. pl. 3. Havithbury v. Harvey, S. C. and Judgment accordingly——There muſt be a particular Damage ſet forth, tho' this is contrary to the Caſe above. And afterwards a Writ of Error was brought on this Judgment, but it was affirmed, 5 Mod. 355. Trin. 9 W. 3. Maddiſon v. Shore. And in an Action brought on this Statute the Plaintiff ſhall have Coſts, becauſe he is partly grieved, and not an Informer. 1 Salk. 206. pl. 4. S. C.—Comb. 449. S. C. accordingly.——

2. *All Perſons accuſed and indicted for Treaſon ſhall have the like Proceſs of the Court where they are tried, to compel their Witneſſes to appear, as is iſſued for Witneſſes to appear againſt them.*

3. Before the 12 E. 2. cap. 2. the Witneſſes were ſummoned in by the ſame Venire that was awarded againſt the Jury. Jenk 47. Co. Litt. 6. b Reg. Jud. 5.

4. In an Action (on 5 Eliz. cap. 9. 29 Eliz. cap. 5.) good Proof muſt be made of proving the Subpœna, viz. by leaving a true Copy in Writing with the Party himſelf, and ſhewing the Subpœna to him at the ſame Time, and alſo by ſerving him with a Summons or more, according to the Quality of the Perſon, and Diſtance of the Place where the Evidence is to be given. Sty. Reg. 35, 36. Lill. Reg. 25, 207.

5. *In*

5. *In criminal Caſes*, if the Witneſſes come not according to the Time mentioned in the Proceſs with which they were ſerved, an *Attachment lies* againſt them. Sty 579.

6. The Delivery of a Ticket containing the Subſtance of the Writ, is ſufficient Service within the Act. 5 Mod. 355. Trin. 9 W. 3. Maddiſon v. Shore.

7. Plaintiff brought an Action of Debt upon the Statute 5 Eliz. cap. 9. for 10 l. and *declared, that he was warned by Subpœna to appear ſuch a Day at one o'Clock* in the Afternoon to be a Witneſs, &c. and upon nil debet pleaded *the Subpœna given in Evidence was generally to appear at this Day, and not at ſuch an Hour*; and tho' a Subpœna to appear at ſuch a Day be of that Effect that the Party ought to attend the whole Day, and ſo, as it was objected, includes that he ought to appear at this Hour, yet in reſpect of the Variance it cannot be ſaid to be the Subpœna on which the Plaintiff did declare, and therefore he was nonſuited; and in this Caſe no Regard was had to the Ticket left with the Defendant, which was according to the Declaration. Tr. Per Pais, 7th Edit. cites 24 Car. 1. Radford's Caſe.

## (Y) Puniſhment of Witneſſes for refuſing to be ſworn.

1. LORD Preſton was committed by the Court of Quarter Seſſions, for refuſing to be ſworn to *give Evidence to the grand Jury, on an Indictment of High-Treaſon*. He was brought by Habeas Corpus into B. R. and Holt Ch. J. ſaid, it was a great Contempt, and that had he been there, he would have fined him, and *committed him till he had paid the Fine*, but being otherwiſe, he was bailed. Salk. 278. pl. 2. Mich. 3 W. & M. B. R. The King v. Preſton.

## (Y. 2.) Demeanor of the Counſel, as to Witneſſes.

1. IN examining a Witneſs, Counſel *cannot queſtion his whole Life, as that he is a Whore Maſter, &c.* but if he has done ſuch a notorious Fact, which is a juſt Exception againſt him, they then may except againſt him. March. 83. pl. 136. Paſch. 17 Car. Anon.

2. One ſhall not ask a Witneſs a *Queſtion*, the affirmative Anſwer to *which, may draw him into a Crime*. L. P. R. 555.

3. An *Evidence given to a Jury may be anſwered by the Counſel, either by confeſſing and avoiding it, or elſe by encountering the Evidence given, with giving ſtronger Evidence*, and of greater Credit on the other Side. Mich. 22 Car. B. R. which is upon the Matter, a Denial of the Evidence given on the other Side to be true, by proving the contrary. L. P. R. 548.

4. The *Defendant's Counſel, ought to conclude by way of Anſwer to the Evidence that was given to the Jury by the Plaintiff's Counſel*. Mich. 24 Car. B. R. for if the Plaintiff's Counſel doth begin the Evidence, it is Reaſon, that the Defendant ſhould ſpeak in Anſwer to that Evidence, becauſe he is upon the defenſive Part, and is to give anſwer to all

all that is ſaid againſt him, in Matter of Evidence; *but the Plaintiff's Counſel, after this, is to ſum up his Evidence to the Jury, which is no more than to put them in mind how he hath proved his Cauſe.* L. P. R. 551.

5. Upon a Trial at the Bar, the Counſel of that Party who doth begin to maintain the Iſſue that is to be tried, whether it be the Counſel of the Plaintiff, or the Counſel of the Defendant, ought to conclude the Evidence. Paſch. 1650. 1 Mail. B. S. that is only ſum up his Evidence given; but if he *give new Evidence, the other Party hath Liberty to anſwer it, or encounter it with another Evidence.* L. P. R. 551.

6. Holt would not ſuffer the Plaintiff to *diſcredit a Witneſs of his own calling*, he ſwearing againſt him. 12 Mod. 375. Paſch. 12 W. 3. Adams v. Arnold.

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## (Z) Witneſſes. How many are neceſſary to prove a Thing.

1. WHERE *two or three Offences of the ſame Species, and againſt the ſame Parties, are proved by ſingle Witneſs*, viz. *one Witneſs to each Offence*, here ſingularis teſtis ſufficit. King v. Newton, in Canc. Stell. Dy. 99.

2. Of two *Accuſers*, if *one* be *of his own Knowledge, or Hearing, and told it to another*, this likewiſe may be an Accuſer. The King v. Thomas, for Treaſon, Dy. 99. b. pl. 62. Paſch. 1 Mar. A Caſe is cited, where *one who was told it at the third Hand, was admitted an Accuſer.* And if *one Witneſs, depoſeth in the Point in Queſtion, and another in the Circumſtance*, this ſhall be ſufficient Ground for the Judge to give his Sentence. Dy. 53. b. Marg. pl. 1. Mich. 10 Jac. in the State-Chamber, Adams v. Canon.

3. In the *Spiritual Court*, one Witneſs, is no Evidence. 2 Roll. pl. 42. Trin. 16 Jac. B. R. in Caſe of Barnewell v. Tracy.

It is not neceſſary in any Caſe at Common Law, that a Proof of Matter of Fact ſhould

4. *When a Trial is by Witneſſes* regularly, the *Affirmative ought to be proved by two or three Witneſſes*, as to prove a Summons of the Tenant, or the Challenge of a Juror, or the like. But when the Trial is by Verdict of twelve Men, there the Judgment is not given upon Witneſſes, or other kind of Evidences, but upon the Verdict, and upon ſuch Evidence as is given to the Jury, they give their Verdict. Co. Litt. 6. b.

be made by more than one Witneſs, and the Authorites cited Inſt. 6. b. does not warrant the Opinion theſe founded upon them; Per Holt Ch. J. Carth. 144. Trin. 2 W. & M in B. R. Shotter v. Friend.——The Reaſon why the Civil Law requires two Witneſſes, is becauſe their Trial is by Witneſſes, and not by a Jury of twelve; Plo. Com. 12. a. Serjeant Hawkins ſays, that the Generality of Authorities, cited by Sr. Edw. Coke to prove, that one Witneſs, was not ſufficient to convict a Perſon of High Treaſon, (3 Inſt. 24, 25, 26) wholly relate either to the Proof of an Eſſoin, or of a Summons in a real Action, or of the Default of Perſons ſummoned on a Jury or other Matters, rather leſs to the Point. 2 Hawk. Pl. C. 256. cap. 25. S. 131.

In the Caſe of the Earl of Mountague v. the Earl

5. There being *but one Witneſs againſt the Defendant's Anſwer*, the Plaintiff could have no Decree. Vern. 161. pl. 151. Paſch. 1683. per Ld. Keeper. Alam v. Jourdan.

of Bath. Mich. 1693. 3 Chan. Caſes, pag. 123. Ld. Keeper Somers ſaid, he took it that no Decree can be made againſt a Man's Anſwer upon the Proof of one Witneſs.

6. A *ſingle Witneſs againſt the Defendant's Oath*, is not ſufficient Evidence to decree againſt the Defendant, nor will the Court ſend it to be tried at Law. 2 Vern. 283. Chriſt's Coll. in Cambr. v. Widdington.

7. *No*

7. 2 W. 3. *Cap.* 3. *Sect.* 3. *No Perſon ſhall be indicted, tried, or attainted of High Treaſon, whereby any Corruption of Blood may happen, or of Miſpriſion of ſuch Treaſon, but by the Oaths of two lawful Witneſſes, both of them to the ſame overt Act, or one of them to one, and another of them to another overt Act of ſame Treaſon, unleſs the Priſoner willingly in open Court, confeſs the ſame, ſtand mute, or refuſe to plead; or in Caſes of High Treaſon, ſhall peremptorily challenge above Thirty-five of the Jury.*

*Provided, that if any Perſon indicted, as aforeſaid, of any ſuch a Treaſon, or Miſpriſion of Treaſon, may be outlawed, and thereby attainted thereof; and in Caſes of High Treaſon, where by Law, the Party outlawed, may come in and be tried, he ſhall upon ſuch Trial, have the Benefit of this Act.*

*And if two diſtinct Treaſons, ſhall be laid in one Indictment, one Witneſs to one of the ſaid Treaſons, and another Witneſs to another of the ſaid Treaſons, ſhall not be deemed two Witneſſes to the ſame Treaſon within the Meaning of the Act.*

*Provided, that this Act ſhall not extend to Impeachments, or other Proceedings in Parliament.*

*Nor to the Treaſons of counterfeiting the Coin, the great Seal, Privy Seal, Sign Manual, or privy Signet.*

## (A. a) Objections to the Credibility of a Witneſs in that particular Cauſe.

1. A *Juror* who is *challenged for giving his Verdict before Hand* or for *being of Counſel of the Party or of his Robes* cannot give Evidence to the Jury after. Br. General Iſſue pl. 65. cites 49 Aſs.

2. *Contra* of him *who is challenged for taking of Money* or ſuch like he ſhall not give Evidence; for this goes in Reproof and Diſhoneſty, Note the Diverſity. Ibid.

3. A *Priſoner having eſcaped may be a Witneſs to prove the Eſcape voluntary*, upon Traverſe of an Inquiſition for the Office of Warden of the Fleet againſt the Warden. Objection, that he was returned, and he to ſave his own Bond which he gave to be a true Priſoner and would intitle him to an Action of falſe Impriſonment and compared it to the Caſe of an uſurious Bond; Sed. per Cur. *this Bond is a collateral Matter to the Eſcape, and the Conſequence of his Evidence as to that Bond is not material to diſable his being a Witneſs*, and not like the Caſe of Uſury, for that renders the Bond void, and this is a matter tranſacted privately between the Party and the Officer, of which there can be no other Evidence. 2 Salk. 690. Mich. 12 W. 3. King v. Ford.

4. The Maſter may well bring the Action where the *Servant was robbed*; And to prove what Money the Servant had, which was 200 l. he was cauſed to prove ſo much Money he had delivered to them, and that he had been formerly truſted by his Maſter, and had well diſcharged that Truſt. Clayt. 35. pl. 62. Aug. 11 Car.

5. A Witneſs having *taken Money*, does *not incapacitate* him from giving his Evidence; but the Jury may give leſs Credit to his Evidence, *otherwiſe* if he take Money *upon the Event of the Cauſe*, 11 Mod. 228. pl. 2. Hill. 8 Ann. B. R. Young v. Slaughterford.

## (B. a) Witneſſes. What Perſons in certain Caſes ſhall not be compelled to give Evidence.

Skin. 404. pl 40. Anon. S. C. & S. P.

1. AN Iſſue was joined upon a *corrupt Agreement*, and a Witneſs was called to prove this Agreement; and being ſworn and asked by the Defendants Counſel, what Money he knew to be paid upon that Agreement, he appealed to the Court, and declared, that he was and had been for many Years the Plaintiff's *Attorney*, and that he was employed by the Plaintiff *to draw the Agreement* between the Plaintiff who was High-Sheriff of K. and his Under-Sheriff; and therefore prayed, that he might not be put to diſcover his Client's Secrets wherein he was intruſted; Whereupon the Court declared, that he ought not to be obliged to anſwer that Queſtion; and thereupon for want of Evidence, the Jury found a Verdict againſt the Plaintiff. The Court declared, if this ſhould be admitted, it would be a manifeſt Hinderance to all Society, Commerce and Converſation. Mich. 5. W. & M. L. P. R. 556.

2. A *Lawyer who was of Counſel* may be examined upon Oath as a Witneſs to the Matter *of Agreement*, not to the Validity of an Aſſurance or to the Matter of Counſel. L. E. 81. pl. 81. March. 83. Oneby's Caſe.

3. In a Trial at the Bar, one Mr. Cony a *Counſellor* at the Bar was examined upon his Oath to prove the Death of Sir Thomas Cony; Whereupon Serjeant Maynard urged to have him examined on the other Part, as a Witneſs in ſome Matters whereof he had been made *privy as of Counſel* in the Cauſe; But Roll Ch. J. anſwered, He is not bound to make anſwer to any thing which may *diſcloſe the Secrets of his Chent's* Cauſe, and thereupon he was forborn to be examined. Cites Styl. 449. Paſch. 1655. Waldron v. Ward.

4. Mr. Aylott having been *Counſel* for the Defendant, deſired to be *excuſed to be ſworn on the general Oath* as Witneſs for the Plaintiff, *to give the whole Truth in Evidence*, which the Court, after ſome Diſpute granted, and that he ſhould only *reveal ſuch things as he either knew before he was of Counſel, or that came to his knowledge ſince by other Perſons*; and the particulars to which he was to be ſworn were particularly propoſed, viz. what he knew concerning a Will in queſtion; Whether he knew any thing of his own knowledge. 1 Keb. 505. pl. 68. Paſch. 15 Car. 2. B. R. Spark v. Sir Hugh Middleton.

5. A *Clerk attending upon a Grand Jury*, ſhall not be compelled to be a Witneſs to reveal that which was given them in Evidence T. per Pais. 226.

6. A *Sollicitor* or Promotor, not to be examined as a Witneſs. Toth. 275. cites Wilſon v. Grove. Trin. 6 Car. li. B. ſo. 626.

7. A *Man that Conveys Lands* may be a *Witneſs to prove he had no Title*, becauſe that is ſwearing againſt himſelf, *but* he *is not compellable* to give ſuch Evidence. 2 Ld. Raym. Rep. 1068. Hill. 2 Ann. Title v. Grovett.

S. P. admitted by Hale Ch. J. Vent. 197. in Caſe of Jones v. the Counteſs of Manchester.

8. A *Sollicitor* was *produced as a Witneſs concerning a Reſcue of a Clauſe in a Will ſuppoſed to be done by his Client*; But it appearing that this Diſcovery of which he was now about to give Evidence, had been made *before the Retainer of him as Sollicitor*, the Court were of Opinion that he might be ſworn; otherwiſe if he had been retained his Sollicitor before; the ſame Law of an Attorney or Counſel. Vent. 197. Paſch. 24 Car. 2. B. R. Cuts v. Pickering.

9. A. makes *ſeveral Mortgages to B. C. and D. and in the laſt Mortgage B. is a Party, and agrees that after he is paid he will ſtand a Truſtee for*

*for D.* It was decreed that C. ſhall be paid before D. for *all the Securities being tranſacted by the ſame Scrivenor, Notice to him was Notice to D.* 2 Vern. 574. pl 519. Hill. 1706. Brotherton v. Hatt and

10. In a Trial at Niſi prius at Weſtminſter, one Saunder who had drawn an *Indenture of agreement between a Sheriff and his under Sheriff*, being produced to prove a corrupt agreement between them, he was *not compelled to diſcover the Matter of it tho' he was not a Counſellor*; and per Holt Ch. J. it ſeems to be the *ſame Law of a Scrivener*, Skin. 404. pl. 40. Mich. 5 W. and M. B. R. Anon.

## (C a) Witneſſes. What Perſons ſhall not be Witneſſes unleſs ſworn. In what Caſes, and how.

1. THE Lord Mohun put the Court to declare, that a *Peer* produced as a Witneſs ought to be ſworn, becauſe he ſaid the Houſe of Lords had made an Order contra. 3 Keb. 631. pl. 26. Paſch. 28 Car. 2. B. R. Earl of Shaftsbury v. Lord Digby. 2 Mod. 99. S. C. and S. P. the Court were all of Opinion that he ought to be ſworn, and ſo he was, but with a ſalvo jure.—Freem. Rep. 422. pl. 566. S. C. held accordingly. And per totam curiam, tho' a Peer cannot be compelled to be ſworn, yet if he be not ſworn, whatſoever he ſpeaks is no Evidence, and ſo he was ſworn.

2. *Quakers* are not ſworn when they give Evidence, but only take a *ſolemn Affirmation*, and this is by an Act of Parliament made 1 Geo. L. E. 17. pl. 8.

## (D. a.) Demeanor of and to Witneſſes in general. How it muſt be, or may be.

1. WItneſſes are ſworn to tell the Truth of what they *know*, *not what they believe*, for they are to ſwear nothing but what they have *heard or ſeen*. L. E. 16. pl. 4. cites Lib. Aſſiz. An. 23. Placit. 11. Vaugh. 142. Buſhell's Caſe. See tit. Apportionment, pag. S. the Matter relating to Worth v. Viner, as propoſed by the Plaintiff's Counſel.

2. To make *Mention of Matters againſt a Witneſs*, which is *not to the preſent Purpoſe, but improper and defamatory*, will give a good Action upon the Caſe. Reſolved on Evidence upon a Trial at Bar. MSS. Rep. Mich. 19. Car. 2. in the Caſe of Sir John Turberville v. Savage. 2 Keb. 545. pl. 13. Mich. 21 Car. 2. S. C. but this Point does not appear.—Mod. 3. pl. 13. Anon. S. C. but S. P. does not appear.

## (E. a.) Witneſſes. Perſons injured.

S. C. and the Cheat was in exchanging this pretended Wine for Hats of 1181 Value. But the Indictment was quaſh'd for its being

1. INdictment for a Cheat done to J. S. by *impoſing* upon him *a Quantity of Beer mix'd with Vinegar and Grounds of Coffee for Port Wine*; One of the Defendants pretended to be a Broker, and the other a *Portugueze* Merchant, for the better carrying on of the Cheat; & per Holt Ch. J. J. S. was allowed to be a Witneſs to prove the Fact upon the Trial, for in ſuch private Tranſactions Nobody elſe can be a Witneſs of the Circumſtances of the Fact, but he that ſuffers. 1 Salk. 286. Mich. 2 Ann. B. R. the Queen v. Mackartney & al.

called Vinum prætenſum. 6 Mod. 301, 302. Mich. 5 Ann.—7 Mod. 119.

## (F. a.) Witneſſes. Who. Particeps criminis.

1. IF there be *diverſe Defendants*, and *one* of them *does not accuſe himſelf*, but accuſes his Companion, another Defendant, he ſhall not be received as a competent Teſtimony to condemn his Companion, but if he had accuſed himſelf, then he ſhould have been received as a competent Teſtimony to condemn his Companion. Noy. 154. Anon.

2. A Man *attainted of Piracy* is not a good Witneſs to prove another guilty or not guilty of Piracy P. 15 Ja. B. R. per Cur. in one Woodford's Caſe, upon Evidence at Bar, Trial. (H. f.) pl. 2.

3. If a Man upon Examination *accuſes another of Piracy, and after he himſelf is attainted of Piracy*, and after being pricked in his Conſcience ſends for the Party accuſed, and *acknowledges before Witneſſes that he accuſed him before falſely, and by Procurement of a Stranger*, yet this Confeſſion ſhall not be taken to enfeeble his Teſtimony made before his Attainder, becauſe it is made by a Man attainted. P. 15 Ja. B. R. Woodford's Caſe, per Cur. præter Dodderidge, who ſeemed to incline e contra. 2 Roll. Trial (H. f.) pl. 3.

So particeps criminis is a good Witneſs upon a penal Statute. 2 Jo. 155.

4 In *Treſpaſs* it appeared by the Witneſs's own Evidence that he himſelf was *one of the Perſons guilty* of the Treſpaſs, but was left out of the Declaration; Per Hale, he *is a legal Witneſs*, altho' his Credit was leſſened by it, becauſe he ſwears Matter to his own Diſcharge; for if Judgment paſs againſt the Defendants, and they have ſatisfied the Condemnation, he may plead the ſame in Bar of any Action brought againſt himſelf. Mod. 283. Trin. 29 Car. 2. B. R. Lutterell v. Reynell.

Yet Sty. 401. Hill. 1654. B. R. it is ſaid they may, unleſs Matter is proved

5. And this Teſtimony may be ſupported by collateral Declarations of his to the ſame Purpoſe, thereby to prove that he was conſtant to himſelf, whereby his Teſtimony was corroborated. But *thoſe in the final cum* are no Witneſſes. Ibid.

againſt them.—As where they are put in by Covin to take away their Teſtimony. There the Juſtices may and ought to receive their Teſtimony; and ſo it was done in the Caſe of Dymoke & al.——So if the Plaintiff forceaſes his Suit againſt any Defendant at the Aſſizes. Godb. 326. pl. 418. Paſch. 21 Jac. B. R. Anon.

6. *Wit-*

5. *Witneſſes* which were *Defendants*, and which are *ſuppreſſed by Order of the Court, altho' that afterwards there are no Proceedings againſt them*, yet they *ſhall not be allowed of* at the hearing of the Cauſe; agreed per tot. Cur. Godb. 439. pl. 504 Mich. 4 Car. in the Star-Chamber. Huet v. Overy. And this was declared to be the conſtant Rule of that Court.

6. An *Information* was againſt A. *for ſeducing and debauching a young Lady, M.* was admitted an Evidence, and ſworn in behalf of A. Skin. 81. pl. 23. Mich. 34 Car. 2. B. R. Lord Grey's Caſe.

7. The Defendant was convicted upon the Statute of 13 Car. 2. againſt *Killing Deer*, upon Oath of the *Informer, who is to have a Moiety of the Penalty of* 20 *l.* It was objected, that the Informer ought not to be a Witneſs, becauſe he is to have a Moiety of the Forfeiture; ſed per Curiam he *is a good Witneſs.* 3 Mod. 114. Trin. 2 Jac. 2. B. R. Jennings v. Hankys.

8. *B. was indicted for ſtriking H. in Weſtminſter-Hall ſitting the Court*, and H. was the Evidence allowed, altho' B. proved that *H. offered B. to compound the Proſecution*, for ſuch Act ſhall not invalidate his Teſtimony, becauſe it ſhall be *intended that ſuch Compoſition was for the Battery, and not for the Contempt* done *to the Court.* Sid. 211. pl. 8. Trin. 16 Car. 2. B. R. the King v. Bockman.

9. C. was *indicted for* a Miſdemeanor in *receiving ſtolen Goods*, knowing them to be ſtolen; and *the very Thief was produced as an Evidence*, who confeſſed the Fact, he being brought up by Habeas Corpus ad teſtificandum from the Compter; per Holt Ch. J. theſe Indictments were never thought good by me before I came upon the Bench, tho' I have been over-ruled in it once; but let us try the Fact firſt, and it ſhall be conſidered after whether the Indictment be maintainable. And he ſaid, ſome Judges would try a Trover for Goods before an Indictment for the taking; but he never would do it, but rather get a Juror withdrawn, if the Matter had proceeded ſo far, that the Plaintiff might not be nonſuited; and the Plaintiff in this Action was bound in a Recognizance to proſecute the principal Felon in 40 l. in Court. 12 Mod. 520. Paſch. 13 W. 3. the King v. Croſs. Comb. 289. the King againſt Croſs is not the ſame Caſe.

## (G. a) Witneſſes diſabled by Crime.

### Enabled by Pardon, or ſome After-Act.

1. IN the Star-chamber, Exception was taken to one of the Witneſſes, viz. Dr. Spicer, becauſe he had *ſtolen Plate*, and had been *pardoned for it.* But notwithſtanding, the Exception the Court did allow of the Teſtimony of the ſaid Dr. Spicer. Note, It did not appear in the Caſe of Fines, the principal Caſe, whether the Pardon by which Dr. Spicer was pardoned were a general Pardon, or whether it were a particular and ſpecial Pardon. L. E. 38. pl. 10. cites Godb. 288. Paſch. 21 Jac. B. R. Sr. Henry Fines Caſe.

2. Note, In the Caſe of the King v. Ford. 2 Salk. 690. it was argued, that a bare *Conviction of Perjury*, would take away one's Evidence; becauſe *it is an infamous Crime*, not ſo of Barratry, which was not of an infamous Nature, without an *infamous Puniſhment* inflicted, as the *Pillory*, &c. but the Court held contra, and that it was not the Nature of the Puniſhment, but the * *Nature of the Crime*, and the Conviction thereof, that created the Infamy; And per Holt Ch. J. if * S. P. Skin. 578. Crosby's Caſe.

one be convicted of Perjury *on the Statute*, he cannot be reſtored to his Credit by the *King's Pardon*, for by the Statute, it is Part of the Judgment, that he be infamous and loſe his Credit; but he may be reſtored to his Credit by a *Statute Pardon*; but in Indictments of *Perjury at Common Law*, the Infamy is only the Conſequence of the Judgment, and therefore the King's Pardon in ſuch Caſes, reſtores the Party to his Credit. L. E. 37. pl. 7.——cites 2 Salk. 514.

3. It was reſolved by all the Judges, that thoſe *Priſoners* who were *equally culpable* with the reſt, may be made uſe of as Witneſſes againſt their Fellows, and they are lawful Accuſers, or lawful Witneſſes, within the Statute. 1 Ed. 6. 12. 5 & 6 Ed. 6. c. 11. & 1 Mar. 1. And accordingly at the Trial of thoſe Men, ſome of their Partners in the *Treaſon*, were made uſe of againſt the reſt; *for lawful Witneſſes* within thoſe Statutes, *are ſuch as the Law alloweth*; and the Law alloweth every one to be Witneſſes, who is not convicted, or made infamous for ſome Crime, and if it were not ſo, all Treaſons would be ſafe, and it would be impoſſible for one who conſpires with never ſo many others to make a Diſcovery to any Purpoſe. But the Ld. Ch. B. Hale ſaid, that if one of theſe culpable Perſons *be promiſed his Pardon on Condition to give Evidence* againſt the reſt, then that diſables him to be a Witneſs againſt others, becauſe he is bribed by ſaving his Life to be a Witneſs, ſo that he takes a *Difference where the Promiſe of Pardon is to him for diſcloſing the Treaſon, and where* it is *for giving Evidence.* But ſome of the other Judges, did not think the Promiſe of Pardon, if he gave Evidence did diſable him; But they all adviſed, that no ſuch Promiſe ſhould be made, or any Threatnings uſed to them, in caſe they did not give full Evidence. L. E. 48. pl. 24. cites Kelynge 18.

Keb. 134. pl. 60. Gary v. Smallbrook. S. C. held accordingly.—— The Court would not admit the Evidence,

4. In Evidence on a Trial at Bar, it appeared, that one Alcott, one of the Witneſſes for the Defendant, was *indicted of Perjury*, in the Time of Cromwel, and *Verdict given againſt him*; but by the Death of Cromwel, *Judgment was not entered*, but all *Proceedings vacated.* The Plaintiff's Counſel, offered this Verdict in Evidence to weaken the Credit of the Witneſs, but the Court reſolved, that the ſaid Verdict is now totally deſtroyed, and cannot be given in Evidence. Raym. 32. Mich. 13 Car. 2. B. R. Finch v. Smalbrook.

becauſe all is diſcontinued by Alteration of Government; But it was agreed, that Evidence might be given viva voce, to prove him perjured; the other Side, to eſtabliſh the Witneſſes Credit, produced a Pardon of the Perjury; But per Cur. that will not do, for it cannot reſtore him to his Credit. Sid. 51. pl. 16. Wicks v. Smalbroke. S. C.——

At Common Law, it is only a conſequential Diſability; Therefore in this Caſe, the King may pardon, and that reſtores him to his Teſtimony; but otherwiſe, where it is upon the Statute; For in that Caſe, he muſt reverſe the Judgment, or he cannot be reſtored. 2 Salk. 514 Mich. 9 W. 3. B. R. The King v. Grepe.

5. If one be *convicted of Perjury*, upon the Statute, he *cannot be reſtored* to his Credit by the *King's Pardon*; For by the Statute, it is Part of the Judgment, that he be infamous and loſe the Credit of Teſtimony; *but he may by a Statute Pardon.* But in other Caſes, where the Infamy is only the Conſequence of the Judgment, the King's Pardon may reſtore the Party to his Teſtimony. 2 Salk. 691. in pl. 3. Mich. 12 W. 3. B. R. cited by Holt Ch. J. as held upon a Trial at Bar.

## (H. a) Proceſs againſt Witneſſes. And Puniſhment of not appearing.

1. 12 *E.* 2. *ſtat.* 1. *cap.* 2. Enacts, that *when a Deed is denied in the King's Court, wherein Witneſſes be named, Proceſs ſhall be awarded to cauſe ſuch Witneſſes to appear as has been uſed, ſo that if none of them came in at the great Diſtreſs returned, or if it be returned, that they have nothing, or that they cannot be found, yet the taking of the Inqueſt, ſhall not be deferred; and if the Witneſſes come in at the great Diſtreſs, and the Inqueſt for ſome Cauſe remains untaken, the Witneſſes ſhall have the like Day given them, as is aſſigned for the taking of the Inqueſt; at which Day, if the Witneſſes do not appear, the Iſſues that were firſt returned upon them, ſhall be forfeit; and the taking of the Inqueſt ſhall not be deferred, becauſe of their Abſence. And for Abſence of Witneſſes, dwelling within Franchiſes, where the King's Writ original does not run, the taking of an Inqueſt ſhall not be deferred,*

2. In quare impedit, it was ſaid per Belk, that at the laſt Aſſiſe in Eſſex, before Ludlow in Aſſiſe of Rent; The *Iſſue* was, that *ne chargera pas by the Deed*, and Proceſs was made againſt the Witneſſes, becauſe Witneſſes were in the Deed. Finch ſaid, certainly it was againſt the Law, for the Deed is not denied, but Kirton contra; For a *Stranger to the Deed* cannot have other Nature of Anſwer; For he cannot deny the Deed; therefore the Deed is ſo far denied, that a Stranger may deny it, therefore quære. Br. Teſtmoignes, pl. 1. cites 43 E. 3. 2.

3. In *Aſſiſe*, the Tenant *pleaded Bar by one who had nothing but Eſtate for Life, the Remainder to one J. que Eſtate the Tenant has, and that the Tenant for Life alened to the Plaintiff and died, and J entered que Eſtate the Tenant has*, and gave Colour *to the Plaintiff*; and the *Plaintiff ſaid, that* where he ſaid, that the firſt Tenant had only Eſtate for Life by Leaſe of W. N. the Remainder to J. *he had Eſtate Tail by the Deed of W. which he had ſhewed*; and the *Tenant ſaid, that nient le fait* & non allocatur, for a Stranger, &c. and therefore he *ſaid, that ne dona pas by the Deed*, and the others contra; and Proceſs was againſt the Witneſſes, as well as if he had had Iſſue upon non eſt factum, contra it was ſaid therefore the next Term. Br. Teſtmoignes, pl. 3. cites 2 H. 4. 21.

4. In Aſſiſe by an Infant, *Deed of the Grandfather, with Warranty was pleaded in Bar*, in which Witneſſes were named, and the Aſſiſe was charged upon the Circumſtances of the Deed, without making Proceſs againſt the Witneſſes, Br. Teſtmoignes, pl. 10. cites 18 Aſſ. 11.

5. Where the *Iſſue* was that *ne releaſa pas* by the Deed before the Note levied, which Iſſue was taken by *a ſtranger to the Deed*, Proceſs was made againſt the Witneſſes as it was ſaid; For tho' the Deed is not expreſsly denied, it is denied in as much as a Stranger may deny it. Br. Teſtmoignes. pl. 2. cites 44 E. 3. 34.

6. Where Witneſſes *make Default at the grand Diſtreſs* no further Proceſs ſhall be made againſt them, but only againſt the Inqueſt; For the *Statute of York*, is that by Default of the Witneſſes at the grand Diſtreſs, the Inqueſt ſhall not be denied by the Abſence of the Witneſſes. Br. Teſtmoignes pl. 5. cites 8 Aſs. 15.

7. *Aſſiſe againſt an Infant* who *pleaded Releaſe of the Plaintiff bearing Date at E.* which was denied, and Witneſſes were named in the Deed, by which Proceſs iſſued to Sheriff to cauſe the Witneſſes to come, and the Inqueſt was of the ſame Vifne, where the Inqueſt were named, and after it was ſaid that they *cannot take Inqueſt of the Foreigners upon Deed bearing Date at E.* and after this Pannel was outed, and Proceſs continued againſt the Witneſſes, and Proceſs to cauſe a Jury to come

from

from the City of E. notwithſtanding that the Tenant be within Age, and cannot be attainted of the Diſſeiſin by the Trial of the Deed. Br. Teſtmoignes, pl. 6. cites 20 Aſs. 13.

8. In *Aſſiſe by an Infant, Deed of his Father with Warranty was pleaded*, and *Inqueſt* was *of the Circumſtances*, and Proceſs was made againſt the Witneſſes alſo as well as if he had been of full Age and had denied the Deed quod nota, and *at the grand Diſtreſs they did not come* by which the Aſſiſe was taken as the Statute wills, without having regard to their not coming, to which it was ſaid that the *Statute does not give it, but where the Deed is denied at the Miſne of the Parties*, ſo in this Caſe; and *if the Court will enquire of Office, as above, the Proceſs remains at Common Law*, and thereupon they were adjourned into Bank, therefore Quære. Br. Teſtmoignes, pl. 7. cites 11 Aſs. 19.

9. In Aſſiſe by an Infant, the Tenant pleaded Deed of the Anceſtor with Warranty, and the Plaintiff ſaid that *Riens paſſa by the Deed*, and the Aſſiſe was awarded without making Proceſs againſt the Witneſſes, becauſe the *Deed bore Date in the Vill where the Land in the Plaint lay*; For by ſome if it had bore Date *in another County*, then Proceſs ſhall be made againſt the Witneſſes, Quære inde. Br. Teſtmoignes, pl. 11. cites 22 Aſs. 11.

10. In Aſſiſe Deed is pleaded at Iſſue in which are Witneſſes, and the *Plaintiff averred all to be dead*, et non allocatur, but Proceſs made upon the Statute; For *this comes in by Return of the Sheriff*. Br. Teſtmoignes, pl 13. cites 25 Aſs. 14. and 26 Aſs. 8 Accordingly.

11. In Aſſiſe a Man made *Feoffment without Deed* and *delivered Seiſin upon Condition contained in certain Indentures, and Witneſſes were in the Indentures*; the Feoffor entered for Condition broken, the other brought Aſſiſe; the Tenant pleaded this Matter, he ſhall not have Proceſs againſt the Witneſſes, Contra if the Feoffment had been by Deed, and Witneſſes had been in the Deed of Feoffment, for *the Feoffment upon Condition is the Force of the Bar and not the Indentures*. Br. Teſtmoignes pl. 14. cites 28 Aſs. 1.

12. In Aſſiſe by an *Infant, Deed of the Anceſtor* was pleaded, and Witneſſes named, and the Aſſiſe was awarded without making Proceſs againſt the Witneſſes, and good per juſticarios; For *Proceſs ſhall not be made againſt the Witneſſes but where the Deed is denied*, and *Infant in Aſſiſe ſhall not be ſuffered to deny the Deed*; For there the Aſſiſe ſhall inquire of all the Circumſtances. Br. Teſtmoignes, pl. 15. cites 29 Aſs. 57.

13. In Aſſiſe, the Tenant *pleaded Releaſe of the Plaintiff*, to which the Plaintiff *ſaid, that after this the Tenant leaſed to him for Years, and after by his Deed*, &c. *releaſed to him in Fee*. Lud. ſaid, he *did not Releaſe by the Deed priſt*, and the others e contra, and Proceſs was made againſt the Witneſſes; for *the Deed is in a manner denied* quod nota. Br. Teſtmoignes, pl. 16. cites 31 Aſs. 25.

14. Deed was pleaded in Bar, and the *Plaintiff ſaid*; *that nothing paſſed by the Deed*. And per Townſend, Proceſs ſhall not be made againſt the Witneſſes, but Brian and Vavilor Contra. Br. Teſtmoignes, pl. 21. cites 5 H. 7. 8.

15. In Aſſiſe by *an Infant, Deed of the Anceſtor with Warranty was pleaded* in which were Witneſſes, and Proceſs was made againſt the Witneſſes upon the Circumſtances without denying the Deed, quod nota. Br. Teſtmoignes, pl. 17. cites 35. Aſſ. 9.

16. In Aſſiſe of Rent the Defendant *pleaded Releaſe of all the Right of the Father of the Plaintiff*, in which were Witneſſes, and the Plaintiff *ſaid, that non eſt factum*, and the *Defendant would have confeſſed the Witneſſes dead* if the Plaintiff would have aſſented to have maintained the Aſſiſe; and the Plaintiff *would not aſſent but prayed Proceſs againſt the Witneſſes*. Br. Teſtmoignes, pl. 18 cites 41 Aſſ. 6.

17. In

17. In Aſſiſe of Rent the Tenant *pleaded Hors de ſon Fee*, the other ſhewed Deed of Rent-charge made by W. N. Knight, he *ne charga pas by the Deed*, and per Cur. Proceſs was made againſt the Witneſſes, tho' the *Deed was not denied*. Br. Teſtmoignes, pl. 19. cites 41 Aſſ. 23. But Thirp and Finch were of a contrary Opinion, H. 42 E. 3. in a Quare impedit.

18. Aſſiſe *Baron and Feme*, who *pleaded Releaſe, which was denied*, and in which were Witneſſes, and Proceſs was made againſt them, the *Sheriff returned that they were dead*, and after the *Feme was received in Default of the Baron and pleaded the ſame Deed again*, and prayed Proceſs againſt the Witneſſes, and could not have it becauſe the Sheriff had returned them dead before, by which the Aſſiſe was awarded quod nota. Br. Teſtmoignes, pl. 20. cites 43 Aſſ. 16.

19. In *Treſpaſs* per Martin and Roll, if *a Deed in which are Witneſſes be pleaded in Treſpaſs, and is denied*, Proceſs ſhall iſſue againſt the Witneſſes, and yet it is Action perſonal. Br. Teſtmoignes, pl. 23. cites 1 H. 6. 5. at the End.

20. In Aſſiſe, if *Deed pleaded is confeſſed and avoided*, it is ſaid that Proceſs ſhall not iſſue againſt the Witneſſes. Contra, where the Deed is denied; For in Aſſiſe, if the Tenant pleads Jointenancy by Deed, and the Plaintiff ſhews that the Jointenancy was conveyed pending the Writ, Proceſs ſhall not iſſue againſt the Witneſſes. Br. Teſtmoignes, pl. 25. cites 7 Aſſ. 10.

21. In Aſſiſe *by two* the *one an Infant, and the other not*, and Deed of their Anceſtor was pleaded, by which the Aſſiſe was awarded at large of the Circumſtances againſt him who was within Age, and he of full Age was compelled to anſwer, who ſaid, that nothing paſſed by the Deed, and Witneſſes were in the Deed, and therefore Proceſs was awarded againſt the Witneſſes. Br. Teſtmoignes, pl. 26. cites 26 Aſſ. 65.

22. Proceſs ſhall *not* be againſt the Witneſſes *unleſs the Party prays it*, quod nota. Br. Teſtmoignes, pl. 27. cites 12 E. 4 4.

23. In Ward the Defendant *pleaded Feoffment of the Anceſtor of the Infant*, the Plaintiff *ſaid that it was upon Condition to infeoff the Heir at his full Age by Colluſion*, to ouſt him of the Ward, &c. The Defendant *ſaid that it was ſimple and without Condition*, or Colluſion; Priſt. and the others e contra, and the Defendant prayed Proceſs againſt the Witneſſes, and had it. Br. Teſtmoignes, pl. 28. cites 45 E. 3. 22.

24. *5 Eliz. cap. 9. ſect. 12.* Enacts, that *none ſerved with Proceſs out of a Court of Record to teſtify as a Witneſs (being tendered convenient Charges, and having no reaſonable Lett) ſhall therein make Default, on pain to forfeit to the Party grieved 10 l. and beſides to yield him ſuch farther Recompence as the Judge of the ſame Court ſhall think fit, according to the Damage ſuſtained, which ſaid Sums ſhall be by him recovered in any Court of Record by Action of Debt, in which no Wager, Eſſoin &c. ſhall be allowed.* A Feme Covert was ſerved with Proceſs as a Witneſs, and tendered Charges, but ſhe did not appear. In Debt brought on this Statute for the 10 *l.* for her not appearing, it was held that ſhe was within the Statute, and that the Tender of the Charges was to be to her, and not to her Huſband; and Judgment for the Plaintiff, tho' it was moved in arreſt of Judgment, that the Plaintiff did declare that the Not-appearance was to his Damages, but did not ſhew what Damages. Cro E 130 pl. 3 Paſch. 31 Eliz. B. R. Havithbury v. Harvy, & ux. —— Le. 122. pl. 166 Havithlome v. Harvey, S. C. adjudged for the Plaintiff. A Note of Proceſs was left at the Defendant's (the Witneſs's) Houſe being 40 Miles from London, and 12 d. to bear his Charges which the Party did accept; and the Party who ſerved the Proceſs promiſed the Defendant ſufficient Coſts. Exception was taken, 1ſt, Becauſe the Proceſs was not ſerved upon the Defendant as the Statute requires, but a Note only thereof, and it being a penal Statute, ought to be taken ſtrictly. 2dly, That 12 d. only was delivered, which was no reaſonable ſum for Coſts and Charges according to the Diſtance of the Place, as the Statute ſpeaks; and therefore the Promiſe that he would give him ſufficient for his Coſts afterwards is not good. 3dly, The Party who recovers by Force of this Statute, ought to be a Party grieved and damnified, as the Statute ſpeaks, by the Not-appearance of the Witneſs; and becauſe the Plaintiff had not averr'd that he had Loſs thereby, and therefore conceived the Action not maintainable. But for the firſt the

the Court was clearly againſt him, becauſe it is the common Courſe to put divers in one Proceſs, and to ſerve Tickets, or give Notice to the firſt Perſons who are ſummoned, and to leave the Proceſs itſelf with the laſt only, and that is the uſual Courſe in Chancery; but if there is only one in the Proceſs, then the Proceſs itſelf ought to be left with the Party; As to the 2d the Court did conceive that the Acceptance ſhould bind the Defendant, but if he had refuſed it, there he had not incurred the Penalty of the Statute; for he ought to have tendered ſufficient Coſts according to the Diſtance of the Place, which 12d. was not, it being 60 Miles diſtant. But as to the 3d Exception, the Court was clear of Opinion, that Action would not lie for want of Averment that the Plaintiff was damnified for the Not-appearance of the Defendant; And ſo it was adjudged that the Plaintiff nil capiat, per Billam, Mar. 18. pl. 43. Paſch. 15 Car Goodman v. Weſt. —— Jo 430. pl. 3. Goodvin v. Weſt. S. C. held accordingly —— Cro. C. 540. pl. 4. S C. adjudged for the Defendant. —— 5 Mod 355. Trin. 9 W. 3. Maddiſon v. Show. S. P. the Court of C B. held the Declaration ill, becauſe the Plaintiff had not ſet forth any ſpecial Damage ſuſtained by him by Defendant's not appearing to give Evidence, as that he was nonſuited or could not proceed to Trial for want of the Defendant's Evidence, and a particular Damage muſt be ſet forth; And afterward a writ of Error was brought on this Judgment, but it was affirmed, tho' contrary to the Caſe of Cro. E. 130. & Le. 122. —— In ſuch Caſe Plaintiff ſhall have his Coſts too. Comb. 449. S. C. —— 1 Salk. 206. pl. 4. Shore v. Maddiſton. S. C. accordingly.

25. One was ſubpœned ad teſtificandum, and *prayed a Priviledge from being arreſted*, which was granted; And per Cur. *it will ſuperſede an Arreſt upon mean Proceſs, but not upon an Execution*; yet the Sheriff in that Caſe may be committed for the Contempt. Tri. per Pais, 7th Edition, 330. Sect. 1. cites Mich. 15 Car. 2. B. R.

## (I. a) Witneſſes joined to the Inqueſt. In what Caſes.

1. A *Witneſs who was outlawed*, was ſworn with the Inqueſt. Br. Teſtmoignes, pl. 29. cites 34 E. 1. & Fitzh. Proceſs, 208.

2. *Aſſiſe* was brought by *an Infant, and Deed of his Anceſtor was pleaded in Bar*; and per Thirn, Hank and Norton, the Circumſtaces ſhall be enquired, and the Witneſſes joined to the Inqueſt, quod nota. Br. Teſtmoignes, pl. 4. cites 12 H. 4. 9.

3. When Proceſs uſed to be made out againſt the Witneſſes in Catta nominat. to join with the Jury in Trial of the Deed, as was uſed before the Statute of 12 E. 3. c. 2. (his teſtibus) being then Part of the Deed, then the Number was uncertain, according as the Number of Witneſſes were in the Deed; wherefore no Attaint lay, if the Deed were affirmed, becauſe more than Twelve joined in the Verdict. But otherwiſe, if the Deed was not found, becauſe Witneſſes cannot prove a Negative. T. per P. 72. cites F. N. B. 106. h. 1 Inſt. 6. 2 Inſt. 130, &c.

## (K. a) Witneſſes. Privileged from Arreſts.

1. THE Court was moved to diſcharge one Collins, that was arreſted as he was attending the Court, to give Teſtimony as a Witneſs in a Cauſe, and for an Attachment againſt the Parties that did arreſt him. Germain Juſtice, Abſente, Roll. Ch. J. Take a *Superſedeas*, and let the Parties ſhew Cauſe why an *Attachment* ſhall not be granted againſt them that arreſted him. Sty. 395. Mich. 1653. Anon.

2. If

2. If a Witneſs, coming to teſtify in a Cauſe in Middleſex, and be arreſted in London, by one knowing the Cauſe, he hath no *Remedy, but by a Habeas Corpus*, to examine and deliver him thereby; but if there be any Contempt by the Officer, &c. an *Attachment*, may *afterward* be awarded againſt him; for they are as well to have Privilege, as the Parties. L. E. 29. cites 1 Keb. 220. pl. 28. Hill. 13 Car. 2. B. R. Vandevelde v. Lluellin.

3. He who has a *Subpœna* to give Evidence, may have a *Writ of Privilege*, to protect him going and coming. L. E. 29. pl. 46. cites 1 Vent. 11. Hill. 20 & 21 Car. 2. B. R. Anon.

4. The Courts not only protect the Parties themſelves, but all Witneſſes are protected eundo & redeundo; for ſince they are obliged to appear by that Proceſs of the Court, they will not ſuffer any one to be moleſted, whilſt he is paying Obedience to *their Writ*. G. Hiſt. C. B. 168. cap. 17.

## (L. a. 2) Witneſſes. Not to be enforced to give Evidence againſt themſelves.

1. A Prohibition, ſhall go to Court Chriſtian, if they compel a Man to be a Witneſs againſt himſelf; for (unleſs in Cauſes matrimonial, and teſtamentary) nemo tenetur prodere ſeipſum. Cro. E. 201. pl. 28. Mich. 32 & 33 Eliz. B. R. Cullier v. Cullier. Mo. 906. pl. 1265. Collier v. Collier. S. C. it was in a Caſe of Incontinency, and the ſpiritual Judge would have examined the Parties upon Oath, whether they did the Fact or not; and Prohibition was granted.——4 Le. 194. pl. 307. 32 Eliz. in C. B. the S. C. the Court would adviſe.——

## (L. a. 3) Evidence by Jurors.

1. If either of the Parties deſire, that a Juror may give Evidence of ſomething of his own Knowledge to the reſt of the Jurors, the *Court will examine him openly in Court upon his Oath*, and he *ought not to be examined privately by his Companions*; Per Curiam, Sty. 233. Mich. 1650. B. R. Bennet v. Hartford (Hundred.) S. P. Tr. per Pais 221. For the Court and Counſel are to hear the Evidence as well as the Jury.—

## (M. a) Examination of Witneſſes. What they may be examined to, and how.

1. In ſome Caſes, the Courts of Common Law, do judge upon Witneſſes; but they *muſt ever give their Teſtimony viva voce*, as in Dower, if the Iſſue be, whether the Husband be alive or not, &c. 4 Inſt. 279.

2. The

4 Inſt. 278. S. P.——

2. The Plaintiff's Commiſſioner, would not let a Witneſs declare the whole Truth, but *held* him *ſtrictly to the Interrogatories, to ſtifle the Truth.* This was held a Miſdemeanor, and, that Commiſſioners to examine, ought to be indifferent, and by all Means to expreſs the Truth, and they are not ſtrictly bound to the End of the Interrogatories, but to every Thing alſo which ariſes neceſſarily upon it, for manifeſting all the Truth concerning the Matter in Queſtion.——And where one of the Commiſſioners *went out of the Place to the Plaintiff* into another Room during the Examination, and had private Conference with him, it was held, that a Commiſſioner ought not before Publication *diſcover* to any of the Parties what any Witneſs has depoſed, nor *to conſer with the Party after he has begun to examine* on the Interrogatories, to take new Inſtructions to examine further than he knew before, and if he does, he is puniſhable by Fine and Impriſonment. 9 Rep. 70. b. Trin. 9 Jac. in the Star-Chamber. Peacock's Caſe.

3. The Defendant's Commiſſioners for examining Witneſſes, *met* at the Time and Place appointed, but *refuſed to join* and act in the Execution of the Commiſſion, and upon Affidavit made of this, the Court ordered, that the Defendant ſhould name other Commiſſioners, and it was prayed, that the Plaintiff might *name other Commiſſioners* too; becauſe one of his Commiſſioners was not there, ſo that it ſeemed to have been a Practice; and the Court doubted whether an Attachment lay againſt the Defendant's Commiſſioners or not. Et adjornatur. Hard. 170. pl. 6. Trin. 12 Car. 2. in the Exchequer, with Forteſcue & al.

4. Where *two Witneſſes* were produced as Witneſſes, *to prove a Bond ſuſpected of Forgery*, the Court upon Motion, *ordered the Witneſſes to be examined apart*, and the one not in the hearing of the other. Sid 131. pl. 1. Paſch. 15 Car. 2. B. R. Guilliams v. Hulie.

5. A *Witneſs ſwears, but to what he hath ſeen or heard, generally, or more largely, to what hath fallen under his Senſes*; but a *Juryman ſwears to what he can conclude, and infer from the Teſtimony of ſuch Witneſſes*, by the Act and Force of his Underſtanding, to be the Fact inquired after. Vaugh. 142. Per Vaughan Ch. J. in Buſhell's Caſe.

6. The *Party who produceth* a Witneſs, *cannot examine to the Diſcredit* of ſuch Witneſs; Per Eyre, Devon. Lent Circuit, 1722. And in Criminal Caſes, where the Priſoner calls Perſons to his Reputation, this gives an Handle to the Crown to give Evidence of the Priſoner's Reputation. Per Page.

## (M. a. 2) Examination on a Voire Dire.

1. UPON a *Challenge to a Juror*, the Way is to examine him upon a voire dire, as to the Truth of the Challenge. Dy. 195. a. pl. 35. Hill. 3 Eliz.

2. Thoſe that produce an Evidence, ought to examine him in Chief only; But *they againſt whom he is brought, may examine upon a voire dire*, if they pleaſe, whether he is concerned in Intereſt. 10 Mod. 151. Paſch. 12 Ann. B. R. Corporation of the Town of Bewdley.

3. When a *Witneſs is examined upon a voir dire, and his Teſtimony is admitted*, and upon his Examination, *he appears by his Evidence to be intereſted*, no Regard is to be had thereto, but the Jury are to be directed to lay it aſide. But how it is in the Courſe of Evidence of other Witneſſes, for before ſuch Examination, the other Party may prove that he is a Party intereſted, and then his Evidence is not to be admitted at all; This

this was ſaid to have been held by Ch. B. Gilbert in the Exchequer, and he committed a Witneſs who had been examined upon a voir dire, and appeared afterwards upon his Examination to be intereſted; and he ſaid, that the ſame did hold in Equity upon the Depoſition of ſuch a Witneſs, the Baron ſitting; Per Lord Chancellor. Paſch. 1743. Moore v. Howell

4. Of examining a Witneſs upon a voir dire, or as to his Character. Vid. Wood's Inſt. 1020.

## (M. a. 3) De bene eſſe.

1. IF a Witneſs be examined *for the Defendant* de bene eſſe to preſerve his Teſtimony, and before Anſwer, and upon an Order of Court for his Examination made *upon hearing of Counſel of both Sides*, and if after Anſwer the Witneſs *die before he is examined again*, the Anſwer coming in on the 28th November, and the Witneſs dying on December 18th following, and he being ſick all the Time, ſo that he could not go to be examined, the Examination of ſuch Witneſs ſhall not be read in Evidence, becauſe it was taken before Iſſue joined in the Cauſe, and he might have been examined after, and the Defendants did not appear to be in Contempt; Per omnes. J. Hard. 315. pl. 6. Mich. 14 Car. 2. in Scacc. ——— v. Brown.

2. The *Reaſon why* the Court allows the taking of Depoſitions de bene eſſe, *is either from a Contempt* in not anſwering, and thereby preventing the joining of Iſſue, or elſe *where the Party is in Danger of loſing his Witneſſes in caſe of Death*, by reaſon of Sickneſs or Age, ſo that there may be Ground to apprehend their not being examined in chief; Per Ld. C. Parker. Wms's Rep. 568. Trin. 1719. in the Caſe of Cann v. Cann.

3 Upon a Petition for *Publication* of Depoſitions taken de bene eſſe, *after Examination in chief of the ſame Witneſſes*, in order to compare the ſaid ſeveral Depoſitions ſo taken in the ſame Cauſe, the ſame was denied by Lord Ch. Parker, and diſmiſſed the Petition, it being admitted on both Sides to be without Precedent; and ſaid, that if the Witneſſes examined de bene eſſe live to be examined in chief, the Depoſitions de bene eſſe ſhall fall to the Ground, and are as it were buried, having *anſwered the whole Purpoſe for which they were taken*. Wms's Rep. 567. Trin. 1719. Cann. v. Cann.

4. It was admitted, that where the *Delay is made by a Defendant*, ſo that a Witneſs cannot be examined *in chief*, he either loſing his Memory, or dying before he can be examined in chief, his Depoſitions taken de bene eſſe *may be read*; But it was argued, that if the *Delay is on both Sides*, that they ſhall never be read againſt the Defendant, becauſe he loſes the Benefit of croſs examining the Witneſſes. Arg. Mod. 133. Hill. 11. Geo. in Caſe of Southwell v. Ld. Limerick.——On the firſt Point the Depoſitions were allowed to be read. 9 Mod. 210. S. C.

5. A Witneſs ordered to be examined *de bene eſſe*, *where the Thing examined into lay only in the Knowledge of the Witneſs*, *and was a Matter of great Importance*, *tho' the Witneſs was not proved to be old or infirm*. 3 Wms's Rep. 77. Mich. 1730. Shirley & al. v. Ferrers.

6. Motion to examine a Witneſs de bene eſſe, upon Defendant's praying a Month's Time to anſwer upon this Caſe.

Upon hearing of this Cauſe, a Deed of the Family Settlement of Lands of 3000 *l.* per annum in Ireland was produced and read, but there being ſome ſuſpicious Circumſtances attending the ſaid Deed, an Iſſue at Law was directed to try the Validity of the ſaid Deed, and if the ſame was a real or forged Deed, but before the Iſſue was tried, *a Perſon upon inſpecting* the ſaid *Deed, which by Order was left in the Hands of the Maſter for all Parties to inſpect* and examine, *declared, that he wrote that Deed with his own Hand in the Year* 1708, *at the Requeſt of the late Earl Ferrars, as a Copy of a Copy of a Deed bearing Date* 1682. So that this Writing could not poſſibly be a true Deed in 1682, which was not wrote till ſeveral Years after the Date, and after the Death of ſeveral Parties to the Deed, and the Witneſs made an Affidavit to this Effect, whereupon the Plaintiffs brought a ſupplemental Bill upon this new Diſcovery after the Hearing, and Defendants prayed a Month's Time to anſwer; and now the Queſtion was, if this Witneſs ſhall be examined de bene eſſe before the Anſwers came in, without the uſual Affidavit that the Witneſs is old and infirm, or otherwiſe in Danger of dying.

Per King C. It is diſcretionary in the Court to grant, or not to grant Liberty to *examine a Witneſs de bene eſſe before Iſſue joined*, and tho' *theſe Motions are uſually granted upon an Affidavit of Sickneſs or Infirmity of the Witneſs*, which is not the preſent Caſe, the Witneſs being of a middle Age, and in Health, yet he being the ſingle Witneſs, and alone privy to the Fact, which cannot be proved without him, and all Life being uncertain, I think it reaſonable, in the preſent Caſe, to let him be examined de bene eſſe; if he ſhould happen to die before Iſſue joined the Loſs of his Evidence would be irreparable; on the other Hand there can be no great Inconvenience, the other Side being at Liberty to croſs examine him, *and if he lives till the Trial at Law this Examination will go for nothing, and he muſt be examined viva voce at the Trial.* Motion granted. MSS. poſt Trin. 4 Geo. 2. in Canc. Counteſs of Ferrars v. Earl of Ferrars & al.

## (M. a 4.) Of whom it may be.

### Of Plaintiffs or Defendants.

1. THE *Plaintiff* is to be *examined upon Interrogatories*, Toth. 211. cites 12 and 13 Eliz. fol. 380. Lambert v. Lambert.

2. A Defendant, *not being a principal Defendant*, might be read as a Witneſs, if he were examined on the Plaintant's Party *in another Suit between other Perſons.* Carey's Rep. 29. cites 10th June 1602. 44 Eliz. in the Caſe of Kingſton upon Thames.

3. The Plaintiff was examined *at the hearing of the Cauſe*; Toth. 211. cites Paſch. 6 Car. Kent v. Benham.

4. Note. If a Man be named *Defendant, who is proper to be a Witneſs* in the Cauſe, the Plaintiff muſt by Order ſtrike out his Name before Anſwer; but after Anſwer he may *by Order* examine him as a Witneſs, tho' his Name be not ſtruck out of the Bill, if he be otherwiſe competent, as *if he diſclaims, or have no Intereſt, or is only a Truſtee.* 2 Ch. Caſes, 214. Hill. 27 & 28 Car. 2. Anon.

5. *After a Cauſe had been heard, and referred to an Account*, the Plaintiff moved to examine two of the Defendants *de bene eſſe*, which was ordered unleſs Cauſe; Upon which the Defendant's Counſel took this *Difference*,

*Difference*, that tho' it was an Order of Courſe to examine a Defendant de bene eſſe, *ſaving juſt Exceptions*, yet *when the Cauſe is open, and it appears that Defendants are Parties intereſted*, it is proper to *ſhew Cauſe* againſt ſuch an Order *before the Witneſſes are examined*; And this Difference was allowed to be well taken. Vern. 452. pl. 423. Paſch. 1687. Glover v. Faulkner.

6. *But* it appearing that *Releaſes were given to the Defendants, and* the Matter to be examined to *being only Matter of Account*, the Cauſe was diſallowed. Paſch. 1687. Vern. 452. Glover v. Faulkner.

7. *Plaintiffs* cannot be examined as Witneſſes, becauſe, as Mr. Vernon ſaid, if the Cauſe miſcarries, the Plaintiffs will be liable to Coſts; and therefore *their ſwearing is to exempt themſelves*, and it is their own Choice that they are made Plaintiffs, for without their Conſent they could not have been made ſo; but the Defendants are forced into the Cauſe, and if their being made Parties ſhould abſolutely invalidate their Teſtimony, it would be in the Power of any one, who had a-mind to oppreſs another, and deprive him of his Defence, to make the moſt material Witneſſes Defendants in the Cauſe, and therefore *any of the Defendants to a Suit may be examined as Witneſſes, ſaving juſt Exceptions to their Credit, Capacity, &c.* Gilb. Equ. Rep. 98. Trin. 1 Geo. 1. in Canc. Caſey v. Beachfield. Abr. Equ. Caſes, 225. pl. 8. S. C. in totidem verbis; and ſays, it was agreed per Curiam.

8. *Obiter.* If a Man *unneceſſarily makes any one a Defendant*, he thereby cuts himſelf off from the Benefit of his Evidence, for it is his own Fault; But where *ſeveral are made Defendants*, it will not hinder any one of the *Defendants* from the Benefit of the Evidence of any others that are made ſo; Indeed, in Caſe of *Truſtees*, it is neceſſary that they be made Defendants, and therefore there the *Plaintiff* may have the Benefit of the Evidence. 10 Mod. 19. Paſch. 10 Geo. in Canc. Gibſon v. Albert.

9. It was held by Macclesfield C. that *a Co-plaintiff* may be examin'd as a Witneſs, *where the Subſtance of the Bill was admitted by the Defendant's Anſwer*; for the Reaſon why a Co-plaintiff ſhould not be examined as a Witneſs is, becauſe if the Bill is diſmiſſed he is liable to pay Coſts; but where ſufficient is admitted by Defendant's Anſwer to found a Decree upon, there the Reaſon fails, and there remains no Influence upon the Plaintiff, if he be not concerned in Intereſt in the Cauſe. A Depoſition of Co-plaintiff allowed to be read. MSS. Rep. Hill. 10 Geo. in Canc. Freeman v. Bridges.

10. One *Defendant cannot move to ſtrike another out* of the Bill, who has never been ſerved with Proceſs in order to make him a Witneſs; But the Plaintiff may, and a Defendant may have an *Order to examine* ſuch Defendant, ſaving juſt Exceptions. G. Equ. R. Hill. 183. 12 Geo. 1. in Canc.

11. It is a Rule, that no *Co-plaintiff* ought to be examined as a Witneſs *on behalf of the Plaintiff*, there being apparent Exception againſt him, viz. his being liable to anſwer Coſts, if the Cauſe go againſt him; Ld. Ch. Parker ſaid, there is *more Reaſon that the Defendant ſhould be at Liberty to examine one of the Plaintiffs*, (they being a Corporation) 1ſt. Becauſe the Defendant cannot diſfranchiſe any of the Corporation as the Plaintiffs may, (by which they may be made good Witneſſes for themſelves, and without which, they cannot be made ſo). And 2dly. If the Plaintiff ſwears any Thing againſt himſelf, it is good Evidence againſt him, though nothing that he ſwears can be Evidence for him. Nevertheleſs, the Practice is otherwiſe, and this ſeems to be in Imitation of the Common Law, where the Defendant * cannot examine the Plaintiff, and tho' Equity goes ſo far, as to give either Side leave to examine a Defendant de bene eſſe, yet this Rule has not been extended to a Plaintiff, who *if he be an immaterial Plaintiff, the Defendant may demur.*

* Vid. Tamen Leygager. (B 2)

*demur.* Wms's. Rep. 595. Mich. 119. Mayor and Alderman of Colcheſter v.———

12. A Party ought not to be examined, tho' by Conſent, unleſs *the whole Matter be referred to his Oath.* MSS. Tab. March 23d, 1723. Charters v. Earl of Hyndford.

13. The Defendant being a *weak Man*, and to be examined on Interrogatories; the Maſter was ordered to take ſuch Defendant's Examination, leſt he ſhould unwarily admit ſomething againſt himſelf that was not true. 3 Wms's Rep. 289. Trin. 1734. Piddock v. Brown.

## (N. a) Of Evidence in General.

1. EVIDENCE *is any Thing offered to a Jury, containing in itſelf an ſemblance de verity.* 2 Sid. 145. Per Witherington C B. Hill. in Caſe of Olive v. Gwin cites Plow. Com. 403. Scholaſtica's Caſe.

Palm. 149. Mich. 18. Jac. S. C. but S. P. does not appear.

2. The Teſtimony of Witneſſes *viva voce, is more effectual to diſcover the Truth, than* their *Depoſition in Paper by* confronting them one with another, and ſo ſift them; as alſo, by applying certain Queſtions for which they cannot be prepared. Hob. 325. pl. 393. about 17 Jac. in Caſe of Darcy v. Leigh.

3. Evidentia in legal Underſtanding *doth not only contain Matter of Record*, as Letters-Patents, Fines, Recoveries, Inrollments, &c. Writing under Seal as Court-rolls, Accounts, &c. (which are called Inſtrumenta) *but* in a large Senſe it *alſo containeth the Teſtimony of Witneſſes, and other Proofs to be produced and given to a Jury, for the finding any Iſſue joined* between the Parties and its called Evidence, becauſe the Point in Iſſue is thereby to be made evident to the Jury. Probationes debent eſſe evidentes (i. e.) perſpicuæ et faciles intelligi. Co Litt. 283. a.

4. Evidence to a Jury, *is that which may be given in Evidence*, as by *Parol, Ore tenus*, (or) *by Writing*, as any *Paper unſealed, or under Seal; but nothing can be delivered in Evidence to a Jury, but that which is of Record, or under Seal*, unleſs by Conſent; per Witherington, Ch. B. in delivering the Opinion of the Court. 2 Sid. 145. Hill. 1658. Olive v. Gwin.

5. Upon motion a Rule *was made by Conſent that a Deed ſhould be allowed in Evidence* at the Aſſiſes *without proving of it.* 1 Sid. 269. pl. 23. Trin. 17 Car. 2. Anon.

2 Jo. 146. S. C. but S. P. does not appear.

6. Evidence is only given for Information of the Conſciences, and therefore *if no Evidence is given on either Part, yet may the Jury find the Verdict either for the Plaintiff or Defendant*, cites 3 H. 7. 11. a. Frowicke, tho' the Evidence given be excluſive, yet the Jury may find againſt it, and hazard an Attaint if they pleaſe, Raym. 405. Mich. 32 Car. 2. B. R. Chicheſter v. Phillips.

7. Evidence *viva voce* is always beſt; and tho' the Law requires the *beſt Proof that can be had*, yet when *better cannot be had*, it is ſatisfied with that which can be had. Reſolved. G. Equ. R. 18. Paſch. 8 Ann. in Caſe of Ld. Angleſey v. Ld. Altham.

8. Evidence which is *contrary to the Matter in Iſſue*, or which is not agreeable to it, is not good. L. E. 469. 7th Edit. lays it down as a Rule.

9. Where the Evidence *proves the Effect and Subſtance of the Iſſue*, it is good. L. E. 470. 7th Edit. lays it down as a Rule.

10. It *ſuffices to prove the Subſtance, without any preciſe Regard to the Circumſtances.* L. E. 471. 7th Edit. lays it down as a Rule.

## (P. a) Examination of Witneſſes.

### After Publication, &c.

1. WItneſſes *after hearing*, examined ad informandum conſcientiam judicis. Toth. 287. cites Dalby v. Mare, Feb. 3 Ja.

2. *After Interrogatories preferred in the Country* by the Defendant, he may examine other Witneſſes, either in Court, or by Commiſſion. Toth. 287. cites Long v. Long. about Hill. 7 Ja.

3. Witneſſes, *after a Hearing*, re-examined to clear the Matter, by the Advice of the Ld. Ch. J. and Ld. Ch. B. Toth. 288. cites Dux Lenox contra Dom. Clifton, 8 Jac. lib. a. fo. 381.

4. Witneſſes examined *in the Country*, if the other Side have ſeen their Interrogatories not to be examined in Court. Toth. 287. cites Hungate v. Crook. Trin. 11 Ja.

5. *After Publication*, examined Witneſſes. Toth. 287. cites Hancorne v. Emery. Mich. 3 Car.

6. Witneſſes examined *after Publication* allowed. Toth. 287. cites Weeks v. Thelwall. 9 Car.

7. Witneſſes examined upon new Interrogatories, *after a Commiſſion to counterprove a Man's Teſtimony at Law*, upon which a Verdict. Toth. 288. cites Tailor v. Tailor, 9 Car.

8. Examination of a Witneſs, as after a Hearing, to prove a Court-Roll. Toth. 288. cites Veizy v. Veizy, Mich. 14 Car.

9. If one of the Parties after Publication has an Order to examine, on making the uſual Oath of not having ſeen the Depoſitions, the other Party may not only *croſs examine*, but examine at large. North K. Vern. 253. pl. 245. Mich. 1684. Anon.

10. A *Witneſs alledged he had miſtaken himſelf at a Commiſſion*, the Commiſſion being *returned*, he came to London, *and made Oath that he was ſurprized*; a ſpecial Commiſſion iſſued to re-examine this Witneſs, which was done accordingly; but this *ſpecial Commiſſion was ſuppreſſed by Motion*, by Advice with the Maſter of the Rolls, with the ſix Clerks, as contrary to the Courſe of the Court. 2 Freem. Rep. 178. pl. 241. Paſch. 1692. Randall v. Richford.

Nelſ. Chan. Rep. 92. S. C. accordingly. —Chan. Caſes, 25. S. C. accordingly.—Equ. abr. 102. pl. 3. S. C.—But ibid. in a Note on the Margin, ſays, that it is now the Practice of the Court to obtain an Order upon Motion, and Affidavit of Surprize, to have the Witneſſes examined viva voce in Court, or his Depoſitions amended, the Witneſs being firſt examined before an Examiner; but when he is examined in Court, or when his Depoſitions are read, the Order for that Purpoſe muſt be produced in Court.

11. *Interrogatories, and the Depoſitions of Witneſſes taken on them were ſuppreſſed, for that the Interrogatories were leading, and then Publication paſſed*; and on Motion that a *new Set of Interrogatories might be drawn and ſettled by a Maſter*, for the Examination of this Witneſs, whoſe Evidence was very material, and yet muſt be wholly loſt, if the Court would not indulge him this Way; and tho' the Practice has been always againſt it, and it was inſiſted to be of dangerous Conſequence, yet one Precedent being produced to this Purpoſe, and the Interrogatories which had been ſuppreſſed were ſuch as might have been drawn by many other Counſel without any Apprehenſion of their being leading, the Court, to let in the Party to the Benefit of this Witneſs's Teſtimony, ordered Interrogatories to be put in, and ſettled by a Maſter

Gilb. Equ. Rep. 150. S. C. in totidem verbis. —Equ. abr. 233. pl. 3. S. C. in totidem verbis.

for his Examination over again. Chan. Prec. 493. pl. 307. Trin. 1718. Spence v. Allen.

12. *Articles*, never are to be exhibited *againſt the Credit of a Witneſs, after ſuch Witneſs has been croſs examined to the Merits.* MSS. Tab. April 19th, 1726. Oneal v. Odair.

13. After the Defendant has been examined on Interrogatories, and Publication paſſed, the Plaintiff ought not to have a Commiſſion to examine Witneſſes, *in order to falſify the Defendant's Examination*, this tending to multiply Cauſes, and make them endleſs. 3 Wms's Rep. 413. Hill. 1735. Smith v. Turner.

14. Upon a Motion. *After a Decree and Account before the Maſter*, one of the Parties had examined Witneſſes, and after the other Side had taken a Copy of Depoſitions, he exhibited Interrogatories, and was about to examine Witneſſes in Contradiction, &c. And now it was moved, that the Party who had taken a Copy, might be ſtaid from examining Witneſſes in Contradiction, or that Maſter might ſettle Interrogatories. Lord Chancellor, although no paſſing Publication before the Maſter, yet examining after Party has ſeen Depoſitions of other Side ſeems to be within the ſame Miſchief and Danger, *and though in Account, before Maſter, by Reaſon of many Items and Particulars, Parties may examine at ſeveral Times as Occaſions offers; yet when one Party has cloſed Examination, as to any particular Point or Fact, the other Side ought not after ſeeing theſe Depoſitions to be admitted to examine in Contradiction.* But in the preſent Caſe, as the *Solicitor* had *made Oath, that he was informed the Practice was otherwiſe*, and that he might examine after ſeeing the Depoſitions, and as the *Notice of Motion was in the Alternative*, therefore let the Maſter ſettle the Interrogatories. Mich. 1734. Charlewood v. St. Amand.

## (P. a 2.) Re-examination. In what Caſes.

1. TADLOW being examined as a *Witneſs, calling himſelf better to mind afterwards*, was ſuffered to amend his former Examinations. and *was further examined ad informandum.* Toth. 286. cites Trin. 27 Eliz.

Long v. Long contrary, about

2. A Witneſs once examined ſhall *not be called up to be examined upon a further Point.* Toth. 286. cites Ld. Scroop v. Sir Tho. Egerton.

Hill. 17 Jac. but Anguiſh v. Trevor, not admitted, in Mich. 19 Jac. Toth. 287.

3. Witneſſes examined to the Damage on Breach of Covenant, not re-examined on the ſame *Interrogatories*, tho' ſpeaking in the firſt uncertainly. 2 Chan. Caſes, Paſch. 28 Car. 2. Inglet v. Inglet.

But it is the Practice now of the Court to obtain an Order on Motion and Affidavit of Surprize, to have the

4. A Witneſs alledged he had miſtaken himſelf at a Commiſſion, the Commiſſion being returned, he came to London and made Oath *that he was ſurprized*; a ſpecial Commiſſion iſſued to re-examine the Witneſſes, which was done accordingly, but this *ſpecial Commiſſion* was ſuperſeded by Motion, by Advice of the Maſter of the Rolls, with the ſix Clerks, as contrary to the Courſe of the Court. Chan. Caſes, 25. Trin. 15 Car. 2. Randal v. Richford.

Witneſſes examined viva voce in Court, or his Depoſitions amended, the Witneſſes being firſt examined before an Examiner; but when he is examined in Court, or when his Depoſitions are read, the Order for that Purpoſe muſt be produced in Court. Abr. Equ. Caſes, pl. 3. Marg.

5. Baron

5. Baron and Feme exhibit a Bill for a Demand in Right of the Wife, the Defendants anſwer, and Witneſſes are examined, and *Publication paſſed*, but before hearing *Baron dies*, and the marries a *ſecond Husband*, and they *bring a new Bill* for the ſame Matter; Per Cur. the Wife was not bound by the former Proceedings, and therefore the now Plaintiffs were allowed to examine, as if no Examination had been in the former Cauſe, per Lords Commiſſioners. 2 Vern. 197. pl. 180. Mich. 1690. Anon.

6. In a *Bill to have the Benefit of a former Decree*, Plaintiff cannot examine Witneſſes, much leſs the ſame Witneſſes, to the Matters in Iſſue in the former Cauſe; But on ſuch Bill the Court may examine the Juſtice of the former Decree; but then it muſt be on Proofs taken in the Cauſe wherein the Decree is made; Per Wright K. 2 Vern. 409. Hill. 1700. Johnſon v. Northey.

7. Where the *Baron and Feme exhibit a Bill for a Demand in Right of the Wife*, the *Defendants anſwer*, and the Cauſe being at Iſſue, ſeveral Witneſſes are examined, and *Publication paſt*, *but before it* proceeds to a *Hearing the Husband dies*; the *Wife marries a ſecond Husband*, *and they bring a new Bill* for the ſame Matter. It was moved they might be reſtrained from examining the Witneſſes examined in the former Cauſe, but not allowed by the Court; the Wife was not bound by the Proceedings in the former Cauſe, and therefore *examine as if no Examination had been in the former Cauſe.* 2 Vern. 197. pl. 180. Mich. 1690. Anon.

8. Holt ſaid, it was frequent in Chancery, after a Witneſs had been examined before a Maſter, to examine him again viva voce *in Court*; but Serjeant Powis replied, it was no frequent Thing ſo to do, in all his Time he had known it done but twice. 7 Mod. 157. Hill. 1 Ann. B. R. in Caſe of Grovenor v. Fenwick.

9. A Witneſs examined was refuſed to be read becauſe *intereſted*, but on a *Releaſe given by him* may be examined again, and tho' there be no *Order of Court* for ſuch Re-examination, yet if the other Side does not move to ſuppreſs the Depoſition for Want of an Order, it is too late to object to it when the Depoſition comes to be read. Chan. Prec. 234. pl. 196. Paſch. 1704. Callow v. Mime.

10. *Depoſitions* taken *de bene eſſe* ſhall *not* be *publiſhed without Affidavit of the Parties Death*, *and that he died before he could be examined in Chief.* Sel. Caſes in Chanc. in Ld. King's Time. 11. Paſch. 11 Geo 1. Cox v. George.

11. Motion to re-examine Witneſſes to the ſame Matter they were formerly examined to, the former Depoſitions being ſuppreſſed after Publication, upon the Maſter's Report that the Interrogatories were leading, &c. The Caſe of **Wawd** v. **Amhurſt** tempore Cowper C. was cited as directly in Point, and inſiſted that the intire Equity of the Cauſe depended upon the Evidence of theſe Witneſſes, and that it would be extremely hard that the Plaintiff ſhould be for ever debarred of his Right by a Slip of the Counſel, &c. Chan. Prec. 493. pl. 307. S. C. accordingly — Rep. of Caſes in Equity, 150. S. C. accordingly. — Equ. abr. 232. pl. 3. S. C. accordingly.

Contra it was inſiſted, that this Motion was directly contrary to the ſtanding Rules and Orders of the Court, that a Witneſs ought not to be examined again to the ſame Matter after his Depoſition is ſuppreſſed; That in two late Caſes, viz. **Harding** v. **Coaketer**, and **Dolbin** v. **Addiſon**, this Matter was very earneſtly preſſed by the Counſel, but in vain, and denied by the Court; That it would be of dangerous Conſequence to allow a Witneſs to be re-examined upon new Interrogatories after he has been drawn in to make a Depoſition upon leading Interrogatories, for he muſt ſwear the ſame Thing over again to ſecure himſelf from an Indictment of Perjury, &c.

Parker C. ordered the Interrogatories and Depoſitions to be read, and then ſaid, it is not ſo clear that theſe Interrogatories are leading, tho' perhaps

perhaps in Strictneſs they may be, yet probably Counſel may think them right, and ſo ſign them, without any Deſign to lead the Witneſſes, and it would be hard the Plaintiff ſhould loſe the Benefit of theſe Witneſſes by ſuch a Slip or Miſtake of the Counſel, eſpecially in this Caſe; ſo here the Depoſitions ſeem very fair and honeſt, and not at all influenced by the leading Part of the Interrogatories, *if the Witneſſes ſhould ſwear directly to the leading Part of the Interrogatories, that might be a Reaſon not to allow them to be re-examined*; but that is not the Caſe, here the Point in Iſſue is, if Bond taken in the Plaintiff's Name, and found among the Papers of the Defendant's Teſtator, were a Truſt for the Defendant or not, and perhaps the Witneſſes examined are the only Perſons that can give any Evidence of this Matter, and unleſs he can have the Benefit of their Teſtimony he is without Remedy, and therefore he ought not to be deprived of their Teſtimony, ſince *the Interrogatories themſelves are not unfair, but rather unskilfully drawn*, and the Depoſitions thereupon ſeem honeſt, and not in the leaſt influenced by the leading Part of the Interrogatories.

*Leave was given to re-examine the former Witneſſes to the ſame Matter upon new Interrogatories, to be ſettled by the Maſter.* MSS. Rep. Trin. 4 Geo. in Canc. Spence v. Allen.

## (Q. a) Preſumptive Evidence. What ſhall be admitted. By Reaſon of Length of Time, &c.

1. IF a *Deed* be *proved to be delivered but not when*, it ſhall be *intended to be delivered the Day it bears Date*; Per Coke, and directed the Jury accordingly. 1 Roll. Rep. 3. pl. 5. Paſch. 12 Jac. B. R. Stone v. Grabham.

2. The *Jury may find a Thing upon Preſumption*, but the Court ought to judge only on what appears in the Record. 1 Roll. Rep. 132. pl. 9. 132. in Hill. 12 Jac. B. R. Iſack v. Clarke.

3. A *Deed of Feoffment of Forty Years*, may be given in Evidence, tho' it cannot be proved that Livery was made, yet, *if Poſſeſſion has always gone according to the Deed, it is good Evidence* to a Jury to find Livery. 1 Roll. 132. Hill. 12 Jac. B. R. in Caſe of Iſack v. Clarke.

4. Bill againſt an Executor, for *Performance of Articles made* with Teſtator *Fifteen Years ago*, in which he was bonnd to pay 608 l. to the Plaintiff, who acknowledged a Receipt of the Whole, viz. 400 l. in Money, and the reſt by a Conveyance of Lands. But thoſe Lands being ſettled on the Wife in Jointure, the Plaintiff brings his Bill. It was decreed, that the Plaintiff having *acknowledged the Receipt* of 6000 l. that is an Evidence of the Performance of the Articles, ſince the Plaintiff *made no further Demand for ſeveral Years*, and it is unreaſonable to put an Executor to prove a Preciſe Payment, after ſo long a Time. Fin. R. 246. Hill. 28 Car. 2. Duke of Newcaſtle v. Clayton.

5. *Ceſtuy que Truſt*, many Years ſince, granted *Leaſes on great Fines* and at low Rents, which he had no Power to do, unleſs impowered by the *Truſtees*, which did not appear; but the Court ſaid, they would preſume, that Ceſtuy que Truſt, *had ſome Conveyances from the Truſtees to enable him*, and the rather, becauſe it was offered as Proof, that it *had been the Opinion of two eminent Counſellors*, that he might make the Leaſes, and that therefore they would preſume there was a further Deed from the Truſtees

Truſtees to impower them, which is *concealed*. Skin. 77. pl. 19. Mich. 34 Car. 2. B. R. Lady Stafford v. Luellin.

6. In the Caſe of *Water-bailage* in the City of London, Evidence of *conſtant Payment*, and their ancient Tables of Duties imported, was judged ſufficient, though it was urged there could be no Preſcription for it, and Judgment was accordingly pro defendente. 2 Show. 48. pl. 33. Paſch. 31 Car. 2. B. R. King v Carpenter.

7. *Sixty Years ago, Lands where limited to Truſtees to pay Debts, Remainder to A. in Tail, remainder to B. in Tail.* A. had Poſſeſſion, and in Conſideration of 800 l. Portion, on Marriage made Settlement, &c. and common Recovery ſuffered, wherein one Moor was Tenant to the Precipe, who vouched A. and he the common Vouchee; Ejectment by Remainder-man after A. who died without Iſſue. But it being a great while ſince that Recovery was ſuffered, a Deed for making Moor Tenant to the Precipe was preſumed, and that Debts had been ſome way or other ſatisfied, ſeeing A. had had a Poſſeſſion for a great while, and it ſhall be taken that the 800 l. received, went to diſcharge Debts, and Plaintiff was nonſuited. Coram Baron Price, Wells Aſſ. Trin. Vac. 1709.

8. *Mutual Benefit*, is *Evidence of an Agreement*, as ſuppoſe *two Men front a River, and each of them has Land between them and the River, and they cut through each others Ground for Water, and that continues twenty Years*; Ld. Cowper ſaid, he would preſume an Agreement. G. Equ. R. 4. Hill. 6 Ann.

9. Upon a Trial at Bar, a *Deed* was offered in Evidence, executed *Thirty-ſix Years ago, without proving the Hands, which was oppoſed by the* other Side, but admitted by the Court, who ſaid, there was no fixed Rule about it, but that it had often been allowed, where the Deed was but Twenty-five or Thirty Years old. MSS. Tab. Paſch. 11 Geo. 2. B. R. Porter v. Gordon.

## (Q. a. 2) Evidence ſufficient, Good by Intendment.

1. IN an Ejectment, the Plaintiff declared upon a Leaſe made and delivered the Day of the Date, but the Witneſs who was to prove the *Deed*, ſaid he ſaw the Deed delivered, but could not ſwear it was delivered the ſame Day it bore Date. Coke directed the Jury to find it was *delivered the Day of the Date*, for being proved to be delivered, it ſhall be intended to be delivered the Day of the Date. 1 Roll. Rep. 3. pl. 5. Paſch. 12 Jac. B. R. Stone v. Gubham.

2. The Defendant pretended a Title, as Heir at Law to P. under whoſe Daughter the Plaintiff claimed. On Proof of it, the Defendant recovered ſome Verdicts at Law, but the pretended Place of his Birth being a mean Place, and but Seven Miles from his Mother's Houſe, and thoſe Verdicts being grounded on Depoſitions formerly taken in this Court, where the Record of the Bill and Anſwer could not be found, and the Witneſſes at the Trial being of indifferent Credit, and becauſe on an Office at the Father's Death, the Daughter was returned Heir, and no Claim made by the Son for Seven Years, and for that, ſeveral Perſons claimed under her Title; and at the laſt Trial, the Jury were credible Perſons, and declared, that *for Twenty Years and upwards*, the

Daughter was *reputed the right Heir*, and therefore the Poſſeſſion was decreed to the Plaintiff Neſſ. Ch. R. 7 Car. 1. Floyer v. Strackley.

An actual taking is good Evidence of a Converſion without proving a Demand and Denial, for it is an actual Converſion; but where the Thing comes by Trover, there muſt be an actual Demand. Sid. 264. pl. 15. Trin. 17 Car. 2. B. R. Bruen v. Ree.

3. In an Action of *Trover and Converſion*, and nothing proved but a *tortious Taking* of Cattle by way of Treſpaſs, *and driving them away*; and it was ruled a good Ground for this preſent Action, and a Converſion ſhall be intended; otherwiſe when he comes to them by Trover, there an actual Converſion ſhall be proved; Per Holt Ch. J. 6 Mod. 212. Trin. 3 Ann. B. R. in Caſe of Baldwin v. Cole.

4. In an Ejectment, Title was made by the Plaintiff, as *Leſſee for Two-thouſand Years* of Lands in C. in W. which the Defendant would preſume was revoked, ſhewing a Will, Charges, and Settlements, made afterwards by the Mother who was ſeiſed in Fee; But per Cur. *Revocation*, or Surrender, *ſhall never be intended* without Proof that it was actually done. 2 Keb. 483. pl. 22. Paſch. 21 Car. 2. B. R. Moreton v. Norton and Thorner.

5. An *Interlineation*, without any Thing appearing againſt it, will be preſumed to have been made at the Time of the making of the Deed, and not after. 1 Keb. 121. pl. 62. Paſch. 13 Car. 2. B. R. Trowel v. Caſtle.

Skin. 49. pl. 3. Eliot v. Beſley. S. C. accordingly.

6. If an Arreſt be by Proceſs out of an inferiour Court in a *Cauſe not ariſing within their Juriſdiction*, the Party arreſted, may have an Action againſt the Plaintiff, who ſhall be intended Conuſant where the Cauſe of Action aroſe, but not againſt the Judge or Officer who has entred the Plaint, or the Officer who has executed it, but the proper and juſt *Remedy is againſt the Plaintiff*. 2 Jo. 214. Trin. 34 Car. 2. B. R. Olliet v. Beſley.

7. In a *Mayhem*, a *Treſpaſs* is neceſſarily ſuppoſed; Per Cur. Skin. 49. Trin. 34 Car. 2. B. R. in Caſe of Foot v. Raſtal.

8. *But in Trover*, a *Treſpaſs* is not neceſſarily ſuppoſed, for Trover will lay where Treſpaſs will not; Per Cur. Skin. 49. in S. C.

9. Where a *Recovery in Treſpaſs is pleaded in Bar*, it ſhall be intended, that the Party was recompenced, tho' otherwiſe where a *Bar in Treſpaſs* is pleaded in Bar; Per Pemberton Ch. J. Skin. 49. Trin. 34 Car. 2. B. R. in Caſe of Foot v. Raſtel.

10. It ſhall be preſumed, that *a Child born after a Divorce a menſa & thoro* is a *Baſtard*, unleſs the Contrary is proved on the other Side. Hawk. C. L. 330. ſays it was lately ſo reſolved. Queen v. Inhabitants of Weſtminſter.

11. A Title was made from the *Black Prince*, which could not be out of him but by an Act of Parliament; but yet, becauſe the *Poſſeſſion had gone* otherwiſe ever ſince, the Court *preſumed* that there had been ſuch an *Act of Parliament*, though not now to be found. Skin. 78. Mich. 34 Car. 2. B. R. cites Farcar's Caſe.

## (R. a.) Evidence. Supplied. In caſe of Neceſſity.

1. WHERE *the Nature of the Thing in Demand makes a Man to fail of his Proof*, there the *Law will ſupply it.* Per Doderidge, J. 2 Bulſt. 310. and cites Fitzh. Corone, pl. 323. In an Appeal of Robbery againſt one who took from him certain Sacks of Corn, and prayed to have Reſtitution of his Corn. Inchden there Demanded, if the Corn was ſtill in the Sacks or not, for if out of the Sacks, it would be very hard to make Reſtitution, and there he reſtored according to the Value of the Corn; and with this agrees, 7 E. 6. Br. Tit. Reſtitution, pl. 22. This was ſo at the Common Law, and not upon the Statute of 21 H. 8. cap. 11. which gives Writs of Reſtitution to the Party robbed, and it was before here agreed in this Court, that a Man ſhall have Reſtitution, notwithſtanding the Property is not known, but he ſhall have like in Value, and where there is a Defect of Proof, the Law ſhall ſupply this.

2. In Ejectment for the Rectory of Burghfield in Berks, at a Trial at Bar, the Caſe was, that the Earl of —— being a *Popiſh Recuſant convict, preſented the Leſſor of the Plaintiff, who was thereupon inſtituted and inducted*; *But the Record of this Conviction being, as was ſuppoſed, burnt in the Fire, in the Inner-Temple*, the *Defendant offered to prove it by the Eſtreat thereof, into the Exchequer*; *and by an Inquiſition found, and Returned into that Court, of Recuſants Lands*; and it was held by Hale Ch. Baron, and the whole Court, that *in ſuch Caſe, a Record may be proved by Evidence, becauſe the Conviction is not the direct Matter in Iſſue, but only an Inducement to it*; as if an Approbation was in Iſſue, the King's Licence, if it cannot be found on Record, it may be proved in Evidence without ſhewing a Record of it, tho' it is the Foundation of the Appropriation, ſo where Sr. Paul Pinder's in Trover for Goods, the Proof depended on a Fieri Facias, and venditioni exponas, and becauſe the Fieri Facias, could not be found on Record, it was allowed to be proved in Evidence, but then the Evidence muſt be very ſtrong. Accordingly the Conviction was admitted to be read in Evidence, but becauſe by the Eſtreat of the Conviction into the Exchequer, it appeared to be at the ſame Aſſiſes, at which the Party was preſented as a Recuſant, which is not allowed, either by the Statute, 23 or 29 Eliz. For a Proclamation is directed to be made at the ſame Aſſiſes, &c. that the Body of the Defendant ſhall be rendered to the Sheriff of the ſame County, before the next Aſſiſes, &c. and therefore it was held, that the Conviction was not well proved, and the Jury found for the Plaintiff, Hardr. 323. Paſch. 15 Car. in Scace. Knight v. Dauler.

3. In an Action of *Trover and Converſion* for Goods, the Proof depended on a Fieri Facias, and a Venditioni Exponas; but becauſe the Fieri Facias *could not be found upon Record*, it was admitted to be proved in Evidence. Hard. 223. Paſch. 15 Car. in Scacc. cites Sr. Paul Pindar's Caſe.

4. A. *in Conſideration of* 500 *l. in Money and Goods which he is to have with his Wife*, makes a Settlement, and alſo *impowers her to diſpoſe of* 200 *l. by Will.* The *Wife fifteen Years after the Marriage died, and diſpoſed the* 1500 l. by her Will. The Legatees after ſo many Years, ſhall not be put to prove that the Husband received 500 l. And the Maſter of the Rolls upon a Preſumption that he did receive it, decreed the 200 l. to be raiſed with Intereſt from the End of the Year after the Wife's Death, and with Coſts. 2 Wms's Rep. (618) Trin. 1731. North v. Anſell.

(S. a.)

## (S. a.) Order of giving Evidence.

### Who muſt begin and end.

1. ON a *Scire facias* the Defendant pleaded *plene adminiſtravit*, and the Plaintiff *replied Aſſets*, on which they were at Iſſue; and in giving Evidence to the Jury, the Defendant began firſt; *nota quia extra ordinem credo*, becauſe it was in the negative. Dyer 80. pl. 53. Hill. 6 & 7 Ed. 6. Dean and Chapter of Exeter v. Trewinnard.

2. In a *Writ of Right*, *quia dominus remiſit curiam*, the *Tenant ought to give his Evidence firſt*, becauſe the miſe is joined by him firſt. Dy. 247. b. 247. b. pl. 75. 8 Eliz Spyrtie v. Mead.

3. So in a *Writ of Right*, demanding a third Part of ſo many Acres of Land, becauſe the Defendant is in the affirmative, 3 Leon. 162. pl. 211. Hill. 29 Eliz. C. B. Heidon v. Ibgrave.

4. In a *Writ of Right* the Defendant ſhall not give his Evidence firſt, for the *Tenant affirms that he hath more Right, and that ought to be firſt proved.* Goldsb. 23. pl. 2. Trin. 28 Eliz. Heydon v. Ibgrave.

Goldsb. 23. pl. 2. S. P. accordingly.

5. Per Cur. he who *affirms the Matter in Iſſue* ought to begin to give Evidence. Litt. Rep. 36. Trin. 3 Car. C. B. Anon.

—3 Le. 162 pl. 211. Hill 29 Eliz. S. C. accordingly. Trin. 28 Eliz. pl. 2. Heydon v. Ibgrave, S. P. accordingly.

6. The Counſel of that Party which doth *begin to maintain the Iſſue*, whether of Plaintiff or Defendant, *ought to conclude.* L. E. 5. pl. 11. Trials per Pais, 220.

7. This was an Iſſue out of Chancery that came to be tried at the Bar; and it was, whether one Mrs. Bruerton was of ſound Memory at the Time of her executing ſeveral Deeds; and becauſe the Execution of the Deeds was at ſeveral Times, there were four Iſſues, but each of them turned upon that ſingle Queſtion, the Defendant was to prove that ſhe was of ſound Memory, the Plaintiff that ſhe was not; and the Counſel of each Side argued who ſhould produce their Evidence firſt; and the Court took this Difference, that *if there is one Affirmative in any of the Iſſues, the Plaintiff ſhall firſt go through his Evidence as to all of them*; but in this Caſe the Affirmative thro' the Whole lies upon the Defendant, and therefore he ſhall go firſt through his Evidence. 1 Barnard. Rep. in B. R. 12 Paſch. 13 Geo. 1. Tyrell v. Holt and Hopley.

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## (T. a.) Evidence. At what Time it muſt be given.

1. A *Privy Verdict was given* in B. R. *for the Defendant*, but afterwards, *before the Inqueſt gave their Verdict openly, the Plaintiff prayed that he might give more Evidence to the Jury*, he having (as it ſeemed) diſcovered that the Jury had found againſt him, but the Juſtices would not admit him to do ſo; but after that Southcote J. had been in C. B. to ask the Opinion of the Juſtices there, they took the Verdict. Dal. 80. pl. 18. Anno 14 Eliz. Anon.

2. Where

2. Where Evidence may be given, after *the Profecutor has replied.* L. E. 4. pl. 7. Vol. 238. cites State Trials.

3. Per Cur. If an *Executor ſuffer Judgment* to go againſt him *by Default upon* executing a *Writ of Enquiry*, he ſhall not give Evidence of *Want of Aſſets*, for he is eſtopped, as if it had been the Caſe of an Heir; for he ſhould have pleaded plene adminiſtravit, or eſpecially what Aſſets he has. 6 Mod. 308. Mich. 3 Ann B. R. Treil v. Edwards.

4. When once a Perſon has *entered upon Evidence by Deed, he cannot* afterwards, if he fails of that Evidence, *go to parol Evidence of that Fact.* Barnard. Rep. in B. R. 8. Mich. 13 Geo. 1. The King v. Rich.

## (U. a) What muſt be produced in Evidence. As Papers, Deeds, &c.

1. NOTE, Upon Evidence to a Jury, between B and W. upon the Diſſolution of a Vicaridge, in the County of Warwick, which was Part of the Priory of Dantry, where the Pope by his Bull, gave to the Vicar *minutas decimas & alteragium*, and it was certified by the Doctors, that Alteragium will paſs to the Vicar, Tithe-wool, &c. And the Uſage was ſhewed in Evidence, and the Copy of the Pope's Bull; and the Court would not credit that, without ſeeing the *Bull itſelf*; and ſo the Party was nonſuit, and the Jury was diſcharged. Winch. 70. Hill. 21 Jac. C. B. Bret v. Ward.

2. When a Releaſe is pleaded, be it a *Releaſe after* Diſſeiſm, *or before Diſſeiſm*, without ſhewing it to the Court, though the Jury find it none, being ſhewn to the Court regularly, it is worth nothing, for the *Court ought to judge what Force this Releaſe has in Law.* Jenk. 19. pl. 35.

3. *But* in Caſes where *Charters* have been loſt *by Fire* burning of Houſes, Rebellion, or when Robbers have deſtroyed them; the Law in ſuch Caſes of Neceſſity, allows the Proof of Charters without ſhewing them. Jenk. 19. pl. 35.

4. If one do produce a *Leaſe made upon an Outlawry*, in Evidence to the Jury *to prove a Title*, he muſt alſo produce the *Outlawry itſelf*, for the Outlawry is the Ground of the Leaſe, and by Conſequence of the Title which is to be proved; but if he produce the Leaſe *to prove other Matter*, he need not ſhew the Outlawry, but may have the Leaſe only read in Evidence; but in both Caſes he muſt prove the Leaſe. L. P. R. 553.

5. And ſo it is of an *Extent*, for at the Trial, the Plaintiff muſt prove by an Exemplification, or *examined Copy of the Statute*, or Judgment on which the Extent is grounded. So held in a Trial at the Bar, between Johnſon and Spencer. L. P. R. 553. cites Paſch. 1655. B. S.

6. In an Action of *Debt for Rent*, upon a *Leaſe-parol*, and *Nil debet* pleaded, the Plaintiff muſt, if it be inſiſted upon, *ſhew his Title to the Land*; *but* upon a Leaſe *for Years under Hand and Seal*, he need not, becauſe the Defendant hath eſtopped himſelf by accepting a Leaſe, and ſealing a Counter-Part. L. P. R. 553.

7. If a Parſon brings an Action of *Debt for Tythes* upon the Statute, upon Nil debet pleaded, he muſt if the Defendant puts him to it, *prove his Inſtitution, and Induction, and Reading* of the thirty-nine Articles,

otherwiſe he will be nonſuited, for that is his Title to the Tithes. L. P. R. 553.

8. In Debt againſt *Executors*, who plead *plene adminiſtraverunt*, the Plaintiff *replied Aſſets* at the Day of the original, Scilicet, ſuch a Day, and on this they were at Iſſue; and on Trial at Middleſex before the Ch. J. the Plaintiff was *nonſuited for not producing the Bill*; on Affidavit of this, Motion was made for a new Trial, and Twiſden, and Windham being only then in Court, ſaid, that the Plaintiff needed not to produce the Bill at the Trial; and therefore if the Plaintiff was overruled in it, he *ought to have tendered a Bill of the Exceptions*, but ſhall not have a new Trial. Sid. 226. pl. 21. Mich. 16 Car. 2. B. R. Rogers v. Rogers.

9. One ſhall not give in Evidence, an Account of the *Subſtance of a Letter*, without the Shewing of it, or informing of the Court how it came to be loſt. L. P. R. 553. cites Trin. 9 W. B. R. at Guild-hall.

10. The *Sheriff* upon Aſſignment, does *not part with* the Poſſeſſion of *the Bond*, becauſe if the Plaintiff be nonſuited, the Sheriff muſt be indemnified, but he muſt *produce it at the Trial*; Per Holt Ch. J. 12 Mod. 527. Trin. 13 W. 3. Anon.

## (X. a) Evidence. Good by Conſent.

1. A Rule of Court was made by Conſent, that a *Deed* ſhould not be given in Evidence at the Aſſiſe without *proving the Execution* of it. Sid. 269. pl. 23. Trin. 17 Car. 2. B. R. Anon.

2. *Examination* of Witneſſes cannot be by Conſent of Parties *before any Judge that is not of that Court out of which the Cauſe went to the* Aſſiſes; by Twiſden and Foſter; becauſe the Depoſitions are not taken before him, as Judge of Aſſiſe, but as Judge of this Court; Contra by Windham; But per Cur. tho' one Conſent to have *a Letter read*, yet the Jury on Pain of Attaint are not bound to find it, therefore it was agreed *that a Bill ſhould be exhibited in Chancery*, and anſwered, and Commiſſions by Conſent go out thence into the Country, to examine ſuch Witneſſes in the Country, *whereby the Depoſitions may come* in hither judicially. 1 Keb. 249. pl. 12. Paſch. 14 Car. 2. B. R. Frankland v. Savill.

3. Though an *Affidavit* was made, *that* the *Witneſſes* now in Town living in Wales, *could not be had at the Aſſiſes*, yet Hide refuſed to examine them by Conſent of Parties, as uſed in C. B. 1 Keb. 787. pl. 38. Mich. 16 Car. 2. B. R.———v. Kelly.

4. Nota pro regula. *Examination* of Witneſſes *by Interrogatories out of Term*, by Foſter Ch. J. is extrajudicial, and not to be allowed, though the Party conſent. Contrary by Twiſden and Windham, conſenſus (if according to Law) tollit errorem; And the Court may as well allow the Examination of Witneſſes before a Judge by Depoſitions, as read the Affidavit of a Perſon abſent, this is no more than the Law allows. Keb. 36. pl. 98. Paſch. 13 Car. 2. B. R. Blake v. Page.

5. The Defendant prayed, that the Trial might be ſtayed on Suggeſtion, that his *material Witneſſes were Mariners, and now going to Sea* with the Fleet, and would not be ready till Michaelmas Term next. The Court agreed to examine the Witneſſes by Conſent of Parties, before the Ch. J. the Trial being to be before him; and the Plaintiff if he will, may croſs-examine them. 2 Keb. 13. pl. 32. Paſch. 18 Car. 2. B. R. Catlin v. Pidgeon.

6. It

6. It was objected, that in an Indictment, Evidence of *Diſcourſe preceeding*, the *Fact* is not to be given; But Holt ſaid, that they might give in Evidence any Thing that explains the Fact. 11 Mod. 229. pl. 2. Trin. 8 Ann. B. R. in Caſe of Young v. Slaughterford.

## (Y. a) Variance between the Evidence and the Declaration, &c.

1. IT was the Opinion of all the Judges in the C. B. that if a Man ſells two Horſes *for forty Shillings*, and the Plaintiff in an Action of Debt, *declares on the Buying of one Horſe for forty Shillings*, the Defendant may plead, Nil debet, and the Jury muſt find for him under Pain of Attaint, for here the Words *modo & formâ* are material, the Contract not being the ſame that was between the Parties. 21 Ed. 4. pl. 2. D. 219. b. pl. 11. cites S. C.

2. *So* if he had *bought one Horſe for forty Shillings*, and the Plaintiff *declared* on a Contract *for two*; *or* if there was *an Ox* bought, and the Declaration was *for an Horſe*; and ſo in every Caſe, when the Plaintiff varies from the Contract. 21 Ed. 4. 2. D 219. b. pl. 11. cites S. C.

3. *Detinue of a Chain containing three Ounces*, where in Truth it *contains but two*; The Defendant may ſafely wage his Law. 22 E. 4. 2. b. pl. 8.

4. *But* otherwiſe, it is if the Variance be only in the *Value* of the Chain. 22 E. 4. 2 b. pl. 8.

5. *So* of a *Horſe*, as to the Value. *But* if the Count be *of a Black Horſe*, and the Jury *find* it to be a White Horſe; This is againſt the Plaintiff. 22 E. 4. 2 b. pl. 8.

6. Per Finchden, on a Declaration on a Bond, ſuppoſed to be made *by two*, if non eſt factum is pleaded, and it is *proved* to be *the Deed of one, and not the other*, yet the Plaintiff ſhall recover againſt him whoſe Deed it is. L. E. 206. pl. 20.—cites 40 Ed. 335.

7. *Treſpaſs in D. without Addition*, and there is no *D. without Addition*; yet if he prove Treſpaſs in D. it will be for him. 12 Mod. 508. cites 9 H. 6. 5.

8. In Account, the Defendant pleaded, *that he accounted before A. and B.* upon which Iſſue was joined, and it was found that he *accounted before A. only*, yet Judgment for Defendant. Hob. 55. cites 46 E. 3. 5. in Caſe of Foſter v. Jackſon.

9. In *Debt upon Obligation*, he pleads, *non eſt factum*, upon which they were at Iſſue, and the Witneſſes ſay, that it *it was delivered at York, which is another Place than where it bears Date*, it does not warrant the Iſſue. 2 E. 6, 7. 31 H. 6.

10. In *Debt* upon an *Obligation* againſt Oliver St. John, and Alice his Wife *as Heir of her Father*, the Defendant pleaded Non eſt factum of the Father, and it was *found* by ſpecial Verdict, that the Obligation *was made* by the Father of the Wife *to the Plaintiff and another*, whereas in Truth, the Plaintiff hath declared upon an Obligation *made to himſelf only*, without ſpeaking of any other joint Obligee, and that the Plaintiff as Survivor hath brought the Action, and if upon the Matter, it ſhall be ſaid, the Deed of the Defendant, in Manner as the Plaintiff hath declared; The Jury refer unto the Court, and the Court was clear of Opinion, that the Plaintiff ought to have declared upon the ſpecial Matter. 1 Le. 322. pl. 453. Mich. 30 & 31 Eliz. C. B. Dennis v. St. John.

11. In

11. In Ejectione firmæ, the Plaintiff declared upon a *Leaſe*, made 14 *Jan.* 30 Eliz. to have *from the Feaſt of Chriſtmas then laſt* before *for three Years*, and upon Evidence, the Plaintiff ſhewed a Leaſe bearing Date the 13 Day of January the ſame Year, and it was *found* by Witneſſes, that the Leaſe was *ſealed and delivered upon the Land, the 13 Day* of January. Anderſon Ch. J. ſaid, that the Evidence was good enough to maintain the Declaration, for if the Leaſe was ſealed and delivered the 13 of January, it was then a Leaſe 14 January, quod cæteri juſticiarii conceſſerunt. 4 Le. 14. pl. 52. Mich. 32 Eliz. C. B. Price and Foſter.

12. The Plaintiff declares, that whereas there was *an Iſſue* joined in Ejectione firmæ, brought by the Leſſee of the Plaintiff againſt the Defendant, which the Leſſee intended to try at the next Aſſiſes, in Conſideration the Plaintiff and his Leſſee at the Aſſiſes would *forbear to enforce their Title*, and give but weak Evidence againſt the Defendant, he promiſed to pay him a certain Sum of Money. On *non aſſumpſit* pleaded, there was a ſpecial Verdict, which found the Aſſumpſit in all Points, only there were *two Iſſues* joined in the Suit, and the Aſſumpſit was in Conſideration of *Forbearance to enforce the Title at the Trial of both Iſſues*; and it was adjudged for the Plaintiff, becauſe it is ſaid in common Parlance, that the Parties have joined Iſſue, and it may well enough ſtand upon two Iſſues as well as one. Mo. 351. pl. 471. Hill. 36 Eliz. B. R. Blackwell v. Eyre.

13 A Woman, in an *Ejectment* brought againſt her, pleads a *Cuſtom* in the Manor, that the *Widow of every Copy-holder* in Fee-ſimple, Fee-tail, or for Life, *ſhould enjoy* the Copy-hold *for Term of her Life*, and the Cuſtom was traverſed; and on Evidence at Niſi prius to maintain the Cuſtom, they *proved ſhe claimed the Eſtate only during her Widowhood*; and on this Evidence, the Plaintiff demurred; and it was adjudged by the Court, that the ſame Evidence did not maintain the Cuſtom pleaded; for the Evidence was of an Eſtate only during her Widowhood, and the Cuſtom pleaded, was for the Eſtate during her Life, which is a greater Eſtate. Dy. 192. a. pl 23. Mich. 2 & 3. Eliz. Lynſey v. Dixon.

14 In an Action for forging a Deed. The Declaration was on a Demiſe of a Manor, & terras dominicales, and upon not Guilty pleaded, *the Plaintiff gave in Evidence, a Demiſe of the Manor, & omnes terras dominicales, except two Cloſes*; It was held, per totam curiam, that the Evidence was good enough, for it is not neceſſary to conſtrue terras dominicales, to be omnes terras dominicales; For the Lands not accepted, are terras dominicales, and that will maintain the Declaration. Le. 139. pl. 192. Hill. 30 Eliz. C. B. Atkyns v. Hales.

Ibid cites the S. P. adjudged. Trin. 22 Eliz. 3. Woolman v. Elliz.—

15. A *Covenant* was, *that Leſſee for Years, ſhould not cut any Trees* ſo as to commit waſte, and gave Bond for the Performance. In Debt upon the Bond, *the Plaintiff aſſigned the Breach, in cutting twenty Oaks, by* which they were waſted. The *Defendant pleaded, that he did not cut the ſaid twenty Oaks, nor any of them, modo & forma* prout, &c. The *Plaintiff rejoined, that he cut twenty Oaks prout*, &c. The *Jury found that the Defendant cut ten*, and Judgment was given for the Plaintiff. D. 115. b. pl. 67. Paſch. 2 & 3 W. & M. Torill v. Dunt.

16. *Aſſumpſit was, to deliver certain Monies to the Plaintiff in London, when he delivered to the Defendant certain Broad-cloths there.* The Defendant pleaded Non Aſſumpſit, and it was found *ſpecially, that the Aſſumpſit was, that the Plaintiff ſhould deliver certain Broad Cloaths of a Pheaſant Colour*, and others of other ſpecial Colours. The Court thought, that the ſpecial Matter is good Maintainance of the Declaration, and that the Defendant ought to have ſaid by way of Anſwer, that the Aſſumpſit was ſo ſpecial, and have traverſed the general Aſſumpſit in the Declaration. Mo. 466. pl. 659. Paſch. 39 Eliz. Cheney v. Hawes.

17 In

19. In an Action upon the Case for *disturbing* the Plaintiffs, and their Children and Family, *in* the *Possession of a Pew*, in the Church of Berkenham, the Declaration set forth, *that they, their Ancestors, and all those whose Estates they had, had always enjoyed* that Pew to sit in the said Church, appertaining to the Manor, to which the Advowson is appendant; that they *are Lords of the Manor, and Founders of the Church*; the Defendant prescribes to the Pew, as appertaining to his House, absque hoc that the Plaintiffs, their Ancestors, or those whose Estates they have, had the Seat modo & forma, as is set forth in the Declaration; and on this Issue was joined, and the Evidence *proved them to be Tenants in Common*, which was held to maintain the Issue, by Ch. J. Houghton and Chamberlain; so the Plaintiff was nonsuit. Dodderidge dissentiente. Palm. 161. Pasch. 19 Jac. B. R. Snelegar v. Brograve.

20. An *Ejectione* firmæ and a Trial at Bar, The Plaintiff had declared of a *Lease made to him by Baron and Feme*; And that he being out of Possession *they* had *made a Letter of Attorney* to enter, and to deliver that Lease, and that they had sealed, and delivered it. And now ruled that the Declaration is naught, because it is *not a Lease of the Wife, but of the Husband only*; And so it hath been adjudged in one Rich's Case. And the *Letter of Attorney of the Wife is void*, because it is only executory. And the Counsel of the Plaintiff confessed that it hath been adjudged accordingly. Noy. 133. 5 Jac. Phimmer v. Hockett. 2 Brownl. 248. S. C. held accordingly.

21. *Ejectione* firmæ of a *Lease* of Lucy Lady Griffin, the *7th of Jan.* 19 *Jac. by Indenture* dated the 6th of December, 19 Jac. *habend. a die datus* Indenturæ præd. Upon Not Guilty pleaded, and Evidence to the Jury, the Lease was shewn, bearing date the 6th of December 19 Jac. and the Habendum was a *Tempore Confectionis* Indenturæ, and because a die datus excludes the Day, so as it is not the same Lease whereof the Plaintiff declares, it was held that the Plaintiff had mistaken his Action, whereof the Plaintiff was nonsuited. Cro. J. 647. pl. 12. Mich. 20 Jac. B. R. Scavage v. Parker.

22. In *Assumpsit* for 10 *l.* due *for Corn sold to four Men*, and the Evidence *proved* the Sale to be made *only to two*, this was holden against the Plaintiff, that he did not prove his Case. Clayt. 114. pl. 198. Aug. 1647. before Green Serjeant, Judge of Assise. Anon.

23. Debt on a *Bond*, and it did appear the *Defendant and another were bound jointly* in this Obligation, and it was ruled, that though *the other* Obligor be *dead*, yet the Plaintiff hath failed in his Declaration, and if Non est factum be pleaded, and this Bond produced, it shall be against the Plaintiff. Clayt. 119. pl. 210. March. 1647. before Germine J. Judge of Assise. Anon.

24. In an Action of Debt upon an *Obligation* which was set forth to be made the *15th of November 25 Eliz.* the Defendant pleaded Non est factum; the Jury found a special Verdict, viz. that it was dated the 15th of November 23 *Eliz. but* was *not sealed, or delivered, till the 18th of November* 26 *Eliz.* Et si super totam materiam, the Court shall adjudge it for the Plaintiff, they find it for the Plaintiff, Et si, &c. And it being hereupon moved, all the Court without any Difficulty resolved, that this Verdict is found for the Plaintiff, for the Issue being generally Non est factum, it appears to be his Deed. But peradventure by special pleading he might have helped himself; Wherefore it was adjudged for the Plaintiff, Cro. J. 136. pl. 12. Mich. 4 Jac. B. R. Lady Lane v. Pledall.

31. Indebitatus *Assumpsit for* 750 *l. laid* out by the Plaintiff *for the Use of the Defendant*; upon Non assumpsit pleaded, there was a Trial at the Bar, and the Evidence was, that the Defendant and another now deceased farmed the Excise, and the Money was *laid out by* the Plain-

tiff *on the Behalf of the Defendant and his Partner*, and that the Defendant promiſed to repay the Money out of the firſt Profits he received. Per tot. Cur. it would not lie; Firſt, Two Partners being concerned, the Action cannot be brought againſt one alone; He ought in this Caſe to have ſet out the Death of the other; But if Judgment be had againſt one, the Goods in Partnerſhip may be taken in Execution. Secondly, The Promiſe here was not to pay the Money *abſolutely*, but *ſub modo*; So that the Evidence did not maintain the Action, and the Plaintiff was nonſuited. 2 Mod. 279. Mich. 29 Car. 2. C. B. Tiſſard v. Warcup.

26. If a *Promiſe* be made *to pay at a Day certain, and the Day is paſt*, the *Plaintiff may declare to pay on Requeſt*; So if he declares on Payment at a Day certain, and gives in Evidence a Promiſe on Requeſt, viz. when it is created on Account which gives the Duty; For there the Time is ex abundanti; But when the *Action is founded on the Contract* it is otherwiſe, for there *the Evidence muſt purſue the Contract*, Trials per Pais. 3d Edit. 184. cites Hill. 1650. B. R. Child's Caſe.

27. In *Aſſault and Battery*, there was a Demurrer on the Evidence; the Caſe was, that the Defendant, the Day ſpecified in the Declaration, alledged that the Plaintiff aſſaulted the Defendant, and in Defence of himſelf, juſtifies the Beating; The Plaintiff replied, De injuria ſua propria abſque tali cauſa; And in the Evidence, the *Defendant maintained, that the Plaintiff beat him the Day mentioned in the Declaration*, and in the ſame Place, whereupon the *Plaintiff gave in Evidence another Day, and Place* viz. &c. which was the Cauſe of the ſpecial Verdict; For if there are two Batteries made between the Plaintiff and Defendant at divers Times, the Plaintiff muſt prove the Battery made the ſame Day as in the Declaration, and ſhall not be admitted to give another Day in Evidence; per totam Curiam, Brownl. 233. Trin. 9 Jac. Downes v. Skrimſher.

28. If a *Treſpaſs* was *done the 4th of May*, and the *Plaintiff alledgeth the ſame to be done the 5th of May, or the 1ſt of May*, when no Treſpaſs was done, yet if upon the Evidence it falleth out that *the Treſpaſs was done before the Action brought* it is ſufficient. Co. Litt. 283. a. ad finem; and ſays, that this is warranted by Littleton, S. 435. who ſpeaketh indefinitely, that the Jury may find the Defendant Guilty at another Day than the Plaintiff ſuppoſeth.

29. *Aſſumpſit for twenty Pounds* upon Accompt, and upon the Evidence it appeared to be another Sum, and the Plaintiff was nonſuit, and the Judge held, where an Action is for ten Pounds upon a *Contract* for a Horſe, and the *Witneſs doth not prove the very Sum, but differs a Penny or* Twelve Pence, in this Caſe it ſhall be found againſt the Plaintiff, and cited the Opinion of Walter Chief Baron to be ſo, but for the Importunity then was contented a ſpecial Verdict ſhould be found; but the Court above did rule the Caſe againſt the Plaintiff, Quod nota in Aſſumpſit, where Damages only are to be recovered; for in ſuch Caſe, if Debt had been brought, it is clear, becauſe he *doth not hit the Contract*, it ſhall be againſt the Plaintiff. Clayt. 87. pl. 147. July 16 Car. before Foſter, Judge of Aſſiſe. Ramſden's Caſe.

30. Action upon a *Promiſe* and Declaration, that the Defendant did aſſure and promiſe that the Defendant *would not ſue the Plaintiff*, and the Evidence was, that he *would forbear his Suit*; And this by the Judge doth ſuppoſe a Suit already begun, and ſo doth not maintain the Iſſue, and upon this the Plaintiff was nonſuit; Clayt. 2. pl. 4. Aug. 7 Car. before Damport, Ch. B. Judge of Aſſiſe. Anon.

31. The Plaintiff declared, that the Defendant, in Conſideration the Plaintiff would *forbear* Suit againſt J. S. *for* 80 *l. which J. S. did owe him*,

*him*, the Defendant would ſee him paid, and the Evidence *proved* that J. S. did owe the Plaintiff *only* 40 *l.* and holden that is againſt the Plaintiff. Clayt. 111. pl. 190. March. 24 Car. Turner Serjeant, Judge of Aſſiſe Hargrave's Caſe.

32. In *Aſſumpſit for Money due, it was laid in the Declaration to be payable on Requeſt*, but by the Witneſs it appeared that a Fortnight's Time was given for the Payment of it, and tho' *the Fortnight's Time was paſt long before the Action brought*, yet it was now held a Failer in the Proof of the Plaintiff of his Caſe as he had laid it. Clayt. 115. pl. 199. Auguſt, 1647. before Green Serjeant at Law, Judge.

33. *Indebitatus by A.* the *Defendant gives Evidence, that B. was Partner with A.* at the Delivery of the Wares, whereupon the Plaintiff was nonſuited. Tri. per Pais, 187. cites Lent Aſſ. 1667, at Norfolk. Franklin v. Walker.

34. In an *Action on the Caſe*, tho' *a Requeſt in the Declaration is laid at one Time*, yet *a Requeſt at another Time may be given in Evidence, tho' it be ſeveral Years diſtant*; Per Wild Recorder, and not denied. Sid. 268. Trin. 17 Car. 2. B. R. King v. Bray.

35. A *Promiſe* was made *to the Father, on his doing a certain Act to pay his two Daughters A. & M. 20 l. a-piece.* M. alone brought an Action on the Promiſe for her 20 l. It was objected, that they ought to have joined in the Action; But per Glyn Ch. J. they have diſtinct Intereſt, and ſo *either of them may bring an Action*, and it being brought *for one 20 l. only*, Judgment was for the Plaintiff Niſi. Sty. 461. Mich. 1655. Thomas v. ———.

36. *Ejectione* firmæ *for ſo many Acres of Meadow*, and ſo many Acres of *Paſture*; upon Not Guilty pleaded, the Jury *find a demiſe de Herbagio & Pannagio* of ſo many Acres; and the Queſtion was, whether this Evidence did, or did not maintain the Iſſue for the Plaintiff? The Court inclined againſt the Plaintiff; Firſt, becauſe by the ſame Reaſon, that an Ejectment upon a Leaſe of Herbage, by the ſame Reaſon, the Plaintiff ought to declare accordingly, as in the Caſe of 27 Hen. 8. where Paſture is granted for ten Oxen, the Præcipe muſt run accordingly and ſo here. Secondly, Herbage does not conclude all the Profit of the Soil, but only part of it. as 1 Inſt. 4. b. Adjornatur. Hard. 330. cites 1 Inſt. 4. b. pl 5. Trin. 15 Car. 2. in Scacc. Wheeler v. Toulſon.

37. *Award to pay Money in, or at the Houſe of J. S.* The Plaintiff ſaid, that it was not paid at the Houſe, which per Curiam is well enough, and *if it were paid in the Houſe*, it may be given in Evidence on Iſſue, that it was paid at, &c. and Judgment for the Plaintiff in Debt upon Bond. 1 Salk. 753. Trin. 16 Car. 2. B. R. Fitzherbert v. Hind.

38. At Guild-hall, in an Action for *Words per quod maritagium amiſit*, and upon Evidence, the Plaintiff *proved Part of the Words only, but proved, that by Reaſon of theſe Words maritagium amiſit*; and ruled by Holt Ch. J. to be well enough, for it is ſufficient if the Plaintiff proves the Loſs of Matriage, by Reaſon of any Words in the Declaration. Skin. 333. pl. 3. Hill. 4 W. & M. in B. R. Geary v. Connop.

39. If A. *promiſe* B. *ten Pounds*, in Conſideration that he would *procure* him one who would give him an Annuity of 100 *l. per Ann.* for 900 *l.* B. does not do it, but *procures* him one who grants *it for a* 1000 *l.* and A. does agree for that Annuity. B. cannot bring an *Aſſumpſit* for the 10 l. becauſe this varies from the Contract, but he may have a Quantum meruit; Per Powel J. 12 Mod. 509. Paſch. 13 W. 3. Anon.

40. Plaintiff in Caſe declared of an *Agreement made* between him and the Defendant, that the Defendant would let him have the Uſe of *twelve Acres of Turnips for ſuch a Time for his Sheep*; and the *Evidence*

was

was, that he would let him have *twelve Acres of Turnips*; And per Holt, It maintained the Declaration, for the Land did not paſs as it would by Grant of ſo many Acres of Paſture; but it is like *granting of ſo many Acres of Corn*, whereby the Corn only would paſs. 12 Mod. 600. At Niſi prius, coram Holt Ch. J. Mich. 13 W. 3. Anon.

41. In Caſe upon a ſpecial *Promiſe to deliver good merchandiſable Wheat*, upon Non Aſſumpſit pleaded at the Trial, Lent Aſſiſes, 12 W. 3. at Bedford, before Holt Ch. J. the Plaintiff's Witneſs ſwore, that it was agreed, that he ſhould deliver good *ſecond Sort of Wheat*. And Holt held this a Variance, and the Plaintiff was nonſuit. Ld. Raym. Rep. 735. Anon.

42. If the Iſſue is *Aſſets at ſuch a Place*, it *is good Evidence to prove Aſſets at another Place*; for Aſſets any where, is Aſſets every where. 3 Salk. 156. Mich. 12 W. 3. Anon.

43. In *Caſe for refuſing Goods* which the Plaintiff had *diſtrained for Rent*; The Plaintiff declared, that he was ſeized in Fee of a certain Meſſuage, &c. and ſo ſeiſed *demiſed to J. S. for a Year, and ſo from Year to Year, as long as both Parties ſhould pleaſe, by a Parol Demiſe*, reſerving Rent, and for Rent Arrear he diſtrained, and the Diſtreſs was reſcued from him by the Defendant, for which the Action was brought; And here the Plaintiff having laid a Seiſin in Fee upon himſelf, was fain to prove it, and in proving the Leaſe, it appeared to be be for a Year, and ſo from Year to Year as long as both Parties pleaſed, *and that the Leſſee ſhould not go away without giving a Quarter's Warning*; and it was inſiſted on by Eyre and Parker, that the Leaſe given in Evidence, varied from the Leaſe declared on, ſo they failed in proving their Declaration; But per Holt Ch. J. it is well enough, for the Agreement concerning the Quarter's Warning *is only a collateral Agreement*, not at all affecting the Land in Point of Intereſt, but collaterally binding the Perſon of Leſſee, and therefore it need not be mentioned in the Declaration. 6 Mod. 215. Trin. 3 Ann. B. R. Dod v. Monger.

44. *Indictment for breaking the Chamber of Cujuſdam Sarœ S. in domo manſionali cujuſdam David James, &c.* the *Evidence was, that it was the Houſe of Jamſon, not James*, and per Parker Ch. J. it will not maintain the Indictment, like Roll. 667; Treſpaſs for *breaking Plaintiff's Cloſe in Calvering in quodam loco vocat. Calverfield*, abutting South on a Mill in the Tenure of J.S. The Plaintiff muſt prove the whole Abuttment, even its being in the Tenure of J. S. So in the Caſe of the Queen v. Sudbury, Indictment *for an Aſſault and Battery, laid as a Riot, two were acquitted, and two found guilty; yet all were acquitted, for the Crime was the Riot, and the whole Charge alledged under that Specification and Deſcription.* So *Indictment for acting a Play, and ſpeaking Words in ſuch a Pariſh in a Playhouſe in Lincolns Inn Fields, if there be no Playhouſe in Lincoln's-Inn-Fields, the Defendant muſt be acquitted*, for though the Words are not local, yet theſe are made ſo. If the Speaking had been alledged in Lincoln's-Inn-Fields, then it had been laid as a Venue; but here it is otherwiſe, being alledged as a Deſcription where the Playhouſe ſtood. One may make a Treſpaſs local, which is not ſo. And in the principal Caſe, the Chamber was local, but the taking and carrying away Goods is not ſo, but then all is put together as one Fact under one Deſcription, and you cannot divide them. 1 Salk. 385. pl. 37. Mich. 11 Ann. at Niſi prius in Middleſex. The Queen v. Cranage

45. In an *Information for a Libel*, the Variance of the Word (nor) for (not) was held fatal upon Evidence. 2 Salk. 660. pl. 7. Mich. 5 Ann. B. R. The Queen v. Dr. Drake.

46. There is a Difference between Words ſpoken, and Words written; Of the Former there can be no Tenor, [viz. a Tranſcript] for there is no Original to compare them with, as there is of Words written, and

and though there have been attempts to plead a *Tenor of Words ſpoken*, it has never been allowed; and therefore, *if one declares for Words ſpoken, a Variance in the Omiſſion, or Addition of a Word, is not material*, and it is ſufficient, if ſo many of the Words be proved, and found, as are in themſelves actionable. 2 Salk. 661. pl. 7. Mich. 5 Ann. B. R. The Queen v. Drake.

47. But otherwiſe *in Debt upon a Bond*; for upon Non eſt factum any *Variance is fatal*. Ibid. cites Dy. 75. 3 Cro. 503. Hard. 470.

48. In Treſpaſs *Quare Clauſum fregit at Needham, a Proof of Breaking at Needham-market is ill, and the Plaintiff muſt be nonſuit*. 2 Salk. 452. pl. 3. Paſch. 5 Ann. B. R. The Queen v. the Inhabitants of Needham-market, Barking, &c.

## (Z. a) Evidence. What muſt be pleaded, or may be given in Evidence.

1. *Matter in Law* ſhall not be given in Evidence to a Jury, but the other may demur upon it; for Lay Gents cannot diſcuſs Matter in Law as it ſeems there, but it it is not expreſly adjudged there. Br. General Iſſues, pl. 51. cites 9. H. 6. 33.

2. *Waſte*, &c. A Man *cannot give in Evidence* a *Licence*, or a *Releaſe*, or *that the Ill which he had in Treſpaſs of Battery was of the Aſſault of the Plaintiff*, and in Defence of the Defendant. Br. General Iſſues, pl. 90. cites 12 H. 8. 1.

3. Or *that he ſerved the Writ as Sheriff*. Ibid.

4. *Or that the Foreſter killed the Man of which the Appeal is brought in the Foreſt, flying*, or ſuch like. Ibid.

5. *For thoſe are Juſtifications* which ought to be pleaded; for they cannot be given in Evidence. Ibid.

6. *But upon Not guilty* pleaded, he *may give in Evidence Matter which makes to him Title, and proves that he is not guilty, as Leaſe for Years*, and ſuch like, &c. Ibid.

7. Scire Facias *againſt the Succeſſor of a Parſon*, to have *Execution of* certain *Arrears of Annuity recovered againſt his Predeceſſor*, the *Defendant ſaid, that he at D. in another County reſigned into the Hands of the Biſhop*, which he admitted, &c. *and ſo he was not Parſon the Day of the Writ purchaſed, nor ever after*, and the beſt Opinion was, that this is a good Plea, but by ſome nothing ſhall be entered, but Not Parſon the Day of the Writ purchaſed, nor ever after, and the Reſignation ſhall be given in Evidence, and it ſeemed to ſome, that all ſhould be entered for Evidence and Plea. Br. Scire Facias, pl. 133. cites 9 E. 4. 49.

8. In Treſpaſs it is no Plea to ſay he *entered by Command of the Owner* of the Land; but the Defendant ſhall plead Not guilty, and give this Matter in Evidence. Br. Gen. Iſſ. pl. 53. cites 34 H. 6. 43.

9. *Entry in Nature of Aſſiſe of Common*, the *Defendant pleaded Non diſſeiſivit*, and the *Plaintiff gave Preſcription in Evidence, and did not alledge it in his Count*, and yet it was permitted; For it ſeems that *Title cannot be made in the Count in this Action as in the Plaint of Aſſiſe*, and therefore does not lie of the Common. Br. General Iſſue, pl. 68. cites 4 E. 4. 1.

10. In *Dower* upon the *Iſſue Ne unques ſeiſe que Dower, the Defendant cannot prove in Evidence that the Baron and his firſt Wife were ſeiſed in ſpecial Tail, and after made a Diſcontinuance, and took back an Eſtate in Fee, whereof he died ſeiſed, by which the Iſſue who is Tenant in Tail is remitted*, but this ſhould have been pleaded; for he was once ſeiſed of an Eſtate

whereof the ſecond Wife was dowable. D. 41. pl. 1. Paſch. 30 H. 8. Anon.

11. If *a Merchant comes to an Inn*, and the *Hoſt tells him that his Houſe is full, and he cannot receive him, yet he that comes puts down his Goods, and by the Admiſſion of a Gueſt lies with him* without the Hoſtler's Appointment, and *his Goods are ſtoln*; In an Action againſt the Hoſtler he may plead the general Iſſue, and give this in Evidence. Bendl. 60. pl. 103. Hill 4 & 5 Ph. & Mar. Bird v. Bird.

12. Upon *Non Conceſſit the Plaintiff cannot give in Evidence the Statute of Miſrecitals or Nonrecitals to make the King's Grant good*, but he ſhould have pleaded the ſame. D. 129. pl. b. 65. Paſch. 2 P. & M. Heydon v. Ibgrave.

13. Treſpaſs, the Defendant pleaded Not guilty; The Jury found that the Plaintiff was ſeiſed with two others as Heirs in Gavelkind, and that the Defendant entred; And upon Motion, without Argument by Popham and Fenner (cæteris abſentibus) it was adjudged for the Plaintiff; For tho' it had been a good Plea in Abatement for the Defendant to ſay, that the *Plaintiff was Tenant in common with a Stranger*, yet foraſmuch as he hath not pleaded it, he has loſt the Advantage thereof, and the finding it by the Jury is not material. The Defendant ought to have pleaded the Jointenancy in Bar; for it is the Cloſe of one only as to a Stranger; and ſo it ſeems of Tenants in Common. Mo. 466. pl. 660. Paſch. 39 Eliz. Stowell's Caſe—And ſo it was ſaid to be adjudged in this Court in one Stowell's Caſe; where in Treſpaſs brought the Defendant pleaded Not guilty, and the Jury found that the Plaintiff was Jointenant of the Land with a Stranger not named; yet there the Plaintiff recovered, wherefore it was adjudged ut ſupra for the Plaintiff. Cro. E. 554. pl. 7. Paſch. 39 Eliz. B. R. Deering v. Moor.

2 Le. 211. pl. 276 S. P. by Periam J.

14. *Collateral Warranty* found by Verdict is of as great Force as if it were pleaded in Bar; Per Periam J. 2 Le. 37. pl. 48. Hill. 31 Eliz. C. B. in Caſe of Johnſon v. Bellamy.

15. *So* of *Fines*. 2 Le. 37. pl. 48. Hill. 31 Eliz. C. B. Johnſon v. Bellamy.

Ld Raym. Rep. 419. 420. S. C. where the Proviſo alters the Tenour of the Covenant,

16. *Where a Proviſo in a Deed goes by Way of Defeazance it muſt be pleaded by him who would take Advantage of it; Contra, where it alters the Senſe of the Covenant, by explaining or tying up the Meaning to a particular Time*, which would not have been underſtood on a general Covenant, by which Means it becomes Part of the Covenant. 2 Salk. 573. Hill. 10 W. 3. B. R. Clayton againſt Kinaſton.

by tying it to another Notice than the general Words of the Covenant would require, it need not be pleaded, becauſe it is Part of the Covenant itſelf.

17. In *Debt for Rent* on a Leaſe for Years, the *Iſſue was, whether the Rent was paid* or not; The *Defendant gave in Evidence for Part of the Rent, that the Plaintiff by Covenant was to repair the Houſe, and did not, and therefore he expended Part of the Rent in repairing the ſame.* Gawdy ſaid, it maintains the Iſſue, for the Law giveth this Liberty to the Leſſee to expend the Rent in Reparations, to which Clench ſeemed to agree; but then he ſhould have pleaded it, and not give it in Evidence on the general Iſſue. Contra per Fenner, for if the Leſſor will not repair, the Leſſee can only reſort to his Action of Covenant. Cro. Eliz. 222. pl. 1. Paſch. 33 Eliz. B. R. Fenner v. Dorrington.

18. And *as to the Reſidue* of the Rent, *he gave in Evidence Payment to Perſons who had Rent-Charges out of the Land by the Leſſor's Command*, and held good Evidence; for Payment to another by the Plaintiff's Appointments is Payment to himſelf. Cro. Eliz. 222. pl. 1. Paſch. 33 Eliz. B. R. Fenner v. Dorrington.

19. In

19. In an Action of *Debt* brought against the Defendant as *Administrator*, he *pleads divers Judgments* amounting to 670 *l.* and the Assignment of 100 *l.* debt to the King by Deed enrolled, and he pleaded that he *retained his Debt in his Hand*; and he might have given this in Evidence, or pleaded it at the Liberty of the Defendant. 1 Brown. 75. pl. 1. 44 Eliz. Bond v. Green. Godb. 216, pl. 310. S. C. accordingly.

20 *Waste* was *assigned in boscis, viz. in succidendo, & vendendo decem quercus*, &c. whereas the Defendant *had only lopp'd and shred the Oaks*. It seems, that as the Waste is assigned he may safely plead Nul Waste done, and give the special Matter in Evidence. D. 92. pl. 16. Mich. 1 Mar. Anon.

21. *Waste* was assigned *in fodiendo fossam* in quodam Prato. The *Defendant pleaded no Waste done.* It was found by special *Verdict that the Defendant made the Trench to drain the Water, per quod pratum melioratur*, & non pejoratur. It was objected, that this ought to have been pleaded, but by the Opinion of the Court this is no Waste, [and so it seems it might be given in Evidence] D. 361. b pl. 12. Pasch. 20 Eliz. Anon.

22. Note that upon Evidence given to a Jury, upon the *Dissolution of a Vicarage* in the County of Warwick, which was *Part of the Priory of Dantry, where the Pope by his Bull gave to the Vicar Minutas decimas and Alteragium*; And it was certified by the Doctors, that Alteragium will pass to the Vicar Tyth-Wool, &c. And the Usage was shewed in Evidence, and the Copy of the Pope's Bull; And the Court would not credit that without seeing the Bull itself, and so the Plaintiff was nonsuit, and the Jury was discharged. Winch. 70. Hill. 21. Jac. C. B. Bret v. Ward.

23. *It is not a general Rule, that a Matter could not be pleaded specially, which might have been given in Evidence upon the General Issue*; as in an Action of Debt for Rent, upon Nil debet pleaded, an Entry and Suspension of the Rent may be given in Evidence; But yet that is always allowed to be pleaded, tho' it might be shewn upon the General Issue. 2 Vent. 295. per totam Curiam. Mich. 1 W. and M. cites Hob. 127.

24. 1 *Jac.* 1 15. *If any Action be brought against the Commissioners of a Bankrupt, or any Person authorized by them, they may plead Not Guilty, or justify by Virtue of this or the former Act of* 13 *El.* 7. *and the whole Matter shall be produced in Evidence, and if Verdict pass for the Defendant, he shall have his Costs.*

25. 7 *Jac.* 1. 5. *If any Action, Bill, Plaint, or Suit upon the Case, Trespass, Battery, or false Imprisonment, be brought in any of the Courts at Westminster, or elsewhere, against any Justice of Peace, Mayor, or Bailiff of a Town corporate, Headborough, Port-Reeve, Constable, Tithingman, Collector of Subsidy or Fifteenths, for any Matter or Thing done by reason of his Office, every such Justice of Peace and Officer aforesaid, and all others who in their Aid and Assistance, or by their Command, shall do any Thing concerning their respective Offices, may plead the General Issue Not Guilty, and give such special Matter in Evidence, as if pleaded had been good in Law to have discharged the Defendant, and if the Plaintiff be nonsuit, &c. shall have double Costs. This Statute made perpetual and extended to Church-Wardens and Overseers, by* 21 *Jac.* 12.

26. C. brought an Action upon the Case against one Wood, and counted that he was seised of a House and 20 Acres of Land, &c. in Thurlfield; and that he, and all whose Estate he hath, *have had a Common in* 7 *Acres in T. and that he, all, and those, &c. have had one Way leading thro' the said* 7 *Acres, and from thence into one Common way leading to B. and from thence to Blakely, and that the Defendant had ploughed and turned up the* 7 *Acres, and stopped the Way.* The Defendant

dant pleaded Not Guilty; Reſolved that the Trial was good, for Not Guilty, is properly a Denial of Treſpaſs and Diſturbance; and tho' he ought to prove Title to the Way, yet *it is ſufficient if he prove Title to the Way by and thro' the 7 Acres upon Evidence*; And yet if the Preſcription had been traverſed, then he ought to prove all the Way. Hutt. 39, 40 Mich. 18 Jac. Clerk v. Wood.

27. In Action of *Treſpaſs*, if it appears upon the Evidence, that the *Plaintiff had nothing in the Land but in Common with a Stranger*, yet the Jury ought to find with the Plaintiff, and if the Defendant would have Advantage of the Tenancy in Common in the Plaintiff, he ought to have pleaded it. Nichols Serjeant was very earneſt to the contrary, and took a Difference where the Plaintiff and Defendant are Tenants in Common, and where the Plaintiff is Tenant in Common with a Stranger; but he was overruled, *the Action was of Treſpaſs, Quare clauſum fregit*, &c. Ruled by Walmſly, Warburton, and Foſter J. abſentibus Cook and Daniel. Godb. 172. pl. 237. Paſch. 8 Jac. C. B. Berry's Caſe.

28 In a *Writ of Right*, if the *Tenant join the Miſe upon the mere Right*, he cannot give in Evidence a collateral Warranty, for he has not any Right by it, and therefore it ought to have been pleaded. 1 Inſt. 283. a.

29. *Aſſumpſit to pay Money on the Marriage of his Daughter*, the Defendant on Non aſſumpſit gave in Evidence a Diſcharge of the Contract; but Hale Ch. J. before whom the Cauſe was tried at Guildhall, ſaid he ought to have pleaded Exoneravit; but that this mitigates the Damages. 2 Lee. 81 Hill. 24 and 25 Car. 2. Abbot v. Chapman.

30 In an Action on *Trover* of Goods, the Defendant pleaded *Sale in the Market overt*, whereby he juſtifies the Converſion; And it was held to be no Plea, becauſe it amounts but to the General Iſſue, and ruled accordingly, that if he did not plead, a Nihil dicit ſhould be entered, Cro J. 165. pl. 3. Trin. 5. Jac. B. R. Johns v. Williams.

31. 'Twas held that if *Colourable Payment* of Money by a Purchaſer, is *recited* when in truth none was paid, this Eſtate is invalid againſt him that comes in Bona fide for a valuable Conſideration, and this may be given in Evidence well enough without pleading it. Clayt. 32. pl. 55. Aug. 11 Car. Barkley, J. Ballard v. Sitwell.

32. *Avowry for Damage done*, &c. and *Iſſue joined upon the Freehold*, and the *Plaintiff did allege that the Defendant had made a Leaſe before the Caption*, and holden no Evidence, but he ought to have pleaded it, &c. and for this Cauſe, the Plaintiff was nonſuited, but the Jury did enquire of the Damages and Coſts by Direction of the Court, and ſo is the Practice in Replevins. Clayt. 91. pl 155. Mar. 16 Car. Whitfield Serjeant, Judge of Aſſiſe. Dickenſon v. Malliverd.

33. It was ſaid by the whole Court, that a *Conſideration* is not traverſable *upon an Aſſumpſit*, but they ought to plead the General Iſſue, and the Conſideration *ought to be given in Evidence*. Hetl. 50. Mich. 3 Car. C. B. Wilkins v. Thomas.

34. Action for *Caſe for Aſſumpſit*, the Defendant pleads *Non Aſſumpſit* and upon Evidence gave the *Statute of Gaming* in Evidence, and allowed by Jefferies, Ch. J. *Otherwiſe* it ſeems, if it had been *Debt upon a Bond*, &c. then it ought to be pleaded. Skin. 195. pl. 9. Trin. 36 Car. 2. C. B. Anon.

35. One *Jointenant* or *Tenant in Common*, or *Parcener*, cannot bring Trover againſt another and if he does, 'tis good Evidence on the General Iſſue of Not Guilty; *But* if one Jointenant brings Trover *againſt a Stranger*, in that Caſe the Defendant may plead it in Abatement, but cannot

cannot take Advantage of it in Evidence. 1 Salk. 290. pl. 29. Trin. 7 Ann. B R Brown v. Hedges.

36. In *Treſpaſs Quare Clauſum fregit, it is a Plea in Abatement to ſay, that the Plaintiff is Tenant in Common with another, but it cannot be given in Evidence upon Not Guilty*, as it *may where one Tenant in Common brings Treſpaſs againſt the other.* Vent. 214 Trin. 24 Car. 2. B. R Anon. 7 Mod. 105. Mich 1 Ann. B R. per Holt Ch. J. in Caſe of Haywood v. Davis.

37. When *an Executor or Adminiſtrator had done what they ought to do, they may plead Plene Adminiſtravit, and give the ſpecial Matter in Evidence; But when Judgments are due, and Bonds ſued*, they cannot give that in Evidence, but *muſt plead it*, becauſe the Goods to ſatisfy are in their own Hands, and ſo not properly adminiſtred, tho' liable to the Judgment; Per Vaughan, nemine contradicente. Freem. Rep. 150. pl. 171. Paſch. 1674. Anon.

38. *Depoſitions* taken *coram non judice*, are not allowed to be uſed at a Trial at Law. Chan. Caſes, 306. Hill. 29 & 30 Car. 2. Stock v. Denew.

39. In Aſſumpſit, *Exoneravit* ought to be pleaded, but being given in Evidence, it mitigated the Damages. 2 Lev. 81. Hill. 24 & 25 Car. 2 B. R per Hale, Ch. J. Abbot v. Chapman.

40. If an *Action* is brought *upon a Promiſe in Law*, Payment before the Action brought may be given in Evidence, *but where* the Action is *grounded on a ſpecial Promiſe*, there Payment, or any other legal Diſcharge muſt be pleaded. Mod. 210. pl. 42. Hill. 27 & 28 Car. 2. C. B. Fits v. Freeſtone.

41. Upon a Motion for a new Trial, the Caſe appeared to be, that the Lord of a Copy-hold Manor ought to repair a *common Bridge*, and the Cuſtom was, that he might take *neceſſary Timber* for this Purpoſe *upon any of the Copy-hold Lands*, the which he had done, and in Treſpaſs for it by a Copy-holder, he would have given this Matter in Evidence upon Non culp; but it was not allowed, for he ought to have pleaded it as in Hob. 174, 175. Treſpaſs for felling Trees, the Defendant pleaded Non culp. He cannot maintain this Plea, except the Trees were his actually before he felled, for if he had but a Liberty to fell, he ought to have pleaded it, and not pleaded Non culp. Skin. 321. pl. 2. Trin. 4 W. & M. in B. R. Anon.

42. An Action on the Caſe brought on Aſſumpſit to ſecure Goods from Perils, thoſe of the Sea excepted; In this Caſe it was held by the Court, that *in Aſſumpſit in Fact*, on a Non Aſſumpſit pleaded, a *Releaſe* cannot be given in Evidence to take away the Aſſumpſit, but only in Mitigation of Damages; but on Aſſumpſit *in Law*, and a Non Aſſumpſit pleaded it may, becauſe it takes away the Aſſumpſit. Quære, ſays the Reporter, if in an Aſſumpſit, either in Fact or Law, on a Non Aſſumpſit pleaded, Performance can be given in Evidence. Sid. 236. pl. 3. Hill. 16 & 17 Car. 2. B. R. Beckford v. Clark.

43. In an Aſſumpſit in Conſideration of the *Marriage of his Daughter* on Non Aſſumpſit pleaded, *Exoneravit* cannot be given in Evidence to diſcharge the Promiſe, but only in Mitigation of Damages, but it ought to be pleaded Cited per Hale. 2 Lev. 81. Hill. 24 & 25 Car. 2. B. R. Abbot v. Chapman.

44. *Any Thing in the ſame Statute, upon which a Suit is commenced, may be given in Evidence, but if it be in another Statute, it muſt be pleaded*; But ſince the Statute of 21 Jac. 1. upon the General Iſſue, any Thing may be given in Evidence and Excuſe of the Party; Per Hale Ch. J. Hard. 231. pl. 6. Trin. 14 Car. 2. in Scacc. in Caſe of Hammond v. Taylor.

46. In *Trover on Not Guilty*, the *Evidence was, that the Goods were taken and ſold by Virtue of a Commiſſion of Sewers*, and held good. All. 92. Mich. 24 Car. B. R. Combs v. Cheney.

47. *Cuſtom of Foreign Attachment* may be pleaded or given in Evidence. 3 Keb. 221. Mich. 15 Car. 2. B. R. in Caſe of Bennet v. Thorn

48. The *Statute of Limitations* may be given in Evidence, as well as pleaded, as had been ruled by Ld. Ch. J. Hale; But agreed per Cur. that the beſt Way is to plead it. Skin. 24. (bis) Mich. 33 Car. 2. C. B. Philpot v. Walcot.

49. *Debt* for *Rent againſt an Aſſignee*, and *Nil debet* pleaded; upon which they were at Iſſue, and the Defendants gave in Evidence an *Aſſignment of the Term before the Rent incurred*; It was objected, that this was a fraudulent Aſſigment, and ſo void; and of this Opinion upon the Trial was North Ch. J. but after, the Caſe being in Court upon many Debates, and much Litigation of the Matter, it was ruled that it might be given in Evidence as it was cited by Pemberton. Paſch. 4 Will. & Mar. in B. R. and not denied per Cur. to have been adjudged betwixt Chriſty and Wilcox. Skin. 318. Chriſty v. Wilcox.

But by the Statute 23 H. 8. c. 5. 50. *Regularly, whatſoever is done by Force of a Warrant or Authority*, ought to be pleaded. Tr. per Pais, 3d Edit. 377.

any Thing done by the Authority of the Commiſſion of Sewers may be given in Evidence on the General Iſſue. Tr. per Pais, 3d Edit. 377.

51. In Treſpaſs againſt one for gleaning on his Ground; Per Hale, Norfolk Summer Aſſize 1668. The Law gives Licence to the Poor to glean, &c. by the general Cuſtom of England, but the Licence muſt be pleaded ſpecially, and cannot be given in Evidence on Non culp. cites Tr. per Pais, 202.

52. *In all Caſes where one cannot have Advantage of the ſpecial Matter by Way of Plea, there he may have Advantage of it in Evidence*; As for Example, the Rule of Law is, that one cannot juſtify the Death or killing of a Man, and therefore if one kills another in his own Defence, he cannot plead this ſpecially, but he may give this in Evidence; ſo in Defence of his Houſe againſt Thieves and Robbers, &c. Try per Pais, 3d Edit. 377.

53. The Defendant was a Vintner in Beverley, and the Plaintiff ſued him for 5 *l.* for *ſelling Wine for not being licenced according to the Statute* of E. 6. by the Juſtice of Peace there being a Corporation, and ſhewed the Defendant did inhabit there; and Jury found for the Plaintiff to the Value of one Pint of Wine ſold by the Defendant, and to prove the Defendant guilty, it was proved that the *Daughter of the Defendant brought in the Wine, and did receive the Money for it*; and this was held good Evidence that the Defendant himſelf ſold the Wine, *without Proof that the Money came to his Hand, or that it was his Wine*, &c. Clayt. 150. pl. 275. Auguſt 1650. before Baron Thorpe Judge of Niſi Prius, Smalls v. Davie.

54. Aſſumpſit againſt a *Feme* who pleads *Coverture tempore promiſſionum*, Plaintiff demurs, becauſe it amounted to the general Iſſue. Per Cur. where it is *Matter of Law* that amounts to the General Iſſue, it may be pleaded, and is no Cauſe of Demurrer; for Matter of Law in that Caſe is Matter of Fact, which avoids the Action, and ſo may be pleaded or given in Evidence as Defendant pleaſes. 12 Mod. 101. Mich. 8 W. 3. James v. Fowks.

PerHolt C. J. S. P. 12 Mod. 376. Paramar v. Johnſon. 55. It is no *General Rule* that a Matter cannot be pleaded ſpecially, which might be given in Evidence upon the General Iſſue. 2 Vent. 295. Mich. 1 W. & M. Sarsfield v. Witherly.

56. *As*

56. *As* in *Debt for Rent* an *Entry and Suſpenſion* of the Rent may be given in Evidence upon *Nil debet*, yet it is always allowed to be pleaded, and ſo *Nil habuit in tenementis.* 2 Vent 295. ibid.

57. *And wherever* the Matter pleaded *contains Matter of Law* it is allowed to be pleaded, tho' it might be ſhewed upon the general Iſſue. 2 Vent. 295. cites Hob. 127.

58. At Guildhall an Action upon the Caſe was brought for Money received to the Uſe of the Plaintiff, the Defendant would have given in Evidence upon Non aſſumpſit, that the Money was *condemned upon a common Attachment* within the City of London, the which was oppoſed, becauſe the Condemnation was *after the Action commenced in the Courts above*; To which it was anſwered, that tho' it was after the Action commenced, yet it was before Non Aſſumpſit pleaded, and ſo well enough, Non allocatur; for the Difference is, where the Condemnation is before the Action commenced, there the Defendant may plead Non Aſſumpſit, and give the Attachment in Evidence; but where the Condemnation is after the Action commenced, the Defendant ought to plead it. Skin. 639. pl. 3. Paſch. 8 W. 3 B. R. Briat v. Gyll.

59. If *Action* be brought *againſt Adminiſtrator by the Name of Executor*, he cannot plead in Bar Ne unques Executor, and give in Evidence he was Adminiſtrator, becauſe he allows himſelf to be ſuable. 12 Mod. 45. Mich. 5 W. & M. Anon.

60. A *Tenant in Tail* had *acknowledged a Judgment* or Recognizance and died; upon a Scire Facias againſt his Heir and Tertenant the *Sheriff returned a Sci. Feci*, and there was Judgment by Default. In Ejectment it was ruled, that the *Iſſue in Tail could not give in Evidence, that the Conuſor was only Tenant in Tail*, becauſe he might have pleaded it to the Scire Facias; a Caſe cited by Holt Ch. J. Comb. 446. Trin. 9 W. 3. in Caſe of Lambert v. Cameret.

61. Action in Name of **Cameret v. Lambert**, Verdict and Judic. pro. Quer. Writ of Error coram vobis; *Error in fact aſſigned that C. before the Trial, &c. died*; *L. ſays, that he was alive, et ad tunc in plena vita exiſtit et hoc petit quod inquiratur per Patriam*, per Holt Ch. J. You are *eſtopped in Evidence to ſhew that Plaintiff died before the original Action*; *for by the Plea you admitted him to be alive*; but here Defendant in Error by his Pleading ſeems to have ſet Plaintiff looſe from his Eſtoppel, whereas if he had ſaid *abſque hoc* that he had died before the Action brought and the Trial, he had hampered him; and the Evidence was admitted, and left to the Jury. Comb. 446. at the Sittings at Niſi Prius at Guild-hall, June 1697. Lambert v. Cameret.

62. In *Debt for Rent*, and *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. Aliter, in an Action *Sur Aſſumpſit*; for the *Plea of Non Aſſumpſit* relates to the Time of making the Promiſe. 1 Salk. 278. pl. 1. coram Holt, Ch. J. at Niſi Prius at Hereford, 1690. Anon.

63. If an *Act of Parliament makes Writing neceſſary to a Common Law Matter* where it was not neceſſary by the Common Law, you need not plead the Thing to be in Writing, but give it in Evidence; *But where a Thing is originally made up by Act of Parliament, and required to be in Writing*, you muſt plead it with all the Circumſtances required by the Act, as upon the Statute H. 8. of Wills, you muſt plead a Will to be in Writing; but a collateral Promiſe, which is required to be in Writing by the Statute of Frauds, you need not plead to be in Writing, tho' you muſt prove it ſo in Evidence; Per Holt Ch. J. 2 Salk. 519. pl. 17. Trin. 13 W. 3. Anon.

64. No

64. 43 El. 2. S. 19. *If any Perſon ſhall be proſecuted for what he ſhall do in Purſuance of this Act for the Relief of the Poor, he may plead the general Iſſue, and give the ſpecial Matter in Evidence, and in Caſe the Plaintiff be nonſuit, &c. the Defendant ſhall recover treble Damages, with Coſts.*

65. *So in Battery or Mayhem* for breaking a Limb, &c. the *Leſs of Time* may be given in Evidence upon the common Declaration. Carth. 296. Hill. 5 W. & M. B. R. in Caſe of Child v. Sands.

66. *After Condemnation on a Seizure*, the Rule is, (*viz*) if the Action is *Trover*,, the Condemnation may be given in Evidence upon the General Iſſue, becauſe thereby the Property is diveſted out of the Party; *But* if the Action is *Treſpaſs*, then the Matter may be ſpecially pleaded; per Ward Ch. B. Carth. 327. Trin. 6 W. & M. in Scac. in Caſe of Martin v. Wilsford.

67. In *Trover* Defendant cannot give a *Releaſe* in Evidence, but he ought to have pleaded it. Comb. 473. Paſch. 10 W. 3. B. R. Kingſton v. Read, at Guildhall.

68. Where a *Proviſo* goes by way of *Defeaſance of a Covenant*, it muſt be pleaded on the other Side; otherwiſe where by way of Explanation or Reſtitution of the Covenant; Per Holt. 2 Salk. 574. Trin. 10 W. 3. Clayton v. Kinaſton.

69. *Diverſity* was ſaid to be *where the Fact is complicated, and may be apt to inveigle the Jury*; in ſuch Caſe, that the Court may be the better able to direct the Jury, the ſpecial Matter may be pleaded. Arg. 12. 538. Trin. 13 W. 3.

Carth. 294. S. C. accordingly.—— Comb 217. Sands v. Child, S. C and Judgment affirmed.——

70. *Conſequential Damages* may be given in Evidence in an Action on the *Statutes againſt ſueing in the Admiralty*, though not mentioned in the Declaration, as, that he *loſt the Profits of his Voyage*; *but if it be laid ſpecially in the Declaration*, (viz.) per quod, he loſt the Profits, &c. it is but Surpluſage. Carth. 296. Hill. 5 W. & M. in B. R. in Caſe of Child v. Sands.

71. In an Action on the Caſe for *Fees*, &c. the Defendant pleaded the Statute of 1 *Jac.* that *no Bill was delivered* under his Hand; Per Cur. this Statute may be given in Evidence on the general Iſſue Non Aſſumpſit. cites Show. 338. Mich. 3 W. & M. Milner an Attorney v. Crowdall.

1 d Raym. Rep. 566. S. C. and S. P.

72. *Upon all general Iſſues*, you may give ſpecial Matter in Evidence. If you *give Colour*, you may plead it ſpecially; as in *Debt for Rent*, you may plead *Nil debet*, and give *Releaſe* in Evidence; Per Holt. 12 Mod. 377. Paſch. 12 W. 3. in Caſe of Paramour v. Johnſon.

73. When you have a good Matter in Bar, and an *Opportunity to plead* it, you ſhall not give it in Evidence; Per Holt Ch. J. 12 Mod. 412. Trin. 12 W. 3. in Caſe of Rook. v. Sheriff of Salisbury.

74. *Treſpaſs for entering the Plaintiff's Houſe, and keeping the Poſſeſſion thereof for ſo long*; *Defendant pleads, that J. S. was ſeiſed in Fee thereof*, and he being ſo ſeiſed, *gave Licence to the Defendant to enter into*, and poſſeſs the ſaid Houſe, till he gave him Notice to leave it; that thereupon he entered, and kept the Houſe for Time mentioned in the Declaration, and had not any Notice to leave it all the Time; and a ſpecial Demurrer becauſe the Plea amounted to the general Iſſue; And per Cur. *he might have given this Matter in Evidence againſt all People, except J. S.* but againſt him he muſt have pleaded it. So he ſhould here either have pleaded the general Iſſue, or given Colour to the Plaintiff; Ergo Jud. pro quer. 12 Mod. 513, 514 Paſch. 13 W. 3. —— v. Saunders.

75. 8 & 9 *W.* 3. *cap.* 26. *Sect* 6. *No Retaking ſhall be given in Evidence in an Action of Eſcape, unleſs ſpecially pleaded, and Oath be made by the Keeper of the Priſon that ſuch Eſcape was without his Conſent; but if ſuch Affidavit prove falſe, ſuch Keeper ſhall forfeit* 500 *l.*

76. If

76. If a Man be *indicted for Murder* or *Felony*, he may plead Not guilty, and give a *Pardon* in Evidence; *but* if he have Occaſion to plead a Pardon *in Bar of any collateral Matter*, there he ſhall not plead to Iſſue, and give the Pardon in Evidence; as if a *Scire facias* were brought *upon a Recognizance*, there you muſt plead the Pardon; Per Holt Ch. J. 12 Mod. 613. Hill. 13 W. 3. in Caſe of Ingram v. Foot.

77. Caſe on *Bill of Exchange* pleaded, that *Defendant after Acceptance gave a Bond in Diſcharge of it*, and on Demurrer it was objected, that it amounted to the General Iſſues; 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 Mich. 8 W. 3. Hackſhaw v. Clerke.

78. In all Caſes where a Man *admits the Action, were it not for ſpecial Matter*, that Matter may be ſpecially pleaded; though it may likewiſe be given in Evidence on the General Iſſue. 12 Mod 97. Trin. 8 W. 3 Huſſey v. Jacob. Ld. Raym. Rep 88. 89. Huſſey v. Jacob. S.C. & S.P. — 1 Salk. 344 pl 2. S. C. & S. P. but otherwiſe, where the Matter of the Plea does not aver, but deny. ——

79. It is not a Rule, that becauſe a Matter *may* be given in Evidence, that therefore it muſt not be pleaded ſpecially; for it often happens to *be in Election of Defendant*, either to plead it ſpecially or not, as he ſhall be adviſed; Per Cur. Carth. 357. Trin. 7 W. 3. B. R. Huſſey v. Jacob.

80. *Where the Matter of the Plea confeſſes the Cauſe of Action, but avoids*, the Defendant may plead ſpecially, tho' he might have given it in Evidence; Otherwiſe where the Matter of the Plea does not avoid but deny. 1 Salk. 344. pl. 2 per Curiam, Mich. 8 W. 3 B. R. in Caſe of Huſſey v. Jacob.

81. In an Action upon the *Caſe on a Bill of Exchange*, Defendant *pleaded that he was at Paris, as a Traveller, &c. and there drew the Bill, &c.* but that he *was never a Merchant*; it was held, that this being Matter of Law it might well be pleaded, tho' objected it amounted to the General Iſſue; and if the Matter would avail the Defendant, he might give it in Evidence on Non Aſſumpſit. 2 Vent. 295. Mich. 1 W. and M. Sarſfield v. Witherly. Carth. 82. S. C. the Court at laſt upon Conſideration had of the Inconveniencies which might enſue amongſt foreign Merchants upon Bills of Exchange, if Perſons who took on themſelves to draw ſuch Bills, ſhould not be liable to the Payment thereof, they all agreed, that the Judgment ſhould be reverſed. —— Comb. 152. S. C. and per Pollexfen Ch. J. it may be either pleaded ſpecially or given in Evidence; and that, to avoid the involving a great deal of Matter in the Iſſue, and that it is a Merchandizable Act, and hinders him from pleading that he is no Merchant, and the Cuſtom is laid for Merchants and other Perſons Negotiators; And the Judgment was reverſed, for that he is a Merchant by the taking up of Money and drawing the Bill. —— Show. 125. S. C. in Error, in Cam. Scacc. and Judgment for the Plaintiff.

82. At a Trial at Hertford Summer Aſſiſes 10 W. 3. in Caſe for *ſtopping* the Plaintiff's *Lights* the Defendant pleaded Not Guilty; and gave in *Evidence that the Corporation of Hertford were Lords of the Soil, where, &c. and preſcribed to ſet up Stalls there*, being near the Market-place. And it was admitted by Holt Ch. J. to be given in Evidence upon the General Iſſue, becauſe *this is to claim Property in the Soil, but where* the Defendant, or he under whom *he claims*, claim *only a particular Benefit, as Common or Eaſement*, as a Way, and not the Property in the Soil; *he ought to plead it ſpecially*, and cannot give it in Evidence upon the General Iſſue pleaded. Ld. Raym. Rep. 732. 10 W. 3. Kent v Wright.

83. *Where there is a ſpecial Matter to avoid the Plaintiff's Action which the Defendant cannot give in Evidence upon the General Iſſue*, he may in ſuch Caſe plead it ſpecially; but he needs not where he can give it in Evidence on the General Iſſue; Adjudged. 3 Salk. 155. pl. 11. Mich. 12 W. 3 Anon.

84. So where there is a *meer Matter of Fact to avoid the Plaintiff's Action, the Defendant may plead the General Iſſue, and give it in Evidence*; But *if the Matter of Fact contains likewiſe Matter of Law*, the Defendant may either plead ſpecially or generally, and give the ſpecial Matter in Evidence. 3 Salk. 155 pl. 12 12 W. 3. Anon.

85. It was ruled by Holt Ch. J. upon Evidence at a Trial at Niſi Prius at Norwich, Summer Aſſiſes, 12 W. 3. that if, in *Indebitatus Aſſumpſit for Goods ſold and delivered*, upon Non Aſſumpſit pleaded, the Defendant gives in *Evidence, that the Debt was attached by foreign Attachment in London upon a Plaint levied by J. S. (to whom the Plaintiff was indebted) againſt the Plaintiff*, &c. the Defendant will be driven to *prove that the Plaintiff was indebted to J. S.* becauſe the Plaintiff has no Notice of the foreign Attachment; And therefore it may be only a Contrivance by the Defendant, and J. S. to bar the Plaintiff of his preſent Action. 2dly. In ſuch Caſe the Plaintiff may ſhew in *Evidence, that the Suit in London was after an Original filed by the Plaintiff in ſome one of the ſuperiour Courts*; and that will avoid the Operation of the foreign Attachment. 3dly, If the *Original* did not iſſue before the Plaint was entered in London, but only was *antedated*, and bore Teſte before, *and no Arreſt was made before upon it*; that will not avoid the foreign Attachment; But this latter point Holt reſerved for his farther Conſideration; But (ut audivi) he was afterwards of the ſame Opinion, Ld. Raym. Rep 727. Palmer v. Hooke or Gouche.

86. In *Treſpaſs for Goods*, the Defendant confeſſes the Taking, but ſays he bought them in *Market-overt*, per Holt. 12 Mod. 377. 12 W. 3. In caſe of Paramour v. Johnſon, cites 10 Co. Byfield's Caſe.

Ld. Raym. Rep. 566. S. C. and S. P. by Holt Ch. J.

87. *But* it is Indulgence to give *Accord with Satisfaction* in Evidence upon *Non Aſſumpſit* pleaded; but that has crept in and now is ſettled. Per Holt 12 Mod. 377. Paſch. 12 W. 3. In Caſe of Paramour v. Johnſon.

88. *Debt for Rent* upon Demiſe; *as to Part, Nil debet, as to the other Part, Nil habuit in Tenementis*, &c. *but held ill*; for in Conſtruction of Law Nil habuit, &c. goes to the Whole, and having alſo pleaded Nil debet, that makes the Plea double; for on Nil debet, Nil habuit, &c. might have been given in Evidence, but by *pleading Nil Debet, the Demiſe was admitted*; *and then by ſaying Nil habuit, &c. it is repugnant*; but he ſhould have traverſed the whole Demiſe. 4 Mod. 254. Hill. 5 W. and M. in B. R. Combs v. Talbot.

89. *As* the pleading a *Releaſe, Coverture* or *Infancy, in an Aſſumpſit*, and yet thoſe Things might be given in Evidence upon Non aſſumpſit pleaded; However the Defendant ſome Times may not be willing to put ſuch Matter of Law to the Judgment of the Jury, or perhaps may deſign to ſave the Coſts of a ſpecial Verdict. Carth. 357. per Cur. Trin. 7 W. 3. B. R. in Caſe of Huſſey v. Jacob.

90. Feme Covert may *plead Non aſſumpſit* and give *Coverture* in Evidence, becauſe Coverture makes it no promiſe; the ſame of Non eſt factum to a Bond. 6. Mod. 230. Mich. 3 Ann. B. R. Anon.

In an Action of Treſpaſs, Quare Clauſum fregit, the Defendant pleaded Not Guilty, and at the Trial before Mr. Baron Carter at the Aſſizes for Devonſhire, offered to prove that the Place was a Common Highway; but the Judge not allowing him to go into the Evidence, the

91. In *Treſpaſs, Quare clauſum fregit, Not Guilty* was pleaded, and on Trial the Defendant gave Evidence that it was in a *Highway*; And per Cur. 'tis a ſpecial Juſtification, and ought not to be allowed to be given in Evidence on the General Iſſue. 1 Salk. 287. Mich. 5 Ann. B. R. Watſon v. Sparks.

the Plaintiff obtained a Verdict; Upon this the Defendant moved for a new Trial, and the ſingle Queſtion was, Whether upon this Iſſue the Defendant can give in Evidence a Highway? And it was admitted by all to have been a Vexata Queſtio, in which there had been great Variety of Opinions; For the Plaintiff it was inſiſted, that all Matters of Juſtification muſt be pleaded, and not given in Evidence, and that the contrary would be a great Surprize upon the Plaintiff, who comes only to prove the Treſpaſs, and not to controvert whether the Place be a Highway or not; And the Caſe in Salk. 287. was relied upon; For the Defendant it was ſaid, that in many Caſes the Party may either plead the ſpecial Matter, or give it in Evidence; That nothing is more Special than the Cuſtom of Foreign Attachment, which yet is received in Evidence upon Non aſſumpſit; So in Ejectment almoſt any Thing is given in Evidence; That ſeveral Statutes have enabled Defendants to plead the General Iſſue, as thoſe of the 7th and 21 Jac. 1. That perhaps a private Way (being a private Right, and as it were a Profit Apprender in Alieno ſolo) muſt be pleaded, but that it is otherwiſe of a Publick Highway, being the Concern of the Publick, for whom the King is a Truſtee; And that it could be no Surprize, ſince nothing can be more notorious than a Highway, and the Plaintiff cannot but know his own Caſe; But all the Court were clear of Opinion for the Plaintiff; That the Old Rules of Special Pleading are not to be departed from, which would create great Confuſion and Inconvenience; That they were founded in great Wiſdom and Experience, and that if ever any Perſons have diſlik'd or thought meanly of them, the leaſt that can be ſaid of ſuch Perſons is, that they underſtood nothing of them. That wherever a Defendant admits the Fact charged, but inſiſts either upon a general or ſpecial Reaſon in Juſtification or Excuſe, he muſt plead it ſpecially. That where any Acts of Parliament allow the contrary, the Court is not to contravert them; but as they extend only to particular Caſes they are out of the Queſtion. That as to Ejectments, it is true, any Title may be ſet up in Evidence; and tho' it has prov'd very inconvenient, yet the Law being ſo ſettled, it is too late to complain. However, 'tis not ſo bad in that Caſe, becauſe the Party may bring a new Ejectment. That the only Pretence for allowing a Highway in Evidence is, that it is the Soil of the Crown, and the King, ('tis ſaid) has the Freehold in Truſt for all the Subjects of England; whereas it is notorious, that the Freehold belongs to the Lord of the Soil through which the Highway runs; who, in conſequence of his Ownerſhip, has a Right to all the Profits, as the Trees, Graſs, &c. And laſtly, They held, that the admitting ſuch Evidence muſt be a great Surprize upon the Plaintiff, who having enjoyed the Land as his Freehold, has no Reaſon to ſuppoſe it is a Highway, or that Defendant will inſiſt upon it as ſuch. Accordingly the Court were clear of Opinion for rejecting the Evidence, but would make no Rule till they had conſulted with the reſt of the Judges; And the laſt Day of the Term the Ch. Juſtice reported, that at his Requeſt the Ld. Ch. Juſtice of the King's Bench had put the Queſtion to all the Judges, by whom it was fully debated, and that a great Majority of them were of Opinion, that upon a Plea of not Guilty to an Action of Treſpaſs Quare clauſum fregit, the Defendant cannot give in Evidence, that the Place where, &c. is a Highway; Upon which the Rule for a new Trial was diſcharged. Trin. 14 Geo. 2. C. B. Salman v. Courtney.

92. The Plaintiff brought *Trover as Adminiſtrator*, and *declared upon the Poſſeſſion of the Inteſtate*, and upon Not Guilty pleaded at the Trial, the Counſel for the Defendant offered to give in Evidence, that the pretended Inteſtate *made a Will and an Executor*; But Holt Ch. J. overruled it, and took this Diverſity, that where an Adminiſtrator brings Trover upon his own Poſſeſſion, the Defendant may give in Evidence a Will, and an Executor upon Not Guilty; otherwiſe if it be on the Poſſeſſion of the Inteſtate, (as in the principal Caſe,) for there the Defendant ought to plead it in Abatement, and if he does not, he ſhall not give it in Evidence. 1 Salk. 285. Mich. 1 Ann. Blainfield v. March. 7 Mod. 141. S. C. and S. P. by Holt Ch. J.

93 *Where a General Juriſdiction is given by Statute, and a Proviſo excepts particular Perſons or Things*, all thoſe *may be given in Evidence*; for if the Party or Thing is not within the Act, the Perſon accuſed is not Guilty; *but where the Juriſdiction is limited and confined to particular Perſons or Things with a Proviſo of Execution*, this muſt be pleaded and you muſt ſhew how the Perſon or Thing is within the Act. Mich. 11 Ann. B. R. Reg. v. Ridley, on the Fire Act.

94. If an *Adminiſtrator bring Trover upon the Poſſeſſion of the Inteſtate*, and Not Guilty is Pleaded, then the Defendant cannot give in Evidence a *Will* made *and Executors* appointed, but that ought to have been pleaded in Abatement, 7 Mod. 141. Hill. 1 Ann. in B. R. 13. Blainfield v. March.

95. *But* if Trover had been *on the Poſſeſſion of the Adminiſtrator*, there upon Not Guilty he might take Advantage of that Matter in Evidence. 7 Mod. 141 Hill. 1 Ann. in B. R. 13 Blainfield v. March.

96. On

At Croydon Aſſ. coram Prat Ch. J. anno 1720. he ſaid, that in Treſpaſs you could not give in Evidence,

96. On Not guilty pleaded in Treſpaſs it was given in *Evidence, that the Place was an Highway.* The Caſe was, the *Plaintiff had altered the common Highway, and ſet out another over his Field, as more commodious for him, and it was further given in Evidence pro quer.* that the Defendant had opened a Gate ſet up on his new Way per quer. and held, that he might juſtify the pulling of it down on Not guilty pleaded; Per Baron Price at Sarum. Trin. Vac. 1711.

that it was an Highway, but that Powel Price J. was of an Opinion it might be done; but that all other Judges that he ever knew, were of a contrary Opinion. —Show. 271. 291.—

97. *Whatever is a Diſcharge of the Action* may be given in Evidence on Non Aſſumpſit, ſo a Releaſe or Diſcharge by a ſecond Agreement will be good Evidence on Non Aſſumpſit without pleading it; For as a Promiſe is made by Parol, ſo it may be diſcharged by Parol; Per Pratt; but Eyre and Forteſcue J. e contra, and that it ought to be pleaded. Paſch. 7 Geo. B. R. Allen v. Jacob.

98. *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 ſo or not; And therefore Actions of Trover and Aſſumpſit, which are modern Inventions to get rid of Law-wagers, which lay in the ancient Actions of Debt and Detinue were ſo formed, that almoſt every Thing may be given in Evidence on the general Iſſue. Gilb. Hiſt. & Pract. of C. B. 52.

99. Thus in *Trover, the Plaintiff declares on the Property of Goods and Chattles, and that they came to the Defendant by finding,* whatever Matters were alledged that confeſs Property in the Plaintiff will intitle him to his Damages, and whatever denied it is on the general Iſſue; and therefore *levying by Diſtreſs, Releaſes,* and the like, which were anciently pleaded in this Action, *are not given in Evidence, becauſe they diſaffirm the Property of the Plaintiff on which his Action is founded.* Gilb. Hiſt. &c. of C. B. 52, 53.

100. *So in Aſſumpſit,* the Action is formed on a Contract, and the Treſpaſs to the Plaintiff in the Non Performance of it, and the Iſſue is Non Aſſumpſit, inſtead of the old Iſſue, which was Not guilty, as Non Dimiſit was on an Action of Debt on a Leaſe, and Non detinet on the Detaining of Goods, yet *on the Iſſue, every Thing may be given on Evidence which diſaffirms the Contract,* for that goes to the Giſt of the Action, ſince there is no Contract to be performed at the Commencement of the Action, there could be no Treſpaſs for the Non-performance of it, and therefore a Releaſe goes to the Giſt of this Action; For it ſhews there was no Contract at the Time the Action was commenced; For as in Trover he muſt have a Right to the Thing declared on; therefore *every Thing which ſhews the Contract to be void, as Nonage, or more Money loſt at Play than the Statute allows, may be given in Evidence on the general Iſſue;* For on a void Contract, the Plaintiff has no Right to any, therefore this and the like goes to the Giſt of the Action. Gilb. Hiſt. &c. of C. B. 53.

101. In a *Declaration about a Seat, you need not alledge the Repairing,* but muſt prove it upon the Trial; Coram Baron Cummins, at Taunton Aſſiſes. Hill. Vac. 1727-8.

## What Things may be given in Evidence. And of what.

### [A. b.] Acts of Courts.

1. THE *Act* or Order *of Eccleſiaſtical Court for granting* Letters of *Adminiſtration* proved by the Book is good Evidence. Lev. 25. Paſch. 13 Car. 2. B. R. Garret v. Liſter. Keb 15. pl. 43 Garrad v. Litter, S. C.—Keb. 509. pl 78.

Perſley v. Friend, S. P.——1 Lev. 101. Peaſelie's Caſe, Paſch. 15 Car. 2. B. R. S. P.——

2. *Copy of the Inrollment of the Grant of Office* of Clerk of the Papers in B. R. allowed to be good Evidence. Vent. 296. Trin. 28 Car. 2. B. R. Woodward v. Aſton.

3. Two *Commoners* in Behalf of themſelves, and all the Commoners within H. *preferred a Bill in the Dutchy Court againſt the Owner of the Land, in which* they claimed Common, &c. and upon hearing the Cauſe, *the Common was decreed for them.* The Dutchy Court was put down, and the now Defendant having purchaſed Land within H. the *Plaintiff, who was a Commoner when the Decree was made, but not a Plaintiff in that Cauſe, exhibited his Bill againſt the now Defendant to have the Uſe of the Depoſitions taken in the Cauſe* in the Dutchy Court at a Trial to be had at the Aſſizes, and the Defendant demurred to the Bill, and allowed, becauſe neither the Plaintiff nor the Defendant were Parties to the former Cauſe, tho' the Suit there was the ſame Cauſe upon which the Action of Law was now brought, and of general Concernment; and it ſeemed hard, conſidering that the Defendant here claimed under the Defendant there. Hardr. 22. Mich. 1655. in Scacc. Stanley v. Pegg.

### [A. b. 1.] Acts of Parliament.

1. In an Action the *Defendant pleaded the Compoſition Act*; the *Plaintiff replied Nul tiel Record*, and upon the Day given to the Defendant to bring in the Record, he produced the printed Statute; Per Holt Ch. J. an *Act printed by the King's Printer is always allowed good Evidence of the Act to a Jury, but was never yet allowed to be a Record without an Exemplification under the Great Seal*, and it muſt be pleaded as exemplified. 2 Salk. 566. Trin. W. 3. B. R. Anon.

2. A *private Act printed among the publick Acts*, hath been allowed in Evidence; Per King Chanc. Trin Vac. 1727.

3. Even a *Private Act* of Parliament *in Print that concerns a whole County*, as the Act of Bedford-Levels, *may be given in Evidence without comparing it with the Record*; Per Holt Ch. J. 12 Mod. 216. Mich. 10 W. 3. at Guild-hall, in Caſe of Dupais v. Shepherd.

4. A *Copy* of an Act of Parliament is no Evidence *unleſs* the Act had been *before allowed of*, and ſo made a Record of this Court, for otherwiſe nothing ſhall be allowed of as a ſufficient Evidence of the Act but the *Exemplification* of it *under the Great Seal*, and the Reaſon is, becauſe the Court is a Party, which cannot *pray Oyer* as the Party may; ſo that the Court would be in a worſe Condition than a common Perſon, if they were to receive for Evidence a Copy offered them. 10 Mod. 126. in Caſe of the Univerſity of Cambridge, cites 35 H. 6. 14. and this was allowed to be ſo per Curiam.

5. *Antient Uſages* for 3 or 400 Years is good Evidence of a Law. If an Act of Parliament be loſt, or embezelled, the Law remains ſtill. 12 Mod. 181. Hill. 9 W. 3. King v. Hewſon.

6. A *printed Copy of a private Act of Parliament, or Ordinance obſolete*, was diſallowed by all the Court to be given in Evidence, unleſs

it had been examined by the Original, Keb. 2. pl. 4. Paſch 13 Car. 2. B. R. Anon.

As by ancient Copies, Tranſcripts, Books, Pleadings, and Memorials, but the Court muſt not admit the ſame to be put in Iſſue by a Plea of Nul tiel Record. Hale's Hiſt. of the Law, 15, 16.

7. Tho' Acts of Parliament, and the Inrollments of them *are deſtroyed by Fire*, or Rebellion, or by the Injury of Time, yet if by any Circumſtances and Proofs they may be manifeſted, they have the Force of Acts of Parliament. Jenk. 280. pl. 5.

8. Act of Parliament produced in Evidence for ſelling Delinquents Eſtates was *ſworn to be examined by the Parliament-Roll, and that it was a true Copy*, before it was admitted to be read in Evidence. Sti. 462. Mich. 1655. in Caſe of Thurle v. Madiſon.

The printed Statute-book is good Evidence of general Statutes, but not of private ones, Tr. per Pais, 232.

9. *Printed Statute* is not Evidence on *Nul tiel Record*; but muſt be *exemplified under the Great Seal*; Per Holt Ch. J. 2 Salk. 566. pl. 5. Trin. 11 W. 3. B. R. Anon.

10. The *Copy* of a private Act of Parliament may be given in Evidence; and if upon *collateral Iſſue* it is to be proved that ſuch a one was *Juſtice of the Peace or Baronet*, &c. common Reputation is ſufficient Proof, without ſhewing the Commiſſion or Letters Patent of the Creation. L. E. 89. pl. 12. cites Tr. per Pais, 226. 3 Jac. 2.

11. A printed *Copy* of an Act of Parliament is not to be given in Evidence, if *not examined by the Rolls, and ſworn to* be a true Copy. L. E. 89. pl. 13. cites Tr. per Pais, 232. 3 Jac. 2.

12. A private Act that concerned *Rocheſter Bridge*, tho' printed by Raſtal, was not allowed in Evidence, *not being examined by the Record*. Otherwiſe of general Statutes; there the printed Statute-Book is good Evidence. L. E. 89. pl. 14. cites Tr. per Pais, 232.

### [A. b. 2] Admiſſion.

1. Finding by ſpecial Verdict or Admiſſion on former Pleading is *good* Evidence, *unleſs the contrary appear*. 1 Keb. 720. pl. 50. Paſch. 16 Car. 2 B. R. in Caſe of Lee v. Boothby.

2. At Guild-hall in an *Action for Work done*, &c. the Plaintiff gave in Evidence to charge the Defendant *a Copy of a Bill delivered to the Defendant, and copyed by the Order of the Defendant*, and diverſe *Exceptions were taken* by the Defendant *to the Bill, ſcil.* Firſt *to the Quantity* of the Work done, and the others were *Marks againſt diverſe Parcels*; ſcil. O and N. intending by it that theſe Parcels were wrought for others, and not for the Defendant, and other Exceptions there were *to the Price*, and he ordered the Servant to *indorſe* upon the Backſide *the Exceptions* to the Quantity and Price, *but to omit the Marks* O. and N. and it was ruled by Holt Ch. J. upon Evidence, Firſt, That this Copy of a Bill delivered was Evidence, as a Copy of a Bill and not a Copy of a Copy, and the Bill is an Original as well as the Book. 2dly, That the *Acceptance of a Bill delivered without Objection but to ſome particulars*, is an Admittance of the Reſidue to be true. 3dly. That the ordering a Copy of the Bill indorſed ut ſupra, omitting the Marks O. and N. and this Copy with the Exceptions being ordered to be delivered to the Plaintiff, it is a *Waving of the Exceptions* ſignified by thoſe Marks. 4thly. Tho' it was objected that this Evidence is a *Confeſſion*, and therefore it ought to be taken together; Yet per Holt Ch. J. they are not Part of a Confeſſion (which ought to be of the ſame Thing) but a

Cavil

Cavil or Objection as to the Price or Quantity, &c. Skin. 672. pl. 11. Mich. 8 W. 3. B. R. Worral v. Holder.

3. In Debt *upon a Bond, Defendant pleaded that he became a Bankrupt, that a Commiſſion was taken*, &c. *and that Bond was given to induce Plaintiff to ſign the Certificate*, and ſo void, &c. Iſſue on this and at the Trial coram Powys at Guild-hall in abſentia Ch. J. *Defendant was held to prove the whole Matter, and he being not able to do it, there was a Verdict pro quer.* but on a Motion for a new Trial, this Verdict was ordered to ſtand as a Security, and a *new Trial was granted, becauſe what they were called upon to prove was admitted by the Iſſue*, which was only whether the Bond was given ea intentione to induce the Plaintiff to ſign the Certificate. Mich. 6 Geo. B. R. Chace v. Lewis.

## [A. b. 3] Affidavit.

1. A Man being about to convey Lands to a Purchaſor made *Oath before a Maſter in Chancery, that there was no Incumbrance on the Eſtate*; In an Ejectment brought, this Affidavit was produced in Court, but not ſuffered to be read but as a Note or Letter, unleſs the Plaintiff would *produce a Witneſs to ſwear that he was preſent when the Oath was taken before the Maſter*. 3 Mod. 36. Mich. 35 Car. 2. B. R. Smith v. Goodier.

2. The Plaintiff or the Defendant may make an Affidavit *in their own Cauſe* depending here, and it may be filed, but it may not be admitted in Evidence in the Trial of the Cauſe betwixt them. L. P. R. 552. cites Mich. 1656.

3. Tho' an Affidavit cannot be read in Evidence, yet if the *Party who made the Affidavit be ſworn, and gives Evidence, his own Affidavit may be read againſt him*; and this is allowable to ſhew in what he contradicts himſelf. Skin. 403. pl. 39. Mich. 5 W. and M. in B. R. the King and Queen v. Rachel Taylor.

4. On Queſtion on a Trial, *whether the Property of a Parcel of Wine was in the Defendant, in order to aſcertain whether Alien or Britiſh Cuſtom was due* for them, a Paper under his Hand, being an Affidavit he had made at the Cuſtom-houſe, was given in Evidence, he ſwearing in it that the Wine was his. Paſch. 4. Geo. B. R.

## [A. b. 4.] Almanack.

1. In Error of a Judgment given in Linn, the *Error aſſigned* was, *that the Judgment was given at a Court held* there *on the 16th Day of Feb. 26 Eliz. and that this Day was Sunday, and it was ſo found by Examination of the Almanacks* of that Year; Upon which it was ruled that this Examination was a ſufficient Trial, and that a Trial per Pais was not neceſſary, altho' it were an Error in Fact; and ſo the Judgment was reverſed. Cro. E. 227. pl. 12. Paſch. 33 Eliz. B. R. Page v. Faucet. Le. 242. pl. 328. S. C. adjudged accordingly, and cites it to have been the ſame in Ld. Catlin's Time in one Robert's Caſe, and that ſo was the Caſe of Galery v. Bunbury.

2. Upon Evidence in a Trial at Bar the Queſtion was, if one was of *full Age* at the Time of his Will made by him; And upon Evidence it appears that he was born the 14th of Feb. 1608. and he made his Will when he was of the Age of 21 Years within two Days; And to prove his Nonage, the Defendant produced an Almanack *in which his Father had Writ the Nativity of the Deviſor*, and it was allowed to be ſtrong Evidence. Raym. 84 Mich. 15 Car. 2. B. R. Herbert v. Tuckal.

3. Tho' in *moveable Terms* the Court is not bound to take Notice on what Day of the Month the Returns are, yet when it is alledged of Record what Day of the Month the Return is, the Court may take Notice of it, and the *Day of Return ſhall be tried by Almanacks* and not per

per Pais, and cites 3 Cro. 227. quod fuit conceſſum per Curiam. Sid. 300. Mich 19 Car. 2. B. R. in Caſe of Courtney v. Phillips.

Ibid. 81. Trin. 2 Ann. in Caſe of Brough v. Perkins, per Holt Ch. J. the S. P. but ſays that the Almanack to go by is that annexed to the Common Prayer Book.

4. The Almanack *is Part of the Law of England, of which the Court muſt take judicial Notice*; per Cur. 11 Mod. 41. Mich. 2 Ann. B. R. in Caſe of the Queen v. Dyer.

[A. b. 5] Antient Deeds.

1. *Deeds before Time of Memory* may be given in Evidence. 2 Sid 146. cites 12 H. 4. 23.

2. The Opinion was, that a *Deed which was before Time of Memory may be given in Evidence, but not pleaded*, which ſee in Avowry, 12 H. 4. 21. For the Plaintiff *in Avowry pleaded Releaſe of the Rent, by H. Son of the Empreſs, then Duke of Normandy, and after pleaded alſo Confirmation thereof by this ſame H. when he was King of England*, viz *H.* 2. and there the Letters Patents of the King (as the ſaid Confirmation) may be pleaded, yet becauſe the principal Deed was a Deed by him when he was Duke and Subject, which cannot be pleaded, becauſe it is before Time of Memory, and cannot be tryed, yet it may be given in Evidence, by which he *pleaded, Hors de ſon Fee, and gave the Deed in Evidence.* Br. General Iſſue, pl. 56. cites 12 H. 4. 21. 23.

3. In *Annuity* they were at *Iſſue upon Traverſe of Preſcription*, the *Plaintiff gave a Deed in Evidence, bearing Date after Time of Limitation*, ſcil. after the Time of R. 1. and the *Defendant would have demurred in Law upon it, and well might per Cur.* by which the Plaintiff would not have it for Evidence, but gave other Evidence. Br. General Iſſue, pl. 55. cites 34 H 6. 36.

4. In the Caſe of a Charter of Feoffment, if all *the Witneſſes* to the Deed are dead (as no Man can keep his Witneſſes alive, and Time weareth out all Men) then a continual and quiet Poſſeſſion for any Length of Time will make a ſtrong or violent Preſumption, which ſtands for Proof; for Ex diuturnitate temporis omnia præſumuntur ſolennitur eſſe acta; Alſo the Deeds may receive Credit per Collationem Sigillorum, Scripturæ, &c. And ſuper fidem Chartarum mortuis Teſtibus, erit ad Patriam de neceſſitate recurrendum. Co. Lit. 6. b.

5. An antient Deed is good Evidence, *without proving or Seal* on it. 1 Keb. 877. pl. 27. Paſch. 17 Car. 2. B. R. Wright v. Sherrard.

6. A Deed *found in Archives of the Chapter* of Hereford, was read to *prove an Endowment* of a Vicaridge, being but concurrent Evidence, tho' it appeared *not* to have been ever *ſealed or delivered.* 2 Keb. 126. pl. 79. Mich. 18 Car. 2. B. R. Smith v. Rawlins.

7. An antient Writing that is proved to have been found *amongſt Deeds* and Evidences of Land, may be given in Evidence, *although the executing* of it *cannot be proved*; for it is hard to prove antient Things, and the finding them in ſuch a Place is a Preſumption they were honeſtly and fairly obtained, and preſerved for Uſe, and are free from Suſpicion of Diſhoneſty. Try per Pais, 2 20. cites 24 Car. B. R.

8. An original Leaſe could not be produced, being an ancient Leaſe, but the Grandſon of the Leſſor produced a *Counter-Part* found among the Evidences of his Grandfather; This was allowed for Evidence, tho' there was *no ſubſcribing Witneſſes to* it; For Juſtice Windham ſaid, he had ſeen many Deeds in Queen Elizabeth's Time without any. Lev. 25. Paſch. 13 Car. 2 B. R. Garret v. Liſter.

As to the Date of the Deed 'tis pleadable

9. Where a Deed before Time of Memory is *ſupported by Uſage, after ſuch Deed is pleadable and good, but that the Books* which ſay Deeds before Time of Memory ſhall not be pleaded, *are to be intended Deeds of ſuch Liberties* and Franchiſes, *as cannot be claimed or ſupported by Uſage in Pais*

*Pais*, as if one claim Goods of *Felo de se* by Deed before Time of Memory, he cannot ſhew his Deed, and ſay Virtute cujus, &c but muſt *ſhew* an antient Confirmation, or a Claim and *Allowance in Eyre*; So in this Caſe, if they had pleaded the Deed, and relied upon it Virtute cujus, &c. it had been naught; but when they ſhew the Deed, and likewiſe a Uſage to ſupport it, it is ſufficient. Skin. 239. pl. 4. Mich. 1 Jac. 2. B. R. James and Trollop.

though Time out of Memory, becauſe it is a private Deed; but Grants of Franchiſes and Liberties, is to be underſtood, whereupon Judgment was affirmed. 2 Mod. 320. 323. S. C.——

must be allowed in Eyre, and ſo my Ld. Roll. in his Abridgment (1 Roll. 649. pl. 8.)

10. An *old Deed* is good Evidence *without any Witneſs to ſwear that it was executed*; Per Holt Ch. J. 3 Salk. 154. pl. 6. Hill. 8 W. 3 B. R. Lynch v. Clerke.

11. Whether the Indorſements on a Bond *by the Obligee, after his Death and after thirty five Years entering into it*, ſhall be given in Evidence at Law to take off an Objection to the Antiquity of the Bond. 8 Mod. 278. Trin. 10 Geo. Serle and Barrington.

[A. b. 6.] Antient Tables of Duties.

1. In the Caſe of Water-Baillage in the City of London, Evidence of conſtant Payment, and their *ancient Tables of Duties* imported, was judged ſufficient, though it was urged there could be no Preſcription for it, and Judgment accordingly for Defendant.—— 2 Show. 48. pl. 33. Paſch. 31 Car. 2. B. R. King v. Carpenter.

[A. b. 7] Apprentices Indentures.

1. 8 *Ann. cap.* 9. *S.* 43. *No Indenture of Apprenticeſhip to be admitted in Evidence, unleſs Oath made, that Duties are paid.*

2. It was ruled by Holt Ch. J. at Summer Aſſiſes at Rigate, 10 W. 3 that the *Service of an Apprenticeſhip ſeven Years beyond the Sea*, though the Defendant was *not bound*, excuſes from the 5 Eliz. cap. 4. Ld. Raym. Rep. 738. Frith v. Torin.

[A. b. 8] Appropriations.

1. A Man had got a Preſentation to the Parſonage of Goſnal in Lincolnſhire, and brought a Quare Impedit, and the Defendant pleaded an Appropriation; there was no *Licence of Appropriation* produced, but becauſe it was ancient the Court would intend it. Said per Hale Ch. J. in 1 Mod. 117. pl. 17. Paſch. 26 Car. 2. Green v. Proude.

[A. b. 9] Arreſt.

1. Where the Iſſue was upon an Arreſt, the Plaintiff demurred upon the Evidence, becauſe the Defendant who pleaded it had not *produced the Proceſs itſelf*, becauſe Matters of *Record* cannot be tryed but by themſelves. Sid. 105. pl. 13. Hill. 14 & 15 Car. 2. B. R. Bryan v. Fitzharris.—It was agreed per Cur. that the Writ ought to have been produced in Evidence; but by the Demurrer the Arreſt (being Matter of Fact) is confeſſed, tho' it be ſuch Matter of Fact as is to be proved by Matter of Record, and the Jury might know of their own Knowledge that there was a Writ, and the Judgment was affirmed. Lev. 87. Fitzharris v. Bojen. S. C.

[A. b. 10] Aſſault.

1. In Treſpaſs of Aſſault, Battery, and Wounding, the Defendant pleaded the Plaintiff began firſt, and the Stroke he received, whereby

he loſt his Eye, was on his own Aſſault, and in Defence of the Defendant; and on Trial at the Bar now by Evidence it appeared the Plaintiff threatned the Defendant, and ſaid, *Were it not Aſſiſe Time he would tell him more of his Mind*, which was ſaid *bending his Fiſt, and with his Hand on his Sword*; Yet per Cur. this is no Aſſault, as it would be without that Declaration; but it was farther ſworn, that the Plaintiff *with his Elbow punch'd the Defendant*, which if done *in earneſt Diſcourſe, and not with Intention of Violence*, is no Aſſault, nor then is it a Juſtification of Battery after a Retreat, as Phineas Andrew's Caſe; And the Jury not believing the Defendant, found for the Plaintiff, and gave 500*l.* Damages; 2 Keb. 545. pl. 13. Mich. 21 Car. 2. B. R. Turbervile v. Savadge.

2. In Action of Battery, which was laid in the Declaration to be the 18th Day of February 1621. Defendant pleaded Son Aſſault demeſne, &c. and at Iſſue upon that, and Defendant *proved an Aſſault by the Plaintiff, but another Day*, and ruled that this doth not prove this Iſſue for the Defendant, becauſe the Juſtification ſhall refer to the Time laid in the Declaration, if the Defendant do not difference the Times in his Plea; and in ſuch Caſe, when the Defendant intends to ſhew the Aſſault was at another Day and Place, he ſhall ſhew that ſuch a Day before that in the Declaration, as here 8th February the Plaintiff did him aſſault, and would have beaten him, and *traverſe the Day in the Declaration*. Clayt. 110. pl. 187. March, 24 Car. Turner Serjeant, Judge of Aſſiſe, Hardcaſtle v. Lockwood.

3. *But* ſee in the Caſe of an *Officer*, who is not tied up to ſpecial Pleading, it ſeems he upon Not Guilty *may vary in his Evidence to juſtify from the Time in the Declaration*, &c. Quod nota. And the Prejudice may come to the Plaintiff's being unprovided perhaps in ſuch Caſe to a Reply; whereas when the Matter is by Pleading brought to a ſpecial Iſſue, he knows his Work, &c. Clayt. 110. 24 Car. Hardcaſtle v. Lockwood.

### [A. b. 11] Attorney's Bill.

1. Attorney's Bill, though *not ſigned*, is Evidence for his Executors, as well as for himſelf, and perhaps ſeveral of the Things could not in their Nature be proved by Record; Per Holt. Cumb. 348. Mich. 7 W. 3. B. R. Blackeler v. Crofts.

### [A. B. 12] Belief.

Vid. Tit. Apportionment. (A) Worth v. Viner.

1. It is *no Satisfaction for a Witneſs to ſay, that he thinks or perſuades himſelf*, and this for two Reaſons, by Coke; 1ſt. Becauſe the Judge is to give abſolute Sentence, and ought to have more Ground than thinking. 2d. That *Judges, as Judges, are always to give Judgment ſecundum allegata & probata*, notwithſtanding that private Perſons think otherwiſe. Dy. 53. b. Marg. pl. 15. Mich. 19 Jac. in the Star-Chamber. Adams v. Canon.

### [A. b. 13] Beyond Sea. Things done there.

S. C. cited by Holt Ch. J. 2 Ld. Raym. Rep. 935. Trin. 2 Ann.

1. A *Ship* was *Dutch built*, and after *made an Engliſh* Ship, the *Maſter was Dutch, ſome of the Seamen Engliſh, and two Dutch*; There being a *War betwixt the French and Holland*, the *French* ſeize the Ship as a Dutch Ship, and *condemn her as a Dutch Ship* in the Court of Admiralty in France; ſhe is there ſold, and after coming into England, the firſt Owner ſeiſes her, and the other brings Trover, and a ſpecial Verdict was found; but the Court would not ſuffer it to be argued, but ordered Judgment to be entered for the Plaintiff; for they ſaid, that *Sentences in*

*in the Courts of the Admiralty ought to bind* generally according to Jus Gentium; and that if we did not obſerve the Sentences given abroad, they would not obſerve ours, which would be a general Inconvenience; And if the Merchant in this Caſe had received Wrong, he ought to *apply to the Admiralty and Council.* this being a Matter of Government; and that the King, if he ſaw Cauſe, would ſend an Ambaſſador Lieger into France, who would take Care that Right ſhould be done; and that if Right be not done, then the King would grant Letters of *Marque and Repriſal*; and in this Caſe they remembred Cottinton's Caſe. Skin. 59. Mich. 34 Car. 2. B. R. Hughes v. Cornelius.

2. Leſſor brought *Debt for Rent* againſt Leſſee *upon a Demiſe at London of Lands in Jamaica*, which was held to be well, being founded on the Privity of the Contract, which is tranſitory; but if a foreign Iſſue, which was local, ſhould happen, it may be tried where the Action is laid, and there may be a Suggeſtion on the Roll for that Purpoſe, that ſuch a Place in ſuch a County is next adjacent, and there it may be tried by a Jury from that Place according to the Laws of that County, and upon Nil debet pleaded you may give the Laws of that Country in Evidence. 2 Salk. 651. pl. 31. Trin. 3 Ann. B. R. Way v. Yalley. 3 Salk. 381. pl. 3. Way v. Gally, S. C.—6 Mod. 194. S. C. held accordingly; and the Defendant upon Nil debet may give Entry, &c. or the Law of the Country in Evidence, if there was ſuch an one, i. e. (that the Houſe being burnt it ſhould be rebuilt, and a Reparation made to the Leſſor by Act of State) and this we ſee every Day done before Committees of Appeals from thence. In an Action of Impriſonment brought here againſt the Governor of Jamaica for an Impriſonment, there the Laws of the Country were given in Evidence.

3. In Trover and Converſion, the *Cuſtom of India was found concerning the Buying and Selling of Slaves*, and it was held that the Action would lie well enough. Freem. Rep. 452. pl. 616. Trin. 1677. B. R. Anon.

4. To prove a Delivery of Goods to the Defendant, *an Exemplification of an Entry made in the Cuſtom-Houſe of Rotterdam, and atteſted by a Publick Notary, and ſealed with the publick Seal there was offered in Evidence, but the Court would not admit it.* 8 Mod. 75. Paſch. 8 Geo. the King v. Maſon.

5. Per Ld. Chan. Mich. 10 Geo. *Where a Suit is for a Debt or other Thing, a Sentence in another Country is not binding*; but the Court here muſt examine into the Matter, in Order to form a Judgment; Contra, where the Suit here is in Order to carry that Sentence into Execution, for then the Proceedings here are founded upon the Sentence, and not upon the Debt.

6. *Exemplification* of a *Sentence* given in a *foreign Country*, ſhall be read as Evidence here to prove that ſuch Sentence was given there without any further Proof. 9 Mod. 66. Mich. 13 Geo. Anon.

7. *Copy* of *an Agreement regiſtered in Holland*, and *atteſted* by a Publick Notary there, may be given in Evidence for Defendant, eſpecially ſince he proved that the Plaintiff took out another Copy of the ſame Agreement, and would not now produce it, ſo he knew the Agreement, and could not be ſurprized. 8 Mod. 322. Mich. 11 Geo. Walrond v. Van Moſes.

8. *Affidavit by a Plaintiff in Holland atteſted* by a Publick Notary, ſhall be admitted as good Evidence to *hold Defendant to ſpecial Bail here.* 8 Mod. 323. Mich. 11 Geo. Walrond v. Van Moſes.

9. A. draws a *Bill of Exchange on B. who is Reſident at Leghorn*, payable to C. three Months after Date; *the Bill is negotiated through ſeveral Hands, and indorſed to one who lived at Leghorn.* B. accepts *the Bill*, and about a Week afterwards B. had Advice, that *A. had eſtopped Payment*, and he refuſed to pay, *and by a Suit in Court at Leghorn, B. got a Sentence to be diſcharged from the Acceptance and Payment. He brought a Bill for Injunction and was relieved, and he inſiſted upon the Sentence at Leghorn.* Cases in Chan. in Ld. King's Time, 69. S. C.

Mich.

Mich 13 Geo. per Ld. Ch. King, the Court at Leghorn had Jurisdiction of the Thing, and of the Person, and he cited the Case of a Person that committed Murder in Portugal, and was tried there and acquitted, and afterwards upon a Prosecution here on Statute H. 8. he alleged the former Trial, and it was allowed. v. the Case of the Admiralty Jurisdiction in R. A. b. A Suit is for Seamens Wages in the Admiralty, and there is a Dismission, this allowed on Non Assumpsit at Law; Objected, that this Sentence was Matter proper for Defence at Law, and that the Sentence was wrong in itself, not sufficient Proof there of A's Insolvency, but by Certificates of three Merchants, which is no Proof here, that this was of Acquittal of Acceptors, for Insolvency of the Drawer is not the general Law of Merchants, nor local at any other Place; But Ld. Ch. thought he was bound by Sentence, and he relied upon the Sentence, and perpetual Injunction granted; he said, that when he was Ch. J. he always allowed foreign Sentences to be given in Evidence. Debt contracted in Holland by Work done, the Party comes here, he shall be liable according to the Civil Law, and Bill and Relief. Mich. 13 Geo. Canc. Burrows v. Temineaw.

[A. b. 14] Bill and Answer in Chancery.

1. The Infant Guardian's Answer in Chancery of a *Feoffee in Trust*, was refused by the Court to be given as Evidence; Because he was *living, and not Party to the Suit*, which was only between the Heir, and Cestui que Trust Keb. 281. pl. 83. Pasch. 14 Car. 2. B. R. Anon.

2. *Allegations by a Complainant in a Bill in Chancery shall by a Copy be made Use of as Evidence against the Complainant in a Suit at Law*, for it shall be intended to be exhibited by his Consent and Privity; But per Bridgman, there is a Difference *when there is a Proceeding upon such Bill*, and when not; for in the first Case, it shall be admitted in Evidence, but in the second not. If Bill be preferred sans Privity of the Plaintiff, an Action lies. Sid. 221. Mich. 16 Car. 2. B. R. Snow v. Phillips.

3. Bill in Chancery allowed in Dom. Proc. as Evidence *to confront a Woman who pretended Marriage.* Parl. Coll. n. 88.

Not good Evidence against his Alienee. 1 Salk 286.

4. An Answer in an English Court is good *Evidence to a Jury against the Defendant himself, but not against other Parties*, yet it is not binding to the Jury. Godb. 326. pl. 418. Pasch. 21 Jac. B. R. Anon.

—— 1 Mod. 301.— 6 Mod. 44. Mich. 2 Ann. B. R. in Case of Ford v. Ld. Grey.——

5. If the Plaintiff *will read the Defendant's Answer in Chancery* against him in Evidence, the *Defendant may likewise take Advantage thereof*; For all is Evidence, or none. 3 Salk. 154. Hill. 8 W. 3. B. R. per Holt Ch. J. Lynch v. Clerke.

6. An Answer in Chancery cannot be given in Evidence, for the Party who made it, or against a *third Person not deriving any Title under him.* 8 Mod. 181. Trin. 9 Geo. Hilliard v. Phaley & al.

(A b. 15.) Books.

1. *Scrivener's Book* to prove a *Consideration paid* (as a *Tradesman's Book*) is no Evidence for himself, but for any other it is; so a Tradesman's Book after his Death.—We have allowed a *Bursar's Book* of a College for Evidence, per Holt. Cumb. 249. Pasch. 6 W. and M. in B. R. Smart v. Williams.

2. Per Holt. The Book of a Man that keeps *regular Entries*, might be Evidence for him. Cumb. 348. Mich. 7 W. 3. B. R. Blackeler v. Croft's.

3. *Shop*

3. *Shop-Book* allowed as Evidence on Proof of the *Servant's Hand* that entered it, and that was uſed to make the Entries, (he being dead) and no Proof was required of the Delivery of the Goods; And per Holt Ch. J. tho' the Statute 7 Jac. 1. 12. ſays, a Shop-Book ſhall not be Evidence after the Year, &c. It is not of itſelf Evidence within the Year. 2 Salk. 690. pl. 2. Hill. 11 W. 3. Pitman v. Maddox in Middleſex. —— 1 Salk. 285. Price v. Ld. Torrington.

4. Ordered that the *Regiſter-Books of a Dean and Chapter* ſhould be made uſe of at a Trial, for they are Publick Books. Comb. 247. Paſch. 6 W. and M. in B. R.

So of *Tranſfer Books* of the E. India Company, &c. For they are the Books of a publick Company, and kept for publick Tranſactions in which the Publick are concerned, the Books are the Title of the Buyers of Stocks by Act of Parliament. 7 Mod. 129. Hill. 1 Ann. B. R. Gery v. Hopkins.

5. Evidence of *Beer delivered* was thus, the Draymen came every Night to the Clerk of the Brewhouſe, and gave him Account of the Beer they had delivered out, to which the *Draymen ſet their Hands*, and that the Drayman was dead, but that his Hand was ſet to the Book; And that was held good Evidence of a Delivery. 1 Salk. 285. pl. 18. Trin. 2 Ann. Coram Holt Ch. J. at Niſi Prius at Guildhall. Price v. the Earl of Torrington. 2 Ld. Raym. Rep. 873. S. C. held accordingly by Holt Ch. J.

6. *Shop-Book* of itſelf ſingly without more is not ſufficient; Ut ſup.

7. How far *Entries in a Treaſurer's Books* ſhall not be allowed to be Evidence *againſt the Partners whoſe Treaſurer he is*. Barnard. Chan. Rep. 417. Hill. 1740. Smith v. the Duke of Chandois.

8. If an Action be brought by a *Shop-keeper* for Money due on Sale of Goods, we never inforced him to produce his Books; but if very ſlender Evidence be with him, then if he will not produce his Books, it brings a great Slur upon his Cauſe. Per Cur. 6 Mod. 264. Mich. 3 Ann. B. R. in Caſe of Ward v. Apprice.

9. A Church-Book *was given in Evidence, to prove the Nonage of the Plaintiff, at the Time of a Leaſe made by him*; and Judgment for the Plaintiff. Cro. E. 411. pl. 1. Mich. 37 & 38 Eliz. B. R. Vicary v. Farthing. Mo. 451, 452. pl. 616. S. C.——

10. The Plaintiff exhibited his *Bill* in the Exchequer *for Tithes of Houſes in the Pariſh of St. Hellen's in London, according to the Statute* 37 *H.* 8. the Defendants in their Anſwer ſet forth a cuſtomary Payment in Lieu of all Tithes, and thereupon a Trial was directed at Law; and now the Plaintiff exhibited another Bill *againſt the Pariſhoners, that the Leiger-Book in their Cuſtody might be produced in Evidence at a Trial*, which Book concerned him, as well as the Pariſh; and upon a Demurrer to this Bill, becauſe it was only to provide himſelf of ſupplemental Evidence after hearing the Cauſe, it was decreed, that the Demurrer was ill, becauſe the Bill was to have ſupplemental Evidence in the ſame Cauſe, and in the ſame Way of Proceeding, but collateral to it, viz. at a Trial at Law, beſides theſe are common Evidences for both Parties, they are like Court-Rolls, which belong as well to the Tenants as to the Lord of the Manor, and therefore they may bring a Bill to have the Uſe of them. Hardr. 18c. Paſch. 13 Car. 2. in Scacc. Langham v. Lawrence.

11. The *Entry of the Names and Titles of Perſons in a Church-Book, either for Marriages or Births*, (though not forged) cannot be poſitive Evidence of the Marriage or Birth of any Perſons, unleſs the Identity of the Perſons by ſuch Entries intended are fully proved, and alſo ſtrengthened with Circumſtances, as Cohabitation, the Allowance of the Perſons themſelves, &c. Draycot v. Draycott. Parl. Coll. n. 88.

12. *Survey Books of a Manor*, which are antient, *unleſs ſigned by the Tenants, or they appear to be made at a Court of Survey* are no Evidence; they *are* elſe *only private Memorials*; Per Baron at Exon. Summer 1719.

13. But *old Court-Rolls* are Evidence. So *Rentals, or Accounts of Money received by the Steward* were allowed at Winchester and Dorcheſter Aſſiſes, Lent 1719. coram King Ch. J.

14. *But Rentals without Money received and paid upon them are* nothing, but Payment makes them of Effect. Ibid.

15. A *Corporation Book* was offered in Evidence *to prove* at the Aſſiſes *a Member of the Corporation not in Poſſeſſion and refuſed.* 1 Salk. 288. pl. 26 Paſch. 7 Ann. B. R. Wright v. Sharp.

16. The Books *of a Corporation, containing their publick Acts* are very proper Evidence, yet *ſome Account ought to be given of them by whom kept*, &c and a Book ſent in 1707. during the Mayoralty of Sharpe, and Entries made therein by him, or by his Party in the Corporation of Elections and other publick Acts, but not produced by the Town-Clerk, &c. were diſallowed, and this was agreed per Cur. B. R. on Motion for a new Trial; it looks as if the Book was made for a particular Purpoſe, there being no other Acts entered in it by the proper Officer, nor any Acts but of this Mayor only who has been adjudged no Mayor; Yet their common Books are Evidence in regard they contain a Regiſter of their publick Tranſactions. Paſch. 4 Geo. B. R. Caſe of Thetford.

2 Sid. 8. The Leger of a Priory was Evidence to prove right of Fiſhery. Mich 1657. B. R. in Caſe of the Aldermen of London v. Haſting.

17. In a Caſe between Dr. Bennet and Inhabitants of Cripple-gate, the *Pariſh-Books* were admitted as Evidence both for the Plaintiff and Defendants, as alſo *Books belonging to the Dean and Chapter of St. Paul's, in which were entered Leaſes made by the Predeceſſors of the Leſſor's Vicars of Cripplegate.* In this Caſe the Court of B. R ordered Plaintiff ſhould have an Inſpection of the Pariſh Books, and Copies of what he pleaſed. Coram. Prat Ch. J. Hill. 5 Geo. apud Guild-hall.

7 *Jac.* 1. 12. *None keeping a Shop-Book, his Executors or Adminiſtrators, ſhall be allowed to give it in Evidence for Wares or Work above one Year before the Action brought, unleſs they have obtained a Bond or Bill for the Debt, or brought an Action thereupon within one Year after the Wares delivered, or Work done.*

*This Act ſhall not hold Place between Merchant and Merchant, Tradeſmen and Tradeſmen, or Merchant and Tradeſmen, for any Thing falling within the Compaſs of their mutual Trades and Merchandice.*

*Provided always, that this Act, or any Thing therein contained, ſhall not extend to any Intercourſe of Traffick, Merchandizing, Buying, Selling, or other Trading or Dealing for Wares delivered, or to be delivered, Money due, or Work done, or to be done, between Merchant and Merchant, Merchant and Tradeſman, or between Tradeſman and Tradeſman, for any Thing directly falling within the Circuit or Compaſs of their mutual Trades and Merchandize; but that for ſuch Things only, they and every of them ſhall be in Caſe as if this Act had never been made, any Thing herein contained to the Contrary thereof notwithſtanding.*

18. At Guild-hall; *In Ejectment for* a *Meſſuage in London*, it was objected againſt the Title of the Plaintiff, that this was a Meſſuage *above* 40 *l. per Ann.* Rent, and that the Cuſtom of the City is, that there ought to be *Warning given* for the Space of Half a Year where the Meſſuage is of ſuch a Rent, and by the Space of a Quarter of a Year, where it is under ſuch a Rent; and an *antient Book in French* was produced *in which*

*which such Custom was registered*; the which was allowed to prove the Custom. Skin. 649. pl. 7. Trin. 8 W. 3. B. R. Tyley v. Seed.

19. A *Shop Book* was allowed as Evidence in Indebitatus Assumpsit on a Taylor's Bill, it being proved, *that the Servant that writ the Book was dead, and this was his Hand, and he accustomed to make the Entries, and no Proof was required of the Delivery of the Goods*; and the Ch. J. said, it was as good Evidence as the Proof of a Witness's Hand to an Obligation, and held, that though 7 *Jac. cap.* 12. *says, that a Shop-Book shall not be Evidence after the Year, &c.* that *it is not of itself Evidence within the Year.* 2 Salk. 690. pl. 2. Hill. 11 W. 3. Pitman v. Maddox. Ld. Raym. 732, 733. S. C. held accordingly.

20. The *Book of* any *Merchant* is no good Proof, nor may be allowed to be read touching any Debt due to him; but as to any Debt against himself it may be good enough. Keb. 27. in pl. 68. Pasch. 13 Car. 2. B. R. cited by Twisden, as the Case of Lee v. Lee, and this was agreed by the Court.

21. *Shop-Books* have sometimes been allowed to be read as Evidence at the Hearing, and sometimes rejected. Toth. 91. Cary's Rep. 45.

22. In Evidence to a Jury, Twisden observed a Case between Lee and Lee, that the Book *of any Merchant* is no good Proof, nor may *not be allowed* to be read *touching any Debt due to him, but* of any Debt *against himself* it may be good enough; which was agreed per Cur. Keb. 27. pl. 78. Pasch. 13 Car. 2 B. R. Crouch v. Drury.

23. Where a Man is *charged only by an Oath or Book, the same shall be his Discharge*, especially where *the Parties are dead* which amounted to *Length of Time*, which was held a good Reason for allowing it; As where an Executor had kept a Book of Accounts, relating to her former Husband's Estate, and then she married R. and the same was kept and continued on; And R. going Governor Abroad, she went with him, as did the Servant that kept the Book of Account, and it was *proved, that the Book was made up from Vouchers*, and had paid great Part of the Monies, and the Witnesses believed all the Monies paid, and Plaintiff charged Defendant only by the Book; Decreed per Ld. Wright. Mich. 1701. Abr. Equ. Cases. Darston and Earl of Oxford v. Executors of Colonel Russell. Where Books were lost in the Earthquake at Smirna, so that Plaintiff could charge Defendant only by Defendant's own Books, the same Books were admitted to be his Discharge. Abr. Equ. Cases. 10. cited as then lately adjudged, in Case of Mellish v. Turner.

24. A *printed Book being an Inventory of the Estate of late South-Sea Stock*, which was *directed to be made by an Act of Parliament*, and to be left with one of the Barons of the Exchequer, and published by the Speaker was allowed as Evidence per King Chan. Trin. Vac. 1727.

25. Pasch 6 W. & M. B. R. it was said, per Curiam, that a *Shop-Book* is *not Evidence for the Tradesman, but is good* Evidence *against him*, or for a Stranger. The same Law of a Scrivener's Book for Money paid by him, or received to the Use of a Stranger, or the Book *of a Burjer of a Colledge*. Ex Relatione Magestri Place. Ld. Raym. Rep. 745. Anon.

## (A. b. 16) Certificates.

1. In *Debt against Sheriff of* Bucks, *for the Reward* given by the Statute 6 & 7 *W. & M.* to those that should discover and *convict Clippers and Coiners*. Note; Here Plaintiff had a *Certificate from my Lord Ch. J. Holt*, who tried the Malefactor, of his having been convicted on the Plaintiff's Evidence, which being produced, though under my Lord's Hand, yet it was *proved by my Lord's Clerk to the Jury*. 12 Mod. 310. Mich. 11 W. 3. Bignoll v. Rogers.

2. The

2. The Certificates *of Clerks of Aſſiſe or Peace* is made ſufficient Evidence of a Perſon's *being convicted and ordered for Tranſportation*, ſo as to make him guilty of Felony without Benefit of Clergy for returning. 6 Geo. 20. S. 7.

[A. b. 17] Chancery. Proceedings there.

1. An *Anſwer* in Chancery may be given in *Evidence to a Jury againſt the Defendant himſelf*, but not againſt other Parties; Per Ley Ch. J. Chamberlain and Doderidge J. Godb. 326. pl. 413. Paſch. 21 Jac. B. R. Anon.

2. A Bill in Equity in the *Court of Wards* was exhibited *againſt* two Defendants, *one* of them in his Anſwer *claimed a Title, but the other did not, but ſet forth ſeverol Things in his Anſwer to make out the Title of the other Defendant*, and *in Action between other Parties concerning the ſame Title, it was moved that this Anſwer might be given in Evidence, but it was denied*; but by Chamberlain J. his Anſwer might be given in Evidence againſt himſelf. 2 Roll. Rep. 311. Paſch. 21 Jac. B. R. Berifford v. Philips.

Upon producing the Anſwer it was objected, that it could not be read, not being taken off the File, but only in Cuſtody of one of the ſix Clerks; but Powel J. ſaid it might be read on ſwearing the ſix Clerk, and ſo it had always been held. 11 Mod. 276. pl. 25. Hill. 8 Ann. B. R. Riley v. Adams.

3. *Defendant's Anſwer in an Engliſh Court* is a good Evidence to be given to a Jury *againſt Defendant himſelf*, but not againſt others. Godb. 326. pl. 418. Paſch. 21 Jac. B. R.——If Defendant's Anſwer be read to the Jury, it is not binding to the Jury, but it may be read unto them by the Aſſent of the Parties. Ibid.

4. In Hilary Term, 22 Jac. a *Commiſſion iſſued to examine Witneſſes returnable in Eaſter Term following*; the Commiſſioners *began to examine on Monday* the 28th of March 1625. *which was the Day after the Death of the King, and continued examining till Friday following*, and then, and not before, *they had Notice of the Demiſe of the King*, yet it was adjudged that the Depoſitions ſhould ſtand, eſpecially it being in a Court of Equity, where the Proceedings are De Jure Naturali, and not by the ſtrict Courſe of Law; And if any Witneſſes examined on ſuch Commiſſion ſhould be perjured, he might be puniſhed by the Statute 5 Eliz. cap. 9. For being examined before Notice of the King's Demiſe, what they did was legal. Cro. C. 97. pl. 24. Mich. 3 Car. C. B. Crew v. Vernon.

Nelſ. Chan. Rep. 74. S. C. decreed. —S. C. cited, 2 Vern. 57 Paſch. 1688.

5. *Payment by Decree in Chancery* is not pleadable at Law, or to be given in Evidence there, and in ſuch Caſe a Bill in Equity is the proper Remedy. 3 Chan. R. 3. 13 Car. 2. Jones v. Bradſhaw.

6. By Twiſden, *decreetal Order under* the *Seal* of the Exchequer, *which recites all the Proceedings, or Exemplifications, &c.* under the Great Seal hath been allowed to be read as Evidence; *but* by Aleyn not *unleſs it have the Bill and Anſwer*, which Windham agreed. But by Twiſden, where the Decree is produced *only in Paper*, then the Bill and Anſwer ought to be adjoined, but not ſo when the Decree is under Seal. And in C. B. Stiff v. Stiff, the Judges admitted a Decree to have been under Seal; and yet would not allow it without Bill and Anſwer. And by Aleyn, it is uſual to diſallow ſuch Decrees, but an Exemplification of the Chancery, Per Cur. always recites the Bill and Anſwer. Moreton Serjeant ſaid, he never did ſee the Seal of any Court denied to be given in Evidence. 1 Keb. 21. pl. 62. Paſch. 13 Car. 2. B. R. Trowel v. Caſtle.

7. At

7. At hearing the Cauſe, the Plaintiff offered to give in Evidence *a Bill formerly exhibited* againſt him by the now Defendant; It was objected, that it ought not to be given in Evidence, unleſs it was proved that it was exhibited *by the Order, Direction, and Privity* of the Defendant; for any Man may file a Bill in another's Name, and the Court was of the ſame Opinion. N. Ch. R. 102. 16 Car. 2. Woollet v. Roberts

8. It was objected, that a *Bill in Chancery* is no Evidence, becauſe it only contains Matter ſuggeſted perhaps by a Counſel or Solliciter, without the Privity of the Party; but per Cur. after Debate the Copy of the Bill againſt the ſame Party, it was admitted as Evidence; for they ſaid they would not intend that it was preferred without the Privity of the Party, and if it was, he had good Remedy againſt them that ſo preferred it by Action for Caſe, but they ſaid that this Evidence is not ſo valid as a Letter of the Party and Note; and it was not urged, that the *Defendant had anſwered in Chancery, and they had proceeded upon it*, which, as it ſeems to me, is the better Reaſon why it ſhall be allowed to be Evidence, for the Proſecution of the Plaintiff takes away that Objection, that it might have been preferred without his Privity by a Stranger. And the Sittings after the Term, at Guildhall London in C. B. where I was a Counſel, when a Bill in Chancery was offered as Evidence, Bridgman Ch. J. demanded if there had been any Proceedings upon it, otherwiſe he would not allow it; and becauſe the Anſwer to the Bill, and other Proceedings upon it were ſhewn, it was allowed for Evidence. Sid. 221. pl. 8. Mich. 16 Car. 2. B. R. in Caſe of Snow v. Phillips.

9. A *Bill in another Cauſe* is no Evidence againſt the Plaintiff in it, unleſs it be proved to be exhibited with his Privity. Chan. Caſes 64. Hill. 16 & 17 Car. 2. Woollet v. Roberts.

10. In Evidence in a Trial at Bar by Leaſe of one Wright, an Anſwer of one Lewis Mordant ſurviving Truſtee, under whom the Plaintiff claimed, was offered, but being after a Conveyance made by him the Court refuſed; but had it been before, per Windham and Moreton, it would be good againſt all claiming under him; which Twiſden denied, becauſe *an Anſwer* doth not diſcover the whole Truth, and therefore *ſhall be admitted only againſt the Party himſelf that made it, and not of one Defendant againſt another, much leſs againſt a Stranger.* 2 Keb. 424. pl. 57. Mich. 20 Car. 2. B. R. Mills v. Barnardiſton.

12. Upon Trial of a Title of Land, a *Bill in Chancery* was given in Evidence *againſt the Complainant*, tho' it was held to be of ſlight Moment. Vent. 66. Paſch 22 Car. 2. B. R. Mews v. Mews.

It is no Evidence againſt the Party that prefers it. Gilb. 197.

pl. 9. Hill. 4 Geo. 2. B. R. Ferrers v. Shirley.

13. It was ſaid that a *voluntary Affidavit before a Maſter in Chancery* cannot be given in Evidence at a Trial. Sty. 446. Paſch. 1655. Anon.

14. The *Defendant obtained an Injunction* in this Court; the *Defendant* moves to diſſolve it, and *obtained an Order to diſſolve it; before the Order was drawn up the Defendant arreſts the Plaintiff*; and it was held clearly that this was a Contempt to the Court, and the Defendant was ordered to be committed; for *it is no Order till it is drawn up and paſſed by the Reſtiſter*, for the Regiſter's Minutes are only a Warrant for an Order, and no Order. 2 Freem. Rep 46. pl. 51. Mich. 1679. in Curia Canc. Anon.

15. An Anſwer in Chancery is Evidence of a Deed *againſt all that claim under that Perſon*, and Reputation of claiming ſo is ſufficient to put a Party upon ſhewing another Title. Ld. Raym. Rep. 311. Hill. 9 Will. 3. the Earl of Suſſex v. Temple.

At a Trial at Bar an Answer in Chancery, tho' not sworn, was given in Evidence, because it was proved to have been filed in the six Clerks Office. 12 Mod. 231. Mich. 10 W. 3. Anon.

16. *Answer in Chancery* is not to be admitted as Evidence at Common Law, unless *proved to be sworn by him against whom it is produced.* 2dly. It ought to appear that *that Part* of it which is *given in Evidence* be *pertinent to the Matter contained in the Bill*, for else it shall be accounted void and superfluous; Per Holt Ch J. at Guild-hall, Cumb. 473. Pasch. 10 W. 3. B. R. Kingston v. Read.

17. The Plaintiff proving his Pedigree would have given in Evidence the *Answer of an Infant by his Guardian to a Bill in Chancery*, but it was held it could not be read. Cumb. 156. Mich. 1 W. & M. Eccleston v. Speke.

But against Alienor himself it may be Evidence. 1 Salk. 286.

18. A Man makes an *Answer in Chancery* prejudicial to his Title, and after conveys away his Estate, this Answer cannot be read against the *Alienee* by any claiming under Alienor. 6 Mod. 44. Trin. 2 Ann. B. R. Ford v. Ld. Grey.

A Decree in Chancery, or other Court of Equity, is no Evidence in a Court of Common Law, as in Walsingham's Case. 2 Sid. 75. Pasch. 1658. Marret v. Sly.

19. An *Order of Chancery* is not to be given in Evidence, *without producing a Copy of the Bill* on which it was made. 6 Mod. 149. Pasch. 3 Ann. B. R. Turner v. Nurse.

20. A *Decree between other Parties* may be read as a Precedent, tho' not as Evidence. January 23d, 1717. MSS. Tab. Austin v. Nichols.

(A. b. 18.) Chirograph of a Fine.

1. Chirograph of a Fine *may be given in Evidence* to a Jury. Pl. C. 410 b. Mich. 13 & 14 Eliz. Newys v. Scholastica.

2 Sid 145. Hill 1658. S P. by Wherington Ch. B. in delivering the Opinion of the Court; but he said it cannot be deliver'd in Evidence.

2. Chirograph of a Fine is of so high a Nature that *no Parol Evidence shall be allowed to falsify it*; Admitted Arg. 10 Mod. 42. Mich. 13 Ann. B. R. in Lord Say and Seal's Case.

(A. b. 19.) Circumstances.

And. pl. 20. 42. Thorne v. Rolfe. 8. C. —

1. *De Morte Viri*, in Case of Dower brought by the Wife after the Husband had been *absent 7 Years beyond Sea*, may be by *Circumstances*; and in such Cases, Qui melius probat, melius habet. D. 185. a. Pl. 68. Pasch. 2 Eliz. Thorn alias Thorp v. Rolf.

2. A Man has 2 Manors of D. and levies a *Fine* of the Manor of D. *Circumstances* may be given in Evidence to prove what Manor he intends. Trial (Y. e. 3) Pl. 11. cites 6, 7 E. 685. per Montague, and 12 H. 7. 6.

3. Circumstantial Evidence ought *never* to be *admitted where better may be had, ex Natura Rei*, because Circumstances are fallible and doubtful, and it is upon this reason that a Copy of a Record is good, because one cannot have the Record itself; but a Copy of a Copy will not do. Arg. 12 Mod. 500. Pasch. 13 W. 3. Dillon v. Crawley.

(A. b. 20.) Collateral Warranty.

1. Where a Collateral Warranty binds, this may well be given in Evidence; for although it does not give a Right, yet in Law this shall *bar and bind a Right*. T. per P. 157. cites Lib. 10. 97.

2. A Col-

2. A Collateral Warranty *may be taken Notice of as well by Evidence as by rebutting.* Per Powell J. 11 Mod. 103. Pl. 9. Mich. 5 Ann. B. R. Smith v. Tindall.

(A. b. 21.) Compariſon of Hands.

1. In Debt upon a Bond upon Iſſue of Non eſt factum, if Plaintiff prove the *Witneſſes dead beyond Sea*, or that he has *made ſtrict Enquiry after* them, *and cannot hear of them*, he ſhall be let in to prove their Hands; Per Holt, Ch. J. at Niſi Prius, 12 Mod. 607. Mich. 13 W. 3. Annon.

2. A *Parſon's Book between 1645 & 1654 was produced, to prove a Modus in the Pariſh of H. one Saunders Rector*, and to prove that this was his Hand-writing and his Name to it, *one P. ſaid he had examined the Pariſh-Books of that Kind, where Saunders's Name was as Rector, and therefore believed the Name on the Book was the Writing of Saunders*, this was allowed to be read, becauſe the Pariſh-Books was not in the Plaintiff's Power to produce, *and he alſo proved that one R. in Diſcourſe with Plaintiff had diſcovered to him, that he had theſe Papers from the Hands of one G who was Saunders's Daughter, and ſaw that delivered to Plaintiff, and R. was dead.* Per Lord Chanc. 6 Dec. 1736. in Canc.

(A. b. 22.) Condemnation of Goods ſeiſed.

1. Trover for a Parcel of Brandy, coram Baron Price at Bodmyn, T. Vac. 1716, an Information in the Name of the Attorney-General in the Exchequer, and an Acquittal thereupon, and a Judgment were given in Evidence the Brandy being ſeized, &c. to which the other Side objected, but *the Judge refuſed to admit any Evidence againſt this Determination, or to let the Parties in to conteſt the Fact over again*, which had been tried on the Information. So if Goods are condemned in the Exchequer the Party ſhall never try this Matter over again in a Collateral Action.

All thoſe Condemnations have relation to the Seiſure to alter the Property, ſo that an Action at Law brought after the Seiſure, and before the Condemnation, will be the ſame as after the Condemnation. Per King Ch. J. at Wincheſter, Lent 1719.

2. If Goods are condemned by the Court and *proclaimed as forfeited*, the Property is altered, ſo as *no Action of Treſpaſs or Trover will lie by the Proprietor* againſt the Perſon that ſeizeth them; adjudged by the whole Court. Raym. 336. Mich. 31 Car. 2. in Scacc. Ekins v. Smith.

(A. b. 23.) Confeſſion of one againſt another.

1. The Queſtion was, if the *Confeſſion of* an *Under-Sheriff of an Eſcape* be any Evidence *againſt the High-Sheriff*; and adjudged that it is, for though the Sheriff is ſuable, yet the Under-Sheriff gives him a Bond to ſave him harmleſs, and therefore it will all fall upon him. And therefore his Confeſſion is good Evidence, becauſe in Effect it charges himſelf. Ld. Raym. Rep. 190. Eaſt. 9. Will. 3. Yabſley v. Doble.

2. Confeſſion of Delivery of Goods *in the Court of Requeſts* may be given in Evidence againſt the Defendant at Law. Mar. 103. pl. 175. Trin. 17 Car. C. B. White v. Grubble.

3. In an Information for publiſhing a *Libel*, the Defendants *own Confeſſion* was given in Evidence againſt him, but per Holt Ch. J. if there was no other Evidence againſt him but his own Confeſſion *the whole muſt be taken*, and not ſo much of it as would ſerve to convict him. 5 Mod. 167. Hill. 7 W. 3. King v. Pain.

So if to prove a Debt it be ſworn that Defendant confeſſed it, but withal ſaid at the ſame Time, that he had paid it, this Confeſſion ſhall be valid as to the Payment, as well as to his having owed it. Per Hale Ch. J. and ſo is the common Practice. Try. per Pais. 209.

4. Confeſſion is the worſt ſort of Evidence that is, if there be *no Proof of a Tranſaction* or Dealing, or at leaſt *a Probability* of Dealing, between them as in the principal Caſe there was, the one being a Sailor, the other a Maſter of a Ship. Per Holt. 7 Mod. 42 Mich 1 Ann. B. R Anon.

5. A Point was reſerved at the Sittings of Niſi Prius, whether the Proof of the *Indorſor of a Promiſſory-Note his Acknowledgment that the Name indorſed* on the ſaid Note *was his Hand-writing*, be ſufficient to prove the Indorſement in an *Action brought* by Plaintiff as *Indorſee againſt* Defendant as *Drawer*; the Objection was, that no Perſon's *Confeſſion* but the Defendant's himſelf can be Evidence, and the Indorſor's Hand muſt be proved. The Objection was held good; and the Verdict, as to the ſecond Promiſe in the Declaration, was ordered to be vacated. Barnes's Notes in C. B. 311, 312. Mich. 6 Geo. 2. Hemings v. Robinſon.

6. The Examination of the Priſoner himſelf (if *not on Oath*) may be read as Evidence againſt him; but the Examination of others (though on Oath) ought not to be read if they can be produced, Viva Voce; St. Tr. 1 Vol. 169. 780.—2 Vol. 575.

7. In Sayer's Caſe Mich. 9 Geo. in a Caſe of High-Treaſon Mr. Staney an under Secretary of State gave Evidence of L's Confeſſions, upon his Examination before the Council, which though taken in Writing, yet the Writing was not read.

8. Where there is any *Confidence or Truſt* between the Parties, the Confeſſion of one in an Anſwer, &c. might be given in Evidence againſt the other, though it might be a Queſtion if concluſive or not. Per Ld. Chan. 8 Mod. 180. Trin. 9 Geo. Hilliard v. Phaley.

## (A. b. 24) Conſpiracy.

1. In Conſpiracy *for indicting* him *of Felony*, &c. the *Plaintiff was put to prove the Indictment now ſhewed in Evidence a true Copy*, then he was put to prove *what the Witneſs ſwore to the Jurors*, who did procure them to ſwear and give ſuch Evidence; *and Proof was, that one W. gave the Evidence to the Jury of Life and Death, that the Plaintiff ſtole the Goods, &c. but the Witneſs now in Court ſwore, that his Oath was the Plaintiff took them, but not that he ſtole them; it was found for the Defendant, Ut credo.* Clayt. 126. pl. 224. March. 1647. B. R. Burnley's Caſe.

12 Mod. 211 S. C. & S. P. by Holt Ch J. in delivering the Opinion of the Court.—— 1 Salk. 13. 15. pl. 5. 3 Salk. 16. S. C. accordingly.——

2. Holt Ch. J. expreſly declared, that theſe kinds of Actions are *not to be encouraged*, but that the Judge before whom any of them are tried ought to hold the Plaintiff to *a Proof of expreſs Malice* in the Defendant in his Proſecution by way of Indictment, for if it does not appear, that the Proſecution was grounded on Malice, the Action is not maintainable, but the Plaintiff muſt be nonſuit. Carth. 417. Trin. 9 W. 3. B. R. in Caſe of Savil v. Roberts.

2. In an Action of Conſpiracy for indicting the Plaintiff of Felony, and the *Defendant* in his Defence *did prove he had Goods ſtolen, and thereupon did prefer an Indictment which was found Ignoramus*, and then it was proved he *did prefer a ſecond Indictment, after he had Notice the Goods were taken by another and pawned to the Plaintiff*, and for this the Jury found him guilty, and that Malice was in this Proſecution, which is the chief Cauſe to maintain this Action; and moreover it was proved, that the Defendant had brought Actions at Law, which was a civil Proceeding for the ſame Goods ſuppoſed to be ſtolen, which was urged to ſhew the malicious Proſecution; but for this, the Judge held this of itſelf would

not

not maintain this Action, for the Party whoſe Goods are ſtolen, may proceed both ways without Malice; and alſo it was held a ſecond Indictment may be preferred upon better Evidence, without making the Proſecutor liable to this Action; ſo Note it was the Notice of the Matter aboveſaid only did maintain this Action; but ſee by me how the Defendant was bound to believe ſuch Notice, &c. Clayt. 85, 86. pl. 144. July, 16 Car. Johnſon v. Stanclift.

3. In Information for Conſpiracy and Attempt *to rob* Sr. Robert Gaire, *and binding themſelves by Oath to execute the ſame, and lying in wait, &c.* they as to the Oath was out of the County, viz. at the Devil Tavern, which is in London, wherefore not regarded, *no Overt Act, or lying in wait was proved*, without which, per Curiam, the Information will not lie, as 2 Inſt. and Verdict for the Defendant, there being no certain Appointment of Time, Place or Perſon, &c. 3 Keb. 799. pl. 58. Trin. 29 Car. 2. B. R. the King v. Parkehurſt and Elling.

2. If two or three Perſons *meet* together, and *diſcourſe* and conſpire *to accuſe another falſely of an Offence*, it is of itſelf an overt Act, and is indictable. Per Holt, Ch J. but per Powell J. that to make a Meeting to conſult and conſpire criminal, they ought to *come to ſome Reſolution*. 11 Mod. 55. Paſch. 4 Ann. B. R. in Caſe of Queen v. Baſs.

(A. b. 25) Conſtat.

1. If a Man *has loſt his Letters-Patents*, he may have new Letters-Patents out of the Chancery, if he ſhews to the Chancellor, that he has loſt them, Per Fiſher quære inde, for it ſeems, that he ſhall not have but a *Conſtat*, & Non Negatur ibidem. But admitted upon the Argument, whether he ſhews the Letters-Patents of the Gift of the King, or not, but that he has loſt his Letters-Patents, and has a new Patent, that it ſhall be intended a Conſtat, as it ſeems to me, that in this Caſe it ſhall *ſerve him to ſhew or plead*, as well as the firſt Patent. Br. Patents, pl. 58. cites 22 H. 7. 12, 13.

(A. b. 26) Copies.

1. In Ejectment, the Jury found that the Leſſor of the Plaintiff had releaſed all Right in the Land to J. S. but they found, that the *Releaſe* itſelf was not ſhewn to them, but a Copy thereof. Per tot. Cur. This Releaſe may well be found thus *to defend a Poſſeſſion*. Cro. E. 863. pl. 41. Mich. 43 & 44 Eliz. C. B. Brome v. Car.

2. There was a *Covenant* between the Parties *to levy a Fine of Lands to T. upon Condition, that if he did not pay ſo much Money* by ſuch a Day, that *it ſhould be to the Uſe of C. and his Heirs*; the Fine was levied, *and before the Day of Payment, C. releaſed to T. all his Right in the Land, and all Demands*, but afterwards ſuppoſing that the Releaſe he made before the Condition broken was not a ſufficient Diſcharge of the future Uſe, he brought an Ejectment, and at the Trial *a Copy of this Releaſe was produced in Evidence; and all the Court held*, that this Releaſe might well be found in this Manner, it being to defend the Poſſeſſion. Cro. Eliz. 863. pl. 41. Mich. 43 & 44 Eliz. C. B. Broom v. Car.

3. If Parties have *Matter of Evidence by Records* of this Court, they *ought to produce the Records themſelves*; Copies of them are not allowable; Ruled per Curiam in the Exchequer. Lane 97. Hill. 8 Jac. Smith v. Jennings.

4. This Court ordered Copies of *Depoſitions* and other *Records* to be recorded and uſed, and to be authentick, and this was with the Aſ-

ſiſtance of the Judges. Chan. Rep. 15. 2 Car. 1. Kinaſton v. the Earl of Darby.

A Copy is not to be admitted as Evidence, but

5. A Copy of a Deed is good *Evidence*, where the Defendant has the Deed, and will not produce it. Clayt. Rep. 15. pl. 24. Mich. 1633. 208.

where it appears, that the Party producing it could not produce the Original. 10 Mod. 74. Hill. 10 Ann. B. R. the Queen v. Sutton. —— Fin. R. 302. The ſame as to a Deed, to lead the Uſes of a Fine, and decreed a Copy to be good Evidence at Law, and in Equity againſt Defendant, his Heirs, and Aſſigns, and all claiming under him, or his Father, ſince the Year 1653, that his Father ſold the Lands, and paſſed the Fine to the Plaintiff. Norwich v. Sanders.

6. Where the Defendant *has the Deed* in his own Hands, which concerns the Land in Queſtion, and *will not produce it*, in ſuch Caſe, the Copy thereof ſhall be permitted to be given in Evidence, and ſo it was, and the Plaintiff ſwore, it was once in his Hand, and this was a true Copy of the Deed, and himſelf did examine it. Clayt. 15. pl. 24. Mar. 1633. before Vernon Judge of Aſſiſe. Anon.

8. Plaintiff having only a Copy of a *Deed of Feoffment*, under which ſhe claimed, the *Original being loſt*, and the Defendant having a *Counterpart*, the Plaintiff prayed the Copy might be compared with the Counterpart, and if it agreed, that the ſame might be allowed in pleading as a good Deed, ſealed and delivered, referred to a Maſter to ſettle the ſame. N. Ch. R. 82. 13 Car. 2. Griffin v. Boynton.

9. Plaintiff claimed Lands by a Will, which was proved, the Original was taken out of the Prerogative Office; Decreed that the Copy of the *Probate of the Will out of the Regeſter's Book* in the Prerogative Office ſhould be admitted in Evidence at Law at any Trial, which ſhould be had concerning the Title of the ſaid Lands, as the true original Will. N. Ch. R. 82. 13 Car. 2. Georges v. Foſter.

10. Copy *of a Deed* pretended to be *had from the Defendant's Counſel without* ſeeing the very Deed, or *comparing* it with the Copy not allowed. 1 Mod. 94. pl. 3. Paſch. 24 Car. 2. B. R. Lord Peterborough v. Mordant.

11. He that takes out a Copy *of Part of a Record* muſt at leaſt take out *ſo much as concerns the Matter in Queſtion*, or elſe the Court will not permit it to be read. T. per Pais, 166. 3d Edition.

12. A Copy *of a Record* is not true, unleſs it be *tranſcribed in the ſame Language*, and therefore a *Tranſlation* ſhall not be given in Evidence, as where a Record is in Latin, and the Copy in Engliſh. T. per Pais, 228. 3d Edition.

13. *Part of a long Patent* was copied out, *and ſworn true*, and it *was ſo much of it as did concern the Thing in Queſtion*, and the Counſel of the other Part did oppoſe this to be Evidence, and the Judge did in the End reject its being ſhewn by Parcels; for that *there may be Proviſo's, &c. in the Patent*, and the *Witneſs could not ſwear he did read the Roll throughout* of this Patent, ſo that no more was in it than now ſhewed. Quod nota, if he could, it ſeems it had been admitted. Clayt. 142. pl. 259. March 1650. Nelthrop v. Johnſon.

15. A Copy *of a Record in the Lord's Houſe* would not be admitted to be given in Evidence at Langhorn's Trial. cites Lang. Try. 44.

17. In Evidence to a Jury, the *Recovery* was proved by Copy *of the Roll under the Steward's Hand*, the *Roll being loſt* 3 Car. but without *Proof there was ſuch a Roll*, the Court refuſed to allow it, although *Poſſeſſion had gone* along with it *according to the Recovery*; and although this be Copyhold, whereof the Rolls are not in the Cuſtody of the Party.

Party, but of the Lord, and no Records but all done at one Court, and the Copy found but of late, without other concurrent Evidence of a Court then held; but per Cur. ſuch a Copy would be *good Evidence of the Copyholders Eſtate*, but *not of ſuch a Recovery* being a *judicial Act*, *but* this Recovery *being recited in a Roll of Court within four Years after*, the Court admitted it. 1 Keble 567. pl. 14. Mich. 15 Car. 2. B.R. Snow v. Cutler and Stanley.

18. A Copy *of the Counterpart of a Leaſe* being *loſt*, was given and allowed in Evidence. T. per Pais 292. cites Mich. 15 Car. 2. Strode v. Dr. Holt. B R.

19. A *printed Copy of an Act of Parliament* is not to be given in Evidence if *not examened by the Rolls*, *and ſworn to be a true Copy*. Try. per Pais 232.

A Copy of an Act of Parliament is no Evidence, unleſs

the Act had been before allowed of, and ſo made a Record of this Court, for otherwiſe nothing ſhall be allowed of as a ſufficient Evidence of the Act, but the Exemplification of it under the Great Seal; and the Reaſon is, becauſe the Court is Party which cannot pray Oyer as the Party may, ſo the Court would be in a worſe Condition than a common Perſon, if they were to receive for Evidence a Copy offered, Arg. cites 35 H. 6. 14. and this was allowed to be ſo, per Cur. 10 Mod. 126. Hill. 11 Ann. B. R. Univerſity of Cambridge's Caſe.

20. The *Copy of a private Act of Parliament* may be given in Evidence. Try. per Pais, 226. and in Marg. cites Mich. 1650. Coram Roll at Guildhall, Littleton v. Poins.

21. Copy *of a Leaſe which the Lord had in his Hands*, *whereby the Tenant had Power to make Leaſes*, is good Evidence without ſwearing it a true Copy; cited by Windham, Keb. 720. pl. 50. Paſch. 16 Car. 2. B. R. in the Caſe of Lee v. Boothby, as the Caſe of Sir John Rogers.

22. *So* is *Copy of Court-Roll under the Steward's Hand*, who was Counſel for the Lord Plaintiff, and was admitted good for the Copyholder; but contra of ſhort Notes by Way of Breviat, which the Court agreed. Ibid.

23. If upon Evidence *it be proved that the adverſe Party has the Deed*, the Court will admit Copies to be given in Evidence. Mod. 266. Trin. 29 Car. 2. C. B. in Caſe of Baſſet v. Baſſett.

24. A ſworn Copy *of a Record* may be given in Evidence, but the ſureſt Way is to have it exemplified under the Great Seal, or at leaſt the Seal of the Court. 10. Rep. 92. 8. Hill. 8 Jac. in Leyfield's Caſe.

25 Copies of *Court-Rolls* examined by the Steward allowed to be good *Evidence* in Ejectment, without bringing the Rolls themſelves into Court. Cumb 138. Mich. 1 W. & M. in B. R.

26. Copy of an Original is Evidence wherever the Original is *Evidence*, if prov'd a true Copy; but the Copy of the *Probate of a Will* is no Evidence, becauſe that is but a Copy of a Copy. Per Holt Cumb. 337. Trin. 7 W. 3. B. R. The King v. Haines.

27. Copy of *ſhort Note of a Judgment* in an inferior Court allowed by Hale at Huntington Aſſizes as good *Evidence*, though the Judgment was not entered upon Record. Per Holt. Cumb. 337. Trin. 7 W. 3. B. R. The King v. Haines.

28. Copies of Court-Rolls, or *Proceedings in Eccleſiaſtical Courts*, &c. are good *Evidence*; it is uſual for inferior Courts not to draw up their Records, but only ſhort Notes, and Copies of thoſe *ſhort Notes* being publick Things are good Evidence, otherwiſe of private Things; for Copies of *Rent-Rolls* are no Evidence, but the Original muſt be produced. Per Holt Ch J. Cumb. 337. Trin. 7 W. 3. B. R. The King v. Haines.

29. The

29. The Queſtion being propoſed in this Caſe to the Juſtices of C. *B.* whether the Copy *of a Bank-Bill remaining upon the File in the Bank of England* was good Evidence or not? They all agreed that it was, and that it was like the Copy of an Inrollment of a Pariſh-Regiſter, the Bank being a Publick Body eſtabliſhed by Act of Parliament for publick Purpoſes. 3 Salk. 155. pl. 8. Paſch 9 Will. 3. Man v. Cary.

Ld. Raym. Rep. 154. Hoe v. Nathorp. S. C. accordingly, and reſolved that the immediate Copy of an Original is good Evidence, where the Original is good Evidence, and therefore the Copy of a Church-Regiſter, the Copies of Town-Books, of Proceedings in Courts Baron, of Proceedings in the Eccleſiaſtical Courts and Admiralty Courts, is good Evidence.

30. In this Caſe it was held per Holt Ch. J. that the Copy *of a Probate of a Will* is good Evidence where the Will itſelf is *of Chattels*; for there the Probate is an Original taken by Authority, and of a publick Nature; *otherwiſe*, where the Will is *of Things in the Realty*, becauſe in ſuch Caſe the Eccleſiaſtical Courts have no Authority to take Probates, therefore ſuch Probate is but a Copy, and a Copy of it is no more than a Copy of a Copy. 3 Salk. 154. pl. 7. Hill. 8 Will. 3. B. R. Hoe v. Nelthrope.

31. The Plaintiff being a *Purchaſor prays Writings and a Partition.* the Defendant inſiſted there was an Entail; the Court gave the Plaintiff a Year to try the Title. In Ejectment a Copy of the Deed of Entail was produced, but the Original was loſt, and not proved to be executed, and ſo Verdict for the Plaintiff. On the Coming on of the Cauſe on the Equity reſerved, the Defendant inſiſted that he ought not to be bound by one Trial in a Matter of Right of Inheritance; Sed non allocatur, being a Decree only for a Partition. Tamen quære. Trin. 1691. 2 Vern. R. 232. Bliman v. Brown.

32. In an Action for Work done, &c. the Plaintiff gave in Evidence, to charge the Defendant, a Copy of a *Bill delivered to the Defendant, and copied by the Order of the Defendant*, and diverſe Exceptions were taken by the Defendant to the Bill, ſcil. Firſt, the Quantity of the Work done, and the others were Marks againſt diverſe Parcels, ſcil. O and N intending by it that theſe Parcels were wrought for others, and not for the Defendant, and other Exceptions there were to the Price, and he ordered the Servant to indorſe upon the Backſide the Exceptions to the Quantity and Price, but to omit the Marks O. and N. and it was ruled by Holt Ch. J. upon Evidence, firſt, That this Copy of a Bill delivered was Evidence, as a Copy of the Bill, and not a Copy of a Copy, and the *Bill delivered is an Original*, as well as the Books. 2dly, That the *Acceptance of a Bill delivered without Objection but to ſome Particulars, is an Admittance of the Reſidue to be true.* 3dly. The ordering a Copy of the Bill indorſed ut ſupra, omitting the Marks O. and N. and the Copy with the Exceptions being ordered to be delivered to the Plaintiff, it is a Waiving of the Exceptions ſignified by thoſe Marks. 4thly. Tho' it was objected that this Evidence is a Confeſſion, and therefore it ought to be taken together; yet per Holt Ch. J. they are not Part of a Confeſſion (which ought to be of the ſame Thing) but a Cavil or Objection as to the Price or Quantity, &c. Skin. 672. Mich. 8 W. 3. B. R. Worral v. Holder.

This is but a Copy, and therefore it ought to be be produced, and a Copy out of the Book will not ſuffice; but a Copy of a Probate of a Will where the Court has Juriſdiction is good, becauſe the Probate itſelf in ſuch Caſe is an original Act of the Court. Skin. 584. Trin. 7 W. 3. B. R. in Caſe of the King v. Haines.

33. Copy *of a Will* examined at the Prerogative-Office allowed in Evidence, tho' it is but a Copy of a Copy, for the Entry in the Entry-Books is the Original quoad hoc (otherwiſe to make Title to Lands by Deviſe) to ſhew who is Executor. Cumb. 248. Paſch 6 W. & M. in B. R. Smart v. Williams.

34. Though

34. Though an *old Manuſcript found among the Evidences of a Family* may be Evidence, becauſe an Original, yet a Copy would not, becauſe it is liable to the Miſtake of the Tranſcriber; Per Holt Ch. J. Skin. 623. pl. 17. Mich. 7 W. 3. B. R. in Caſe of Steynet and the Burgeſſes of Droitwith.

35. On Evidence the Court ſaid, that a Copy *of a Court-Roll* of a Manor is good Evidence; for where the Original is Evidence, there a Copy is; *Copy of a Probate* is good Evidence 12 Mod. 24 Paſch. 4 W. & M. Trial on the Cuſtom of the Manor of Bray.

36. The Copy of a *Town-Clerk's Book* was not allowed Evidence to charge a Man in a *Criminal Matter*. Skin. 584. Trin. 7 W. 3. B. R. The King v. Haines.

37. Copy of a *Record* is good, becauſe one cannot have the Record itſelf; But a Copy *of a Copy* will not. Arg. 12 Mod. 500. Paſch. 13 W. 3. in Caſe of Dillon v. Crawley.

38. Copy *of a Bill in Chancery* taken from the File with ſix Clerk's Evidence. 12 Mod. 565. Mich. 13 W. 3. Anon.

39. Note, a Copy *of a Charter under the Great Seal* cannot be given in Evidence, but a Copy *of the Record* thereof may. 12 Mod. 579. Mich. 13 W. 3. Anon.

40. Copy of a *Will examined at the Prerogative Office* is not to be allowed as Evidence *to make Title to Lands by Deviſe*, yet where it concerned only a Mortgage *Term* it was allowed (tho' it was oppoſed as being only a *Copy of a Copy)*; for the Entry in their Eccleſiaſtical Books is the Original *Quoad Hoc*. Comb. 248. Paſch. 5 W. & M. in B. R. Smart v. Williams.

41. *Wherever an Original is of a publick Nature, and would be Evidence* if produced, an immediate ſworn Copy thereof will be Evidence; Per Holt Ch J. 3 Salk. 154. pl. 6. Linch v. Clerk.

42. *As* the Copy of a *Bargain and Sale, or* of a *Deed inrolled* of a *Church-Regiſter, &c* Ibid.

43. *But where* an Original is *of a private Nature*, a Copy is not Evidence, *unleſs the Original be burnt or loſt*. Ibid.

44. A Copy of an *Entry in the Books of the Office of Franchiſes* was diſallowed to be Evidence, wherefore the Book itſelf was produced. Ld. Raym. Rep. 745. ruled by Treby Ch. J. at Guild-hall. Paſch. 10 W. 3. Selby v Harris.

45 It was ruled by Holt Ch. J. in B. R. Mich. 10 W. 3. that if a Man *deſtroys a Thing that* is *deſigned to be Evidence againſt himſelf*, a ſmall Matter will ſupply it; And therefore the Defendant having *tore his own Note* ſigned by him, a Copy ſworn was admitted to be good Evidence to prove it. Ld. Raym Rep. 731. Anon.

46. A Copy *of a Fine or Recovery* is good Evidence, ſo as it be ſworn to be a true Copy, and examined; Per Holt Ch. J. 3 Salk. 154. pl. 6. Hill. 8 W. 3. B. R. Lynch v. Clarke.

47. That *wherever an Original is of a publick Nature, and would be Evidence*, if produced, *an immediate ſworn Copy thereof* will be Evidence, as the Copy of a Bargain and Sale, of a Deed inrolled, of a Church-Regiſter, &c. *but where* an Original is *of a private Nature*, a Copy is not Evidence, unleſs the Original is loſt or burnt; Per Holt Ch. J. 3 Salk. 154. pl. 6. Hill 8 W. 3. B. R. Lynch v. Clarke.

48. Copies *of Affidavits proved to be examined by the Originals on the File*, and produced in Evidence was allowed (theſe Affidavits taken before Commiſſioners in the County) It was objected, that this was no Evidence, unleſs the Commiſſioner who gave the Oath was preſent to prove that the Defendants were the ſame Perſons who made Affidavits before him, Sed Non allocatur; coram Juſtice Eyre in Oxford Circuit, and adjourned to B. R. pro Opinione; Paſch. 4 W. & M. On Indict- Show. 397. S. C. adjudged pro Rege.

ment of Perjury; and per tot. Curiam, the Copies are ſufficient Evidence. Carth. 220. the King v. James.

49. A Copy of *an Original is Evidence wherefoever the Original is Evidence*, i. e. *if proved a true Copy*; but the Copy *of the Probate of a Will* in the Eccleſiaſtical Court is no Evidence, becauſe that is but a Copy of a Copy. Hale at Huntingdon Aſſiſes allowed a Copy of a *ſhort Note of a Judgment in an Inferiour Court* as good Evidence, *though the Judgment was not entered upon Record.* Matters of Evidence ariſe from conſtant Uſage, as well as from what is ſtrictly legal; Copies of Court Rolls, or Proceedings in Eccleſiaſtical Courts, &c. are good Evidence; we know it is uſual for Inferiour Courts not to draw up their Records, but only ſhort Notes, and Copies of theſe ſhort Notes being publick Things are good Evidence; but otherwiſe of private Things, for Copies *of Rent-Rolls* are no Evidence, but the Original muſt be produced. Comb. 337. Trin. 7 W. 3. B. R. the King v. Hains, Alderman of Worceſter.

50. In a *Trial* at Bar *concerning a Leaſe, and when the ſame was to take Effect in Poſſeſſion, a Copy of a Survey taken in the late Times in* 1647. *by Virtue of a Commiſſion granted by the Powers then in being was admitted as Evidence*; and was then ſaid, that thoſe Surveys were taken with great Care, and had been often admitted in Evidence; But the Reaſon why the Copy was admitted here was, becauſe *it was proved that the Original was removed from Gurney-houſe to St. Faith's under St. Paul's, and were there burnt in the great Fire*; And Northy ſhewed me a Caſe in Mich. 25 Car. 2. B. R. between *Berry and Halſted*, where ſuch a Survey was admitted in Evidence, by Hale Ch. J. Freem. Rep. 509. pl. 684. Mich. 1699. Under [illegible] v. Durham.

51. Holt Ch. J. ſaid, that at Huntingdon before Hale Ch. J. the *Book of a Town Clerk* was [illegible]ad; and if the Book may be read, a Copy of the Book may be read, for in *all Caſes where the Original is Evidence, the Copy is Evidence*; but if the Original be a Copy, there a Copy of ſuch Original may not be read, as a Book for Probate of a Will of Land. Skin. 584. Trin. 7 W. 3. B. R. in Caſe of the King v. Hains.

52. A Copy *of the Book at Doctors Commons was produced in Evidence to prove ſuch a one to be Executor*; it was objected, that it was no Evidence, becauſe it was but a Copy of a Copy, and the Book ought to be produced, or the Will with the Probate, or a Copy of the Probate, Non allocatur; For per Cur. it being a *Will of Goods*, the Act of the Court is the Original, and the Will is proved by the Act of the Court before that it is under the Seal with the Probate, and ſo a Copy of the Act of the Court is ſufficient; *but* if it was a *Will for Lands*, there a Copy would not be ſufficient; but they ought to have the Entry, and Book itſelf there; Per Holt Ch. J. Skin. 431. Paſch. 6 W. & M. B. R. cites it as in a Trial at Bar the ſame Term in Andrew Newport's Caſe.

53. Mich. 8 W. 3. C. B. In Ejectment, a Motion was made for a new Trial, becauſe the Party againſt whom the Verdict was given, produced in *Evidence a Fine*, and the *Copy of the Inrollment of* a *Deed, which led the Uſes of it*; And Rokeby J. before whom it was tried, refuſed to admit this Copy of the Inrollment to be Evidence; And reſolved in C. B. that ſuch Copy is Evidence, prima face, but *the Party* ſhall not be eſtopped by it, as by the Record, but *may controvert it, as forged*, &c. becauſe Inrollment at Common Law, and that for ſome Purpoſe; and they relied upon Mr. Kendal's Caſe. (See it now reported, 3 Lev. 387.) And of this Opinion, Powel J. was generally; But Treby Ch J. doubted, whether ſuch Evidence generally ſpeaking was Evidence; But here he agreed with the other Juſtices, viz. Powel and Nevil; becauſe it was only to lead the Uſes of the Fine, which might be done by Parol. Ld. Raym. Rep. 746. 10 W. 3. Taylor v. Jones.

54. Copy

54. Copy *of a Note given by A. to B. which being left with C. the Copy* [illegible] *was taken by C. who is ſince dead.*—According to the Copy it ſeems, that under the Note, the Defendant B. had ſubſcribed an Acknowledgment, that nothing was really due; this though not proved to be a true Copy (C. being dead, and the Note in the Hands of B.) and though B. had ſworn in his Anſwer, that there was no ſuch Acknowledgment ſubſcribed, was allowed to be heard as Evidence being the Hand-writing of C. and on producing the Note which was on ſtampt Paper, it appeared, that the *Bottom was torn off*; Per Cowper Ch. 2 Vern. 603. pl 541. Hill. 1707 Winne v. Lloyd. 2 Vern. 228. pl. 6. S. C.

55. A *Deed* made by Robert Spencer and Elizabeth his Wife *to declare the Uſes of a Fine* levied by them of the Wife's Inheritance being loſt, but *having been inrolled for ſafe Cuſtody*, upon the firſt Hearing of theſe Cauſes, it being objected, that the Conveyance was not a Bargain and Sale, and ſo did not operate by the Inrollment; and that therefore the Copy of the Inrollment not to be allowed as Evidence; and the Court ſeemed to be of that Opinion But an Iſſue at Law being directed to try whether the Deed to lead the Uſes of the Fine was duly executed by Mr. Spencer and his Wife, the Ld Ch. J allowed the Copy of the Inrollment to be given in Evidence, and a Scrivener alſo who drew the Deed being examined, a Verdict paſſed for the Plaintiffs, *that the Deed was duly executed.* 2 Vern. 591. pl. 529. Mich. 1707. Combs v. Dowell, and Squire v. Dowell.

56. A Copy *of a Roll of Court* ſigned by the Officer of the Court is no Evidence in any other Court, unleſs the Judge of the Court ſet his Hand to it himſelf, but at Niſi Prius the Hand of the Officer is enough becauſe it is the ſame Court. 10 Mod. 109. Hill. 1 Ann. B.R. Stennil v. Brown.

57. *Warrant to a Conſtable to diſtrain* Goods by Virtue of an Act of Parliament; he makes a Diſtreſs and returns the Goods to the Offender but keeps the Warrant. Reſolved that a *Copy* of the Warrant in this Caſe will be good Evidence. 6 Mod. 83 Mich. 2 Ann. B. R. Morley v. Staker.

58. The Copy of the Writ, and the Return thereof into the Crown-Office is Evidence enough *of the falſe Return of a Mandamus* to be the Mayor's. 6 Mod. 152. Paſch. 3 Ann. B. R. Queen v. Chapman Mayor of Bath.

59. A Copy *of a Deed leading the Uſes of a Fine, and enrolled for ſafe Cuſtody only*, allowed to be read as Evidence at a Trial at Law. 2 Vern. R. 471. pl. 429. Mich. 1704. Combes v. Spencer. 2 V pl. 529. Mich. 170[illegible] Combes v. Dowell

ſeems to be S. C a Scrivener who drew the Deed, being examined, a Verdict paſſed for the Plaintiff that the Deed was duly executed.——

63. A Copy *of the Record of a Deed inrolled* may be given in Evidence *againſt the Party acknowledging it* as well as any other Copy of a Record, *but* it ſhall *not* be *good againſt a Stranger*; per Holt Ch. J. and Powell. Mich. 5 Ann. B. R. 3 Lev. 387, 388.

64. On Treſpaſs at the Houſe of the Warden of the Fleet, to prove the Poſſeſſion not in the Plaintiff, a Copy of *an Inquiſition finding a Forfeiture of the Office, with a Judgment thereon* of Seizure was produced, ſed non allocatur. Trin. 9 Ann. B. R.

65. A *Copy of a Rule of Court ſigned by the Officer of the Court* is no Evidence in any other Court, unleſs the *Judge of the Court ſet his Hand to it himſelf*; But at *Niſi Prius the Hand of the Officer is enough*, becauſe it is the ſame Court. 10 Mod. 109. Mich. 11 Ann. B. R. at Niſi Prius, Guild-hall, London, in Caſe of Stennil v. Brown.

66. The

66. The Copy *of a Revocation of the Deputation of an Office* was offered in Evidence of the Revocation, but not allowed, becauſe it did *not appear but the Original might be produced.* 10 Mod. 74. Hill. 10 Ann. B. R. Queen v Sutton.

67. A Copy *of the Condemnation of a Ship in the Admiralty Court of France* was refuſed as Evidence, for *Want of an Exemplification under the Seal of the Court.* 10 Mod. 103. Hill. 11 Ann. B. R. Stennil v. Brown.

68. Motion was made that a Juſtice of Peace might produce on a Trial on an *Indictment for Subornation of Perjury* an Examination taken before a Juſtice of Peace from *a Woman*, who at the Solliciation and *by Procurement of the Defendant*, *had charged ſuch an one with being the Father of a Baſtard Child*; the Woman had been convicted of Perjury; and per Cur. a *Copy of the Examination is no Evidence*, becauſe it deprives the Party of controverting whether it were his Hand ſubſcribed to it or not, and therefore *the Original ought to be ſhewn*, and ſo it is in all Caſes where written Evidence is produced which is grounded upon being under a Man's Hand; and a *Rule was made*, *that the Juſtice Produci faciat the Examination at the Trial*, *and the Party to have Copies in the mean while.* It was ſaid, that the Reaſon of allowing Copies of the Bank or Eaſt-India Books was becauſe the Handwriting muſt be proved; and Forteſcue J. added, that *in an Indictment for Perjury*, *in an Affidavit the Original ought to be produced*, tho' he ſaid there had been ſome Queſtion about this Matter, and a Copy was not ſufficient. Mich. 5 Geo. B. R. The King v. Smith.

69. 8 *Geo. cap. 25 Sect. 2. Copies of Recognizance, in Nature of Statute Staple, ſigned by the Clerk or his Deputy, if Original loſt, good Evidence.*

## (A. b. 27) Counterparts.

1. Y. Covenants with C. to make an Aſſurance of Blackacre before Eaſter by Indenture. Y. dies, the Covenant not performed, and the very original Deed comes into the Hands of the Executor of Y. and C. brought a *Writ of Covenant on the Counterpart*, and it was ſaid by the Court, that it *does not lie without the Deed itſelf*; Per Walmſly, he may have an Action of Detinue to recover the Deed. Noy. 53. Yelverton v. Cornwallis.

3 Salk. 153 pl. 1. S.P. 2. In *Ejectment*, *Title was under a long Term*, but the *original Leaſe could not be produced*, but being an antient Leaſe, the Grandſon of the Leſſor produced a *Counterpart found among the other Writings of his Grandfather*, and this was allowed *for Evidence*, *though no Witneſſes were ſubſcribed to it*; And Windham J ſaid, that he had ſeen many Deeds in the Time of Queen Elizabeth without Witneſſes. 1 Lev. 25. Paſch. 13 Car. 2 B R. Garret v. Liſter.

6 Mod. 225. S. C. cited by Holt Ch. J. as the Caſe of Mayo v. Comb. 3 Per Holt Ch. J. In a Caſe in my Ld. Hale's Time between Comb and Mayo, a Counterpart *of an antient Deed* was admitted as Evidence of the Deeds, and *the ſpecial Verdict was drawn up*, *as finding the Deed with a Prout Patet by the Counterpart*, which he ſaid was done to preſerve the Precedents; and now by all the Court, the Counterpart of a Deed without other Circumſtances is not ſufficient Evidence, unleſs in Caſe of a Fine, in which Caſe a Counterpart is good Evidence of itſelf. Salk. 287 pl. 23. Mich. 3 Ann. B. R. Anon.

4. Trin. 9 Ann. C. B. Sr. Wm. Pole's Caſe, Arguendo. In Order to induce the Court to read the Counterpart of a Deed where the Original could not be produced, it was ſaid there ought to be good Reaſon *ſhewn to the Court*, *as 1ſt. That the Deed is loſt*; *2dly. That it in the Adverſaries Hands*; *3dly. That the Poſſeſſion was gone according to the Deed*, *and if* Poſſeſſion has not gone according to the Deed, *there ought to be a*

very

*very good Reason must given why it did not*; The Court C. B. was divided in their Opinion. There was now a *Bill of Exceptions* and Writ of Error brought in B. R. but no Judgment was there given, the Cause being agreed.

## (A. b. 28) Court-Rolls.

1. As to the *Time of a Surrender* made, or *Court held*, the Rolls of the Manor are no concluding Evidence; but shall be tried by the Country. Le. 289, 290. pl. 395 Trin. 26 Eliz. B. R. Burgess v. Foster. 4 Le. 215. pl. 348. S. C. & S. P. held accordingly.

2. To maintain *Customary Descents* the Court enforced the Parties which maintained the Custom to shew *Presidents in the Court-Rolls* to prove the Usage; And Coke Ch. J said, without such Proof, that it had been put in Use, though it had been deemed and reported to have been the true Custom, yet the Court could not give Credit to the Proof by Witnesses. 4 Le. 242. pl. 395. Pasch. 8 Jac. C. B. Ratcliff v. Chaplin.

3. If Proof be to be made of a particular Benefit, which the *Lord of the Manor* is to have, no better Proof can be of this than by the *Rolls of of the Court*; for no Proof can be more directly and particular, than by setting down of all the Rolls in certain; Per Whitlock J. Per Doderidge J. the Lord ought to shew that the Rent or Heriott, &c. was paid; for the Steward may put in what he will, 325, ut ante; afterwards Judgment was for the Lord. 3 Bulst. 324. Hill. 1 Car. B. R. Hungerford v. Haviland.

4. *Proclamations whereby the Lord claims Forefeiture of a Copyhold* ought to be *proved Viva Voce*, and not by the Court-Rolls only; held in Evidence to a Jury Keb. 287. pl. 98. Pasch. 14 Car. 2. B. R. Pateson v. Danges, alias Ld Salisbury's Case. Lev. 63. S. C. but S. P. does not appear.

5. *On Traverse of Tenure by Suit of Court-Rent of 16 s. and Relief* in Replevin; As Evidence of the Relief, *several antient Rolls Tempore H. 8. and E. 6. and Eliz. and Jac. 1. were produced shewing Relief due for the Estate* in Question, and also for other Estates; *also old Accounts of Bailiffs of the Manor* in which Reliefs were mentioned; also there was Parol Proof, the Rent and Suit of Court, and Verdict Pro Domino Manerii; for in Case of Heriots, Justice Levins allowed of such antient Memorials, tho' no Evidence could be given of any modern Payment; that till the Time of Queen Elizabeth these Rolls were kept regularly and well by Counsel, but since this Time they were drawn up by Attornies and others not skilled in the Law, and so were not of that * great Authority as formerly; that a *Relief was incident to a Tenure of Socage* † || *by Rent and Fealty, and upon Death of the Tenant the Heir ought to pay double the Rent*; that *Seisin of the Rent was Seisin of the Fealty, and Seisin of Fealty was Seisin of all Manner of Services*; that the Statute of Car. 2. had abolished the slavish Part of the Tenures, but had preserved and established all Duties relating to them; that he would not presume the Relief or other Services had been released; that tho' the Prescription here was to hold a Court-Leet and Court-Baron every Year within a Month after Michaelmas and Easter, and Court-Barons ought to be held oftner, and are not tied down to this Rule by any Statute, yet of late Years they have usually been held together, and as it is the general Practice, it is well enough. Mr. Hele's Case, Lord of the Manor of King's-Nympton, coram Baron Price, at Lent, Devon. 1717, 1718.

* Lit. S. 126, 127, 128, 129.

† No Relief where Tenure is by Fealty only. Co. Litt. 93. S. 143.

|| But it Tenure be by corporal Service, or Labour, or Work, no Relief is due, but contra of yearly Rents or Profits which may be delivered or paid, the Lord may distrain imediately; yet if Tenure be by a Rose, Lord cannot distrain till Roses by Course of Year may have Growth.

[A. b. 29] Decrees.

1. A *Decree of Chancery, or other Court of Equity is not any Evidence in a Court of Common Law*, as in Walſingham's Caſe. Agreed per Curiam. 2 Sid. 75. Paſch. 1658. B. R. in Caſe of Marret v. Sly.

2. A *decretal Order under Seal, which writes all the Proceedings on Exemplification under the Great Seal*, hath been allowed to be read; per Twiſden, but per Allen contra, not unleſs it hath the Bill and Anſwer, which Windham agreed; but by Twiſden, where the Decree is produced only in Paper then the Bill and Anſwer ought to be adjoined, but not ſo when the Decree is under Seal; and in C. B. Stiffe v. Stiffe the Judges admitted a Decree to have been under Seal, and yet would *not allow it without Bill and Anſwer*; and by Allen it is uſual to diſallow ſuch Decrees, but an Exemplification in Chancery, per Curiam always recites the Bill and Anſwer. Moreton Serjeant ſaid he never did ſee the Seal of any Court denied to be given in Evidence. Keb. 21. pl. 62. Paſch. 13 Car. 2. B. R. Trowell v. Caſtle.

[A. b. 30.] Deeds; tho' the Witneſſes not proved dead or beyond Sea.

1. Where *Aſſiſe is adjoined for Difficulty*, and the *Plaintiff ſhews Deed which he gave in Evidence*, the *Court ſhall not regard it if the Deed be not enter'd of Record*; for we adjudge only of that which is ſent to us of Record, and we cannot know if it was given in Evidence or not if it does not come to us of Record. Br. General Iſſue pl. 35. cites 18. Aſſ. 3.

2. Cancelled Deeds allowed in Evidence after *Proof of the ill Practice how they came to be cancelled.* Het. 138. Hill. 4 Car. C. B. Beckrow's Caſe.

Palm. 403. S. C. accordingly.—S. P. by Twiſden Mod. 11. in Caſe of Clerke v. Heath—

3. Seals broken off from a *Deed to lead the Uſes of a Recovery* ſubſequent, yet being proved it was done by a little Boy, and that the Seals were once annexed, and the Razures of the Parts agreed upon Examination, it was admitted to guide the Uſes. Lat. 226. Mich. 3 Car. Anon.

4. The Defendant produced a Deed under the Plaintiff's Hand and Seal, whereto were Witneſſes Names; but becauſe they did *not prove the Witneſſes dead*, nor that they were *gone to Sea*, though they alledged it, it was not permitted at firſt to be given in Evidence; but afterwards, *upon Proof that it was read at a former Trial, it was ſuffered to be read.* Freem Rep. 84. pl. 103. Paſch. 1673. Phillips v. Crawly.

5. Twiſden ſaid he had ſeen *Adminiſtration* given in Evidence *after the Seal was brok off*, and ſo Wills and Deeds. 1 Mod. 11. pl. 34. Mich. 21 Car. 2. B. R. in Caſe of Clerk v. Heath.

6. *Certificate of a Biſhop* that *has but a ſmall Bit of Wax upon it*, may be read as Evidence that A. had taken the Oath according to the Uniformity Act. Per Twiſden J. and not objected to. Mod. 11. pl. 34. Mich. 21 Car. 2. B. R. Clerk v. Heath.

7. It was ſaid, that where there is a *Common-Seal* put to a Deed, that is Title enough of itſelf, *without Witneſs* to prove it, or that the major Part of the College be agreed; and if it was ſaid that it was put to by the Hand of a Stranger, that ſhall be proved on the Side that ſays ſo. Skin. 2. pl. 2. Mich. 33 Car. B. R. Ld. Brounker v. Sir Robert Atkins.

8. Upon

8. Upon a Trial at Bar the *Plaintiff made Title by an Act of Parliament* 16 & 17 Car. 2 the Defendant's *Defence was upon a Proviſo* in that Act, *which ſaved all Rights* to the King, *and Eſtates before* 1639. *made with Power of Revocation*, by Sir Robert Carr the Father, and then not actually revoked. The Defendant would have ſet up a Settlement made before that Time, and proved it ſealed and delivered before that Time, and *to prove that it was not actually revoked* by Sir Robert Carr, offered *an Abſtract of the Deed, and a Caſe made upon it, with an Opinion, all under the Hand of Mr. Juſtice Ellis*, with the Depoſitions of Mr. Juſtice Ellis in Chancery in a Caſe between Sir Robert Carr the Son and his Mother; *wherein it appears to be a Deed in Force after Sir Robert Carr's Death*, though not cancelled and cut in Pieces; yet the Court refuſed it as Evidence, and would not allow the Deed to be read. Skin. 285. pl. 2. Mich. 36 Car. 2. B. R. Scroop v. Carr.

9. Deeds *not ſtamped* will not be allowed to be given in Evidence. *Vid. the Stamp Acts*, 5 & 6 *W. & M. cap.* 21.

10 A Deed of *Bargain and Sale* acknowledged by the Bargainee, and *inrolled*, by which a *Term for Years was aſſigned*, was given in Evidence without any Proof made of the Bargainer's ſealing and Delivery thereof, and after Debate it was allowed, per Holt Ch. J. and Eyre J. and tot. Cur. For the Acknowledgment of the Party in a Court of Record, or *before a Maſter Extraordinary in the Country* (as this was) is good Evidence of its being ſealed and delivered, and ſuch an Acknowledgment eſtops a Man from pleading Non eſt factum. Alſo Inrollments of Deeds on the Statute are admitted every Day in Evidence, without Witneſſes of the ſealing and Delivery; and it is the Acknowledgment which gives it Credit, and not its Operation or Contents. 1 Salk. 280. pl. 7. Paſch. 6 W. & M. in B. R. Smart v. Williams.

This Deed was inrolled ſome Years after the Date, and it was objected that the Lord paſſed by the Deed and not by the Inrollment, being of a Term for Years, was in caſe of a Bargain, and Sale of Lands in Fee, the Eſtate paſſes by the Inrollment, and cited C. L. 225 b. that the Inrollment is no Evidence. But Holt Ch. J. ſaid that how ſtrong the Evidence is muſt be left to the Jury, but is Evidence. For in Caſe of Inrollment where Land paſſes, it cannot be a Proof of the Deed by the Help of the Statute, but by the Common Law; and that there was an Inrollment at Common Law, and that in Caſe of a Bond inroll'd the Party is eſtopped to plead Non eſt factum, and that though the bare Inrollment is not Evidence, yet the Acknowledgment is Evidence of as high a Nature as a Recognizance to this Purpoſe. Comb. 247. &c. Smart v. Williams. — 3 Lev. 387. S. C. —

11. *Alſo* they held a *ſworn Copy of a Deed inrolled*, good Evidence. 1 Salk. 281 ibid.

12. *Counterpart of ancient Deeds loſt* good Evidence with other Circumſtances, but not of itſelf, but of a Deed *leading the Uſes of a Fine*, it is good Evidence of itſelf. 6 Mod. 225. Mich. 3 Ann. B. R.

## [A. b. 31] Depoſitions.

1. Manlye has taken Oath; the Depoſition of Witneſſes examined on the Behalf of the Plaintant, and remaining in this Court, are to be *given in Evidence at a Court-Baron holden at Potton in the County of Bedford* on Monday next, therefore Publication is granted. Cary 50. 5 & 6 Ph & Mary Manlye v. Simcote.

2. If the Party *cannot find a Witneſs*, then he is as it were dead to him, and *his Depoſition in an Engliſh Court in a Cauſe between the ſame Parties* Plaintiff and Defendant may be allowed to be read to the Jury, ſo as the *Party make Oath* he did his Endeavour to find his Witneſs, but that he could not ſee him, nor hear of him. Godb. 326. pl. 418. Paſch. 21 Jac. B. R. Anon.

4. Proceſs

4. Proceſs by Depoſition *taken here in a former Suit* ſhall be allowed in this, notwithſtanding all the Parties be alive. Cited by Tanfield J. Lane. 100. in Paſch. 8 Jac. in the Exchequer, in Gooche's Caſe.

5. Upon an Evidence *in an Ejectione firmæ* betwixt the Plaintiff and Defendant, the *Court would not ſuffer Depoſitions* of Witneſſes *taken in the Court of Chancery or Exchequer to be given in Evidence, unleſs Affidavit* be made *that the Witneſſes* who depoſed *were dead.* Godb. 193. pl. 276. Trin. 10 Jac. in C. B. Sir Francis Forteſcue v. Cooke.

6. In Evidence given to a Jury, Hutton ſaid, that *Teſtimony examined in a Court which is not of Record, as in the Spiritual Court, tho' it be in a Cauſe of which they have Juriſdiction*, yet it *ſhall not be read here*; But the other three Juſtices e contra, and they all agreed, that Depoſitions taken in the Council of York or Marches of Wales ſhall not be received here; but afterwards they agreed with Hutton in that Caſe, becauſe it never was uſed to be done, and they would not make this a Precedent. Litt. Rep. 167. Mich. 4 Car. C. B. Anon.

7. Depoſitions taken *in the Dutchy, and exemplified*, were offered in Evidence and rejected, becauſe the Anſwer of the Defendant was not alſo exemplified, ſo that it may appear to be the ſame Matter and Title; ſo that it ſeems they might then have been allowed. Clayt. 9. pl. 17. Mar. 8 Car. before Damport Ch. B. Judge of Aſſiſe. Albroke's Caſe.

8. A *Witneſs* examined for the Plaintiff, and to be *croſs-examined* for the Defendant, but before he could be croſs-examined *died*, yet this Court ordered his Depoſitions *to ſtand.* Chan. Rep. 90. 10 Car. 1. Lord Arundell v. Arundell.

9. Depoſitions *in Eccleſiaſtical Court* not allowed becauſe not a Court of Record. March 120. pl. 198. Mich. 17 Car. And it was held, per two Juſtices contra one, not allowable, tho' the Parties aſſent to the Allowance.

10. Depoſitions taken in the Eccleſiaſtical Court, *cannot be given in Evidence at a Trial at Law, becauſe not taken in a Court of Record, tho' the Party that depoſed* it *is dead*; Crawley held, that by Conſent they might; Foſter and Reeves contra, yet admitted that Depoſitions taken in a Court of Record might be given in Evidence. March. 120. 1 Cro. 396. pl. 198. Mich. 17 Car. Anon.

10. A Perſon ſubpœned to give Evidence at a Trial did not appear, but it being ſworn that he came Part of his Journey, and *fell ſick upon the Road*, ſo that he was not able to travel any farther, his Depoſitions *in Chancery*, in a Suit there between the Parties about this Matter were admitted to be read. Mod. 283. pl. 29. Trin. 29 Car. 2. B. R. Lutterell v. Reynell & al.

11. Depoſitions *taken in the Court of Wards*, are *no Evidence in B. R.* to prove the ſame Title. 2 Roll. R. 312. Paſch. 21 Jac. B. R. Berisford v. Philipps.

But where ſuch Bill was diſmiſſed becauſe it prayed Relief, and it being only to perpetuate the Teſtimony, ought not to be ſet down for Hearing; Yet the Maſter of the Rolls ſaid, that the Plaintiff would at Law have the Benefit of theſe Depoſitions notwithſtanding the Diſmiſſion of the Bill. At the Rolls, 2 Wm's Rep. 162. Trin. 1723. Hall v Hoddeſdon.

12. Depoſitions taken *in Chancery in perpetuam rei memoriam* upon a Bill exhibited *to prove a Will* cannot be given in Evidence on a Trial at Common Law, unleſs there be an Anſwer put in and produced. Ellis Ch. J. ſaid it has been ſo reſolved ſeveral Times in B. R. and C. B. and it was reſolved ſo in **Dutton's** Caſe, upon a Trial at Bar concerning his Will forged by Mr. Colt. Raym. 335. Mich. 31 Car. 2. in Cam. Scacc. cites it as the Caſe of Bray v. Whitelage.

13. A

15. A *Bill* was *diſmiſſed at the Hearing* for want of Equity, yet the Maſter of the Rolls ſaid, and allowed the Plaintiff to uſe the *Depoſitions* in this Cauſe at a Trial at Law in caſe of the Death of the Witneſſes, tho' the *Bill did not pray to perpetuate the Teſtimony* 3 Chan. R. 22. Hill 1667. Moyſer v. Peacock.

16. Depoſitions taken *Coram non Judice*, were not allowed to be uſed at a Trial at Law. Chan. Caſes, 306. Hill. 29 & 30 Car. 2. Stork v. Denew.

17. It was ruled, that the *Examination in Chancery* of one between the ſame Parties, and croſs-examined there ſhould be *read before the Delegates*. 2 Chan. Caſes. 250. Hill 30 & 31 Car. 2. Gargrave v. Far.

18. Ordered upon long Debate, that Depoſitions of Witneſſes *taken in a former Cauſe thirty Years ſince, where the ſame Matters were under Examination*, and in Iſſue as in this, (the Point being concerning Incumbrances, and Dampnification in both Caſes) ſhould be made Uſe of in this Cauſe, albeit the Plaintiff in this Cauſe, and thoſe under whom he claims were not any Parties in the former Cauſe, inaſmuch as the Tertenants were then Parties, and the now Plaintiff's Title did not then appear, and the Witneſſes were dead; and Preſidents were cited for this between **Trinity-Hall and Doctors Commons**, where Dr. North's Depoſitions taken in a former antient Cauſe, wherein neither of the now Parties were Party, was read, and the like between **Culton and Daughan.** Chan. Caſes, 73 Paſch. 18 Car. 2. Terwit v. Greſham.

19. It was ſaid by Juſtice Ellys, that it was reſolved by the whole Court of B. R. in the Caſe of Dutton upon a Trial at Bar, concerning his Will forged by Mr Colt, that Depoſitions taken in Chancery *in perpetuam rei Memoriam upon a Bill for that Purpoſe exhibited, cannot be given in Evidence at a Trial at Law, unleſs there be an Anſwer put in and produced*; and ſo he ſaid he has known it ſeveral Times reſolved, both in B. R. and C. B. Raym. 335. Mich. 31 Car. 2. in Scacc. Powlet's Caſe cites it as the Caſe of Dutton v. Colt.

20. The Ch. J *refuſed* Evidence of Depoſitions in Chancery, *becauſe no Rule was made on the Hearing to allow them, but only a ſubſequent Order of Court after Diſmiſſion, and it appeared not whether they were taken here or beyond Sea, nor in Engliſh or foreign Language, but only Affidavit, that the Witneſſes were Foreigners, and could not be found*; But the Court conceived, if the Depoſitions were according to the Courſe of the Court they ought to be allowed; Sed concordatum eſt inter Partes. 1 Keb. 685. pl 91 Hill. 15 & 16 Car. 2. B. R. Sr. Martyn Nowel's Caſe.

21. Depoſitions *taken on a Bill of Revivor and diſmiſſed, cannot be uſed on an original Bill.* 3 Chan. Rep. 40 Hill. 21 & 22 Car. 2. Backhouſe v. Middleton.

22. Depoſitions taken *de Bene eſſe* by Order of Court, *ſhall not be admitted, if put in before the Defendant has anſwered*, for then they are taken before Iſſue joined, *but in the ſame Court they may*, though not in a Court of Law; and therefore the Courſe is to procure an Order of Chancery requiring the adverſe Party to admit ſuch Evidence; yet this does not bind the Courts of Common Law. 2 Jo. 164. Mich. 33 Car. 2. B. R. in Piercy's Caſe.

23. But *otherwiſe* it may be *where the Defendant has been in Contempt for Non-appearance, where the Bill is brought for preſerving Teſtimony ſeems to be admitted.* Mich. 14 Car. 2. in Scacc. Hard. 315. Brown's Caſe.

24. Depoſitions *ſhall not be uſed* as Evidence *in a Suit at Law, where any of the Parties at Law were not Parties to the Suit in Equity*, for being

Strangers they were not capable of preferring Interrogatories or examinining ſuch Witneſſes; And therefore ſuch Strangers ſhall not be bound by them, and inaſmuch as they cannot be read againſt them, no more ſhall they be read for them. Hard. 472. pl. 1. Hill. 19 & 20 Car. 2. in Scacc Ruſhworth v. Counteſs of Pembroke.

Lev. 180 Bromwich's Caſe. S. C. held accordingly. —— Sid. 277. pl. 1. S. C but. S. P. does not appear.

25. *Depoſitions* of Witneſſes *taken before the Coroner againſt the Aider and Aſſiſter to a Murder at which he was preſent, and againſt the Perſon that did it, who were afterwards dead, or unable to travel, were read by the Opinion of all the Juſtices*, the Coroner firſt making Oath, that ſuch Examinations are the ſame he took upon Oath, without any Addition or Alteration whatſoever; Reſolved by all the Judges. Keling. 55. 18 Car. 2. Ld. Morley's Caſe.

26. Upon an *Indictment for Murder*, the Queſtion at the Trial was, whether the *Depoſitions* of a Witneſs *taken before the Coroner* ſhould be read in Evidence againſt the Criminal, it appearing, that the *Witneſs was gone beyond Sea, and as ſuppoſed at the Inſtigation of the Offenders*; And it was here ruled, *that it ſhould be read*, for being beyond Sea is the the ſame Thing as if he was dead; But all (except the chief Juſtice) were of Opinion, that a *Depoſition taken before a Juſtice of Peace could not be read*, but the Authority of Coroner ſuper viſum Corporis is very great, and in ſome Caſes it is a Record, and not traverſable. 2 Jo. 53. Trin. 28 Car. 2. B. R. the Caſe of Thatcher and Waller.

Abr. Equ. 247. pl. 3. cites S. C.

27. Depoſitions taken in a former Cauſe cannot be *read in any other Cauſe* with one that does not claim under the Party with whom thoſe Depoſitions were taken; But if a *Legatee* brings a Bill againſt the Executor, and proves Aſſets, another Legatee though no Party may have the Benefit of thoſe Depoſitions. Vern. 413. pl. 390. Mich. 1680. Coke v. Fountain.

Show 363. 364. S. C. Gregory and Eyres held it good Evidence, Dolben dubitavit. and Holt Ch. J. Hæſitavit, and for that Reaſon, adjornatur. —Carth. 265. S. C. and after much Debate the Court was of Opinion that theſe Depoſitions might be given in Evidence, otherwiſe a Bill in Equity to perpetuate the Teſtimony of Witneſſes would be to very little or no Purpoſe.—

30. Upon a Bill exhibited in Chancery to perpetuate Teſtimony, the Defendant, who was Heir at Law, ſtood in Contempt and could not anſwer, and thereupon the Plaintiff had a Commiſſion and examined Witneſſes to the Matter of his Bill, *de bene eſſe*, and the *Defendant joined in Commiſſion and croſs-examined ſome of the Witneſſes produced for the Plaintiff, and before the Anſwer came in the Witneſſes died*; and upon a Trial in Ejectment in which the Plaintiff made Title under this Will, the Queſtion, was, whether theſe Depoſitions could be given in Evidence, and a Verdict was taken for the Plaintiff, but the Poſtea ſtay'd, 'till the Opinion of the Court was had on this Point, and it was not queſtioned, but if the Defendant had anſwered, and theſe Depoſitions had been taken after Anſwer they had been good Evidence againſt the ſame Parties, and thoſe that claim under them; and per Eyre J. it might be very inconvenient if this ſhould not be allowed as Evidence, how otherwiſe can a Deviſee examine Witneſſes in Perpetuam Rei Memoriam? for the Heir at Law will not anſwer to the Plaintiff's Bill, and on the other Side, he will not call in Queſtion the Title of the Deviſee, as long as he has Witneſſes alive to prove the Will, but as ſoon as they are dead, then he will commence his Suit. 1 Salk. 278. pl. 3. Mich. 4 W. & M. in B. R. Howard v. Tremaine. Per Cur. nothing can make it Evidence but the *Neceſſity of the Thing*; it is true, in Caſes of Wills it may be neceſſary to examine Witneſſes to perpetuate their Teſtimony, but in this Caſe the Plaintiff was nonſuited upon Evidence Viva Voce, and afterwards exhibited a Bill, and obtained theſe Depoſitions upon Examination of his own Witneſſes, which is but Paper-Evidence at the beſt, and therefore they inclined not to allow it, Tamen Quære. 4 Mod. 147. S. C.

31. De-

31. It was inſiſted upon by the Sollicitor General that the Depoſitions *in Chancery*, which were read againſt the Lord of Bath *in the other Cauſe* are no Evidence in this, becauſe the Trial is *not between the ſame Parties*, and Depoſitions are never Evidence but where they are mutual, and this Defendant does *not claim under any Party to the former Suit*; but per Cur. they may be read, becauſe the Defendant ſhelters himſelf under the others Title, and the Title of the Land is not in Queſtion, but to whom the Rent ſhall be paid. If the Defendant gives the *Plaintiff's Anſwer* in Chancery in Evidence he may inſiſt to read only ſuch Part as he will; for it is like Examination of Witneſſes; but the other Side may inſiſt to have the whole read after. 5 Mod. 9. Mich. 6 W. & M. E. of Bath v. Batterſea.

32. On a Trial *on an Information for a Libel, Depoſitions taken before a Juſtice of Peace relating to the Fact the Deponent being ſince dead, were not allowed in Evidence. Per B R.* upon Advice with the Judges of C. B In Caſes of Felony ſuch Depoſitions before a Juſtice, if the Deponent die, may be uſed in Evidence by 1 and 2 Ph & M. cap. 13. But this cannot be extended farther than the particular Caſe of Felony. 1 Salk. 281. Hill. 7 W. B. R. The King v. Pain

Comb 358. Hill 8 W 3. S. C. and after long Debate and Conference with the Juſtices of C. B. by Juſtice Eyre S C accordingly, and the Ch J. declared that it was the Opinion of both Courts, that theſe Depoſitions ſhould not be given in Evidence, the Defendant not being preſent when they were taken before the Mayor, and had loſt the Benefit of a Croſs-Examination.—

the Court would not allow it to be given in Evidence. —Ld. Raym. Rep. 729, 730

33. *To prove a Jointure (the Jointure Deed being loſt) Depoſitions* in Chancery were produced, and *offered to be read (the Bill and Anſwer being taken off the File and loſt)* but propoſed to prove by the Six Clerk's Book, that it was once filed, and produced an Inrollment of the Decree, which mentioned both Bill and Anſwer; and the *Court held that the Deed being loſt the Proof might be ſupplied by Memorials.* 5 Mod. 210. Paſch. 8 W. 3. Barley's Caſe.

34. An Appeal was from the Commiſſioners of Exciſe to the Commiſſioners of Appeals upon the Statute 12 Car. 2. cap. 23. The Queſtion was, whether the *Depoſitions of Witneſſes, and their Examination wrote by the Clerk of the Commiſſioners of Excife* ſhall be read in Evidence upon this Appeal, or whether the Commiſſioners of Appeals ſhould not re-examine the Witneſſes Viva Voce. The Court (mutata Opinione) held that *the Commiſſioners ought to examine the Witneſſes de novo on the Appeal.* and that it was the Intent of the Act, and the Commiſſioners of Appeals had Authority given for that Purpoſe by the Act to adminiſter Oaths, and this was juſt, becauſe the firſt Sentence might be by Default, or the Depoſitions might miſrepreſent, or not repreſent the whole Caſe; and that on Appeals from Orders of Juſtices Examination is always De Novo; thereupon a Prohibition was granted; but Holt Ch. J. ſaid that his private Opinion was, that *if the Witneſſes were dead*, they might uſe the Depoſitions. 2 Salk. 555. Mich. 8 W. 3. B. R. Breedon v. Gill.

Comb. 474 S. C but no Judgment — 5 Mod 271. S C and at length upon further Conſideration, a Prohibition was granted —Ld Raym. Rep 222. Paſch. 9 W. 3. S. C. held that Commiſſioners of Appeals from the Commiſſioners of Exciſe, ought not

proceed on the former Depoſitions unleſs the Witneſſes are dead, &c. Ld. Raym. Rep. 222. Paſch 9 W. 3. Bree. Bredon v. Gill. —

35. Depoſitions *taken before Juſtices of the Peace cannot be read upon Appeal to the Quarter-Seſſions*, nor can Depoſitions *taken before Commiſſioners*

*miſſioners of Bankrupts* be uſed *at Trial at Common Law.* Arg. Ld. Ray. Rep. 220. Eaſt. 9 Will. 3. in Caſe of Breedon v Gill.

36. If a *Witneſs* who is not likely to be had at a Trial be *examined before a Judge and croſs-examined* by the other Party, and his Depoſitions put in Writing; yet if at the Trial it be proved, that the Party might have had him there his Depoſitions are not to be read. Per Cur. 12 Mod. 493. Paſch. 13 W. 3. Anon.

37. If a *Witneſs going to Sea be by Rule of Court examined* upon Interrogatories *before a Judge, and the Trial comes on before he is gone,* his Depoſitions ſhall not be read, but he muſt appear, for the Rule was made on Suppoſal of his Abſence. 2 Salk. 691. Paſch. 13. W. 3. B. R. Anon. and by Conſent of the Parties. Per Prat. Ch. J.

38. Theſe *Depoſitions in perpetuam, &c. cannot be* made Uſe of *againſt any others but the Defendant who were ſubpœnaed to defend the Matter, or ſome claiming under them ſome Intereſt accrued ſince the Bill preferred* Prac. Reg 36, 37.

40. It was ruled by Holt Ch. J. at Lent Aſſiſes at Eaſt-Grimſtead, 11 W. 3. 1699. that if an *Anſwer to Interrogatories in Chancery* be given in Evidence at a Trial, they *ought to be proved by the Examiner himſelf to have been the ſame Day that is mentioned upon them.* Ld. Raym. Rep. 734. Goring v. Evelin.

41. At Lent Aſſizes at Thetford, 12 Will. 3. 1699. Holt Ch. J. refuſed to admit Depoſitions in Chancery to be given in Evidence *after the Bill was diſmiſſed*; but it was reſerved as a Point for his further Conſideration, and conference had with the Practiſers in Chancery; he gave his Opinion, that notwithſtanding ſuch Diſmiſſion of the Bill, *the Depoſitions were good Evidence.* And ſo he ruled it afterwards at Guildhall at the Sittings after Hillary Term. 1 Ann. Ld. Raym. Rep. 735. Smith v. Veale.

Freeman's Caſes in Equity, 260. pl. 329 S. C. accordingly.

42. Several Perſons were examined as Witneſſes no ways concerned in Intereſt, and the Cauſe heard, and Iſſues directed to be tried, but the Trials were not carried on, and the Cauſe ſlept many Years, and after abated; and then thoſe Perſons *who had been examined as Witneſſes became Heirs at Law*, and thereby intereſted in the Matter; The Cauſe was revived and heard, and the ſame Iſſues directed to be tried; and the Perſons who had been ſo examined (being now Plaintiffs) prayed to have an Order that their Depoſitions taken when they were diſintereſted might be read as Evidence at Law for themſelves; and my Lord Keeper ordered accordingly, and likened it to the Caſe where one is the only, or only ſurviving Witneſs to a Deed becomes after the Party intereſted, his Hand may be proved at Law; ſo if a Witneſs to a Deed becomes blind. Then the Cauſe proceeded to Trial at Bar in C. B. where the whole Court held theſe Depoſitions could not be read without Conſent, the Parties being living; but the Defendant conſented, and had a Verdict for him, and the Plaintiff obtained a new Trial, and then would have had the ſame Order; but my Lord Keeper ſaid, ſince the Judges had reſolved otherwiſe, he could not take upon him to make that Evidence which was not, and therefore only ordered they ſhould be read in Evidence, as by Law they might. Abr. Equ. Caſes, 224. Trin. 1702. Holcraft v. Smith.

2 Ld. Raym. Rep. 1008. S. C. accordingly.

43. Depoſitions were taken in Chancery *in Perpetuam rei memoriam*, and it happened afterwards *that the Inheritance of the ſame Land deſcended to a Perſon who was ſworn as a Witneſs, and he was now a Party to the Suit in Ejectment*, and upon a Queſtion in C. B. whether theſe Depoſitions could be read, Trevor Ch. J. held they ought; but Tra-

cy

cy and Blencow contra, whereupon Tracy went to B. R. for the Opinion of the Court, and per Cur. they ought not to be read; for the only Intent of ſuch Depoſitions was to perpetuate Teſtimony in caſe Witneſſes died, and they cannot be read in any Caſe between other Parties till after the Death of the Witneſs who is to appear and give Evidence Viva Voce as long as he lives; much leſs can they be read in this Caſe where the Witneſs himſelf is a Party. 1 Salk. 286. Mich. 2 Ann. Tilly's Caſe.

44 The *Depoſitions of one in Ireland, or elſewhere out of England*, where no Proceſs will fetch him may be read as Evidence to prove the Record, as alſo in Caſe one be ſick, &c. Per Gould and Powel J. it is better to have Witneſſes Viva Voce, where they may be had; but ſuppoſe the Record be out of the Queen's Dominions, or in the Weſt-Indies, or in Scotland, a Depoſition would do in ſuch Caſes; Per Powel J. the Law requires the beſt Evidence that can be had, but we cannot compel any one to come out of Ireland, nor oblige any one to go and inform himſelf in Order to be a Witneſs; but the Rule is to be interpreted with reſpect to the Perſons depoſing, as that a Man's Affidavit ſhall not be read when he is here to give his Evidence Viva Voce; yet the Depoſitions of thoſe that are abſent may be read; Per Holt Ch. J. and cited Cro. 541. but ſaid, he would not warrant the Authority of the Caſe. 11 Mod. 210. pl 1. Paſch. 8 Ann. B. R. Ld. Altham v. Ld. Angleſey. Gilb. Exp. Rep. 16 S. C.

45 Depoſitions *in another Cauſe in which the Matters in Queſtion were not in Iſſue*, cannot be read. MSS. Tab. 1706. Allibone v. Attorney-General

46. Regularly the Depoſitions in Chancery of a Witneſs *ſhall not be given in Evidence if he be alive, altho' he beyond Sea, as in Ireland*, &c. *otherwiſe* if he be *in France*, or another Kingdom not ſubject to the Dominion of our King. Tr. per Pais, 7th Edit. 385, 386.

47. Depoſitions *in a former Cauſe, where neither Plaintiff nor Defendant were Parties* cannot be read as Evidence, *but* Depoſitions in a Cauſe *where either Plaintiff or Defendant were Parties* may be read as Evidence againſt ſuch Plaintiff or Defendant. MSS. Tab. January 20th, 1702. Ld. Peterborough v. Germain.—February 25th, 1717. Everard v. Aſhton.

## [A. b 32] Examination.

1. One *examined in Admiralty Court*, uſed here at the Hearing. Toth. 288. cites 16 Eliz. li. a. fo. 530. Watkins v. Furſland.

2. A *Witneſs not to be examined Viva Voce at the Hearing.* Toth. 287. cites Wright v. Moor, 6 Car.

3 To examine Witneſſes upon Oath *for Proof of Acquittances, Payments, and other Diſburſements upon Hearing.* Toth. 287. cites Comes Kenrie v. Gore Paſch. 6 Car.

4. Nota pro Regula. *Examination* of Witneſſes *by Interrogatories out of the Term*, by Foſter Ch. J. is extrajudicial, and not to be allowed, though the Party conſent; contrary by Twiſden and Windham, conſenſus (if according to Law) tollit errorem; and the Court may as well allow the Examination of Witneſſes before a Judge by Depoſitions, as read the Affidavit of a Perſon abſent; this is no more than the Law allows. 1 Keb. 36. pl. 98. Paſch. 13 Car. 2. B. R. Blake v. Page.

5. The *Defendant having prepared for a former Trial, which the Plaintiff delayed*, and would not proceed then, *but now ſpurr'd a Trial on again*, whereupon the *Defendant pray'd that it might be ſtayed on Suggeſtion that his material Witneſſes were Mariners, and now going to Sea with the Fleet*, and would not be ready 'till Mich. Term next. The Court agreed to examine the Witneſſes by Conſent of Parties before the Ch. J. the Trial being to be before him, and that the Plaintiff, if he would, might croſs-examine them. 2 Keb. 13. pl. 32. Paſch. 13 Car. 2. B. R. Catline v. Pidgeon.

6 If one *Witneſs* be *examined for the Defendant de bene eſſe* to preſerve his Teſtimony *upon a Bill preferred, and before Anſwer, and upon an Order in Court for his Examination* made upon hearing Counſel on both Sides; and if *after Anſwer the Witneſs dies before he is examined again* the Anſwer coming in on the 28th of Nov. and the Witneſs's Death happening on the 18th of Dec. following, *and he being ſick all the mean Time, ſo that he could not go to be examined*, the Examination of ſuch Witneſs ſhall not be read in Evidence, becauſe it was taken before Iſſue joined in the Cauſe, and he might have been examined after; and the Defendant did not appear to be in Contempt. Held upon Evidence in the Exchequer per Curiam, by Advice of all the other Judges conſulted with thereupon. Hardr. 315. pl. 6. Mich. 14 Car. 2. Browne's Caſe.

7. The Witneſſes may be *examined before a Judge by Leave of the Court, as well in Criminal Cauſes as in Civil*, where a ſufficient Reaſon appears to the Court, as *going to Sea*, &c. and then the other Side may croſs-examine them. Comb. 63. Mich. 3 Jac. 2. B. R. Matthews v. Port.

8. In a Trial at Bar May 14, 1705. of an Iſſue directed out of Chancery to try if a Leaſe was made in Purſuance of a *Power*, which *was to make Leaſes for the beſt Rent that could be got*; a Witneſs named *Ruſſley was examined in Chancery concerning the Value of the Land, having been Collector of the Rents*; *and at* the Time of *his Examination in Chancery he referred to and conſulted his Rental. But now* at this Trial he *was become blind*, and therefore his Examination in Chancery, and Depoſitions there were admitted to be read; becauſe if he had been ſo ill as that he could not have come to the Trial, they had been good Evidence, and now he is diſabled to conſult the Rental, by the Act of God, and therefore the ſame Reaſon holds. He alſo gave Evidence of what he remembered beſides. 2 Ld. Raym. Rep. 1166. Eaſt 4 Ann. Kinſman v. Crook.

9. Where a *Supplemental Bill is brought after Publication in the original Cauſe*, it is irregular to examine the Witneſſes to a Matter that was in Iſſue, and not proved in the original Cauſe, and ſuch Proofs are not to be read. March 31ſt 1725. MSS. Tab. Bagnall v. Bagnall.

[A. b. 33] Exemplification. Of what.

1. In Aſſiſe, he who *pleads a Recovery in a Writ of Right in Court-Baron in Bar of Aſſiſe before the Juſtices of Aſſiſe*, ought to *ſhew the Record exemplified under the Seal of the Chancellor*, and otherwiſe it is no Plea, and it ought to be removed into Chancery by Recordare, &c. and then to be exemplified. Br. Barr. pl. 95. cites 28 E. 3. and Fitzh. Tit. Aſſize.

Tho' a Patent was ſurrendered, yet before Vacat. entered a Con-

2. 3 & 4 *Edw.* 6. *cap.* 4. *ſect.* 2. *All Perſons which ſhall claim by Force of any Patents to be made by the King, and all other that ſhall have any Eſtate or Intereſt in any Lands, Offices, or other Things, by or under ſuch Patentees, may convey unto themſelves Title, as well againſt the King as againſt any other Perſon, by ſhewing forth the Exemplification or Conſtat of*

*of the Roll, or of ſo much thereof as ſhall ſerve for the Matters in Variance, under the Great Seal; and the Exemplification or Conſtat of the Inrolment ſhall be of the ſame Force, as the firſt Letters-Patent ſhould be, or if the ſame were pleaded or ſhewed.*

that is grantable, but not after that it is entered on the Roll. D 167 a.

Marg. pl. 13 cites it as Sir Robert Sidney's Caſe, and ſays that Br. Patents, 97. which cites 32 H. 8. is to be ſo intended.——S. C. cited accordingly. 3 Le 240. Mich 32 Eliz

R. and W were Patentees of an Office. R in the Abſence of W. beyond Sea ſurrendered the Patent in Chancery, and was cancelled there, and a Remembrant thereof indorſed but not inrolled, that they both had ſurrendered, &c. whereupon a new Patent was made by Qu. Mary to a third Perſon, reciting the former Surrender as made in the Names of both. W. on his Return from beyond Sea ſued to have an Exemplification or Conſtat by the 3 & 4 E 6 cap 4 It was much doubted if the Patentee himſelf ſhall be intended within the Purview and Benefit of the ſaid Statute, becauſe the Title and Preamble thereof declares the Miſchief that thoſe who purchaſe Parcel of the Lands in the Patent contain'd of the Patentee or his Heirs, ſuſtain by the Surrender or Loſs of the original Patent; but as it ſeems by that firſt Sentence of the Purview the Patentees themſelves ſhall be aided. D. 167. a. pl 13 Hill. 1 Eliz. Wroth v. Walgrave. ——S. C. cited per Cur. 5 Rep. 53. a as reſolved that theſe Words, "Al and every Patentee and Patentees, &c." is a diſtinct Clauſe of itſelf, and extends to all Letters Patents whatſoever, either concerning Lands, &c. or Perſons, &c or any Thing or Matter whatſoever; for in the next Clauſe i, "Any Lands, Tenements, or Hereditaments, "or any Thing whatſoever;" and afterwards towards the End, "As ſhall and may ſerve to and for "ſuch Title, Claim and Matter;" and therefore this Act extends to Letters-Patents of Creation of Dukes, Marquiſſes, &c. and to Pardon of Treaſons, and all other Letters Patents which at the Time of Exemplification or Conſtat are in Force, and lawfully ſurrendered or cancelled, which concern any Inheritance, Franchiſement, or Chattels, any Thing or Matter, real, perſonal, or mixt whatſoever——Co. Litt 225 b. S. P.——S. C. cited and allowed as to the Point of Pardons. Carth. 158. Paſch. 2 W. & M. in B. R. in the Caſe of Biſſe v. Harcourt.

4. Exemplifications of Depoſitions taken in Chancery *to prove one's being of Age when he levied a Fine* was allowed as Evidence, and the Jury regarded it more than the Fine's being reverſed for Non-age. Dy. 301. pl. 40 Trin. 13 Eliz.

5. 13 *Eliz cap* 6. *An Exemplification, or Conſtat of a Patent under the Great Seal is ſufficient for the Patentee.*

6. The *Court ordered* an Exemplification of a Deed to be pleaded at Law *where the Deed could not be brought.* Toth. 153, 154. cites 33 Eliz. Fuller v. Smith.

8. 13 *Eliz. cap.* 6 *An Exemplification of the Inrollment of the Letters-Patents by H. 8. E. 6. Qu M Ph. & M. Qu. Eliz. or any of them, ſince the 4th Feb. in the 27 H. 8. or hereafter to be granted by the Queen, her Heirs or Succeſſors, ſhall be of as good Force to be ſhewn and pleaded in Behoof of the Patentees, their Heirs, and Succeſſors, and Aſſigns, and every other Perſon having any Eſtates from, by, or under them, or any of them, as well againſt the Queen, her Heirs or Succeſſors, as againſt any other Perſons whatſoever, as if the Letters-Patent themſelves were produced.*

17 *Eliz. cap.* 9. *S* 8 *The Exemplification of Records of any Fine or Recovery inrolled, or any Part thereof, in the twelve Shires of Wales, and the Town of Haverford Weſt, under the judicial Seal, or in the Counties Palatine under the Seal of the reſpective County Palatine, ſhall be of as good Force as the original Record itſelf.*

10. In Ejectment upon the Iſſue of Not Guilty, the *Defendant gave in Evidence a Recovery in Wales in a Quod ei Deforceat*, and Iſſue being tendered thereupon, the Defendant *produced an Exemplification* under the Seal of the great Seſſions, *but not the Record itſelf*, whereupon the Plaintiff demurred to the Evidence, and after long Arguments it was ſaid by Judges, that an Exemplification of a Record in Wales might not be given in Evidence * while the Record itſelf is in Being, unleſs the ſame were exemplified under the Great Seal, and then the Court ought to take Notice; but not of other inferiour Seals, but an Exemplification may be produced in Evidence in the ſame Court to prove a Record upon a Nul Tiel Record pleaded, but agreed that a ſworn

But it was reſolved it might 2 Sid. 145. S. C. as being under the Great Seal of Brecknock and Judgment for the Defendant.

Copy

Copy of a Record in Wales might be given in Evidence. Hard. 118, 119, 120. Trin. 1658. in Scacc. Oliver v. Gwyn.

11. In Evidence to a Jury at Bar of Eſſex in Ejectment, Maynard pro Defendant offered an *Exemplification under the Great Seal in* 1588. *of Depoſitions in Chancery, whereby a Conveyance made in* 86. *and loſt*, was proved; and the *Court agreed, that being ſo old, and the Records of the Rolls burnt ſince*, it is good Evidence, tho' the Bill and Anſwer were not in it, which, per Twiſden and Maynard, was uſed but thirty Years loſt paſt, and before it was not uſual to inſert the Bill and Anſwer; and this was given in Evidence in a former Trial here at Bar, tho' it appeared to be a Bill of Diſcovery by Francis Moor and Rich. Moor his Father, under whom the Plaintiff claimed as Heir, the Defendant as Purchaſer, becauſe the Depoſitions of ſuch are never publiſhed without Notice given to both Parties. 2 Keb. 31. pl. 65. Paſch. 18 Car. 2. B. R. Blower v. Ketchmere.

12. *Copies of Depoſitions* are not to be allowed to be allowed or exemplified 2 Chan. Rep 36. 21 Car. 2. Brabant v. Perne.

3 Keb 310. in S. C. cites it as Peter's Caſe, and that the Exemplification under the Mayor's Hand, who was Judge of the Court, was allowed by all the Judges of England. Vide S. C. cited Arg. Hardr. 179 as held accordingly, in the Time of Wild C. B. in Whitehead's Caſe.

13. The Defendant ſetting up an Entail, the Plaintiff exhibited an Exemplification of a Recovery in the Marquiſs of Wincheſter's Court in Ancient Demeſne, the other Side objected that they did not prove it a true Copy, but becauſe it was ancient the Court ſaid they ſhould not be ſo ſtrict upon the Evidence of it, for the other Side ſaid the Court-Rolls were burnt in the Baſeing-houſe in the Time of the Wars, and Hales ſaid the Mayor of Briſtol had offered in Evidence an *Exemplification of a Recovery* under the Town-Seal of Houſes in Briſtol, the Records being burnt, and that Exemplification was allowed for Evidence. 1 Mod 117. pl. 17. Paſch. 26 Car. 2. B. R. Green v. Proude.

14. *Will exemplified* under the Great Seal is not Evidence to a Jury in Ejectment. Cumb 46. Paſch. 3 Jac. 2. B. R. Anon.

16. In *Replevin, Exception was taken to the Avowry, that the Demiſe of the Manor for ninety-nine Years was alleged to be to* Sr. H. B. &c. by Indenture *under the Great Seal prout by Inrollment of the ſaid Indenture* in Chancery it appears, *but did not produce any Exemplification or Conſtat thereof*; but after it is *alleged that this Indendure is loſt*; but that the Saying that the Indenture is loſt *is not ſufficient*; for if this ſhould be allowed the Statute of 3 & 4 E. 6. cap 4. was made to no Purpoſe, by which Act in ſuch Caſe, Title may be made by producing an Exemplification or Conſtat, &c. And to this all the Court at firſt inclined if it was not *aided by the Conuſſing it in the Bar by a direct Bene & Verum eſt*; But afterwards Powel and Rookby Juſtices held, that it was not aided; but this was not fully reſolved per Curiam; And the Reporter adds a Quære alſo if Advantage can be taken of it unleſs by ſpecial Demurrer. 2 Lutw. 1171, 1172. Hill. 1 W. & M. in Caſe of Hill v. Bolton.

15. Exemplification of *Letters Patents* of a Grant of *Feefarm Rents* was produced, but ſo far only as concerned this grant was ſhewn forth and good. Carth. 209. Hill 3 W. & M. in B. R. Tucker v. Hodges.

16. Exemplification *of Part of a Patent* not allowed to be read in Evidence, notwithſtanding the Statutes of 3 & 4 of Edw. 6 & 13 Eliz. in Caſes where the other Side have not Time to conſult the Patent-Roll, and ſo may be ſurprized by an imperfect Exemplification. Chan. Prec. 59. pl. 56. Mich. 1695. Attorney-General, at the Relation of the Inhabitants of Stains v. Taylor.

17. Plaintiff

17. Plaintiff would have read in Evidence an *Exemplification of Part of a Patent*, but Defendant objected, that nothing but the Patent itſelf, or an Exemplification, or Copy of the whole could by Law be Evidence; And it *was not ſuffered to be read in Evidence*, notwithſtanding the Statutes of 3 & 4 of Ed. 6 & 13 Eliz. where the other Side have no Time to conſult the Patent-Roll, and ſo may be ſurprized by an imperfect Exemplification. Chan. Prec. 59. Mich. 1695. Attorney-General at the Relation of the Inhabitants of Stains v. Taylor.

19. To prove the *Delivery of Goods to a Maſter of a Ship*, an Exemplification of the *Entry* thereof was offered in Evidence, which Entry was made *in the Cuſtom-Houſe Books at Rotterdam, atteſted by a publick Notary*, and ſealed with the Publick Seal there, but the Court would not admit this Exemplification to be given in Evidence. 8 Mod. 75. Paſch. 8 Geo. the King v. Maſon.

## [A. b. 34] Fine.

1. A *Fine* may be given in Evidence to a Jury, *though not under the Seal of the Court or Great Seal.* Pl. C. 410. b. Mich. 13 and 14 Eliz. Newys v. Larke.

## [A. b. 35] Foreign Letters in a ſtrange Language.

1. In a *Cauſe in Canc. between Two Jews* ſeveral *Letters written in Portugueſe were tranſlated (without Order of the Court)* and *the Engliſh Copies were proved to be true Copies of the Originals*; but per Maſter of Rolls theſe are no Evidence, for *the Court always appoints a Tranſlator*, and he would not allow theſe Engliſh Copies to be read, although it was ſaid the Portugueſe Letters were alſo proved. Paſch. 9 Geo. in Canc.

## [A. b. 36] Goldſmith's Note.

1 Goldſmith's Note to pay is *Evidence of his receiving Money.* 1 Salk. 283. pl. 14. Hill. 12 Will. 3. Ford v. Hopkins. 4 and 5 Ann. Cap 9. accordingly. But tho' the Note itſelf is Evidence now of the Conſideration, yet it is not concluſive Evidence, but turns the Proof upon the Defendant to ſhew that there was no Conſideration given for ſuch a Note; and ſo he can ſhew that it is ſtill a ſimple Contract, and ſo but a Nudum Pactum unde non oritur Actio. And of this Opinion was Ld. Chancellor King, and directed it to be ſo ruled at Niſi Prius. Gilb. Rep. 154. Mich. 1 Geo. 1. in Canc. Brown v. Marſh.

## [A. b. 37] Guardian's Anſwer in Chancery.

1. On a Trial at Bar in Ejectment this Queſtion aroſe, whether the Anſwer of a Guardian in Chancery ſhall be received as Evidence in B. R. to conclude the Infant, there being ſome Opinions that it ought to be read, and the Defendant's Counſel inſiſting on the contrary, Mr. Juſtice Eyres being the puiſne Juſtice was ſent to C. B. to know their Opinions, who returning made this Report, that the Judges of that Court were all of Opinion, that ſuch Anſwer *ought not to be read as Evidence*, for *it was only to bring the Infant into Court*, and to make him a Party. 3 Mod. 258. Mich. 1 W. & M. in B. R. Eggleſton v. Speke. For it is not Reaſon that what the Guardian ſwears in his Anſwer ſhould affect the Infant. 2 Ventr. 72. Anon. and ſo as to have an Opportunity to take Depoſitions and to examine Witneſſes to prove the Matter in Queſtion, and an Infant is never concluded by any Matter contained in his Anſwer per Guardianum. Carth. 79. S. C. — Show. 89 Edleſtone v. Speake S. C. but S. P. does not appear. —— Comb. 156 S. C. but S. P. does not appear.——

(A. b. 38) Hearſay.

1. To prove a *Diſcharge of Tithes* by Unity of Poſſeſſion in the Time of the Abbot, and at the Time of the Diſſolution two Perſons teſtified, that they had ſeen a Deed of Appropriation of the Parſonage to the Abbot, for which Reaſon they verily thought there was an *Unity of Poſſeſſion* at the Time of the Diſſolution; But it was ruled to be no Proof for it may be intended not to continue, and a Conſultation was granted, but they ſaid that *Hearſay* ſhall be allowed for a Proof. Cro. E. 228. pl. 17 Paſch. 33 Eliz. B. R. Stanſham v. Cullington.

2. On a *Modus* alledged, it was agreed, that where the Statute appoints Proof of the Surmiſe to be by two, it is ſufficient if two affirm that they have known it to be ſo, or that the common Fame is ſo. Noy. 28. Anon.

3. On a *Modus* ſuggeſted, and Iſſue joined upon it, the Witneſſes ſaid, that for a long Time as they heard ſay, the Occupiers of that Farm, &c. had uſed to pay annually to the Parſon three Shillings for all Tithes, and it was agreed, that a Proof by Hearſay was good enough to maintain the Surmiſe within the Statute. 2 E. 6. Noy. 44. Web v. Peirs.

4. Hearſay from others is not to be applied immediately to the Priſoner; however thoſe Matters that are remote at firſt *may ſerve to prove there was a general Conſpiracy* to deſtroy the King and Government; and ſo was the conſtant Rule and Method about the Popiſh Plot, firſt to produce Evidence of the Plot in general; By Ch. J. cites Sidney's Caſe, Try. per Pais, 56.

5 Being told by Perſons of good Credit all along the Road of the *Parliament's Prorogation*, is good Evidence of *Notice* in an Action of falſe Impriſonment. 2 Show. 300. pl. 302. Paſch. 31 Car. 2. B. R. Verdon v. Deacle.

But then the Record of that Trial muſt be produced, elſe ſuch Evidence is not to be admitted; Per Pemberton Ch. J. Show. 163. pl. 152. Trin. 33 Car. 2. B. R. Anon.

6. If a *Witneſs ſwear in a Cauſe and dies*, per Cur. held, that in another Trial one that heard him may upon Oath repeat his Teſtimony, and it ſhall be good Evidence. 2 Show. 48. pl. 33. Paſch. 31 Car. 2. B. R. King v. Carpenter.

7 Though a Hearſay was not to be allowed as a *direct Evidence*, yet it might be made Uſe of to this Purpoſe (viz.) to *prove that* a Man was *conſtant to himſelf*, whereby his Teſtimony was *corroborated*. 1 Mod. 283. pl. 29 Trin. 29 Car. 2. B. R. Lutterell v Reynell.

8. In a Suit between A. & B. A. produced a Deed. In a Suit afterwards between C. & A. it was *Viva Voce proved, that A. in a Cauſe between A. and B produced ſuch a Deed which proved ſo and ſo*, &c. Per Cur. it is good Evidence, for here A. may give that very Deed in Evidence if he will, which C cannot, becauſe it is in A's Cuſtody. Carth. 80. Mich 1 W. & M. in B R. Eccleſtone v Speke.

9. The *Saying of old Men* not to be given in Evidence *on Iſſue, whether Parcel or not Parcel*, as they may in Caſe of a Modus; Coram Baron Bury, at Launceſton. Lam. 1710.

10. Queſtion in Ejectment, whether ſuch a Parcel belong to one or other; the Declaration of a Perſon who held under both, and Deed was allowed as Evidence by Ld. Ch. J. Hardwick. Summer Aſſiſes at at Exeter 1735. between Roll and Fellow.

13. *In the Caſe of Murder, what the Deceaſed declared after the Wound given*, may be given *in Evidence*. Coram King Ch. J. apud Old-baily, 1720. the King v. Ely.

12. In

12. In Trowter's Caſe, Paſch. 8 Geo. B. R. the Court would not admit the *Declaration of the Deceaſed which had been reduced into Writing* to be given in Evidence *without producing the Writing*.

(A. b. 39) Herald's Books.

1. Herald's Books were admitted to be good Evidence to Triers of a Challenge *to prove Conſinage* in the Sheriff. 2 Plow. 426. a. Mich. 14 & 15 Eliz. C. B. in Caſe of Vernon v. Mannors.

2. In Ejectment at a Trial at Bar, a Herald's Book being antient, was admitted as Evidence *to prove a Pedigree*, and an Inquiſition poſt Mortem is likewiſe Evidence, but not concluding Evidence. 2 Jones 224. Mich. 34 Car. 2. B. R. Earl of Thanet v. Foſter.

But an Extract by the Heralds out of the ſaid Book was refuſed. Ibid.

3. In this Caſe the *Viſitation-Book of the County of Worceſter by the Heralds* was allowed as Evidence, being an Original, but a Copy has been often diſallowed. Comb. 63. Mich 3 J. c. 2. B. R. Matthews v. Port.

4. An Entry in the Herald's Office ſhall not be allowed good Evidence to prove a *Pedigree for an Heir*; Becauſe they are not Matters of Record, but allowed only as *circumſtantial Evidence*. L. P. R. 557.

Herald's Book are good Evidences to Pedigrees; Per Hale Ch. J. 1 Salk. 281. pl. 9. Mich. 7 W. 3.

5. Herald's Books not allowed as Evidence *to prove a Pedigree* at Sarum Aſſiſes, Lent 1719. Coram Forteſcue A. in Ejectment, for he ſaid it was *made up by the Party that ſigned it, and returned into the Office, and not the Entries of any publick Office*.

[A. b. 40] Hiſtory.

1. A *General Hiſtory* may be given in Evidence *to prove a Matter relating to the Kingdom in general*, becauſe the Nature of the Thing requires it, but *not to prove a particular Right or Cuſtom*. 1 Salk. 281. pl. 9. Mich. 7 W. 3. B. R. Stainer v. the Burgeſſes of Droitwich.

Speed's Chronicle was given in Evidence to prove the Death of Iſabell Queen Dowager to E. 2. and though Maynard ſeemed to oppoſe it, and Dolbin ſaid, it was done by Conſent, yet the Chief Juſtice ſaid he knew not what better Proof they could have, and Waller ſaid that in the Houſe of Lords it was admitted by them in Ld. Bridgwater's Caſe Skin. 15. pl. 16. Mich. 33 Car. 2. B. R. Ld. Brounker v. Sir Robert Atkins.

2. In *Ejectment for the Barony of Cockermouth, and all the Honours, Manors, &c. of Joceline the late Earl of Northumberland of the Family of Piercy* in the County of Cumberland, Sir *William Dugdale's* Book of the *Baronage* of England was offered in Evidence; ſed non allocatur. 2 Jo. 164 Mich, 33 Car. 2. B. R. Piercy v. ———

3. *Dugdale's Monaſticon* was refuſed in Evidence *to prove the Abbey of* Fountains *of the Order of Ciſtertians* in the Exchequer in this Term, becauſe it might be proved by the *Records in the Court of Augmentation*. The ſame Law of Dugdale's Baronage in Piercies Caſe; le quel jeo obſervavi. Skin. 624. pl. 17. Mich. 7 W. 3. B. R. in Caſe of Steyner v. Droitwich Burgeſſes.

4. A Deed was produced 1 W. & M. and Chronicles were admitted to prove *that K. Philip did not uſe the Stile which was in the Deed of that Time*. 12 Mod. 56. Mich. 7 W. 3. cites Neal v. Jay.

So that the Deed muſt needs be forged. 1 Salk. 281. cites it as the Caſe of Neale v. Fry.

5. Upon

Speed's Chronicle was given in Evidence to prove the Death of Isabell Queen Dowager to E 2 and though Maynard feemed to oppofe it,

5. Upon an Iſſue out of Chancery, *whether by the Cuſtom of Droitwich Saltpits could be ſunk in any Part of the Town, or in a certain Place only.* Camden's *Brittannia* was offered in Evidence but refuſed, for the Court held that *a General Hiſtory might be given in Evidence to prove a Matter relating to the Kingdom in general*, becauſe the Nature of the Thing requires it, *but not to prove a particular Right or Cuſtom* So in the Caſe of St. Katherine's Hoſpital Hale Ch. J allowed a Chronicle to be Evidence of a particular Point of Hiſtory in E 3. Time. 1 Salk. 281. pl 9. Mich. 7 W. 3. B. R. Stainer v. Burgeſſes of Droitwich.

and ſaid it was done by Conſent, yet the Chief Juſtice ſaid he knew not what better Proof they could have, and Waller ſaid that in the Houſe of Lords it was admitted by them in Ld. Bridgwater's Caſe. Skin 15. pl 16 Mich 33 Car 2. B. R. Ld Brounker v. Sir Robert Atkins. Holt Ch J. ſaid old Manuſcripts may be Evidence, becauſe an Original, but not a Copy for it is liable to a Miſtake of the Tranſcriber. Skin. 623 pl. 17. S. C.—— 12 Mod. 85. S. C. accordingly.——

6. There was a **Trial** at Bar concerning *the Right of viſiting Univerſity-College* in Oxford. One of the Iſſues in this Caſe was, *whether King Alfred was Founder?* and the Counſel for the Plaintiff would have given in Evidence ſeveral Hiſtorians as to this Point. But the Ch. J. declared that ſuch Evidence is never admitted, unleſs in Proof of a Point concerning the Government; the reſt of the Court did not deny it, accordingly it was waved. 1 Barnard Rep. in B. R. 14. Paſch. 13 Geo. 1. Cockman v. Mather.

## [A. b. 41] Indorſement.

2 Ld Raym. Rep. 370. Mich. 11 Geo. S. C A new Action was brought on the ſaid Bond, and on a Trial before Raymond Ch. J. he admitted the Indorſements to be read, and the Jury found for the Plaintiff, upon which a Bill of Exceptions were tendred, and the Ch. J. ſigned them, and afterwards Judgment was given for the Plaintiff and on Error brought, the ſame was affirmed in the Houſe of Peers. ——

1. In *Debt* by Adminiſtratix on a *Bond to Inteſtate dated 35 Years ago*; at the Trial the Plaintiff offered in Evidence an *Indorſement by the Inteſtate's* own Hand of the *Payment of Intereſt for 1 Year after the Bond was 9 Years old*; but the Ch. J. who tried it would not admit it, becauſe the Indorſement being all his own Hand-writing might be made at one Time and dated at another, and being made by himſelf ought not to be given in Evidence for him; Plaintiff was nonſuited; and on a Caſe ſtated by Way of Reference for the Opinion of the Court, it was argued for the Plaintiff, that the Rule that *no Man can be Evidence in his own Cauſe* is diſpenſed with in Caſes of *Neceſſity*, where no other Evidence can be had, as in the Plaintiff's Caſe, and the rather as it is to prove Money paid in Diſcharge of the Defendant. Urg'd e contra, that if ſo any one, who gets the Poſſeſſion of an old Bond, may charge the Obligor after Payment by making ſuch an Indorſement. Per two Juſtices no Judgment can be given, as it comes not judicially before the Court. But after ſaid it was a Queſtion for the Jury, whether this was a true Indorſement or not, and that this might be admitted, becauſe ſuch Indorſements are daily made, and at the Requeſt of the Obligor, and is the fureſt Evidence, becauſe Acquittances may be loſt, whereas the Indorſement continues as long as the Bond itſelf. Ch. J. diſſentiente, it was adjourned. 8 Mod. 279. Trin. 10 Geo. Serle v. Barrington.

## (A. b. 42) Inqueſt of Office.

1. An Inqueſt of Office *is no concluding Evidence.* 2 Jo. 224. Mich. 34 Car. 2. B. R. King v. Foſter.

2. An Inquiſition not admitted to be read as Evidence, there *being no Commiſſion to warrant it.* Jan. 23. 1717. MSS Tab. Auſtin v. Nichols.

3. An

3. An old Inquiſition poſt Mortem read as Evidence without producing the Commiſſion. MSS Tab. Feb. 6th, 1726. Anderton v. Magawly.

(A. b. 43) Inrollments of Deeds.

1. It was ſaid by Glyn Ch. J. that if *divers Perſons do ſeal a Deed*, and *but one of them acknowledge the Deed*, and the Deed is thereupon inrolled, this is a good Inrollment within the Statute, and may be given in Evidence as a Deed inrolled at a Trial. Sty. 462. Mich. 1655. in a Trial at Bar. Thurle v. Madiſon.

2. *Inrolment of a Deed which needs no Inrollment is no Evidence.* 1 Keb. 217. Mich. 13 Car. 2. Eden v. Chalkhill.

3. A Queſtion ariſing whether an inrolled Deed ſhould be Evidence without further Proof, a *Difference* was taken *where the Eſtate paſſes by the Inrollment*, as in a Bargain and Sale, there it is an Evidence; but *where it is only for ſafe Cuſtody*, there it is not otherwiſe than againſt the Party who ſealed it, and all claiming from, by, or under him, and ſo far it ſhall 2 Freem. Rep. 259. pl. 327. Trin. 1702. Lady Holecroft v. Smith.

4. At a Trial at Bar in Ejectment, the Queſtion was upon a Commencement of a Leaſe, which was to be upon the Determination of a Leaſe then in Being to Queen Elizabeth, of certain Lands belonging to the Church, and to prove ſuch Leaſe to the Queen, an ancient Book in which Entries were of Leaſes of theſe Lands ever ſince H. 7th's Time, and this was found amongſt the Evidences of the Biſhops (this being Biſhop's Land) was offered, but oppoſed, becauſe not ſuch good Evidence as they might have had; for the Leaſe being *made to the Queen* it *muſt have been inrolled, and then they might have brought a Copy of the Inrolment*; for without an Inrolment the Queen could not take, and it is better Evidence of a Leaſe in Fact as well as in Law than the Book, and therefore muſt be produced. 6 Mod. 248. Mich. 3 Ann. B. R. Shillingfleet v. Parker.

5. 10 *Annæ.* 18. *Where in any Declaration or Pleading whatſoever, an Indenture of Bargain and Sale inrolled ſhall be pleaded with a* Protert hic in Curia, *the Perſon ſo pleading it may produce a Copy of the Inrolment of the Bargain and Sale, which being examined with the Inrolment, and ſigned by the proper Officer, and proved on Oath to be a true Copy ſhall be of the ſame Effect, as if the original Indenture of Bargain and Sale were produced.*

*Provided, that this Act ſhall not give any Benefit in pleading, or deriving a Title to any Rent which hath not been paid or levied within twenty Years next before the Time of ſuch pleading or deriving a Title.*

(A. b. 44) Inſpeximus.

1. It is ſaid, that one may not ſhew in Evidence to a Jury *an Inſpeximus of a Deed inrolled* in Chancery, unleſs it be a Deed of Bargain and Sale inrolled here; for if it be a Deed of *Feoffment*, he muſt ſhew the Deed itſelf, for the Inſpeximus is no Matter of Record; But per Roll Ch. J. though it be the Inſpeximus of the Inrolment, and not of the Deed itſelf, yet if it be an *antient Deed* it may be given in Evidence. Sty. 445. Paſch. 1655. Anon.

2. The Defendant *in an Ejectment* on Trial at Bar, gave Evidence on an *Inſpeximus of a Leaſe by the Abbot of B.* which the Court diſallowed, being a private Deed and may be forged, and an Inſpeximus *lies only of Matter of Record*, whereupon they *ſhewed an Allowance of the ſame Deed in the Court of Augmentations*, which per Cur. is good againſt the King. 2 Keb. 294. pl. 79. Mich. 19 Car. 2. B. R. Kirby v. Gibbs.

3 A Conſtat or Inſpeximus *of Letters-Patents made ſince* 27 *H.* 8. may be pleaded by the King's Patentees, or any claiming under them, as well againſt the King as any other. Hawk. C. L. 311. (225)

(A. b. 45) *Inventory.*

1. In an Action of *Trover* upon Not Guilty pleaded, an Inventory of the Goods was given Evidence to the Jury, *as* the Goods were appraiſed *by Upholſters*, Judgment for the Plaintiff. 4 Leon. 243. pl. 396. Paſch 8 Jac. C. B. Arden v. Goad.

2. Jones moved, that Hattings Sheriff of Middleſex, might bring in an Inventory *of Goods taken in Execution by* Fieri Facias for *Evidence (in Trover) of the Value of the Goods* which the Court granted in a Suit between other Parties, the Sheriff being not charged albeit he be not compellable on ſuch a Writ, but only on Extent, and he agreed to bring it at the Trial if he could find it. 2 Keb. 277. pl. 39. Mich. 19 Car. 2. B. R. Baxter and Cramfield v. Seix.

(A. b. 46) *Jointenancy.*

1. Jointenancy cannot be given in Evidence, but *muſt be pleaded in Abatement.* L. Evid. 231. pl. 27. cites Tryal per Pais 207. Hill. 1652. Jones v. Randal.

(A. b. 47) *Journal.*

1. Journal *of the Houſe of Commons* is no Evidence, becauſe they have no Power to give an Oath; Per Jeffries Ch. J. in Oates's Tryal.

2. Journal *of the Houſe of Lords* proved and admitted *in the Biſhop's Trial, to prove the King's Speech* 1662, *and the Opinion of the Houſe of Lords about the King's Power in Eccleſiaſtical Affairs.*

[A. b. 48] *Minutes of Proceedings in Courts.*

1. In an *Action for a malicious Proſecution* brought againſt the Defendant *for inditing a Bailiff for forcibly taking away his Goods without a legal Authority*, the Plaintiff to juſtify his having Authority produced the *Minutes of a Judgment in the Court-Baron, and likewiſe a Warrant for Execution made upon it*; but the Judge was of Opinion that the Judgment ought to have been drawn up, and that the Minutes were not Evidence of it. Accordingly the Plaintiff was nonſuited, though Serjeant Urlyn ſubmitted it, that 2 Mod. 306. is contrary to the Judge's Opinion. 2 Barnard. Rep. in B. R. 406. Hill 7 Geo. 2. Pitcher v. Rinter.

[A. b. 49] *In what Caſes a Negative muſt be proved and what ſhall be Proof thereof.*

1. In a Suit for *Tythes* in the Spiritual Court the Defendant *pleaded that the Plaintiff* had not read *the thirty nine Articles*, and the *Court put the Defendant to prove it*, though a Negative, whereupon he moved for a Prohibition which was denied; for in this Caſe the Law will preſume that a Parſon has read the Articles; for otherwiſe he is to loſe his Benefice; and *when the Law preſumes the Affirmative then the Negatives is to be proved.* 1 Roll. Rep. 83. pl. 29. Mich. 12 Jac. B. R. Monke v. Butler.

2 Inſt. 662. S. P. — 2. Witneſſes cannot *teſtify a Negative*, but an Affirmative. 4 Inſt. 279. Cap. 64.

3. Where

3. Where there is an Affirmative Affidavit and a Negative Affidavit, the Affirmative Affidavit of the Plaintiff is to be taken. Cumb. 18. Paſch. 2. Jac. B. R.

4. Defendant ſwore an *Affidavit*, and *Information* againſt him *for it*, although a Negative cannot be proved yet the *Court directed that they ſhould firſt give their probable Evidence, and that the Defendant ſhould afterwards prove his Affirmative if he could.* Cumb 57. Trin. 3. Jac. C. B. R. The King v. Combs.

(A. b. 50) Nonſuit.

1. Debt on a *Bond* in which Obligee had made a material Raſure, Defendant pleaded Non eſt Factum, and Plaintiff finding that Defendant upon Oyer had diſcovered the *Forgery*, he countermanded the Notice. The Court ſaid the beſt Way was for Defendant to carry the Cauſe down by Proviſo, and if the Plaintiff would ſuffer himſelf to be nonſuited, whereby the Suit would be at an End, and the Plaintiff intitled to take his Bond out of Court, yet that Nonſuit would be great Evidence againſt him in another Action to be brought thereupon. 6 Mod. 232. Mich. 3 Ann. B. R. Selby v. Green.

(A. b. 51) Notary Publick's Certificate.

1. It was reſolved that a Copy of an *Agreement regiſtered in Holland*, and *atteſted* by a Publick Notary there, may be given in Evidence for the now Defendant, eſpecially ſince he proved that the *Plaintiff took out another Copy* of the ſame Agreement, *and would not now produce it*; therefore the Copy which the Defendant had taken out was given in Evidence, for it is plain that the Plaintiff knew the Agreement, he having taken a Copy thereof, ſo could not be ſurprized. 8 Mod. 322. Mich. 10 Geo. Sir John Walrond v. Jacob Senior Henricus Van Moſes.

2. The Court held that a *Plaintiff* who was *in Holland might make Affidavit there*, and get it *atteſted* by a Publick Notary; and that it ſhould be admitted as Evidence *to hold the Defendant to ſpecial Bail* here. 8 Mod. 323. Mich. 11 Geo. in Caſe of Sir John Walrond v. Jacob, &c.

(A. b. 52) Office found.

1. Nota, by Choke and Bryan an Office *before an Eſcheator* ſhall not be given in Evidence *unleſs* it be *exemplified*, for it ſhall not otherwiſe be delivered to the Jury unleſs it be under the Great Seal of England, no more than a Teſtimonial, and it is good Law. Bro. Gen. Iſſ. pl. 75. cites 21 E. 4. 25.

2. Office *poſt Mortem* found was held to be no concluding Evidence. 2 Jones 224. Mich. 34 Car. 2. B. R. Earl of Thanet's Caſe.

[A. b. 53] Parliament Rolls.

1. Upon View of the Parliament Roll of the Stat. 2 *Ed.* 6. *for Payment of Tythes*, and comparing it with the Declarations in the Cauſes between Bowes and Broadhead, and Burreſton and Herbert, it was found that the Stat. was rightly recited, notwithſtanding what had been objected, and the *Journal-Book* of Parliament *produced to the contrary*; and thereupon Judgment was given in both Caſes, and Court ſaid that they were to be ruled by the Parliament-Roll and not by the Journal-Book. And the ſame Day in the Caſe between *Boyer and Tanningar* for the ſame Reaſon, and the Court ordered the Parliament-Roll to be brought into Court the next Term to make it appear *whether*

*ther an Adjournment in Parliament was well recited*, and would not credit the Journal-Book. Style 155. Mich. 1649. B. R. Anon.

(A. b. 54) Parol Evidence contrary to Writing.

1. Parol Agreement or Evidence *is not to be admitted againſt a Deed, or a Truſt expreſſed in a Deed; yet a Declaration fully proved and made before a Deed was drawn, and it appearing* plainly *to be the Deſign of executing the Deed for a particular Purpoſe is proper and right.* 2 Chan. Cases, 180. Mich. 2 Jac. 2 Harvey v. Harvey.

C. cited by Ld Ch. B. Reynolds. Gibb. Rep. 213. Hill. 4 Geo. 2. who aſſiſted the Ld. Chancellor in the Caſe of Fitzgerard v. Falconbridge, and his Lordſhip ſaid, that though the general Rule is, that no Parol Agreement or Evidence is to be admitted againſt a Truſt expreſſed in a Deed; Yet as that Caſe was, he thought that Reſolution was very proper and right; but if without ſuch Foundation we ſhould admit Parol Proof againſt a Deed, it would be of very ill Conſequence, and a dangerous Precedent. ——

2. Parol Evidence may be given *concerning the Election of an Alderman*, &c. in a Corporation, *againſt an Entry in the Corporation-Books* by the Town-Clerk, or other Officer, for theſe may be cooked up for the Purpoſe; Per Parker Ch. J. Paſch. 4 Geo. B. R.

3. Parol Evidence admitted *to prove the Effect of a Record loſt, and of another obliterated.* Feb. 6, 1726. MSS Tab. Anderton v. Magawly.

(A. b. 55) Preſentment of the Forreſters.

1 The *Preſentments of the Officers of the Foreſt* was ſufficient Evidence, that *ſuch Wood and Timber was felled*, and there was no other Evidence given. 1 Jo. 268. 8 Car. Itin. Windſor. Whitlock's Caſe.

(A. b. 56) Preſumption. Length of Time.

1. Preſumptions *are of three Sorts*, viz. *Violent*, *Probable*, *Light* and *Temerary*; Violent Preſumption is many Times Plena Probatio, a clear Proof; As if one be run thro' the Body with a Sword in a Houſe whereof he inſtantly dieth, and a Man is ſeen to come out of that Houſe with a bloody Sword, and no other Man was at that Time within the Houſe. Probable Preſumption moveth little; But Preſumption Levis, or a light Preſumption moveth not at all; Cites Bracton.

2. The Abbot of S. held the Parſonage of B. in the Country of L. appropriate, which, as a Parſonage Impropriate came to K. H. 8. by the Diſſolution of Monaſteries, 31 H. 8. who in the 37th Year of his Reign granted it in Fee-Farm, under which Grant the Plaintiff claims; the Defendant has obtained a Preſentation of the Queen, and to deſtroy the ſaid Impropriation did ſhew the original Inſtrument of it 22 Edw. 4. with Condition that a Vicarage ſhould be competently endowed, and alledged that the ſaid Vicarage was never endowed, and therefore the Impropriation was void, and in Truth there was no Inſtrument, nor any direct Proof of the *Endowment* of the *Vicarage*; but becauſe the ſaid Rectory was *during all the Time* of the Impropriation ſuppoſed reputed, and taken to be appropriate, and all that Time a Vicar preſented, admitted, inſtituted, and inducted as a Vicar rightfully endowed, and paid his Firſt-Fruits and Tenths, it was reſolved by all the Court, that it ſhall be preſumed that the Vicarage, *in reſpect of Continuance*, was lawfully endowed, for that *Omnia præſumuntur ſolenniter eſſe acta*; and it ſhall be of dangerous Preſident to examine the Originals of Impropriations of any Parſonages, and the Endowments of Vicarages, becauſe the Originals of them in Time will periſh, and ſo it was decreed for the Plaintiff. 12 Rep. 4. Trin 30 Eliz. in the Exchequer-Chamber, Crimes v. Smith.

3. An

3. An *Impropriation* ſhall not be void becauſe of an *Eſtate-Tail in the Patron*, Grantor, &c. but it ſhall be preſumed, by Reaſon of ancient and continual Poſſeſſion; That an *Ancient Grant* was made by one that had Power to make it, and that it was duly made; for if any Objection or Exception ſhould now prevail, the ancient and long Poſſeſſion of the Owners of the ſaid Rectory ſhould hurt them; for if theſe Objections or Exceptions had been made in the Life-times of the Parties, without any Queſtion they had been anſwered, or otherwiſe in ſo many Succeſſions of Ages it would have been impeached or impugned. 12 Rep. 2. Hill. 4 Jac. Bedle v. Beard and Wingfield, in Canc.

4. In *Quare Impedit* in C. B. the Suit was ſtayed by Aid Prayer, and the Record removed into Chancery; the Plaintiff moved for a Procedendo, and upon Oyer of Cauſe before Bromley Ld. Chan. &c. Plaintiff ſhewed a Gift in Tail of the ſaid Advowſon to his Anceſtor 18 R. 2. and a Verdict for his Anceſtor 12 H. 8. and a Preſentation by his Grandfather of a Clerk who was admitted, inſtituted, and inducted, with Poſſeſſion for certain Years, and other Matters to prove his Title; yet becauſe the Defendant, and thoſe from whom he claims *Time out of Mind* had the Poſſeſſion of the Parſonage as impropriate (ſaving Interruption for a ſmall Time) and it would be a dangerous Precedent to Owners of Impropriations, being able to maintain the Appropriations to be perfect in all Points, requiſite to the making an abſolute and compleat Impropriation, the Appropriations being made of ancient Time; it was reſolved that no Procedendo in Loquela ſhould be granted in Canc. 12 Rep. 3. Paſch. 4 Jac. Ld. St John v. Dean of Glouceſter.

5. If a *Deed of Feoffment* be given in Evidence to have been *made forty Years paſt, but it cannot be proved that Livery was made*, yet if *Poſſeſſion has all along gone with the Deed*, this is good Evidence to the Jury; Per Coke Ch. J. who ſaid, that in ſuch Caſe he would direct the Jury to find a Livery; For it ſhall be intended; but if the Jury find all this Matter ſpecially, we cannot adjudge it a good Feoffment without Livery. Roll. Rep. 132. in pl. 9. Hill. 12 Jac. B. R.

Ibid. The Reporter adds a Remark, that it ſeems the Jury may find a Thing upon Preſumption,

but that the Court ought to judge upon that which appears upon the Record.——

6. If a Parſon ſhews that for two hundred Years certain Land was Parcel of his *Glebe*, it is not therefore of Neceſſity that the other ſhould produce a Confirmation from the Patron, and Ordinary; for the Continuance in Poſſeſſion makes it intendable to be according to Law when it was made. Cro. J. 456. pl. 13. Mich. 15 Jac. B. R. in Caſe of Griffin v. Stanhope.

7. Where there had been four Siſters, and the Queſtion was as to their being alive, and who ſhould prove it? Chamberlain and Dederidge held, that they *ſhall be intended to be alive if* the Contrary be not proved. 2 Roll. Rep. 461. Mich. 22 Jac. B. R. Throgmorton v. Walton.

8. In Things of *great Antiquity* Omnia præſumuntur Solemniter eſſe Acta; Per Crew Ch. J. Palm. 327. Paſch. 2 Car. B. R. in Caſe of Cope v. Bedford.

9. About eighteen Years before the Bill filed, Moyle the Father became bound in a *Bond* of 200 l. conditioned for the Payment of 100 l. to the Ld. Robert the Defendant at a certain Day long ſince paſt; Afterwards *the Obligee purchaſed Lands of* (Roſecarrick) *the principal Obligor* to the Value of 500 l. which Purchaſe was made about four Years before Roſecarrick's Death; after his Death Moyle took out Adminiſtration to him, and being ſued upon this Bond, exhibited his Bill for Relief, and in Regard of the *Antiquity* of the Bond, and for that Roſecarrick himſelf *never ſued in his Life-time*, it was preſumed, that the

Defendant did deduct the Debt out of the Purchaſe-Money; and notwithſtanding there were *no Proofs of the Payment of the* Money made, the Court decreed, that the Defendant ſhould be reſtrained from the Proceeding at Law on the Bond; Per Ld. Coventry. N. Ch R. 9. 5 Car. 1. Moyle v. Ld. Roberts.

10. A *Sleeping Mortgage of Seventeen Years* due, which Time the Mortgagor and a Purchaſor under him have been in quiet Poſſeſſion, and the Mortgagee having purchaſed Lands of the Mortgagor and paid him Money ſhall be preſumed to be ſatisfied, and decreed that the Mortgage-Deeds be delivered up to be cancelled. Chan. Rep. 8 Car. 1. 60. Sibſon v. Fletcher

11. *After* long Poſſeſſion as for *Twenty five Years*, *Livery and Seiſin ſhall be preſumed*; for this is much favoured in Law as well as in Equity. Vern. 196. in pl. 192. cites 11 Car. 1. Biden v. Loveday.

12. *Reconveyance* of Lands, which were a Security for a Recognizance to pay an Annuity, gives a probable Reaſon to imagine that the *Recognizance* was *diſcharged*, and no Part of the ſaid Annuities being paid for ſeveral Years after, and though demanded yet being denied; decreed that the ſame be *vacated*. Chan. Rep. 102. 12 Car. 1. Baldwin v. Proctor.

13. Whether *after Forty Years Poſſeſſion of a Copyhold under a Will*, a Surrender to the Uſe of the Will ſhall not be preſumed? Ld. Keeper was clear *that the Want of a Surrender ſhould be ſupplied*, Surrenders being kept by the Lord and his Stewards, who are oftentimes changed, and not ſo careful as they ſhould be, and therefore a Surrender might be loſt without the Default or Negligence of the Party. Vern. 195. pl. 192. Mich. 1683. Lyford v. Coward.

14. Length of Time is only a *Preſumption of Payment*, and there is a *Difference between Debts and Legacies as to their Antiquity. Legacies always appear upon the Face of the Will*, and ſo an Executor knows what he ought to pay without being ask'd or told; but for Debts and other dormant Demands, againſt which he cannot provide without Notice, the Statute had Reaſon to limit the Time. Vern. 256, 257. pl. 140. Mich. 1684, in the Caſe of Parker v. Aſh.

15. Where *two Facts* are *alledged againſt the ſame Man*, and it be queſtioned whether it be the ſame Man, it is ſufficient that it be reported; and this is good Evidence, unleſs ſome one elſe of the ſame Name be produced. L. E. 278. pl. 8. cites Oats 2. Try. 15.

16. If Defendant pleads Payment of a *Bond or Bill*, and it appears that the Debt *is very old*, and *hath not been demanded nor any Uſe paid for it for many Years*, a common Preſumption is good Evidence that the Money is paid, and the Juries uſed to find for the Defendant in ſuch Caſes. Try. per Pais, 7th Edition, 311.

## (A. b. 57) Probate.

Br. Record, pl. 28. cites S. C.

1. If a *Teſtament* be *raſed in the Name of the Executors*, yet Writ ſhall go by them; For it appears in the Regiſter if they were made Executors or not; and alſo the Party may travers, that they were not Executors, notwithſtanding the Teſtament; Per Newton and all his Companions; Brooke ſays, and ſo ſee, that the Probate (as it ſeems) is not Matter of Record at the Common Law. Br. Teſtament, pl. 4. cites 22 H 6. 52.

2. *Teſtament* proved *under the Seal of the Biſhop* is only Eſtoppel. Br. Eſtoppel, pl. 36. cites 44 E 3. 16.

3. The Probate of a Will, *if it reſpects Lands*, ſhall be no Evidence at Common Law, nor ſhall Examination of Witneſſes of the Probate be made Uſe of at Common Law. Cro. C. 395, 396. pl. 7. Hill. 10 Car. B. R. Netter v. Bret.

4. In

4. In *Ejectment of Term for Years*; The *Plaintiff claimed by Letters of Adminiſtration granted by the Archbiſhop of Armagh* (the Lands lying in Ireland) and the Defendant *produced a Probate of a Will made by the Teſtator*, and in which Defendant was made Executor, and this was *under the Seal of the Biſhop of Fernes* (where the Land lay); This is concluſive Evidence, and nothing can be given in Evidence againſt it but Forgery, or its being obtained by Surpriſe; and if a Verdict be given contrary to the Probate, the Defendant ought to *demur upon the Evidence*, and not bring a * Writ of Error, for if he does the Judgment will be affirmed, for the Jury may hazard an Attaint if they will. Raym 404. Mich. 32 Car. 2. B. R. Chicheſter v. Philips.

* Jo. 146. S. C. but it only upon the Writ of Error.

5. To *prove* the Sealing and *Delivery of a Deed*, and *not knowing the Parties that did it* is not good Evidence; *but* if he *knows* the Party *upon Sight of him* it is good enough. T per Pais, 172.

6. In a Writ of Error on a Judgment in the Common Pleas in Ireland in *Ejectment* this Queſtion aroſe upon a Bill of Exceptions, which was preferred, becauſe the Judges there would not direct the Jury that the Probate of a Will *before the Archbiſhop of Canterbury in whoſe Province the Teſtator died, and alſo before the Biſhop of Fernes* was ſufficient and concluding Evidence, but only that they were good Evidence, and ſo left it to the Jury; To which the other Side ſhewed in Evidence *Letters of Adminiſtration of the Goods under the Seal of the Primate of Ireland*; The Thing in Queſtion was a *Leaſe for Years in Ireland*, claimed by the Leſſor of the Plaintiff under the ſaid Adminiſtration, and on the firſt Opening of the Cauſe, Judgment was affirmed. 2 Jon. 146. Patch. 33 Car. 2. B. R. Philips v. Chicheſter.

The firſt Judgment was in C. B. in Ireland, and affirmed in Error there in B. R. and now affirmed by the whole Court of B. R. here in England, becauſe though the Evidence be concluſive, yet the Jury may hazard an Attaint if they pleaſe, and the proper Way had been for the Defendant to have demurred on the Plaintiff's Evidence Raym. 404. Chicheſter v. Philips. S. C.—

7. At Rygate in Surry, Summer Aſſiſes 10 W. 3. it was ruled by Holt Ch. J. upon the Evidence, that becauſe in the Spiritual Court after *Probate of a Will ſix Months are allowed to regiſter it*, and when it is regiſtered, *it is regiſtered by the Original*, but the *Probate is ſigned by the Regiſter only upon the Atteſtation of the Proctor and the Examination of him*; therefore a Will proved in 1666. in the Archdeacon's Court of London, and the *Office was burnt in the Fire of London* ſoon after, and the Probate was produced in Evidence to prove the Will with all theſe Circumſtances; It was denied by Holt Ch J. to be good Evidence to prove the Will. Ld. Raym. Rep. 732. Anon.

8. N. B. In this Caſe, though the *Will* was *made in* 1685, yet inſiſted to have it proved, and the Court would not allow the *Probate* to be read, that *being in Nature only of a Copy*, and *cannot be read as to Lands, unleſs the Original be loſt*. The Will was *proved in a former Cauſe*, and Order for reading the Depoſitions in that Cauſe, *but* the Will produced *not being marked by the Examiner as an Exhibit, Objection was taken hac Cauſa as to its being read*, but the Will *being ſet forth in hæc Verba in the Interrogatory*, and being *examined in Court with it, the Will was ordered to be read*; But agreed it could *not* be read *out of the Interrogatory*, becauſe that is no more than a Copy and only Evidence when the Original is loſt. And King Chancellor examined the Officer who brought the Will into Court, where he had the Will, &c though no Order in the Cauſe to examine Viva Voce. Wiſeman's MSS Rep. Mich. 2 Geo. 2. in the Caſe of Lady Jones v. Ld. Say and Seal.

(A. b. 58) Proceedings in Courts Spiritual.

8 Mod. 181. Trin. 9 Geo. Hilliard v. Phaley S. P. accordingly.

1. A Thing concluded in the Eccleſiaſtical Court *touching Lands* cannot be given in Evidence at a Trial at Law for Land; per Curiam, Sty. 10. Paſch. 23 Car. B. R. in Caſe of Betſworth v. Betſworth.

1 Lev. 255. S. C. — 2 Keb 337. pl. 1. S. C. adjudged for the Plaintiff.

2. In Debt upon a Bond by an Executor's Plea Ne unques Executor, &c. and on this Iſſue at a Trial a *Will under the Seal of the Ordinary was offered in Evidence*, upon which the *Defendant offered to prove that the Will was forged*; but per Cur (on a Caſe ſtated by the Opinion of the Court) *nothing can be given in Evidence againſt what is adjudged and allowed in the Spiritual Court, but it may be given in Evidence that it is not the Seal of the Ordinary, or that the Seal is forged, or that it is repealed, for theſe Things are in Affirmation of the Spiritual Proceedings.* No Difference between an Adminiſtration under Seal, or a Will of Goods under Seal. So here the Defendant may give in Evidence that there were bona notabilia, contra that another is Executor, or that the Teſtator was not Compos Mentis, for theſe falſify the Proceedings of the Ordinary in Caſes whereof he is a Judge. 1 Sid. 359. Raym 404. 407. Comyn's Rep. 150. c. Paſch. 20 Car. 2. B. R. Noell v. Wells.

3. In Treſpaſs the Defendant pleaded Simony in the Plaintiff (againſt whom a Sentence of Decree had been given in the Spiritual Court for the Simony) and now upon the Trial the Defendant offered to read the *Proofs in the Spiritual Court*, but was *not allow'd*, becauſe thoſe Courts are no Courts of Record; but the *Sentence of Deprivation was allowed to be read* It was objected againſt reading them, that the Plaintiff ought not to be concluded of his Intereſt in his Freehold by what was done in the Spiritual Court. But the Court ſaid that the Spiritual Court did not by Sentence ouſt him of his Freehold, but that it was a Conſequence of the Sentence; and that Simony being a Matter they had properly Cognizance of (for tho' ſince 31 Eliz. cap. 6. the Temporal Courts have Juriſdiction, yet that Statute has not taken away the Juriſdiction which the Spiritual Court had at Common Law) they ought not to ravel into the Grounds of the Sentences, but to give Credit to them, as they ſhould in a Certificate of Marriage or Baſtardy and other Things which lie within their Conuſance, ſo that they muſt take him as guilty of Simony, he being deprived of it in the Spiritual Court. Freem. Rep 84 pl. 103. Paſch. 1673. Phillips v. Crawley.

4. Upon a Trial at Bar in *Ejectment* the ſole Queſtion was, if Sir Robert Carr was actually married to Iſabella Jones by whom he had Iſſue, and under whom the Plaintiff claims. The Defendant by Way of Anticipation to the Evidence which the Plaintiff was about to give, *moved* the Court, *that the Plaintiff ought not to be allowed to prove a Marriage* between them, *becauſe there was a Sentence in the Arches, upon a Suit brought againſt her Cauſa Jactationis matrimonii; by which it was decreed, that there was no Marriage between them, but that they were free one of another, and that they might marry ſeparately, which they afterwards did.* And this Sentence was now offered in Evidence by the Defendant's Counſel, as a Bar to conclude the Plaintiff from any Proof of the Marriage, unleſs he could ſhew that the ſame was repealed. And upon Debate the Court were all of Opinion, that this Sentence, whilſt unrepealed, was concluſive againſt all Matters precedent, and that the Temporal Courts muſt give Credit to it untill it is reverſed, it being a Matter of meer Spiritual Conuſance And hereupon the Plaintiff was nonſuit. Carth 225, 226 Paſch. 4 W. & M. B. R. Jones v. Bow.

5 A Matter which has been *directly determined by their Sentence* cannot be gainſaid, their Sentences are concluſive in ſuch Caſes, and no Evidence ſhall be admitted to prove the contrary; but that *is to be intended*

*tended only in the Point directly tried*; otherwise it is if a *collateral Matter* be collected or *inferred from their Sentence*; as where, because the Administration is granted to the Defendant, therefore they infer that the Plaintiff was not the Defendant's Husband, as he could not have been taken to be, if the Point tried in their Court had been married or unmarried, and their Sentence had been not married. Per Holt Ch. J. 1 Salk 290. pl. 30 Hill. 7 Ann. Blackham's Case.

6. Proceedings in the Spiritual Court *against the Father for Incontinency with the Mother* cannot be given in Evidence *against the Children not deriving* any *Title under her* to the Lands in Question, and the Intent of reading it being to shew that the Mother's Marriage was not until after their Births, was not allowed by the Judge to be read, which the Ld. Chancellor thought hard of. 8 Mod. 180. Trin. 9 Geo. Hilliard v. Phaley.

7. *But* if there was a Marriage and they were *divorced for Consanguinity*, such Sentence would have been conclusive Evidence to *bastardize* the Children born in Wedlock before the Divorce, and what could be better Evidence in a Court of Law to shew there was *no Marriage* than a Sentence in the Spiritual Court carried on in a *regular Suit, and pronounced in the Life-time of the Parties* that they were guilty of Fornication, and the Proof of the *Commutation-Money paid by the Father*. Per Ld. Chan. 8 Mod. 180. Trin 9 Geo. Hilliard v. Phaley.

[A. b. 59] Proclamation.

1. In *Case on a Wager about the Day on which the Peace was concluded* it was held by Holt Ch J. that a printed Proclamation was good Evidence tho' not examined by the Record inrolled in Chancery, nor proved to have been under the Great Seal. 12 Mod. 215. Mich. 10 W. 3. Dupais v. Shepherd.

2. Proclamations *must be examined with the Original*; Per King Chan. Trin. Vac. 1727.

[A. b. 60] Receipt.

1. In *Debt for Rent*, on Reference to the Secondary to see if all were paid, he reported, that a Receipt *of the last Half Year's Rent* was shewed in Discharge of all former Arrearages; But per Cur. this is only Evidence of Payment of all, but is no Discharge of the former Arrear, unless it be *under Hand and Seal*, and then but by Estoppel. 2 Keb. 346. pl. 25. Pasch. 20 Car. 2. B R. Coome v. Denne.

2. A Receipt *of the last Half Year's Rent* is Evidence that all before was paid. L. E. 204 cites Tr. per Pais, 211.

[A. b. 61] Recital.

1. It was said, that if a *Deed express a* Consideration of *Money* upon the Purchase made by the Deed, yet this is no Proof upon a Trial that the Monies expressed were paid, but it *must be proved by Witnesses*. Sty. 462. Mich. 1655. B. R. Thurle v. Madison.

2. Recital *in a Patent of a former Patent* is no Evidence without producing the first Patent. 2 Lev. 108. Trin. 26 Car. 2. B. R. resolved in Case of Cragg v. Norfolk.

3. Error of a Judgment upon a Demurrer to Evidence in C. B. the *Witness* to the Sealing and Delivery of a Deed being *subpœnaed did not appear*; But to prove it the Party's Deed, they proved an *Indorsement made* by him *thereupon three Years after, reciting a Proviso within*, that if he paid such a Sum the Deed should be void, and acknowledging that the said Sum was not paid; and a Fine was levied of the very

Lands mentioned in the Deed to Crawly, and by the Indorſement he *expreſsly owned it to be his Deed*, and upon this the Deed was read; and now it was objected, that this was not good Evidence, becauſe not the beſt the Nature of the Thing could bear, but only circumſtantial, which never ought to be admitted where better may be had *ex Natura rei*, becauſe Circumſtances are fallible and doubtful; and it is upon this Reaſon that a Copy of a Record is good, becauſe one cannot have the Record itſelf, but a Copy of a Copy will not do. Holt Ch. J. ſaid, Can there be better Evidence of a Deed than to own it, and recite it under his Hand and Seal? Et per totam Curiam Judgment affirmed. 12 Mod. 500. Paſch. 13 W. 3. Dillon v. Crawly.

4. A *Fine* was produced but *no declaring the Uſes*; but a Deed was offered in Evidence which did recite a Deed of Limitation of the Uſes; and the Queſtion was, Whether that was Evidence? And the Court ſaid, that the *bare* Recital of a Deed was not Evidence, but that if it could be *proved that ſuch a Deed had been, and loſt*, it would do, if it were recited in another; and it not being proved that ever there was a Deed leading the Uſes of the Fine, the Counſel on one Side oppoſed the ſaid Deed of Recitals being at all read; But the Court ſaid, we *cannot hinder the Reading of a Deed under Seal*, but what Uſe is to be made of it is another Thing. 6 Mod. 45. Mich. 2 Ann. B. R. Ford v. Ld. Grey.

6 Mod. 44. Mich. 2 Ann. B. R. the S. P. ruled in Caſe of Ford v. Ld. Grey.

5. The Recital of *a Leaſe in a* Deed of *Releaſe* is good Evidence of ſuch Leaſe *againſt the Releaſor and thoſe that claim under him*; but not as to others, without proving there was ſuch a Deed, and that it was loſt or deſtroyed.

Ibid. 434. a Note is added by the Editor, that, agreeable to this Decree, was a like Decree made 11th Decem 1735 by Ld. Ch. Talbot. Cray v. Cray and Rooke.

6. A. gave a *Bond to B. for Payment of* 2000 *l.* within a Year after his Death (he having ſeduced her and had a Child by her) afterwards A. by *Deed-Poll reciting that he had given a Bond* (as above) *agreed the* 2000 *l. ſhould be laid out in Annuity for the Uſe of B.* and the Child for their Lives. A. died. B. ſued the Adminiſtrator on the Bond, but there being only one Witneſs to it, and (tho' his Handwriting was proved, yet) he ſwearing that he did not ſee the Bond ſealed and delivered, B. was nonſuited, and brought her Bill to be paid out of the Aſſets. Ld. Chan. King held, that the Recital in the Deed, that A. had given ſuch a Bond was ſufficient Evidence of there having been ſuch; that it is a Confeſſion by the Obligor himſelf, and ſtronger than a verbal Confeſſion, being under his Hand and Seal, and decreed accordingly. 2 Wm's. Rep. 432. Hill. 1727. Annandale (Marchioneſs) v. Harris, & e contra.

## [A. b. 62] Record.

1. When the Party makes a Title by Record, he *muſt ſhew it under the Great Seal, unleſs in the ſame Court*, and Day is given to bring it in. Pl. C. 411. a. Mich. 13 & 14 Eliz. in Caſe of Newys v. Larke.

If 'Nul tiel Record be pleaded, the Plaintiff muſt not fail to have in Readineſs the Record exemplified under the Great Seal, unleſs in Caſe of Letters-Patents. 2 Sid. 145. Per Witherington Ch B. in delivering the Opinion of the Court, Hill. 1658. cites 6 Rep. Eden's Caſe, and Bartue's Caſe.

2. In pleading a Man *cannot make himſelf a Title in any Caſe by Record, without ſhewing it under the Great Seal.* Pl. C. 411. a. Mich 13 & 14 Eliz. in Caſe of Newys v. Larke.

3. A Deed of Uſes was loſt, and to ſupply it, Evidence was given, that the *loſt Deed had formerly been ſhewed in Evidence in the Exchequer upon an Alienation there queſtioned, the Land being holden in Capite*, and the Record thereof was ſhewed, and this was allowed for Evidence. Clayt. 85. pl 151. 16 Car. before Foſter J. Ld. Wharton's Caſe.

4. If a Record be given in Evidence the Jury may find it, *tho' it is not Sub Pede Sigilli*, if they have other good Matter of Inducement to prove it; but if it be given in Evidence, it muſt be *Sub Pede Sigilli*; Per Roll. Ch. J. Sty. 22. Paſch. 23 Car. B. R. in Caſe of White v. Pynder.

5. Indebitatus Aſſumpſit for 5 l. received to the Uſe of the Plaintiff for Fees of his Office of Clerk of the Peace for Oxfordſhire; upon Non Aſſumpſit pleaded, it was inſiſted, that the Plaintiff had *forfeited the Office by not taking the Oaths* within the Time appointed by Law, and to prove it, the *Record of Seſſions was given in Evidence*, and held good. 2 Salk 284. Mich 12 W. 3. B. R. Thurſton v. Stafford.

6. No particular Crime ſhall be proved againſt a Witneſs, except the Record of *his Conviction* be produced. L. E. 35. pl. 2.

[A. b. 63] Recovery. In other Courts than thoſe of Weſtminſter.

1. Upon a *Trial in Herefordſhire for Lands in the County of Brecknock, a Recovery had in the Grand Seſſions of Wales was produced* in Evidence *under the Great Seal of that Court*; and it was objected, that the Courts at Weſtminſter could not take Notice of it; but adjudged, that ſince the Grand Seſſions is appointed by Act of Parliament, viz. by the Statute of 24 H. 8. cap. 26. the Courts of Weſtminſter ought to take Notice of it. 2 Sid. 145. Hill. 1658. in Scacc. Olive v. Gwynn.

A Recovery may be given in Evidence to a Jury, tho' not under Seal of the Court or Great Seal. Pl C. 411. a.

by all the Juſtices, præter Harper, Mich 13 & 14 Eliz. in Caſe of Newys v. Larke.—And it may be delivered in Evidence; Per Witherington Ch B. in delivering the Opinion of the Court in the Caſe of Olive v. Gwynn; cites S. C. But the Chirograph of a Fine may be given in Evidence, but not delivered in Evidence.—

[A. b. 64] Regiſter-Book.

1. A Regiſter-Book for Entry of *Marriages, Births*, &c. is Evidence; Per Glinn. Ch. J. 2 Sid. 71. Paſch. 1658. B. R. in Dudley's Caſe.

S P. Salk. 281. in Caſe of Strainer

v. Burgeſſes of Droitwich. Mich 7 W. 3. B R—12 Mod. 86. S. C. & S. P. Obiter though it ſays, that there is no Law for it, but the Nature of the Thing requires it.

[A. b. 65] Rent. Diſcharge thereof.

1. In *Debt for Rent*, on Reference to the Secondary to ſee if all were paid, he reported that a *Receipt of the laſt half Year's Rent* was ſhewn in Diſcharge of all former Arrearages; But per Cur. this is only Evidence of Payment of all, but it is no Diſcharge of the former Arrear, unleſs it be under *Hand and Seal*, and then but *by Eſtoppel*. 2 Keb. 346. pl. 25. Paſch. 20 Car. 2. B. R. Coomes v. Denne.

[A. b. 66] Rentals.

1. *Bill* in Chancery by *Truſtees of a Charity, to ſubject an Eſtate to a Rent of 3 l 13 s. 7d. againſt the Owners* of the Land, *one whereof was lately Purchaſor, but had reſerved Money in his Hands on Account of this Rent, though not certain out of what Lands it was iſſuing. Several Court-Rolls were read where this Rent was mentioned, but not ſaid out of what Lands,*

*Lands, others mentioned Lands in ſuch a Place.* They *read alſo Papers, (Copies of Rentals given to Bailiffs to collect by) and read Evidence, that theſe Bailiffs charged themſelves with the Sums there mentioned,* for the Charge of the Bailiffs Receipt that makes theſe Rentals Evidence; So the Bailiffs Accounts. Decree for Plaintiff againſt all Defendants, they joining in Defence, and it not appearing out of what particular Lands the Rent was iſſuing, ſo no Remedy at Law. Paſch. 11 Geo. in Cane.

2. Antient Rent-Rolls *proved by a Receiver*, denied to be read as Evidence, but the Decree reverſed. April 1727. MSS. Tab E. Angleſey v. Ram.

3. A Rental was but *weak Evidence, unleſs Payment alſo proved, and* not ſufficient de ſe; Coram Baron Cummins, at Taunton Aſſiſes, Hill. Vac. 1727-8.

(A. b. 67) Reputation common.

1. The Judges ſhall apprehend Words as they are intended in Places, where the Land demanded lies. Palm. 102. Paſch. 17 Jac. B. R.

2. Uſage may expound antient Charters where the Words are obſolete and obſcure, and may bear ſeveral Senſes, but contra where the Charter is of modern Date. The Reputation and *Declaration of People, may be given in Evidence to explain old Words in a Conveyance in the Deſcription of an Eſtate or Lands*; Coram Baron Price, at Launceſton.

5 Mod. 9. in Atkin's Caſe ---And ſee Palm. 102.

3 *No Witneſſes ſhould be asked how the Defendant ſtands affected; but if the Defendant give Evidence of a general Reputation, it may be anſwered by particular Inſtances* on the other Side *for the King.* Comb. 337. Trin. 7 W. 3. B. R. The King v. Hains, Alderman of Worceſter.

4. The *Copy* of a private Act of Parliament may be given in Evidence, and if upon *collateral Iſſue* it is to be proved that ſuch a one was *Juſtice of the Peace or Baronet, &c.* Common Reputation is ſufficient Proof without ſhewing the Commiſſion, or Letters-Patent of the Creation. L. E. 89. cites T. per Pais, 226.

(A. b. 68) Rule of Court.

1. It was was ruled by Treby Ch. J. of C. B. at Guildhall, Paſch. 10 W. 3. that if at the Trial at Niſi Prius a Rule of the Court of C. B. or B. R. be *produced under the Hand of the proper Officer*, there is no need to prove it to be a true Copy, becauſe it is an Original. Ld. Raym. Rep. 745. Selby v. Harris.

(A. b. 69) Seals of Courts.

1. *A Recovery under the Seal of Brecknock* is Evidence; Per Witherington Ch. B. 2 Sid. 146. Hill. 1658.

2. The Seal *of Cheſter* may be given in Evidence; Per Witherington Ch. B. 2 Sid. 146. Hill. 1658.

3. The Courts at Weſtminſter ought to take Notice of the *Seal of the Grand Seſſions in Wales*, their Authority being by Act of Parliament, and the Profits of thoſe Seals are appointed to be paid into the Court of Exchequer; Per Witherington Ch. B. 2 Sid. 146. Hill. 1658.

4. Moreton Serjeant ſaid, that he *never* ſaw the Seal of any Court denied *in Evidence.* Keb. 21. pl. 62. Paſch. 13 Car. 2. B. R. in Caſe of Trowell v. Caſtle.

(A. b. 70) Sentence. In the Exchequer, as to Goods forfeited.

1. Upon a Seiſure of Goods, as Brandy, &c. *if the Property is once determined* in the Exchequer *upon an Informaion*, &c. and the Defendant acquitted, *the Title ſhall not afterwards be drawn over again in another Action.* So if Goods are condemned, the Party is bound by this, and ſhall not have Liberty afterwards to conteſt this in a collateral Action; Coram Baron Price, at Bodmyn. Trin. Vac. 1716.

(A. b. 71) Signet Manual of the King.

1. In Caſe between A. & C. in Chancery, the King by Letters under his Signet Manual *certified the Manner and Subſtance of the Agreement between them*, and it was allowed as Proof beyond Exception. Hob. 213. pl. 271. 9 Jac. Abignye v. Clifton.

(A. b. 72) Similitude of Hands.

1. In Debt upon a *ſingle Bill for the Payment of 200 l. on Demand*, upon Non eſt factum pleaded, *one Witneſs gave full Evidence of the Sealing and Delivery. On the other Side was produced a Perſon of the ſame Name and Surname with the other ſubſcribing Witneſs, who acknowledged that the Hand was very like his, but that it was not his Hand, and that he never knew either of the Parties, nor the other Witneſs, neither could the other Witneſs ſay that he was the Man*; and both their Reputations being proved good, Holt Ch. J. ordered both to write their Names, which they did, and left it to the Jury, who found for the Plaintiff. 6 Mod. 167. Paſch. 3 Ann. B. R. Osbourn v. Hoſier.

(A. b. 73) Things done or ſworn at another Trial.

1. In an Action of *Debt for Tythes* the Caſe was, theſe Tythes were in *Leaſe to F. for Life, Remainder to the Plaintiff for Life*; and *at a Trial for theſe Tythes had by F.* the firſt Tenant for Life in Poſſeſſion, *ſeveral Witneſſes were examined, which are dead*; and it was now *moved that the Depoſitions taken in that Cauſe might be read as Evidence for the now Tenant for Life in Remainder*; but it was denied, becauſe he in Remainder was neither Party or privy to the firſt Suit. 2 Roll. Rep. 211. Mich. 18 Ja. B. R. Shotbolt v. Frances.

But Doderidge J held that Tenant for Life and he in Remainder have all one Eſtate, and ſo it ſeemed to him that the Witneſſes for that firſt Leſſee when it was for the ſame Title, may be examined for him in Remainder; But that as this Caſe is, he ſaid that it cannot be ſo, becauſe it appears that there was Covin in the bringing the laſt Suit, upon which the Trial was in the Court of Wards, for the Tenant for Life and he In Remainder for Life ſhall not be prejudiced by the Recovery and Judgment had againſt the particular Tenant for Life; for theſe are Privies to the Action, and Privies in Intereſt, and Recoveries had againſt Privies to the Action ſhall not prejudice Privies in Intereſt, for they are Strangers to the Suit, and the Action might have been brought againſt the other alſo who were Privies in Intereſt; and this was agreed to by all. Ibid. 212.

2. The *Evidence given upon an Indictment cannot be offered by either Party as Evidence upon an Appeal of Murder brought for the ſame Offence*, but the Witneſſes on the Indictment muſt appear themſelves to give their own Teſtimonies. *Neither can the Evidence on an Indictment of Treſpaſs be given Evidence in an Action of Treſpaſs, although the Witneſſes ſhould be dead.* Sid. 325. Paſch. 19 Car. 2. B. R. Sampſon v. Tothill. Sid 324, 325. S. C and S. P. according y.

3. Information againſt Buckworth for a Perjury; upon Not Guilty pleaded, *a Witneſs was produced to prove the Perjury; what one (who is ſince dead) ſwore at the Trial in which the Perjury was ſuppoſed to be committed*;

*mitted*; and this was allowed by the Opinion of two Judges againſt one. Mich. 20 Car. 2. B. R. Raym. 170. Buckworth's Caſe.

Equ Ab 227. pl. 3 S C. and S. P.— 4. *One Legatee ſhall have Benefit of Depoſitions taken by another Legatee to prove Aſſets.* 1 Vern. 413 pl. 390. Mich. 1686. Coke v. Fountain.

5. Ejectment to prove a Pedigree; it was allowed to ſhew that the Defendant had at another Trial for Part of the ſame Eſtate produced a Deed of Releaſe, which had a Clauſe in it to prove the Pedigree. Objected that it was no Evidence, becauſe the now Plaintiff was not a Party, et Res inter alios acta non nocet, and it is not mutual. And Depoſitions taken to perpetuate the Teſtimony of Witneſſes if the Witneſs ſhould die, are no Evidence but only between the Parties to the Suit, Sed non allocatur. For here the Defendant may give this Deed in Evidence of the Will, and it is reaſonable the Plaintiff ſhould have Advantage to prove it Viva Voce, becauſe the Defendant hath the Deed in his Cuſtody, and may diſprove the Witneſs if he ſwore falſly. Carth. 79, 80. Mich. 1 W. & M. in B. R. Eccleſton v. Petty, alias Spcke.

6. In Caſe, the Plaintiffs preſcribed to have a Farthing for every Quarter of Malt brought by any of the Weſt-country Barges to London. On the General Iſſue a Trial was at Bar, where the *Plaintiff offered in Evidence four ſeveral Verdicts at Niſi Prius againſt four Weſt-country Malſters*; and the Court admitted them to be given in Evidence, though the *Defendant was neither Party or privy to thoſe Records*; for it is as reaſonable that a Recovery againſt a Stranger ſhould be given in Evidence as that Payment of the Duty ſhould be proved by other Strangers which was never yet doubted. Carth. 181. Hill. 2 & 3 W. & M. in B. R. the City of London v. Clerke.

7. And per Holt Ch J. If a *Lord of a Manor claims ſuit of his Tenants Ad Molendinum* by Cuſtom, &c. and in an Action Recovery is againſt one Tenant, that Recovery may be given in Evidence in a like Action to be brought againſt other Tenants upon the Reaſon above, unleſs the Defendant can ſhew any Covin or Colluſion between the firſt Action. Quod Nota, Ibid.

8. Ordered upon a long Debate, that the *Depoſitions* of Witneſſes *taken in a Cauſe thirty Years ſince about the ſame Matters, being Incumbrances and Dammifications, ſhould be made Uſe of* in this Cauſe, Witneſſes being Dead, *though that Suit were between other Parties from whom theſe claim not*; and the Caſe between Trinity Hall and Doctors Commons cited, and between Charlton and Vaughan. 2 Freem. Rep. 184. pl. 258. Paſch. 1692. In Curia Cant. Terwit v. Greſham.

9. If *a Man was ſworn a Witneſs at a former Trial, and gave Evidence and died*, the Matter that he gave in Evidence at the former Trial may be given in Evidence at another Trial by any Perſon who heard him ſwear it at the former Trial. Reſolved at a Trial at Bar. Ld. Raym. Rep. 730. Mich 8. W. 3. in B. R. Pyke v. Crouch.

10. It was reſolved Mich. 8 W. 3. in B. R. upon Evidence in a Trial at Bar,

1. That *Legatee* cannot be a Witneſs *to prove the Will*, becauſe the Legacy is deviſed to him, unleſs he has *releaſed the Legacy*. But after ſuch Releaſe he will be a good Witneſs to prove the Will; if the Counſel of the other Side have *permitted ſuch Legatee to be ſworn, and* to be *examined as a Witneſs to prove the Will, without having taken Exception* againſt him, they cannot afterwards except againſt his Evidence for the Reaſon that he was a Legatee.

2. If the *Duplicate of a Will* be *written by the Direction of the Teſtator, and ſent by him to a Stranger to keep* it ſafely, and the *Stranger ſends back a Letter to the Teſtator*, in which he makes mention *that he has received the*

*the ſaid Will*; after the Death of the Stranger ſuch letter may be read as circumſtantial Evidence, to prove that ſuch Duplicate of the Will was ſent by the Teſtator to the ſaid Stranger.

3. If a Man produced as a *Witneſs for the Plaintiff in Ejectment confeſſes that there was ſuch a Will* made *as the Defendant's Counſel pretends, and under which the Defendant makes Title* to the Lands in queſtion; yet that is not ſufficient Proof, to prove that there was ſuch a Will, but *the Will itſelf ought to be produced, or other legal Proof made of it.*

4. If *ſeveral Eſtates in Remainder* be *limited in a Deed*, and *one of the Remainder-Men obtains a Verdict* for him *in an Action brought againſt him for the ſame Land*, that Verdict may be given in Evidence for the ſubſequent Remainder-Man, in an Action brought againſt him for the ſame Land, though he does not claim any Eſtate under the firſt Remainder-Man, becauſe they all claim under the ſame Deed. Ld. Raym. Rep 730. 1 Mich. 8 W. 3. on a Trial at Bar. Pyke v. Crouch.

11. *Conviction at Suit of the King for Battery, &c.* cannot be given in Evidence in an Action of *Treſpaſs for the ſame Battery*, nor Vice Verſa. 12 Mod. 339. Mich. 11 W. 3. in Caſe of King v. Warden of Fleet.

12. The *like* Law of an *uſurious Contract*. Ibid. Mich. 11 W. 3.

13. *No Record of Conviction or Verdict* can be given in Evidence, *but ſuch whereof the Benefit may be mutual*, viz. where the Defendant as well as Plaintiff might have made Uſe of it, bring it into Court, and give it in Evidence in Caſe it did for him. So if the Record had been for the Plaintiff's Advantage, and that they could not give it in Evidence, the Defendant ſhould not give it in Evidence for that very Reaſon; and this was reſolved at another Trial at Bar before this Term, between **Sherwin and Sr. Walter Clarges**, where a Verdict between the Earls of Bath and Mountague, upon the very ſame Point and Title now in Queſtion, viz the Legitimacy of Chriſtopher Duke of Albemarle was denied for Evidence. Ibid. 12 Mod. 339. Mich. 11 W. 3. King v. Warden of the Fleet

14 In an Inquiſition againſt the Warden of the Fleet for Miſdemeanors, whereby he was to forfeit his Office, a Priſoner who had given Bond to be a true Priſoner was produced to prove that the Warden ſuffered him voluntarily to eſcape; Reſolved, that a *Conviction of the Warden upon the Priſoner's Evidence of an Eſcape* would be no Evidence againſt the Warden in *Debt on the Bond to be brought by the Warden againſt the Priſoner*, ſo as to ſet it aſide as a Bond for Eaſe and Favour, nor in Action of falſe Impriſonment by the Priſoner for retaking him, becauſe it would not be between the *ſame Parties*. 12 Mod. 339. Mich. 11 W. 3. King v. Warden of the Fleet.

15. Evidence given at a former Trial, and *between other Parties, &c.* is not Evidence in another Trial, &c. L. E. 32 pl. 60. cites State Tr. 2 Vol. 354. 380. 385.

16. By Jeffries, though in Strictneſs we do not uſe to admit of what others have ſworn at another Trial, unleſs the Party be dead that ſwore it; Yet the *Priſoner is ſomething indulged ſo far as to be admitted to prove it.* L. E. 278. pl. 9. cites Oats's 2 Vol. State Tr. 40

17. No Evidence ought to be given of what an *Accomplice has ſaid*, eſpecially if not in the ſame Indictment. L. E. 32. pl. 61. cites State Tr. 2 Vol. 436.

18. Yet a *Priſoner* may bring Evidence to *prove* the Witneſs *gave a different Teſtimony before a Juſtice of Peace*, or at another Tryal; But the Court will not command the Depoſitions taken before the Juſtice to be produced for him to make uſe of. L. E. 32. pl. 62. cites 2 Vol. State Tr. 578

19. *Anſwer in Chancery by a Mother* cannot be given in Evidence *againſt the Children not deriving any Title under her* to the Lands in Queſtion,

tion, and the Intent of reading it being to ſhew that the Mother's Marriage was not till after their Births was not allowed by the Judge to be read, which the Lord Chancellor thought hard of. 8 Mod. 180. Trin. 9 Geo. Hilliard v. Phaley.

20. In Treſpaſs, the Defendant produced a *Deed under the Plaintiff's Hand and Seal, whereto were Witneſſes Names*, but becauſe they did not prove the Witneſſes dead, nor that they were gone to Sea, though they alledged it, it was not permitted at firſt to be given in Evidence; But afterwards *upon Proof, that it was read at a former Trial* it was ſuffered to be read. Freem. Rep. 84. pl. 103. Paſch. 1673. Phillips v. Crawley.

21. Where a new Trial is directed *upon the ſame Iſſue between the ſame Parties*, and *a Witneſs examined at a former Trial dies* before the ſecond Trial, Depoſitions made by him in Chancery whence the Iſſue was directed, and alſo what he ſwore at the former Trial may be given in Evidence. 2 Wms's Rep. 563. Hill. 1729. Coker v. Farewell.

22. On feigned Iſſue from the Exchequer to try a *Cuſtom about grinding at Bovey-Mills in Devon* by all the Inhabitants of the Pariſh, *former Decrees were admitted to be read* in Evidence, and ſaid that former Verdicts about Cuſtoms had been admitted as Evidence, although not concluſive Evidence; At Exon. Aſſiſe, Lent, 1731.

(A. b. 74) Torn Papers, Books, &c.

1. In an Action upon the *Caſe* for taking the *Profits of the Under Clerk of the Treaſury*, a *Note* obtained by the Ld. Finch Maſter of the Office formerly, *of the Officers Subſcription that they were but Servants* (which by Allen for the Plaintiff is no more than ſome Pariſhoners Subſcription to pay Tythe in Kind) which will not bind others; which the Court agreed, and refuſed to let it be given in Evidence, eſpecially *Part being cut off*. 1 Keb. 258. pl. 36. Paſch. 14 Car. 2. B. R. Whitchurch v. Pagett.

2. To prove taking of the Oath, &c. in the Act of Uniformity *a Certificate* was produced *that had only a ſmall Bit of Wax upon it.* Per Twiſden if it were ſealed, though the Seal was broken off, yet it may be read as we read *Recoveries after the Seal broken off; and* ſaid he had ſeen *Adminiſtration* given in Evidence after the Seal broken off, *and ſo Wills and Deeds.* 1 Mod. 11. pl. 34. Mich. 21 Car. 2. B. R. Clerk v. Heath.

(A. b. 75) Tranſfer Books of a Company.

1. *Tranſfer Books of a Company* were allowed as Evidence. 7 Mod. 129. Hill. 1 Ann. B. R. Gery v. Hopkins.

(A. b. 76) Verdict.

1. A Verdict *againſt one under whom*, either *Plaintiff or Defendant claims* may be given in Evidence againſt the Party ſo claiming. Contra if neither claim under it. L. E. 95. pl. 22. cites Duke v. Ventres. Mich. 1656. B. R. Try. per Pais, 206.

2. Finding by ſpecial Verdict, or Admiſſion by former Pleading is *good* Evidence, *unleſs the contrary appear*; agreed per Curiam. Keb. 720. pl. 50. Paſch. 16 Car. 2. B. R. Lee v. Boothby.

3. In an *Ejectment brought by a Reverſioner, or in Debt upon Statute of E. 6. by a Proprietor of Tythes*, they may give in Evidence a *Verdict for a former Leſſee*, becauſe the Parties to this Action could not have been Parties to the former Suit in that the then preſent Leſſee could be only Party. Hard. 472. Hill. 19 and 20 Car. 2. Ruthworth v. Pembroke.

7. *Verdict*

4. *Verdict on a former Trial* ought not to be read as Evidence *on a new Trial* in the ſame Cauſe Per Saunders Ch. J. 2 Show. 255. pl. 262. Hill. 34 & 35 Car. 2. B. R. Rogers and Ux v. Goddard.

But in a Cauſe againſt other Defendants on the ſame Matter it may. Carth. 181. Hill 2 & 3 W & M. in B. R. City of London v Clerk.—For if it were in Affirmance of Plaintiff's Title they could not read it; as being between other Parties; and what would not be Evidence for one ſhall not be for the other. But notwithſtanding the Verdict was read to ſer them in to give Evidence that a Witneſs produced by Plaintiff had ſworn now directly contrary to what he had ſworn at the Trial. 12 Mod. 343 Mich. 11 W. 3. Sir Walter Clarges v. Sherwin.

5. Upon a Trial at Bar, in Ejectment it was reſolved per Curiam, that if a *Plaintiff hath a Title to ſeveral Lands, and brings an Ejectment againſt ſeveral Defendants, and recovers againſt one*, he ſhall not give that Verdict in Evidence againſt the reſt, becauſe the Party, againſt whom the Verdict was had, might be relieved againſt it if erroneous, but the reſt cannot, though they claim under the ſame Title, and all make the ſame Defence. 3 Mod. 141. Mich. 3 Jac. 2. B. R. in Caſe of Lock v. Norborne.

6. *So if two Tenants will defend a Title in Ejectment*, and a *Verdict* ſhould be had *againſt one* of them, it *ſhall not be read againſt the other unleſs by Rule of Court.* Ibid. 142.

7. But if an *Anceſtor has a Verdict, the Heir may give it in Evidence*; becauſe he is Privy to it; for he who produces a Verdict muſt be either Party or Privy to it, and it *never ſhall be received againſt different Perſons, if it does not appear that they are united in Intereſt*; therefore a Verdict againſt A, ſhall never be read againſt B. For it may happen that the one did not make a good Defence which the other may do. 3 Mod. 142. Mich. 3. Jac. 2. B. R. in Caſe of Lock v. Norborne.

8. Verdict *in a Civil Cauſe* may be given in Evidence *in a Criminal Cauſe*; but *not Vice Verſa*; and Court ſaid, they would hardly grant a *new Trial where* a Verdict *might become Evidence in a Criminal Cauſe.* 12 Mod. 319. Mich. 11 W. 3. Richardſon v. Williams.

9. If Defendant ſued upon a forg'd Bond, brings *Caſe for ſueing him on a forg'd Bond* a Verdict therein will be Evidence for him. Per Serjeant Darnell. 6 Mod. 234. Mich. 3 Ann. B. R. Selby v. Green.

(A. b. 77) Water Courſes. Diverting them.

1. In Treſpaſs upon the Caſe in turning Part of a Courſe of Water running from a Spring in C. by a Conduit to his Houſe. The Evidence was that A. *finding an ancient Pipe in his Yard, through which the Water was conveyed to the Plaintiff 's Houſe, put a Quill and a Cork into the ſaid main Pipe, and ſo drew Water to ſerve his Houſe*, and ſtopped it as he pleaſed, *and after his Death his Wife continued to do the ſame*; and it was held that the Action lay; for *every Opening was a new Diverſion.* D. 319. b pl. 17. Mich. 14 & 15 Eliz. Moore v. Brown

Bendl 215. pl. 249 S. C. and the Pleadings.—

2. In Action on the Caſe a ſpecial Verdict was found that the *Plaintiff* was ſeiſed of a Stream running through his Land; and that about *Sixty Years ſince* he *had erected a Water-Mill* upon his own Freehold; and likewiſe it was found, how that the *Defendant was ſeiſed of an ancient Dam* upon the ſame Stream above the Plaintiff's Mill, and how that the Defendant had *pulled down the ſaid Dam*, and thereby diverted the Stream from the Plaintiff's Mill, whereupon the Plaintiff commences this Action. Pollexfen argued for the Plaintiff, and cited Palmer 29 a. and 1 Cr. 575. and took that to be a clear Caſe, that the *Stream being the Plaintiff's, the Defendant could not divert it*, and ſo held the Court, that an Action had lain for diverting a Stream, though no Mill had been erected; and that therefore it *need not be ſhewn to be an ancient Mill*, as it muſt where he preſcribes to have a Water-Courſe,

Skinn. 175. S. C. Curia adviſare vult. — 3 Lev 153 Nu'mes v Hebleth-waite S. C. adjudged for the Plaintiff in C. B. and Judgment affirmed in B. R — Carth. 84 Hebleth-waite v. Palmer.

where the Water is not his own; as the Court ſaid was the Meaning of Lutterell's Caſe, 4 Rep. 80. for there preſcribing to the Water-Courſe he ought to ſhew that they were antient Mills, but here he need not: So the Court ſeemed wholly for the Plaintiff, for here the Stream is his own, ſo there needs no Preſcription. Skin. 65. pl. 10. Mich 34 Car. 2. B. R. Palmes v. Heblethwait.

Mich. 1 W. & M. in B. R the S. C. and Judgment affirmed; but Holt Ch J. ſaid, that if the Cauſe had been tried before him the Plaintiff ſhould have proved his Mill to have been an antient Mill, or been Nonſuit. — 3 Mod. 48. S. C. in B R and Judgment affirmed. — Show. 64. S C. adjornatur. —

(A b. 78) Year Books.

1. To prove the *Cuſtom of a Manor relating to Copyholders about cutting down of Trees*, the Book-Caſe of 14 E. 3. tit. Bar. Fitz. was given in and avowed for good Evidence. Godb. 235. pl. 326. Mich. 11 Jac. C. B in Caſe of the Biſhop of Chicheſter v. Strodwick.

2. A Year-Book is Evidence *to prove the Courſe of the Court*. 1 Salk. 291. Mich. 7 W. 3. B. R. Stainer v. the Burgeſſes of Droitwich.

## (B. b) What Things may be given in Evidence. Variance in Time or Place, &c.

1. EVidence which is *contrary to that in Iſſue, or* which is not anſwerable to the Matter in Iſſue is not good; As nothing paſſed *by the Deed, and Evidence that it is not his Deed* is not good, for it is contrary to the Iſſue, and to that which he acknowledged in his Plea by Implication. Kitch. 241. cites 5 H. 4. fo. 2.

2. Upon Not Guilty in *Treſpaſs de uxore rapta. et* abducta cum Bonis viri *in London*, it is no Evidence for the Plaintiff, that the *Adultery was committed in Southwark*, and in Ratclif in Middleſex, whence the Defendant conveyed her to Richmond in Surry; for this does not prove the Defendant guilty in London. Dy. 256. b. pl. 10. Mich. 8 & 9 Eliz. Anon.

Quære, for the Jury brought him in guilty generally, though Dyer would have it found ſpecially.

3. In *Ejectment* the Plaintiff *declared of a Leaſe* 14th *Jan.* and *the Evidence was of a Leaſe the* 13*th*, it is well; for if it was ſealed and delivered the 13th, it was a Leaſe the 14th. 4 Le. 14. pl. 52. Mich. 32 Eliz. C. B. Frice v. Foſter.

4. Though an Ejectment be laid on a certain Day, yet if it be *proved to be* at any Time *before the Action brought, or after the Leaſe made* it will do, but not otherwiſe. 1 Bulſt. 122. Paſch. 9 Jac. Hall v. King.

5. If the *Treſpaſs* in the *Declaration is laid in one Day, and the Evidence is of Treſpaſs in another*, it is well whether the Time be before or after the Day laid. So if a Promiſe is laid to be made one Day, if this be found to be made of another, yet it is good. 1 Roll. Rep. 353. pl. 1. Paſch. 14 Jac. B. R. in Caſe of Cooke v. Lankaſter.

6. Yet a Declaration was, that a *Teſtator* for ſuch a Conſideration in certain to him given 30*th October* 11 *Jac. promiſes to pay ſo many Quarters of Barley before ſuch a Feaſt next following*, &c. whereas the *Teſtator was dead before* 30*th October* 11 *Jac.* and held, that the Miſtake being

ing in the Day of Payment of the Quarters, which were to be paid at ſuch a Feaſt enſuing 30th October 10 Jac the Defendant might have excuſed himſelf by the Death of the Teſtator, and the Iſſue is varia t, and Contract not the ſame, ſuppoſing the 30th October had been in Teſtator's Life-time. 1 Roll. Rep. 353 pl. 1. Paſch. 14 Jac. B. R. Cooke v. Lankaſter.

7. In an Information *for an Aſſault, &c. at* Highgate, Evidence of an *Aſſault at Weſtminſter* is good. T. 9. W. 3 Per Holt.

8. If the *Petition* to the Lord Chancellor mentioned in the Declaration *recites, that the Bankrupt was indebted in* 300*l.* and the *Petition produced at the Trial recites, that he was indebted in* 500*l.* yet that is no material Variance. Ld. Raym Rep. 741. Kirne v. Smith, & al.

9. In an Action for Money which certain Eaſt-India Goods were ſold for at Auction, the Plaintiff in his *Declaration ſet forth Part of the Articles of Sale in hæc Verba, but not the whole.* Upon which Mr. Kettleby took an Exception, that there was a Variance between the Declaration and the Evidence; And the Ch. J. at Niſi Prius in Guildhall allowed of the Exception; accordingly the Plaintiff was nonſuited. Barnard. Rep. in B. R. 303. Hill. 2 Geo. 2. Pitt v. Norman.

## (C. b) Proof. Good or not, tho' it comes not fully up to the Suggeſtion.

1. IN *Debt upon a Recognition* the Defendant pleaded Nul Tiel Recognition, upon which Iſſue was joined, and a *Recognition upon Condition was certified*, and held good Evidence to maintain this Iſſue; for *Recognition upon Condition is a Recognition.* Hob. 55. per Hobart Ch. J. cites 36 E. 3. 5.

2. So it is if the *Variance of the Contract be in the Things ſold*; for it cannot be the ſame Contract. D. 219. b. in pl. 11. cites 21 E. 4.

3. The Plaintiff *pleads a Leaſe ſimply, and gives in Evidence a Leaſe upon Condition*, and for that, that *the Condition is performed*, it is good; for the Evidence proves the Effect and Subſtance of the Iſſue, and for that it is good. Kitch. 242. cites 14 H. 8. 20.

4. In Action on the *Caſe by the Huſband on an Aſſumpſit made to him*; The *Evidence was, that it was made to his Wife, to which he agreed*; this is good. Kitch. 242. cites 27 H. 8. 29.

5. If in *Formedon in Deſcender on a Gift in Frank Marriage*, upon Traverſe and Iſſue of the Gift, a Deed of Gift in Free Marriage, with a *Remainder over to the Demandants* being given in Evidence will not maintain Demandant's Writ. Plow. 14. a. Arg Hill. 4 E. 6. in Caſe of Reniger v. Fogaſſa.

6. If Plaintiff *declare on a Leaſe by Parol*, and the ſame is traverſed, Evidence of a *Leaſe in Fait* will not maintain it. Plow. 14 a. Ibid.

7. *So* of an *Agreement*; a *Special Agreement* will prove it. Pl. C. 8. b. Arg. Hill. 4 E. 6. in Caſe of Reniger v. Fogaſſa.

8 In *Debt to perform Covenants*, whereof *one was, that he ſhould not cut any Trees to do Waſte*, the Plaintiff aſſigns the *Breach in cutting down twenty Oaks*; Defendant pleaded that he did not cut twenty, nor any of them, whereupon Iſſue was joined, and the *Plaintiff proved ten Oaks only to be cut down*, yet held ſufficient Evidence to maintain the Iſſue; for the Cutting of the ten Oaks muſt needs be a Breach of the Covenant not to do Waſte. Dy. 115. b. pl. 67. Paſch. 2 & 3 P. M. Teril v. Dune.

9. In

3 Nelſ. Abr. 160. pl. 1. & 2 mentions S. C as adjudged, but I do not obſerve any Judgment in Dyer, or any Opinion of the Court.

9. In a *Writ of Entry of ſeventy Acres* of Land *in H.* the Tenant *pleaded, that one C. was ſeiſed in Fee, and leaſed the Land to him for Life*, &c. the Demandant replied, and likewiſe made a Title under the ſaid C. abſque hoc, that he leaſed to the Defendant Modo & Forma, &c. and the Jury *found that C. and ſix others were ſeiſed of the ſeventy Acres, and of a Meſſuage in H.* &c *to the Uſe of the ſaid C. and that they all joined in a Leaſe of the ſaid Houſe with the Appurtenances unto the Tenant*; One Queſtion was, if this Demiſe by Ceſtui que Uſe and his Feoffees jointly, be Matter ſufficient to maintain the Iſſue for the Tenant. D. 156. a. pl. 31. Hill. 4 & 5 P. & M. Drew v. Marrow.

10. Iſſue was taken upon the *Cuſtom of a Manor* relating to a *Copyhold Eſtate*, whether the *Widow* ought to hold *for Life*, and the Evidence proved only *during her Widowhood*; and ill; Quod nota. Heath's Max. 84. cites 1 & 2 Eliz. Dyer. 192.

11. Upon *Iſſue that by the Cuſtom of B. the Widow of every Copyholder in Fee-Tail or Life is to enjoy it for Life*, Evidence of enjoying it *Durante Viduitate* won't do, for it is a leſs Eſtate. Dy. 192. a. pl. 23. Mich. 2 & 3 Eliz. 3. Linſey v. Dickſon.

12. *Debt on a Bargain for* 20 *l.* upon Non Debet the Defendant may give in *Evidence* that the Bargain was *only for twenty Merks*. Dy. 219. b. pl. 11. Mich. 4 & 5 Eliz. Bladwell v. Sleggin.

13. In Treſpaſs the Defendant pleaded, that one Tindal was ſeiſed in Fee by Proteſtation, and died ſeiſed, and that the Land deſcended to the Defendant; the Plaintiff replied, and traverſed the Seiſin in Fee, upon which they were at Iſſue, and the *Evidence to prove* the *Seiſin in Fee was, that Tindal was ſo ſeiſed a long Time before he died, and aliened, and never was ſeiſed after.* It was ſaid, that this Evidence did not maintain the Iſſue, for the Seiſin in Fee upon which the Iſſue was taken, muſt be intended a dying ſeiſed, and not a general Seiſin at any Time during his Life, and Peryam and Anderſon were of that Opinion. 4 Leon. 97. pl. 200. Trin. 29 Eliz. Paſton v. Townſend.

14. In *Replevin for* 1000 *Beaſts*, the *Defendant juſtifies by Reaſon of Property*, and in Iſſue thereon the *Defendant in Evidence may ſurmiſe a leſſer Number, and drive the Plaintiff to prove a greater Number*, and what he fails of ſhall go in Mitigation of Damages, notwithſtanding that the Number in the Plaint be by the Defendant's Plea Quodammodo admitted. 1 Le. 43. pl. 54. Mich. 28 & 29 Eliz. C. B. Wood v. Foſter.

15. G. P. brought *Treſpaſs* againſt L. Parſon of the Church of D. *for the taking of certain Carts loaded with Corn*, which he claimed as a *Portion of Tithes in Right of his Wife*, and ſuppoſed the Treſpaſs to be done *the 27th of Auguſt* 29 Eliz. and upon Not Guilty it was given in *Evidence* on the Defendant's Part, that the Plaintiff delivered to him a *Licence* to be married, bearing Date the *28th of Auguſt 29th Eliz.* and that he *married* the Plaintiff and his ſaid Wife *the ſame Day*, ſo as the Treſpaſs was before his Title to the Tithes. And it was holden by the whole Court, that that Matter did abate this Bill; but it was holden, that if the Treſpaſs had been aſſigned to be committed one Day after that, it had been good; but now it is apparent to the Court, that at the Time of the Treſpaſs aſſigned by himſelf, the Plaintiff had no Title, and therefore the Action cannot be maintained upon that Action, for which Cauſe the Plaintiff was nonſuit. Le. 104. pl. 138. Paſch. 30 Eliz. B. R. Pawlet v. Lawrence.

16. The Plaintiff *declared of a Leaſe made by the Houſe or College* of St. Thomas, and *the Leaſe* ſhewn in Evidence *was by the Maſter of the Houſe* or Hoſpital, and yet well; for the Variance is not material; becauſe College and Hoſpital are all one. 1 Le. 215. Mich. 32 & 33 Eliz. 3. C. B. Cheney v. Smith.

17. *Aſſumpſit*

17. *Assumpsit to deliver the Plaintiff certain Monies in London, when the Plaintiff delivered to the Defendant certain Broad Cloaths there*; upon Non Assumpsit pleaded the Jury found a special Verdict, that *the Assumpsit was, that the Plaintiff should deliver certain Broad Cloth, some of Pheasant Colour, and the other of other several Colours*; the Court thought, that the special Matter thus found maintained the Declaration; and that the *Defendant ought to have pleaded that the Assumpsit was thus special, and traversed the general Promise* in the Declaration. Mo. 460. pl. 659. Pasch. 39 Eliz. 3. Cheney v. Hawes.

18. *His Freehold* must be intended his own Freehold, and in his own Right, and finding that it was the Freehold of the Avowant's Wife is not sufficient. Cro. El. 524. pl. 52. Mich. 38 & 39 Eliz. B. R. Bonner v. Walker.

19. If the Suggestion be, that the Parson or Proprietor of the Rectory, and his Predecessors had twenty Acres of Pasture, and twenty Acres of Wood in Satisfaction of the Tithes. If the Witnesses prove *the twenty Acres of Pasture, but do not prove the twenty Acres of Wood*, it is Proof sufficient. For the Substance is proved, that he held Land in Satisfaction. Cro. E. 736. pl. 4. Hill. 42 Eliz. B. R. Austen v. Pigot.

20. A. *promised B. to pay him for such Beasts as J. S should buy of him, so much as J. S. should agree to pay for them at any future Time.* B. sold J. S. several Beasts partly for ready Money, and partly upon Trust. This is within the Promise. Cro. E. 807. pl. 9. Hill. 43. Eliz. B. R. Philips v. Turner.

21. In Trespass the Defendant *pleaded a Devise to him and his Heirs*, which being traversed Modo & forma, and Issue hereupon *the Will given in Evidence devised the* Lands in this Manner, to J. S. for ninety nine Years, and that J. S. shall have *all my Lands of Inheritance if the Law will allow it him*; And held good, for the Law allows it to be a Devise in Fee. Hob. 2. Hill. 8 Jac. Widlake v. Harding.

Mo 855. pl. 1218 Hill. 11 Jac. Whitlo k. v. Harding. Upon the whole Matter, the Intent appears to pass the Inheritance; For an Estate for Life after ninety nine Years is of little Value, and could not be intended.—Godb 267. pl. 295. Wedlock v Harding. S. C. but mentions it as a Devise to his Cousin Harding for eight Years, and also that his Cousin Harding should have all my Inheritances if the Law will; and adjudged per tot. Cur. that this was a Devise of the Messuage in Fee, and that all his other Inheritances passed by the said Will by those general Words.

22. In Case against Sheriff for an Escape, it was found that the Party was *taken in Execution by the former Sheriff*, and *not by Defendant*, but *delivered by him to Defendant*; yet the Imprisonment and Escape being found, Plaintiff had Judgment. Cro. J. 380. pl. 8. Mich. 13 Jac. B. R. King v. Andrews.

23. If the Issue be whether J. S. was *taken by Force of Cujusdam brevis de Capias ad satisfaciendum*; a Taking by Force of an *Alias Cap. is good to maintain this Issue*; for Alias & Pluries are but Distinctions of Numbers, a Capias is the Substance, and an alias Capias with a little Addition that might be spared. Hob. 54. Trin. 13 Jac. Per Hobart Ch. J. Foster v. Jackson.

24. *Yet* on this Issue *a Taking by Force of a Capias pro fine, or a Capias utlagatum* with a Prayer of the Plaintiff to remain in Execution for him is not sufficient to maintain the Issue; for though he be taken by a Capias, and also holden ad Satisfaciendum, yet he was not taken by Force of a Ca. Sa. which is a Kind of Writ certain. Hob. 55. Per Hobart Ch. J. Ibid.

25. *But if the Issue had been whether taken by a Capias at the Suit of A. a Taking by Force of a Capias at the Suit of B. and then a Delivery of a Capias at the Suit of A.* who thereupon charged him with this Suit is good Evidence to maintain this Issue; for as to this Execution it is in Law a new Taking. Hob. 55. Per Hobart Ch. J. Ibid.

26. *So* it is if it be proved, and *found that the Defendant cut down ten Aſhes*; for the very Iſſue in Law is Waſte or no Waſte, the reſt is but Certainty of Form. Hob. 53 in Caſe of Foſter v. Jackſon.

27. In Replevin, the Defendant made *Conuſance, for that P. was ſeiſed of ſix Acres of Land, &c. in Fee, and granted a Rent-Charge out of it to (the Plaintiff) W. his Son in Tail*, and for the Rent Arrear he avowed the Taking the Cattle, &c. The *Iſſue was, that the Rent did not paſs by this Grant*; Hobart ſaid, that *The Avowant ought to prove, that the Grantor was ſeiſed of ſix Acres or more*, but not leſs, as four or five Acres if he would maintain this Iſſue. Winch. 15. Trin. 19 Jac. Bennett's Caſe.

28. In a Replevin, Iſſue was *whether one and all whoſe Eſtate he had in a Manor had uſed to tether their Horſes to Stakes in a Place called B ab & poſt feſtum Pent. annuatim*, and the Jury *found that they had uſed ſo to do in Vigil. Pentecoſtes, in feſto Pentecoſtes, die Lunæ in ſeptimana Pentecoſtes aut Poſtea ad ſuam libitum Annuatim*; And adjudged, that it did not maintain the Preſcription, becauſe it was more large, and alſo gave a Choice. Hob. 64 pl. 66. Trin. 22 Jac. Johnſon v. Throughgood.

29. In *Aſſumpſit for 11 l. lent to the Defendant at ſeveral Times*, it is no *Evidence for the Defendant, that he owed only 10 l.* for the Action being for diverſe Things the Plaintiff ſhall recover the 10 l. and be barred for the Reſidue otherwiſe when the Contract is entire, and ſo of an entire Aſſumpſit. Dy. 219. b pl. 11. Marg. cites 3 Car. in Scacc. Walter v. Boats.

30. The Point in Iſſue was, *if J S. deviſed Lands to J. N. and his Heirs* or not; the finding a *Deviſe to B. for Years Remainder to J. N. and his Heirs* is not a Finding according to the Iſſue; for the Iſſue is upon an immediate Deviſe in Poſſeſſion. Jo. 224 pl. 5. Paſch. 6 Car. King v. Newdigate.

31 In an Action of *Treſpaſs for Taking of a Stack of Corn* if the Defendant pleads *Not Guilty*, and *the Jury find him guilty of five Quarters of Grain provenientibus of Parcel of the ſaid Stack* it is good Evidence, and good Verdict P. 10 Car. B. R. between Anguiſh and Methold Adjudged it being moved in Arreſt of Judgment. The Delaration was, that he took Unum Acervum Siliginis Anglice a Goalſteade or Stack of Rye; And the Jury as to eight Combes, and two Buſhels Siliginis de infraſcripto Acervo Siliginis in Narratione Specificatos found the Defendants guilty, and for the Reſidue Not Guilty; and this adjudged good Evidence, and a good Verdict, and this afterwards Tr. 11 Car. affirmed in Writ of Error in the Exchequer-Chamber by the whole Court. 2 Roll. 684. Trial (F. 1) pl. 6.

32. *Aſſumpſit* was brought *for 10 l Money lent*; The Defendant *pleaded Non Aſſumpſit*, and the Judge admitted him to *prove Payment before the Action brought*, which if the Defendant can do, then there was no Conſideration to charge him in this Action. Clayt. 71. pl. 123. Aug. 1639. before Vernon and Henden J. Blesbie's Caſe.

33. In an Action of *Waſte for cutting and ſelling of Trees* upon Nullum Vaſtum fecit, if the Jury *find that he* rooted the Trees, *and did not cut them*, that is a Variance. 2 Ro. Ab. 720. cites Trin. 7 Jac. in C. B.

34. *Aſſumpſit* for the Price of a Beaſt, and declares that the *Agreement to pay ſo much as the Beaſt ſhould be worth* reaſonably, and the Witneſs *proved* the Agreement to be that the Defendant *would give content for it*; and this was ruled good Evidence to prove the Promiſe laid, and in common Senſe the Words amount to ſo much. Clayt. 148. pl. 271. Aug. 1650. before Thorpe Judge of Niſi Prius. Bland v. Tenant.

35. An Action upon the *Caſe* was brought againſt one for *Nuſance in digging a Hole* in ſuch a Way, *whereby the Plaintiff* as he was *travelling in that Way with his Horſe did fall into the ſaid Hole and hurt himſelf*, to his Damage, &c. To which the Defendant pleaded *Not Guilty*, and the

the Plaintiff gave in Evidence *that one J. S. his Servant was driving his Horse in the said Way*, and for that the *Defendant* had digged the aforesaid Hole in the said Way, the Plaintiff's Horse *fell therein*, and was spoiled, and *rendered thereby unfit for Service*; but held no good Evidence to maintain the Issue; Roll Ch. J held that it ought to find the Way and the Hole digged, and all the Matter conducing to the Issue, and therefore let the Verdict be quash'd, and a new Venire awarded. Sty. 335. Trin. 1652. B. R. Anon.

36. If in Trespass Defendant in pleading doth entitle himself to a *House and Land*, to hold of the Lord *according to the Custom* of his Manor, and upon a Trial he gives the *Custom* in Evidence *for the Lands only*, that will not maintain the Issue. Brown's Anal. 14.

37. On a Declaration, Quare Defendens *Crimen Feloniæ ei imposuit*, the Plaintiff cannot give in Evidence *Words* only but *Acts*, as arresting, charging or convening him befor a Justice of Peace for Felony. Raym. 61. Mich. 14 Car. 2. B. R. Sanders v. Edwards. Words importing a Charge of Felony will not be Proof of it; but there must be Proof of some Acts adjudged Show. 282. Mich 3. W. & M. Haynes v. Rogers.——

38. If one *fail* of his *Proof* in the same Nature his Plea is, it is *ill*. Heath's Max. 83.

39. There is a Difference as to the Evidence on a Declaration of a *Trespass Quare Clausum & alia enormia*; for when it arises *ex turpi Causa*, the *particular Wrong* may be given in Evidence on such a General Declaration under the Words (alia enormia) because the Law will not compel the Party to shew it on Record, but in all other Cases the Special Matter must appear in the Declaration, nor shall any Evidence be given of Facts that are not in it. Sid. 225. pl. 17. Mich. 16 Car. 2. B. R. Sippora v. Baffet. Keb. 787 pl. 70. Baffet v. Shippon S. C. and it was for entering his House, &c. and Alia Enormia, and gave in Evidence that the Defendant came as Suitor to his Daughter for two Years and defiled her, and the Court conceived it might be well given in Evidence, without saying Quod Infultum fecit super Filiam suam, &c. and so of the Wife, and that this is the better Way.——

40. At Guildhall in an *Action for Words per quod Maritagium amisit*, upon Evidence the *Plaintiff proved Part of the Words only*, but proved *that by Reason of these Words Maritagium amisit*; and ruled by Holt Ch J. to be well enough, for it is sufficient if the Plaintiff proves the Loss of Marriage by Reason of any Words in the Declaration. Skin. 333. pl. 3. Hill. 4 W. & M. B. R. Geary v. Connop.

41. If a Man brings *Trover for a Ship*, and upon the Evidence it appears that *he has but the Sixteenth Part of it*; this is good, and the Interest of the others may be given in Evidence in Mitigation of Damages. Skin. 640. pl. 4. Pasch. 8 W. 3. B. R. in Case of Dockwray v. Dickenson. Comb. 366. S. C. accordingly. ——

42. Where the *Time of Payment* is *past at the* Time of *Acceptance of a Bill of Exchange*, the Acceptance can be only to pay the Money, and if the Defendant was so absurd as to *promise to pay the Money Secundum tenorem Billæ*, yet *that is no more in Law now than a Promise to pay the Money generally*; but it is *better to declare on a general Promise to pay the Money*. 1 Salk. 127. pl. 8. 10 W. 3. B. R. Jackson v. Pigot.

43. In Case for Words spoke of a Woman, whereby she *lost her Marriage with J. N.* Holt Ch. J. refused to let Evidence be given of a Loss of Marriage with any Body but J. N. 2 Ld. Raym. Rep. 1007. Hill. 2 Ann. at the Sittings in Middlesex. Anon.

44. In Case for running over the Plaintiff's Barge with his Ship, Holt Ch. J. would not suffer any *Damages* to be recovered *for the Goods*, because not set forth particularly, saying, they *ought to be set forth specially*;

*cially*; as where an Action is brought for burning his House; *so in Case for Words, per quod she lost her Marriage with J. S & alius Personis*, He said he *would not suffer them to give in Evidence a Loss of Marriage with any Body but J. S.* 1 Salk. 287. pl. 22. Hill. 2 Ann. at Guildhall. Martyn v. Hendrickson.

6 Mod. 117. Elvis v. Lombe S. C.

45. In Trespass *Quare Clausum fregit* in D. if the Defendant *pleads Liberum Tenementum*, and Issue is thereupon joined, it is sufficient for the Defendant to *shew any Close in which is his Freehold, but* if the *Plaintiff gives the Close a Name*, he must prove a Freehold in the Close named. Adjudged in C. B. and affirmed in Error in B. R. 2 Salk. 453. pl. 2. Hill. 2 Ann. B. R. Helwis v. Lamb.

46. *In Local Actions* as in Trespass Quare Clausum fregit, the *Plaintiff cannot prove a Trespass but where he lays it*, nor lay it in any other Place than where it is, *but* it is *otherwise in Actions transitory*, so that a Proof of a Trover for Trees cut down in Ireland, is good upon a Declaration of Trover in Middlesex. 1 Salk. 290. pl. 29. Trin. 7 Ann. Brown v. Hodges.

47. *Assumpsit for Meat, Drink, &c. found by the Plaintiff for the Defendant*, upon Evidence it appeared that *it was found for the Defendant's Apprentice* and not for himself, and held that the Plaintiff could not recover upon this General Count. Coram Prat Ch. J. apud Guildhall. Mich. 5 Geo.

48. Action upon the *Case* Plaintiff *declared that whereas he had put a Gelding to the Defendant to be depastured, the Defendant promised Salvo custodiendum* to the said Gelding, *but that he had so inordinately rid the said Gelding that by Means thereof the Gelding died.* The Ch J. was of Opinion that the Plaintiff had not proved the Declaration, because he had *no Evidence that the Defendant promised Ad salvo custodiendum eundem, but only that the Plaintiff put him to the Defendant to Grass.* Coram Prat Ch J. Hill. 6 Geo. apud Westminster Ford v. Osborn.

## (D. b.) Proof. At what Time it must be.

1. PROOF of the Thing for which the *Assumpsit* is made need *not* be *before the Action is brought*, but may be in the Action Show. 845. cites Griffith's Case.

2. So in Debt upon *Bond not to hunt* in a Park. Ibid. cites 7 Rep. 2 Fitzh. Barr. 241. per Belknap.

3. 1 *W. & M. cap.* 16. *sect.* 2. *No Evidence of Simony shall be given, unless the Party supposed to be guilty of it be then living, or were in his Life convicted of the said Simony at Common Law, or in some Ecclesiastical Court.*

## (E. b.) In what Cases new Evidence shall be given.

1. IN an *Attaint* the *Defendant* may give new Evidence, *but not the Plaintiff.* The Reason seems, because the Defendant is to defend himself. D 212. a. pl. 34. Paich. 4 Eliz. Kent v. Paramor.

2. An *Appeal* was *from the Master of the Rolls's* Decree, and it was a Question whether new Evidence that had *arisen between the Hearing and Decree and the Appeal* should be received, and it was held per Lord Keeper

Keeper Holt Ch. J. and Powel J. that all the Matter at the Rolls had fallen to the Ground on the Appeal, and it was now the ſame Thing as if nothing had ever been done in it, and by Conſequence the new Evidence ought to be admitted. 6 Mod. 287. Mich. 3 Ann. B. R. per Holt Ch. J. in Caſe of St. Clement's v. St. Andrew's Pariſh.

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## (F. b.) What Evidence the Parties may inforce each other or Strangers to produce; as Court-Rolls, Books of Account, Church-Books, &c.

1. IN an Action of *falſe Impriſonment againſt the Officers of the College of Phyſicians*, the Court will not make a Rule for the Plaintiff to inſpect their Books. Lord Raym. Rep. 253. Mich. 9 W. 3. Groenoelt v. Barwell. Carth. 421. S. C. 1 Salk. 44. S. C.

2. A *Difference* ariſing *between an Impropriator and the Pariſhioners concerning the Right of an Houſe*, he brought an Ejectment, and moved, that the *Church-Wardens* might *ſhew him the Pariſh-Books, and give* him *Copies of what concerns his Title*, and they might be produced as Evidence at the Trial; and ſaid, that ſuch Copyholders, on ſuch Motions, have frequently had Rules for the Steward to grant Copies, and that the Court-Rolls be produced at the Trial; But, per Curiam, *this Caſe differs from the Caſe of Copyholders, becauſe all the Tenants of the Manor have an Intereſt in the Court-Rolls*; but, in the principal Caſe, the Impropriator hath a diſtinct Intereſt from the Pariſhioners; for it was not a Parochial Right, but a Title, which is now in Queſtion, and therefore it was not reaſonable that the Pariſh-Books be produced, which would be to ſhew the Defendant's Evidence; beſides, Church-Wardens are not a Corporation without the Parſon. 5 Mod. 395. Paſch. 10 W. 3. Cox v. Copping.

3. *Ejectment for a Houſe by the Impropriator againſt the Church-Wardens of the Pariſh of Aldgate*; Eyre for the Plaintiff moved, that he might have a Rule to ſee the *Pariſh-Books*, upon Suggeſtion that they would make the Title appear, and that they were common Books belonging to all the Pariſh, and that it did not differ from the Caſes where a Rule is granted for the Defendant to ſee Court-Rolls and the Books of a Corporation; but denied per Cur. for where the Parſon claims a diſtinct Intereſt from that of the Pariſh, it is not reaſonable to compel the Pariſh to diſcover their Title by ſhewing the Books, which are kept only for their own Uſe, but the Title of the Copyholder depends upon the Court-Rolls; ſo of Corporation-Books, which differ from the preſent Caſe. Ld. Raym. Rep. 337. Paſch. 10 Will. 3. Anon.

4. An *Information* was preferred *againſt the Defendants being Cuſtom-Houſe Officers*, for forging of a Bond ſuppoſed to be given by a Merchant to the King for his Cuſtoms. And *Motion was made* on Behalf of the Proſecutor, *to have the Cuſtom-Houſe Books, in which the Entries were made, &c. brought into Court* to convict the Defendants; but the Motion was denied, becauſe the ſaid Books are a private Concern, in which the Proſecutor has no Intereſt, and therefore it would be in Effect to compel the Defendants to produce Evidence againſt themſelves; and *the Court never makes ſuch Rules, but only of Records, or Deeds of a publick Nature*. Ld. Raym. Rep. 705. Mich. 13 Will. 3. The King v. Worſenham, & al.

7 Mod. 127. S. C.

5. A Rule to produce the *Caſh-Book of the India Company*, and the *Transfer-Book of Bank-Stock* at a Trial. 2 Ld. Raym. Rep. 851. Hill. 1 Ann. Geery v. Hopkins.

6. The Defendant and eight others were incorporated under an Act made in the 39 Eliz. by the Name of the *Surveyors of the Highways of Aylesbury* in the County of Bucks, and were Truſtees of a Charity called *Bedford's Gift*. An Information was preferred againſt the Defendant for executing this Office, being an Office of Truſt, without having took the Oaths, contrary to 25 Car. 2. to which he pleaded Not Guilty; and now Mr. Raymond *moved for a Rule, that the Proſecutor might have two Books produced which theſe Surveyors kept, in which they entered their Elections, and alſo their Receipts and Diſburſements*; and that he might take Copies of what he thought neceſſary, and that the Books might be produced at the next Aſſiſes at the Trial; *but* per Curiam *denied, becauſe they are perfectly of a private Nature*, and it would be to make a Man produce Evidence againſt himſelf in a criminal Proſecution. 2 Ld. Raym. Rep. 927. Trin. 2 Ann. The Queen v. Mead.

7. The Plaintiff, and likewiſe the *Defendant, and ſeveral others were Part-Owners of a Ship*, and the Defendant *received ſeveral Sums* of them *for the Uſe of the Ship, and gave Receipts for what he received*, and afterwards he laid out the ſaid Sums in the Ship and Voyage, *of which he kept an Account, and in which Book Allowances were made him for what he ſo laid out, which Book belonged to the Plaintiff, and to the Defendant, and all the Part-Owners, but was now in the Poſſeſſion of the Plaintiff*, who brought an Indebitatus Aſſumpſit againſt the Defendant for ſo much Money received to his (the Plaintiff's) Uſe; Upon Affidavit of this Matter, *the Court was moved, that the Plaintiff might produce the Book at the Trial, or give the Defendant Copies of what Allowances had been made*, that he might uſe it as Evidence for him at the Trial, but it was denied; 'tis true, if Covenant is brought on an Indenture, and the Defendant ſwears he never had a Copy, the Court will not compel him to plead till the Plaintiff give him a Copy; but here the Plaintiff ſhould have taken up his Note upon his Account allowed, and he was truſted with the Book by all the Parties concerned, and if he breaks his Truſt, you muſt ſeek for Remedy in Equity. 6 Mod. 264. Mich. 3 Ann. B. R. Ward v. Apprice.

8. On a Motion in *Caſe for a falſe Return to a Mandamus*, that the Plaintiff might have the *Sight of the Books of the Corporation* to take Copies of them in order to be made Uſe of on the Trial (to prove the Election of a Bailiff of Bewdley) a Rule was granted for taking Copies of any Thing relating to the Election, but nothing elſe, for theſe Books are publick Things, and ought to be ſeen, and are made Uſe of in this Caſe, and on a Quo Warranto againſt the Corporation there may be a Rule to produce the Books themſelves. A Caſe was cited, that it had been ſo ruled in Caſe of the *Eaſt-India Company*, for them to produce their Books. On a Queſtion between two Copyholders, any one of them may move for a Rule to have the Sight of the Books and Rolls of the Manor. Paſch. 6 Ann. B. R. Slade v. Walter.

9. But on a *Queſtion between two Perſons who had a Right to the Manor*, the Court denied a Rule to produce the *Rolls of the Manor* at the Trial, it being out of the common Caſe when it is between two Tenants. Paſch. 6 Ann. C. B. Wood v. Whitcomb.

10. N. B. The Court will not order the *Copy of a Charter*, nor the Charter itſelf to be produced, becauſe the ſame is enrolled, and a Copy *may be had from the Record*.

11. On

11 On Motion by Dean and Chapter, Leave was not given to inſpect Books, and Papers of the Veſtry of the Pariſh of St. Margaret Weſtminſter on a *Queſtion about the Right of Nominating a Clerk of the Pariſh*, which was *between the Pariſh and the Dean and Chapter*, being but a private Thing, and no publick Concern, but only between private Perſons as to the Right of Nomination. Paſch. 13 Ann. B. R. Turner v. Gethin.

12. In Caſe between Dr Bennet and Inhabitants of Cripplegate, the Pariſh-Books were admitted as Evidence both for the Plaintiffs and Defendants, as alſo *Books belonging to the Dean and Chapter of St. Paul's*, in which were entered Leaſes made by the Predeceſſors of the Leſſor Vicars of Cripplegate. In this Caſe, Court of B R. ordered Plaintiff ſhould have an Inſpection of the Pariſh-Books and Copies of what he pleaſed. Coram Prat Ch. J. Hill. 5 Geo. apud Guildhall

2 Sid 8. The Leidger of a Priory was Evidence to prove Right of Fiſhery

13. Rule for Defendants to ſhew Cauſe why an *Information in Nature of a Quo Warranto* ſhould not be exhibited *for exerciſing the Office of Bailiffs of Dreitwich*, and on Motion, it was ordered, that they might have Acceſs to the *Books of the Corporation* in Order to make their Defence. Mich. 7 Geo. B. R. The King v. Littleton, & al.

14. The Court ordered Defendant at Plaintiff's Expence, to give him a *Copy of the Articles for Epſom Races*, and produce the ſame at the Trial. Defendant was the Stake-holder, and Plaintiff, whoſe Horſe won the Guineas or Plate, could not proceed to Trial without the Articles. Barnes's Notes in C. B. 316. Mich. 8 Geo. 2. Gracewood v. ———

15. This was an Action brought upon the Statute 9 Annæ, againſt Defendant, Deputy Poſt-Maſter of Carliſle, for the Penalty of 500 l. for his perſuading a Perſon to Vote at the laſt Election of Members to ſerve in Parliament; Defendant moved for Inſpection of the *Corporation-Books*; Per Cur. Defendant is laid to be an *Elector*, and *having a Right to Vote*, he *is intitled to inſpect the Books by the Act of Parliament*; To this Purpoſe the Books are publick, and therefore let Defendant have the Inſpection of that Part of the Corporation-Books where the Names of the Freemen are inrolled, and Copies at his own Expence, Barnes's Notes in C. B. 154, 155. Trin. 10 Geo. 2. Richards Qui tam, &c. v. Pattinſon.

Comyns's Rep. 555. Richardſon v. Patiſon S. C. but there the Motion was for the Plaintiff to inſpect the Books, and take Copies to be uſed at the Trial, and a Rule made accordingly; (Reeve Ch. J. abſent) though it was objected, that the Plaintiff was no Freeman, and ought not to be admitted to inſpect the Books to make Evidence for his Action, nor is here any Affidavit, that the Right of Election is in the Freemen; But it was anſwered, that the Plaintiff has a Right by being Plaintiff in the Action to ſee what relates to the Fact on which the Action is grounded.

16. Defendant moved for Leave to inſpect the *Books of the Conick Lamp-Office*, and had a Rule to ſhew Cauſe, which was diſcharged; Per Cur. the Proprietors of theſe Lamps are *not a Corporation*, their Books are publick, nor do they appear to be Truſtees for Defendant. Barnes's Notes in C. B. 155. Trin. 11 & 12 Geo. 2. Smith v. Huggins.

## (H. b) In what Cafes a Special Matter may be given in Evidence.

COMMON, *Rent-Service*, *Rent-Charge*, *Licence*, &c. *ought to be pleaded*, and not given in Evidence upon General Iſſue, *Contra of Leaſe of Land for Years*. Br. General Iſſue, pl. 81. cites 25 H. 8.

2. If a *Villein pleads Frank*, and of Frank-Eſtate he may give *Manumiſſion in Evidence*; for this is Manumiſſion in Fact. Br. General Iſſue, pl. 82. cites 25 H 8.

3. *But* where he is *manumitted by Act in Law*, as Suit taken againſt him by his Lord, or Obligation made to him by the Lord, or Leaſe for Years, &c. for theſe are Manumiſſions in Law, of which the Jury cannot diſcuſs, and therefore ſhall be pleaded. Br. Ibid.

4. In *Treſpaſs* for *breaking his Cloſe and beating his Servant, and carrying away of his Goods.* Upon Not Guilty pleaded, the Jury found this Special Matter; Scil. That Sir T. B. was ſeiſed of the Land, where, &c. and *leaſed* the ſame *to the Plaintiff and one A. which A. aſſigned* his Moiety *to C* by whoſe Commandment the Defendant entered. It was moved that that *Tenancy in common betwixt the Plaintiff and him*, in whoſe Right *the Defendant juſtified*, could not be given in Evidence; and ſo it could not be found by Verdict, but it ought to have been pleaded at the Beginning. But the whole Court was clear of another Opinion, and that the ſame might be given in Evidence well enough. 3 Leon. 83 and 94, pl. 123. and 137. Mich. 26 Eliz. B. R. Role's Caſe.

5. *Whenſoever a Man cannot take Advantage of the Special Matter by Way of Pleading*, there he ſhall take Advantage of it in the Evidence. For Example, the Rule of Law is that a Man cannot juſtify in the Killing or Death of a Man, and therefore in that Caſe he ſhall be received to give the ſpecial Matter in Evidence, as that it was Se defendendo, or in Defence of his Houſe in the Night againſt Thieves and Robbers, &c Co. Litt. 283. a.

6. In any Action upon the Caſe, Treſpaſs, Battery, or of *Falſe Impriſonment againſt* any Juſtice of Peace, Mayor or Bailiff of City or Town Corporate, Headborough, Portreve, Conſtable, Tithingman, Collector of Subſidy or Fifteenth in any of his Majeſty's Courts at Weſtminſter, or elſewhere, concerning any thing by any of them done, *by Reaſon of any of their Offices aforeſaid*, and all other in their Aid or Aſſiſtance or by their Commandment, &c. they may plead the general Iſſue, and give the ſpecial Matter for their Excuſe or Juſtification in Evidence. Co. Litt. 283.

7. A Defendant cannot in any Action upon *Not Guilty* pleaded, give in Evidence a *Licence*, but he may give a *Gift* in Evidence. Brown's Anal. 15.

8. In an Action of *Treſpaſs*, where the Defendant pleads *Not Guilty*, and *makes Title by a Stranger* it is no Evidence to ſay *that he committed the Treſpaſs by the Commandment of the Stranger*, but ought to plead the ſame, as he muſt do the Licence of the Plaintiff himſelf. Ibid.

9. If the *Defendant* pleads *Nil debet* to an Action of Debt upon a Contract, he may give in Evidence, *that the Contract was conditional*, or he may plead the ſame without Traverſe. Ibid.

10. *The like* upon *Non Aſſumpſit* pleaded to an *Action upon the Caſe*.

11. Upon the Plea of *Non detinet*, the Defendant cannot give in Evidence a *Mortgage*. Brown's Anal. 15.

12. *Neither*

12. *Neither* can the Defendant upon ſuch Iſſue give in Evidence, *that he had the Thing* of the Plaintiff *as a Pledge for Money not yet paid.* Brown's Anal. 16

13. In Debt upon an *Eſcape*, if the Defendant plead no Eſcape made, he cannot give in Evidence *No Arreſt.* Brown's Anal. 16.

14. Upon the Iſſue *Non dimiſit* to an Action of Debt *for Rent upon a Leaſe-Parol*, the Plaintiff cannot give in Evidence *a Leaſe by Deed*, but he may give a *Leaſe conditional*, as an Agreement conditional in Evidence. Br. Anal. 16.

16. Upon *Non eſt factum* pleaded generally the Defendant may give in Evidence, that the *Plaintiff* afterwards *pulled the Seal off* from the Deed; dubitatur. Brown's Anal. 16.

17. *But* upon *Non eſt factum* pleaded generally the Defendant may give in Evidence *Minime literatus.* Brown's Anal. 16.

18. *The like* upon *Delivery* of the *Deed* as an *Eſcrow.* Brown's Anal. 16.

19. *Debt* for the *Arrears* of *Rent* upon Leaſe for Years; upon *Nil debet per Patriam* pleaded, it is good Evidence to prove *Quod non demiſit.* Brown's Anal. 16.

20. *Debt* for the *Sale* of a *Horſe for* 40*s.* the Defendant may plead *Nil debet*, and give in Evidence, that the Sale *was of Two Horſes for* 40*s.* or of an Ox for 40*s.* and good. Brown's Anal. 16.

21. *Treſpaſs* for *taking of Goſhawks*, *Not Guilty pleaded*, and Evidence given, *that the Defendant has a Leaſe of the Woods where the Hawks were taken*, and good, becauſe he thereby makes a Title to himſelf. Brown's Anal. 16.

22. In *Treſpaſs* Not Guilty is pleaded, and the Defendant gives in Evidence a *Leaſe for Years*, and good, but *Secus* of a *Leaſe* at *Will*, becauſe that is *determinable at Pleaſure.* Brown's Anal. 17.

23. In *Treſpaſs De bonis Captis*, the Defendant pleads *Non Culp.* and gives in Evidence, *that he recovered the ſame Goods by Verdict, and had them delivered to him in Execution*, and good. Brown's Anal. 17.

24. In *Treſpaſs*, and Not Guilty pleaded, the Evidence was, that the *Property was to J. S.* who gave them to the Defendant, and good. Brown's Anal. 17.

25. *But in Treſpaſs*, where Not Guilty was pleaded, the Evidence was, that the *Property was to J. S.* and that the Defendant as his Servant, and by his Commandment took the Goods in the Count and ill; For he thereby confeſſeth the Treſpaſs, and yet juſtifies the ſame. Brown's Anal. 17.

26. In *Treſpaſs*, *Not Guilty was pleaded*, the Evidence was, that *Locus in Quo, &c. fuit liberum Tenementum J. S. who licenſed* the Defendant to Enter, by Virtue whereof he entered accordingly; but no good Evidence, becauſe it is a Juſtification. Brown's Anal. 17.

27. In *Treſpaſs* of *Battery*, and Not Guilty pleaded, the Evidence was, that the Battery was done in the Defendants own Defence, and ill. Brown's Anal. 17.

28. In *Covenant* the Iſſue was, *whether the Defendant had made an Eſtate ſufficient in Black Acre to the Plaintiff or not*, and the Evidence was, that the Eſtate was not of ſuch a Value, and ill, for it is not anſwerable to the Matter in Iſſue. Brown's Anal. 17.

29. *Debt* upon an Obligation for *letting one go at large upon a Mainprize*, and doth *not ſay the Plaintiff is Sheriff*, the Defendant may plead ſpecially, and ſo conclude his Plea by Way of *Non eſt factum*, but cannot plead *Non eſt factum* generally, becauſe *contrariant.* Brown's Anal. 17.

30. In Treſpaſs *Quare Clauſum fregit*, it is a Plea in Abatement to ſay that the *Plaintiff is Tenant in common* with another, but cannot be given in Evidence upon Not Guilty, as it may where one Tenant in common brings Treſpaſs againſt the other. Vent. 214. Trin. 24 Car. 2. B. R. Anon.

31. In *Replevin* upon *Non cepit* pleaded, *Property* cannot be given in Evidence. Per Hale Vent. 249. Mich. 25 Car. 2. B. R. in Caſe of Wildman v. Norton.

Yet this may be anſwered by proving that this was by the Leaſe of the Leſſee. Vent. 277. Mich. 27 Car. 2. B. R. Per Hale Ch. J. in Caſe of Hodgskins v. Robſon and Thornborough.

32. In *Debt againſt Leſſee*, he may plead *Nil debet*, and give the *Expulſion* in Evidence. Vent. 258. Paſch. 26 Car. 2 B. R. Anon.

33. In an *Aſſumpſit* for Money *upon a Sale of Goods*, Defendant pleads *Non Aſſumpſit*; he may give in Evidence an *Eviction of the Goods* to mitigate the Damages. Per Hale Vent. 267. Hill. 26 & 27 Car. 2. B. R. Anon.

12 Mod. 272. S. P. Per Holt Ch. J in S. C.— Ld. Raym. Rep. 500. S. P. in S. C. Per Holt Ch. J.— 5 Mod. 442. S. C. and S. P.—

34. If a *Citizen is choſen Sheriff of London, and the Mayor* and Aldermen *refuſe a reaſonable Excuſe*, the Party is not bound by ſuch Refuſal, becauſe he may give it in Evidence upon *Nil debet* pleaded in an Action of Debt brought for the Forfeiture, and there the Validity of the Excuſe will be try'd by a Jury. Carth 483. Paſch. 11 W. 3. B. R. Per Holt Ch. J. in the Caſe of London City v. Vanacker.

35. *Trover by Adminiſtrator* on the Inteſtate's Poſſeſſion, Defendant cannot give in Evidence *a Will* on the General Iſſue, otherwiſe if *on Adminiſtrator's own Poſſeſſion*. 1 Salk. 285, pl. 17. Mich. 1 Ann. Coram Holt Ch. J. at Niſi Prius. Blainfield v. March.

36. One *Jointenant*, or *Tenant in common*, or *Partner* cannot bring Trover and if he does, 'tis good Evidence on the General Iſſue of Not Guilty. *But* if one Jointenant brings Trover *againſt a Stranger*, in that Caſe the Defendant may plead it in Abatement, but cannot take Advantage of it in Evidence. 1 Salk. 290. pl. 29. Trin. 7 Ann. B. R. Brown v. Hedges.

## In Account

Brown's Anal. 15. S. P.

1. *Debt upon Arrears of Account*, the *Defendant ſaid, that he owed him nothing & Forma*, and gave in *Evidence*, that there was *no ſuch Account*; and Newton ſaid for Law, that the Evidence is good, and *and alſo he may ſay* in Evidence *if there was Account, that yet he owes him nothing*, and yet he might have ſaid for Plea, No ſuch Account. Br. General Iſſue. pl. 7. cites 20 H. 6. 24.

Brown's Anal. 15. S. P.

2. In *Debt upon Account before Auditors*, the Defendant may plead *Nihil Debet*, and give in Evidence that *No ſuch Account*. Br. General Iſſue. pl 39. cites 9 H. 7. 3. Per Fineux.

3. And *in Debt upon a Leaſe for Years*, if the Defendant pleads *Nihil debet*, he may give in Evidence that *Non Dimiſit prout, &c.* Quære inde. Ibid.

## In Annuity

1. In Scire Facias *of Annuity againſt a Parſon*, if he *pleads that Not Parſon*, he may give in Evidence *Reſignation*, and the Jury is bound to find it. Br. General Iſſue, pl. 62. cites 9 E. 4. 49.

In Appeal.

1. He who pleads Not Guilty in Appeal, cannot give in *Evidence that he was Sheriff and hanged him.* Br. General Iſſue, pl. 46. cites 12 H. 8 1.

2. Or that he *was a Foreſter and killed him flying.* Ibid

In Aſſets.

1 *Debt againſt Executors*, if they are *at Iſſue upon Aſſets enter-mains*, it is good *Evidence* that they have *ſold the Land by the Will of the Teſtator, and have the Money.* Br. General Iſſue, pl. 4. cites 3 H. 6 3.

2. So that they have *recovered in Treſpaſs of Goods taken in the Life of the Teſtator.* Ibid.

3. So in *Debt of* 10 *l. to prove that they have to the Value of* 40 *l.* Ibid.

In Baſtardy.

1. *Baſtardy was pleaded in the Plaintiff in whom the Defendant had pleaded Villeinage*, and the *Defendant ſaid, that the Eponſals were at D. &c. which continued all their Lives* within which Time the Plaintiff was born, & Non Allocatur, by which he concluded over, *and ſo Mulier and not Baſtard*, and prayed that all be entered & Non Allocatur; For *nothing was entered but Mulier and not Baſtard.* Br. General Iſſue, pl. 13. cites 19 H. 6. 17 Br. Villeinage, pl. 20. S. C.

2. In Aſſiſe of *Mortdancester, the Tenant ſaid, that he was ready to bear the Recognizance, and in Evidence* would have *Baſtardized the Plaintiff, and was not ſuffered*, For *he has pleaded againſt him as Mulier*, but the Aſſiſe was charged upon all the Points of the Writ, but in this Caſe the Tenant cannot baſtardize him; And ſo ſee that it ought to have been pleaded. Br. General Iſſue, pl. 34. cites 12 Aſſ. 3.

As to Common.

1. In *Aſſiſe by Commoner, where the Lord has approved*, and the *Plaintiff has Common to Land in this Vill, and in another Vill* he *ſhall take the firſt Vill for Plea, that he has twenty Acres there, and by Proteſtation that he has forty Acres in another Vill to which he has Common here*, and *join Iſſue upon the Inſufficiency of the Common*, and give the Matter in *Evidence that he has Common Appendant there to his Land in ſeveral Vills.* Br. General Iſſue, pl. 83. cites 16 E. 3. and Fitzh. Common, 9.

2. In Treſpaſs the *Iſſue was upon Preſcription to Common with ſo many Beaſts Time out of Mind*, and gave *in Evidence Common for Cauſe of Vicinage*; and it was held no Evidence; for the *Iſſue ſhall be intended by Preſcription only*, and the *Evidence is Preſcription and Conſideration that the one ſhall have Common with the other.* Br. General Iſſue, pl. 96. cites 13 H. 7. 13.

3. In Action on the *Caſe for diſturbing the Plaintiff in Enjoyment of his Common*, the Defendant may plead the General Iſſue, and give the ſpe- Matter in Evidences. 8 Mod. 120, 121. Hill. 9 Geo. 1. Moſte v. Bennet.

In Debt.

1. *A Servant is retained taking Yearly* 20 *s. or a Robe of the Price of* 20 *s.* which is Arrear, *the Defendant ſaid, that he has paid the Robe Yearly at D. in the County of S. &c.* And per Moyle he ſhall ſay Nil Debet, and Br. Dette. pl. 112. cites S. C.

give

give the ſpecial Matter in Evidence; For it amounts to Non Debet, &c. Br. General Iſſue, pl. 27. cites 9 E 4. 36.

Br. Dette. pl. Dette. cites S. C. 2. But where the *Payment* is of *another Thing than of Money* the Plea is good, and he ſhall not be compelled to the General Iſſue; Per Littleton, Choke and Needham J. Ibid.

Br. Dette. pl. 112. cites S. C. 3. And the Defendant *may plead, that the Plaintiff departed out of his Service*, and ſhall not be drove to the General Iſſue, Quod Nota Bene. Ibid.

## In Debt againſt Corporation.

Br. Abbe. pl. 9. cites S. C. 1. In *Debt againſt an Abbot* a Man *may count generally, that the* 10 *l. borrowed came to the Uſe of the Houſe*, and ſhew in Evidence how, as in *Buying of Bread and Beer*, or in *Defence of a Suit* againſt the Abbot, *or en Reparations*, &c. Br. General Iſſue, pl. 21. cites 22 H. 6. 56.

## In Debt againſt Executors.

1. In *Debt againſt J. S. Executor of the Teſtament of W.* if he *imparles*, he *cannot plead to the Writ that he is Adminiſtrator, and not Executor, and therefore* by Advice of the Court *he pleaded Ne Unques adminiſtered as Executor*, and give *in Evidence, that he was Adminiſtrator, and not Executor*; Per Cur. Quod Nota. Br. General Iſſue, pl. 61. cites 9 E. 4. 4.

2. In *Debt againſt Executors who plead Ne Unques Executor, &c. or Riens enter-mains*, upon which they are at Iſſue upon Aſſets, or that Adminiſtraverunt, &c. and *do not ſhew what they adminiſtered, or what is the Aſſets*; yet it is good; for it *ſhall be given in Evidence*. Br. General Iſſue, pl. 87. cites 9 H. 7. 14.

## In Detinue.

1. *Detinue of a Writing by which J. M. Abbot of C and the Covent granted a Corody and Penſion of* 3 *l. per Ann. and the Office of Porterſhip of the ſaid Abbey to W. S. for Term of his Life, who granted it over to the Plaintiff and the firſt Deed alſo, & Factum illud Detinet*, &c. The *Defendant pleaded Non Detinet*, and the *Jury found that he ſold as above*, &c. *but it was agreed between them that the Defendant ſhould retain the Deed till* 40 *l. was paid, of which* 7 *l. is paid, and not the reſt, therefore Detinet*, &c. Per Danby, this Matter is a good Bar, and ought to have been pleaded, and otherwiſe he ſhall not take thereof Advantage, by which the Plaintiff recoverd by award. Br Detinue, pl. 19. cites 22 H. 6 33.

2. *And* in Detinue if the Defendant pleads Non Detinet, *and it is found that it was delivered in Mortgage*, the *Plaintiff* ſhall recover; For this ought to have been pleaded. Ibid.

3. If a Man *bails Goods to J. S.* and after *buys a Horſe of J. S. and agrees that he ſhall have the Goods bailed for the Horſe, and after he brings Detinue of the Goods bailed*, and he *plead Non Detinet*; and all found as above, the Plaintiff ſhall recover, becauſe the Matter was not pleaded. Ibid.

## In Dower.

Br. Dower, pl. 54. cites S. C. 1. The *Tenant ſaid, that the Feme had an elder Baron than he of whoſe Dowment ſhe now claims, which elder Baron is yet in full Life*, Judgment, Et Non Allocatur, by which he added to it, *and ſo Ne unques Accouple in lawful Matrimony*, and nothing was entered but Ne unques Accouple, &c. and Writ awarded to the Biſhop to certify it, and this Matter ſhall be Evidence before the Biſhop, &c. Br. General Iſſue, pl. 29. cites 39 E. 3. 15.

2. In

2. In *Dower of Rent*, the *Defendant said, that the Baron had nothing in it, unless jointly with J. S who is yet alive*; the *Feme replied, that J. S. released to her Baron all his Right*, &c. Thirn asked where the Release was? Skrene said, it does not belong to us; Per Thirn it *is better for you to say that ſeiſie que Dower* la poit, and *give the Releaſe in Evidence* Quod tota Curiæ conceſſit, by which Skrene took Iſſue accordingly. Br. General Iſſue, pl. 48. cites 11 H 4. 83.

3. In Dower of Rent, Hill ſaid, *Ne unque ſeiſe que Dower la poit*, Horton ſaid, *J. S. granted the Rent to the Baron payable at Michaelmas next, and before the Day the Baron dyed, and ſo was he ſeized in Law, and demanded Judgment*; *Thirn bid him ſay generally, that ſeiſie que Dower la poit*, and give your Caſe in Evidence, and ſo well notwithſtanding the Doubt of the Lay Gents; for they ought to credit the Law. Br. General Iſſue, pl. 49. cites 11 H. 4. 88.

4. In *Dower*, the *Tenant ſaid, that S was ſeiſed in Fee, and infeoff'd him in Fee, and after he leaſed to the Baron to hold at the Will of the Leſſor now Tenant, which Eſtate he continued all his Life, Abſque hoc that he was ſeiſed of ſuch Eſtate que Dower la poet*; and all this Matter entered in the Roll, and not only the General Iſſue, by Reaſon of the long Continuance of Poſſeſſion for Doubt of the Intelligence of the Lay Gents. Br. General Iſſue, pl. 33. cites 39 H. 6. 9

5. In *Dower*, the *Tenant demanded the View*, the *Demandant ſaid, that the View he ought not to have*; *For our Baron dyed*; the Defendant rejoined, that her *Baron did not die ſeiſed of ſuch Eſtate that ſhe might have Dower*, *Priſt*, and the *Tenant e contra*, but the Court and the Prothonotaries doubted of this Iſſue, and the next Day Starkey ſaid, *that the Baron died ſeiſed of the ſpecial Tail*. Per Cur. you ſhall not have this by Plea, but ſhall give it in Evidence; for *the Courſe of the Entry is that the Baron died ſeiſed*, and this ſeems to be in ſuch Eſtate Que Dower la poet, and the others econtra; for otherwiſe this cannot come in Evidence. Br. General Iſſue, pl. 47. cites 21 E. 4. 22.

## Falſe Impriſonment.

1. In *falſe Impriſonment*, if the *Defendant had arreſted the Plaintiff, and juſtifies by Warrant of the Peace which came to him after the Arreſt made* there, the *Plaintiff may ſay*, that *De ſon tort demeſne Abſque hoc, that he had any Warrant*, and ſhall give the Matter in Evidence. Br. General Iſſue, pl. 23. cites 14 H. 8. 16.

2. In falſe Impriſonment, the *Defendant ſaid, that his Maſter impriſoned the Plaintiff in a Chamber and locked the Door, and delivered the Defendant the Key to keep, which he did*, and becauſe the *Plaintiff was Clerk of the Court* he was drove to the General Iſſue, and gave the Matter in Evidence, ſcil. the Cauſe of the Impriſonment. Br. General Iſſue, pl. 78. cites 22 E. 4. 45.

## Grant.

1. In *ſecond Deliverance* the *Defendant avowed for Damage Feaſant, becauſe A. leaſed to B. for twenty Years, and B. granted to him his Term*, and the Beaſts were Damage Feaſant, &c. The *Plaintiff ſaid, that ſuch a Day B granted the Term to him abſque hoc that he granted to the Defendant before the Grant made to the Plaintiff*, and ſo to Iſſue, and the Plaintiff at the Niſi Prius gave in *Evidence* a *Grant upon Condition that if he ſhould obtain the Favour of the Leſſor, and pay ſo much as J. N. ſhall ſay, and* that *he obtained the Favour of the Leſſor, and pay 3 l. as J. N. awarded*, &c. and *good* Evidence, *notwithſtanding that the Defendant ſaid, that meſne between his Grant and the Performance of the*

*Condition, the Leſſor ſaid to this Defendant that he never gave his Favour to the Plaintiff*, and yet good, becauſe when the Plaintiff came to him he gave to him his Favour, Quod nota, and ſo well for the Part of the Plaintiff. Br. Gen Iſſue, pl. 24 cites 14 H. 8. 17.

Hors de ſon Fee.

1. If a Man *pleads Hors de ſon Fee*, the other ſhall not ſhew Tenure, and ſo within his Fee, but *ſhall ſay that within his Fee, Priſt* only, and *ſhall give the Matter in Evidence.* Br. General Iſſue, pl. 70. cites 10 E. 4 10.

Maintenance.

1. In *Maintenance* the *Defendant tendered Juſtification that is no Maintenance*; that is to ſay, *that he, at the Prayer of the Party for whom, &c. gave him Counſel to ſue Superſedeas*, &c. which is no Maintenance, therefore *Not Guilty ſhall be entered*, and the Matter ſhall be given in Evidence. Br. General Iſſue, pl. 20. cites 22 H. 6. 35.

2. He who pleads Not Guilty in Maintenace, cannot give *lawful Maintenance in Evidence.* Br. General Iſſue, pl. 46. cites 12 H 8. 1.

Non eſt Factum.

1. In *Debt*, per Broke J. where I *deliver a Deed* to J. N. *as an Eſcrowe upon certain Conditions performed, to deliver over* as my Deed, and *he delivers it over, the Conditions not performed*, I may ſay Non eſt Factum, and give the Matter in Evidence. Br. General Iſſue, pl. 25. cites 14 H. 8. 28.

2. In *Debt upon an Obligation* the Defendant may *plead Non eſt Factum*, and give in Evidence that he is Lay, and *not Letter'd, and that it was read to him in another Form*, and ſo he did, Quod nota. Br. General Iſſue, pl. 22. cites 15 E. 4. per Brian.

3. Where a Man pleads that he was a Layman, and not Letter'd, in Avoidance of a Deed, and that it was otherwiſe read to him, &c. and ſo Non eſt Factum, there all ſhall be entered; and yet he may ſay Non eſt Factum, and give the Matter in Evidence, but the other Form is better for the Intelligence of the Lay Gents. Br. General Iſſue. pl. 33. cites 39 H. 6. 9.

4 In Treſpaſs, where *a Leaſe by Deed of Maſter and Confreres is pleaded*, it is only Argument *to ſay that there were no Confreres at the Time* of the making. Br. General Iſſue, pl 41. cites 11 E. 4 4.

5. *So* where a *Deed of the Father is pleaded*, to ſay that *he had no ſuch Father*; for he ſhall ſay Non eſt Factum, and ſhall give the Matter in Evidence. Ibid.

6. Where a *Deed is pleaded in Bar*, the *other ſays Riens Paſſa by the Deed*, he may give in his *Evidence* that *Not his Deed*; per Brian, but he ſaid at another Time in the ſame Term, that he ſhall not give in Evidence that Not his Deed; For when *when he pleads that Riens Paſſa, &c. then it is not denied but that it is his Deed*, but Riens Paſſa by it, and per Keble, he ſhall give it Evidence, therefore quære, for it ſhall not. Br. General Iſſue. pl. 38. cites 5 H. 7. 8.

Rent. Aſſiſe.

1. In *Aſſiſe of Rent* if *Nul Tort is pleaded*, the Plaintiff may give in *Evidence a Grant of the Rent in another County, and Diſſeiſin in this County.* Br. General Iſſue, pl. 62. cites 9 E. 4. 49.

Receipt,

Receipt, and Counter-Plea.

In *Precipe quod* reddat, if *J. N. prays to be received upon Default of the Tenant for Life*, the Demandant *may counterplead* that *nothing in Reverſion, without ſhewing how the Reverſion was deſtroyed*, but ſhall give this in Evidence; for a Stranger had Title to enter, and entered, but it is not expreſly ruled, but taken de gree. Br. General Iſſue, pl. 57. cites 8 H. 6. 16.

Rent. Avowry.

1. *Avowry for Rent*, and that the Tenant held by *Fealty and Rent*, *and for the Rent Arrear*, &c. and the *Plaintiff ſaid that Hors de ſon Fee*, and the others contra, and the *Defendant gave in Evidence a Deed before Time of Memory, and Seiſin of the Rent*; and per Cur. this does not prove the Iſſue. Br. General Iſſue, pl. 2. cites 27 H. 8. 20.

2. *By which he gave in Evidence Seiſin of the Suit of Court*; for *Seiſin of the Rent is not Seiſin of the Services*; and per Fitzherbert clearly, he ſhall not give it in Evidence, becauſe in his Avowry he does not alledge other Tenure but of Fealty and Rent only, Quod Nota; And *Seiſin of the Rent is not Seiſin of the Fealty*. Ibid.

Rent. Replevin.

1. *Replevin of a Sow and Pigs*, the *Defendant juſtified for the Sow*, and *to the Pigs ſaid Ne Priſt pas*; and it was found by the Jury, that the Sow was with Pigg at the Time of the Taking, and after farrowed her Pigs and well, and the Plaintiff recoverd; and ſo it ſeems that this Matter was given in Evidence, and therefore this is a *Special Taking in Law*. Br. General Iſſue, pl. 88. cites 18 E. 3. and Fitzh. Replevin, 34.

Statutes Penal.

1. In Debt upon the *Statute of Farms*, 21 *H. 8. cap.* 13. if the *Defendant ſays*, That *Non habuit nec tenuit ad firmam contra formam Statuti*, &c. he may give in *Evidence* that he *took it in Maintenance of his Houſe by the Proviſo in the Statute*; Per Fitzherbert and Shelley J. But Baldwin Ch. J. denied it, and ſaid, that he ſhall plead it. Quære. Br. General Iſſue, pl, 2. cites 27 H. 8. 20.

Tenure.

1. In Reſcous, if the Plaintiff *counts of Tenure by Homage*, *Fealty*, *and Eſcuage*, *and he diſtrained for the Rent-Arrear*, and the *Defendant made Reſcous*, and the *Defendant pleads Not Guilty*, he ſhall not give in *Evidence* that there was *no ſuch Tenure*. Br. General Iſſue, pl. 93. cites 9 H. 7. 3.

2. And he who *pleads Riens Arrear in Avowry* does not deny the Tenure, and therefore ſhall be pleaded, and not given in Evidence. Ibid.

Treſpaſs of Battery.

1. *Treſpaſs of Battery and Wounding*, the Defendant *pleaded Not Guilty*, and the Plaintiff gave in *Evidence* to the Jury that he was *maihem'd at this Time*, and the Jury find it accordingly to the Damages of 18 *l.* and the Juſtices upon View of the Maihem gave Judgment of the 18 *l.*

and

and 22 *l.* more, ſcil. 40 *l.* in all. Br. General Iſſue, pl. 30. cites 39 E. 3. 20.

2. In Treſpaſs of *Battery*, if the *Defendant pleads Not Guilty*, and *it is found that it was of the Aſſault of the Plaintiff, and in Defence of the Defendant*, the Plaintiff ſhall recover; for it ought to have been pleaded. Br. General Iſſue, pl. 19. cites 22 H 6. 33.

Kitch. 240. S. P. cites 11 H 4. Fol. 63.

3. He who pleads Not Guilty in Treſpaſs of Battery cannot give *Se defendendo in Evidence*. Br. General Iſſue, pl. 46. cites 12 H. 8. 1.

## Treſpaſs of Cloſes, &c. Broken. &c.

1. *Treſpaſs of Cloſe broken in C.* the *Defendant juſtified in K. Abſque hoc that he is guilty of any Treſpaſs in C.* and had the Plea by Award, and was not drove to the General Iſſue Not Guilty in C. and to have the Matter in Evidence, but the Plaintiff was forced to reply that Guilty in C. prout, &c. quod nota, per Cur. Br. General Iſſue, pl. 26. cites 4 H. 6. 13.

2. Treſpaſs *in D. in the County of N. of Treſpaſs local* the Defendant *juſtified at D. in the County of L. abſque hoc that he is Guilty at D. in the County of N.* and was not ſuffered to have any Thing entered but the General Iſſue, and to give in Evidence that the Treſpaſs was in another County. Br. General Iſſue, pl. 52. cites 9 H. 6. 62.

Kitch. 237. cites S. C.

3. In Treſpaſs *of breaking his Houſe*, if the *Defendant ſays that there is no Houſe there*, this is no Plea; but he may ſay Not Guilty, and ſhew this in *Evidence that there is no Houſe there*. Br. General Iſſue, pl. 59 cites 22 H. 6.

4. In Treſpaſs *againſt two*, if the *one juſtifies for the Land*, and the *other ſays, that he came in Aid of him, to put the Beaſts of the other Defendant into the Land of the ſame Defendant*, this is no Treſpaſs to the Plaintiff, by which he pleaded Not Guilty, and gave the Matter in Evidence. Br. General Iſſue, pl. 60. cites 22 H. 6. 36.

5. In Treſpaſs *in a Free Warren*, it is no *Plea that it is the Frank Tenement of W. N. who commanded him to enter*, &c. for it is only Argument, by which he ſaid, *Abſque hoc, that the Plaintiff has Warren there*, &c. by which he had nothing entered but the General Iſſue. Br. General Iſſue, pl. 53. cites 34 H 6. 43.

6. In Treſpaſs *againg a Commoner*, he *ought to juſtify*, and cannot ſay Not Guilty, and give this in Evidence. Br. General Iſſue, pl. 53. cites 38 H. 6. 43.

7. In *Treſpaſs upon 5 R. 2. of a Houſe and Shop*, it is no *Plea that the Shop is Parcel of the Houſe*. Br. General Iſſue, pl. 67. cites 3 E. 4. 28.

8. *Nor of ſuch Action in D. and S. to ſay that all is in D.* Ibid.

9. *Nor of the Manor of D. in S to ſay that twenty Acres extend into T.* but ſhall have the General Iſſue, and ſhall give the Matter in Evidence; for the Plaintiff in thoſe ſhall recover only Damages. Ibid.

10. *But* thoſe are good Pleas *in Aſſiſe and Precipe quod* reddat, where the Land itſelf ſhall be recovered. Ibid. and cites 4 E. 4. 31. and 10 E. 4. 11. accordingly.

11. In *Treſpaſs of Entry ubi ingreſſus non datur per legem by a Prior*, it is a good *Plea that the Plaintiff was not Prior at the Time*, &c. and *ſo in Action* brought *by Warden, Sheriff, or Maſter of the Priſon of his Servant*, it is a good *Plea that he was not Warden, Sheriff, or Servant at the Time*, and ſhall not be compelled to plead Not Guilty, and give this Matter in Evidence. Br. General Iſſue, pl. 42. cites 12 E. 4. 7.

12. If *my Wife or Servant without my Notice puts my Cattle into another's Land, who brings Treſpaſs* againſt me for the eating his Graſs, if I plead Not Guilty, I cannot give the ſpecial Matter in Evidence, becauſe

cauſe it is contrary to the Iſſue; Per Keble. Keilw. 3. b. pl. 7. Mich. 12 H. 7. Anon.

13. In Treſpaſs upon Not Guilty, *Licence* cannot be given *in Evidence*, Br. General Iſſue, pl. 46 cites 12 H. 8. 1. Br. General Iſſue, pl. 92. cites S. C.

14. Upon Not Guilty in Treſpaſs, *Leaſe* cannot be given Evidence. Br. General Iſſue, pl 46. cites 12 H. 8. 1. Br. General Iſſue, pl. 92. cites S. C.

15. Upon Not Guilty of Goods taken in Treſpaſs, a *Gift* is good Evidence. Br. General Iſſue, pl. 46. cites 12 H. 8. 1.

16. In *Treſpaſs*, if the *Defendant pleaded Not Guilty*, he cannot give in Evidence *the Hedge of the Plaintiff, which the ſame Plaintiff ought to inclofe, was open, and the Beaſts of the Defendant entered*, &c. For this ought to been pleaded; for it *is Matter of bar, and alſo confeſſes the Treſpaſs, and proves a Juſtification* which is not pleaded, and therefore it is loſt. Br. General Iſſue, pl. 1. cites 19 H. 8. 6. Kitch 240. cites S. C. that it is not good; for it is contrary to Not Guilty, and is a Juſtification.

17. *In Treſpaſs*, if *a Man entitles a Stranger, and juſtifies by his Command*, this *ought to be pleaded*, and not given in Evidence *upon Nul Tort, or Not Guilty pleaded*. Br. General Iſſue, pl. 81. cites 25 H. 8. Kitch 240. cites S. C.—Brown's Anal. 15.—

S. C. cited by Vaughan Ch J. Freem. Rep. 44. pl. 52. in caſe of Fox v. Grundie.

18. In Treſpaſs upon Not Guilty, the *Defendant may give a Leaſe for Years in Evidence*. Br. General Iſſue, pl. 82. cites 25 H. 8.

19. *Contra* of a Leaſe *at Will*; for this is a Licence, which may be countermanded or determined at Pleaſure. Ibid.

## Treſpaſs of Goods carried away.

1. In Treſpaſs *of Goods carried away* the *Defendant juſtify'd, becauſe J. N. was poſſeſſed, and gave to the Defendant, by which he took them, Abſque hoc, that he took any Goods of the Plaintiff*; and per Cur. Nothing ſhall be entered but Not Guilty, and the Matter ſhall be in Evidence. Br. General Iſſue, pl. 5. cites 5 H. 6. 11.

2. *Treſpaſs in D. of Fiſh taken* the Defendant *juſtify'd by Common of Piſchary in the ſame Place appendant to his Frank-Tenement in B. to the Middle of the Stream, which Stream extends between B. and D.* and ſo he *juſtify'd in B. Abſque hoc, that he is guilty in D.* and nothing was entered but Not Guilty, and yet per Cur. they may ſuffer all to be entered, ſo that it is at their Diſcretion. Br. General Iſſue, pl. 32. cites 14 H. 6. 23.

3. In Treſpaſs De bonis, &c. it is no *Plea that the Plaintiff had no Goods*, for it is only Argument. Br. General Iſſue, pl. 53. cites 34 H. 6. 43.

4. *Treſpaſs of taking of Hawks*, the Defendant *pleaded Not Guilty*, the Defendant gave in *Evidence* that the Plaintiff *leaſed to him the Wood for Twenty Years, and during the Term the Hawks bred in the Wood, and he took them*, and good Evidence, and ſo the Leſſee ſhall have the Hawks, *Quære if the Trees were reſerved* as in 14 H. 8. Br. General Iſſue, pl. 45. cites 16 E. 4. 1.

## Waſte.

1. *Waſt in cutting of Trees*, the Defendant *pleaded No Waſte* done, and gave in *Evidence*, that the Plaintiff *leaſed* to him, *and granted to cut Trees for Reparations, and that the Houſe was ruinous at the Time of the Demiſe, and he cut for Reparations*, and the Plaintiff demurr'd, and recovered per Judicium. Br. General Iſſue, pl 46. cites 12 H. 8. 1. Br. General Iſſue, pl. 90. cites S. C.—Co. Litt. 355. a. S. P. and cites S. C. and ſays that he cannot give in Evidence juſtifiable Waſte, as to repair the Houſe, &c.

Co Litt. 293. a S. P. and cites S. C.

2. Upon no Waſte done pleaded, he may give in *Evidence*, *that the Houſe was burnt by Enemies or Thunder*, or that it *was ruinous at the Time of the Demiſe made, and fell, or by great Wind or Tempeſt.* Br. General Iſſue, pl. 46. cites 12 H. 8. 1.

3. Waſte was aſſigned in Boſcis, viz. *in ſuccidendo & vendendo Ten Oaks*, &c. *whereas he had only lopp'd and ſhred them.* It ſeemed that as the Waſte is aſſigned, the Defendant may ſafely plead Nul Waſte done, and give the ſpecial Matter in Evidence. D. 92. a pl. 16. Mich. 1 Mar. Anon.

4. Waſte was aſſigned in *digging Foſſam in quodam Prato.* The Defendant pleaded Nul Waſte done. It was found by Special *Verdict that the Defendant made a Trench to carry off the Water, Per quod Pratum melioratur & non Pejoratur.* It was argued that this Matter ought to have been pleaded in Bar, but the Opinion of the Court was, that it was not any Waſte. D. 361. b pl. 12 Hill. 20 Eliz. Altman's Caſe.

It ſhould be pleaded in Bar; For by ſuch Evidence it is confeſſed that there was a Waſte done at the Time.

5 If one does Waſte, and *before the Action brought, the Leſſee repaireth it*, and after the *Leſſor bringeth an Action* of Waſte, and the *Leſſee pleads Quod non fecit Vaſtum*, he cannot give in Evidence the Special Matter. Co. Litt. 283. a. in Principio. D. 176. a pl. 51. Trin. 10 Eliz. Anon.

## (I. b.) Evidence. What may be given in Evidence in Mitigation of Damages.

1. UPON Not Guilty pleaded, the Defendant may give in Evidence, *that a Shop is Parcel of the Houſe.* Heath's Max. 78. cites 3 Ed 4 Bro (General Iſſue) 67.

2. *So* upon this Plea the Defendant may give in Evidence a *Leaſe; but not* a *Leaſe at Will* no more than a Licence. Heath's Max. 78. cites 14 H. 3. 16 Ed. 4. 1. 25 H. 8. Bro. (General Iſſue) 82.

S. P. For if the Plaintiff has not his Goods again the Plaintiff ſhall recover Damages to the Value of the Goods, but if he has them again he ſhall not recover Damages but for the taking, and Detinue Quouſque querens rehabeat, &c. and all this ſhall come in Evidence quod nota bene. Br. General Iſſue, pl. 15 cites 19 H. 6. 34.——But the Defendant ſhall not plead to the Writ that the Plaintiff had his Goods again, Quod nota bene. Br. General Iſſue, pl. 15. cites 19 H. 6 34

3. *Where the Law is, that in Treſpaſs of Goods taken the Plaintiff ſhall recover the Value of the Goods* there; Per Culp. if the *Plaintiff re-has his Goods, and yet proceeds in his Action*, the Defendant ſhall give this in Evidence, that the Plaintiff re-had them to eaſe him of the Damages. Br. General Iſſue, pl. 11. cites 11 H. 4. 24.

Br General Iſſue, pl. 46 cites S. C. —

4. *So* in Waſte he cannot upon *Nul Waſte fait* pleaded give in Evidence that he *cut the Timber for Reparations.* But in Waſte he may give in Evidence that the *Premiſſes were ruinous at that Time*, or burned by Enemies or the like. Heath's Max. 78. cites 12 H. 8. 1.

5. But *Title in an Eſtranger* upon ſuch a Plea, *and to juſtify by his Commandment*, is no Evidence, but ought to plead the ſaid Antwer, as the *Licence* of the Plaintiff himſelf (as it ſeems) or one pretendeth Common, &c. Heath's Max. 78. cites 25 H. 8. Bro. 81.

6. In a *Replevin*, the Parties were at *Iſſue upon the Property*, and it was found for the Plaintiff, and Damages entire were aſſeſſed, and not for the taking by itſelf, and for the Value of the Cattle by themſelves, for the Judgment upon that is abſolute and not conditional; and alſo *if the Plaintiff had the Cattle*, the Defendant might have given the ſame in Evidence to the Jury, and then they would have aſſeſſed Damages accor-

accordingly, viz. but for the taking. Godb. 98. pl. 111. Mich. 28 & 29 Eliz. C. B. Anon.

7. In Treſpaſs for *taking away the Plaintiff's Goods*, it will be good Evidence for the Abridgment of Damages to prove that the Plaintiff had Part of his Goods *again*. Brown's Anal. 15.

8. *But if* the *Defendant pretend an Intereſt from a Stranger in the Land* itſelf, *although but an Eſtate at Will*; yet he may plead Not Guilty. Heath's Max. 78.

9. In Evidence to a Jury in Action upon the *Caſe againſt one convicted of Perjury and pardoned, to recover Damages only*; the former Conviction, by Foſter and Windham may, notwithſtanding the Pardon be given in Evidence being collateral; as in calling one Thief, after Pardon his former Ill-Converſation may be given in Evidence in Mitigation of Damages, which Twiſden denied; for he may ſatisfy or traverſe it in this collateral Action; but by the reſt, though it be not concluſive, yet it is good Evidence to induce Belief. 1 Keb. 286. pl. 95. Paſch. 14 Car. 2. B. R. Howard v. Golding-Prentice.

10. It was held by the Court that *in Aſſumpſit in Fact* on a Non Aſſumpſit pleaded, a *Releaſe* cannot be given in Evidence to take away the Aſſumpſit, but only in Mitigation of Damages; but on Aſſumpſit in Law and a Non Aſſumpſit pleaded it may, becauſe it takes away the Aſſumpſit. Quære, ſays the Reporter, if an Aſſumpſit either in Fact or Law, on a Non Aſſumpſit pleaded, *Performance* can be given in Evidence. Sid. 236. pl. 3. Hill. 16 & 17 Car. 2. B. R. Beckford v. Clark.

11. In an Aſſumpſit in Conſideration of the *Marriage of his Daughter*, on Non Aſſumpſit pleaded, *ex neravit* cannot be given in Evidence to diſcharge the Promiſe but only in Mitigation of Damages; but it ought to be pleaded; Per Hale. 2 Lev. 81. Hill. 24 & 25 Car. 2. B. R. Abbot v. Chapman.

12. If a Man bring *Trover for a Ship*, and upon the Evidence it appears that he *has but the Sixteenth Part of it*, this is good, and the *Intereſt of the others* may be given in Evidence in Mitigation of Damages. Skin. 640. pl. 4. Paſch. 8 W. 3. B. R. Dockwray v. Dickenſon. Comb. 326. S. C. accordingly.

13. *Licenſe by Husband* to Wife to lie with another Man cannot be pleaded in Bar to an Action of Treſpaſs by Husband, nor that ſhe was a *notorious lewd Woman*, but the Matters may be given in Mitigation of Damages. 12 Mod. 232. Mich. 10 W. 3. Coot v. Berty.

14. Though an *Executor*, *de Son Fort pays Debts duly* with all the Aſſets that come into his Hands, yet the rightful Executor ſhall maintain *Treſpaſs* againſt him, but he may give ſuch Payment in Mitigation of Damages; yet the Right of the Action and Verdict ſhall go againſt him. Per Holt Ch. J. 12 Mod. 441. Hill. 12 W. 3. Anon.

15. In Caſe for *Words*, which *imported the committing of Adultery by the Plaintiff with Jane at Stile*, the Defendant in Mitigation of Damages may give in *Evidence that the Plaintiff committed Adultery with Jane at Stile*, but not, that he committed Adultery with any other Woman. Per Holt Ch. J. at Brentwood Summer Aſſizes 13 Will. 3. ruled accordingly. Ld. Raym. Rep. 727. Smithies v. Dr. Harriſon.

16. *Caſe of ſlanderous Words by the Defendant of Plaintiff*, who was *an Attorney*, the Baron would *not allow any thing to be given in Evidence on the Defendant's Part which tended to juſtify the Words*, though in Mitigation of Damages only, and often ſo practiſed, but his Opinion was, that *any thing which tended to ſhew a Provocation, or any Tranſaction between the Parties giving Occaſion for ſpeaking the Words was proper in the Defendant to make out*, becauſe theſe Matters cannot be pleaded, nor would he allow any thing that concerned a Stranger to be given in Evidence on the Trial, nor any particular Credit to be given of the Plaintiff

Plaintiff, but if the Defendant had a Mind to examine to this the Queſtion muſt be asked in general. Coram Baron Price at Bodmyn. Trin. Vac. 1716. Dennis v. Pawling.

## (K. b.) What may be given in Evidence where the Plea is in Aggravation of Damages.

1. WHERE an *Information contains* ſome *particular Offences, as Extortion*, &c. *and afterwards there are General Words, which may include Offences of the ſame Nature as Oppreſſion*, &c. if the *Plaintiff proves the particular Offence*, he may give Evidence of the other Offences included in the General Words, and this he may do in Supplement and Aggravation of the particular Offences contained in the Bill, and the Court will give the greater Sentence againſt him; but if he does not prove the particular Offence, then it is otherwiſe. 2 Brownl. 151. Paſch. 1612. in the Star-Chamber, Doctor Manning's Caſe.

2. In *Caſe for Words*, if they are *in their own Nature actionable*, the Jury may conſider the Damage which the Party may ſuſtain; but *if a particular Averment of ſpecial Damages makes them actionable, the Jury are only to conſider ſuch Damages as are already ſuſtained*, and not ſuch as may happen in futuro; Per Cur. 2 Mod. 150. Hill 28 & 29 Car. 2. in Caſe of Lord Townſend v. Hughes.

3. In an Action of Treſpaſs, Aſſault, and Falſe Impriſonment, *Quouſque finem fecit ſeptem Librarum.* Upon Evidence at the Trial it appeared that there *was but 5 l. paid* by the Plaintiff to the Defendant for his Deliverance, which varied from the Declaration, that being 7 *l.* But the Ch. J. ſaid, it was well enough; for the Action is for the Treſpaſs and Falſe Impriſonment, and the other is only in Aggravation of Damages. L. P. R. 595, 596. cites Trin. 8 W. 3. in C. B.

4. In *Treſpaſs for entering the Plaintiff's Houſe, and beating his Wife, or Children, or Servants*, &c. *the latter Matters are only alledged as an Aggravation of the Damage* to ſhew the Manner of the Entry; for the diſturbing the Quiet of the Family is an Injury to the Plaintiff, tho' an Action will not lie for it ſingly; but the Wounding a Servant, or Loſs of his Service cannot be given in Evidence, but he muſt bring his Action, however the Plaintiff may give in Evidence, *Per quod Servitiam amiſit.* 2 Salk. 642. pl. 14. Trin. 5 Ann. B. R. Newman v. Smith.

## (L. b.) Evidence. Repugnant to the Iſſue.

1. IF one *pleads that nothing paſſed by the Deed*, he cannot after give in Evidence that it is *not his Deed*; for it is contrarying. Kitch. 242. cites 5 H. 7. fol. 2.

But Quære it it ſhould not be fol. S. pl. 19.—— Br. General Iſſue, pl. 38. cites 5 H. 7. 8.—Ibid. pl. 79. cites H. 7. 3. S. P. by Brian; but Keble contra; but Brook ſays, it ſeems it ſhall not, and cites 5 H. 7. 3. S. P. by Brian.

2. In *Detinue*, the *Defendant ſaith he doth not detain*; he *cannot give in Evidence that he hath it in Pawn*; for it is contrarying. Kitch. 242. cites 9 H. 7.

3. In

3. In a *Replevin*, the Taking was *ſuppoſed to be in a Place called Kelſtorn-lyng*, and the *Defendant ſays, that the ſaid Place contains* 200 *Acres of Paſture*, which are, and by Preſcription have been *Parcel of the Manor of Kelſtorn*, (and omits naming the County where the Manor lay) *which Manor is and was Solum & liberum Tenementum of the Defendant*, and avows the Taking of the Cattle Damage-feaſant; the *Plaintiff* in Bar to the Avowry *pleads*, that the Place where is *Parcel of the Manor of Kelſtorn, in Kelſtorn* aforeſaid, and conveys a Title to himſelf, and traverſeth its being the Avowant's Freehold, and Iſſue was taken on the Traverſe; and at Niſi Prius the Plaintiff gave in *Evidence, that there was no Manor of Kelſtorn*, and conſequently the 200 Acres could not be Parcel of it; and by the Opinion of the whole Court, this Evidence was adjudged *repugnant to the Plaintiff's own Traverſe*. Dy. 183. a. pl. 58. Paſch. 2 Eliz. Anon.

4. An Action of *Debt* was brought *upon a Leaſe for Years*, the Defendant pleaded *Nil debet per patrium*, and did intend to give in Evidence an *Entry of the Plaintiff* before any Rent behind. But per Cur. he cannot do it; for it is contrary to the Iſſue. Ow. 55. Mich. 29 & 30 Eliz. Anon

5. In *Debt* upon an *Obligation* made for *Uſury*, if the *Defendant* pleads *Non eſt factum*, he cannot give in Evidence, that the Bond was made for *Uſury*, becauſe it is contrary to the Iſſue. Brown's Anal. 17. Kitch. 242. S. P. cites 7 E. 6. 14.

6. In *Aſſiſe*, Tenant pleads *Nul Tort nul Diſſeiſin*, he cannot give in Evidence a *Releaſe of Right after the Diſſeiſin*; for it is an implied Confeſſion of the Diſſeiſin, and repugnant to the Plea of No Tort no Diſſeiſin. Jenk. 18. pl. 35. But if the Releaſe was before the Diſſeiſin, it is good Evidence. Ibid. 19. ——— C. L. 283.

7. *So* in *Waſte*, if Defendant pleads *No Waſte* done, and gives a *Releaſe* in Evidence, it is of no Uſe; for the Evidence is repugnant to the Plea. Jenk. 19. pl. 35.

## (M. b) Evidence. Admitted by what Plea or Action.

1. IN *Debt on Account ſtated, and Nil Debet pleaded*, it was urged that this confeſſed the Account, and therefore it ought not to be given in Evidence, that there never was any ſuch Acount; But per Newton Ch. J. it may be given in Evidence, or pleaded. L. E. 199. cites 20 H. 6. 24. Br. General Iſſue, pl. 7 cites S. C.

2. If the Plaintiff pleads *Son-Aſſault*, he cannot give in Evidence that he made no Battery; For he acknowledged the *Battery* by his Plea. Keilw. 55. b. pl. 4 Mich. 20 H. 7. Gulford v. Grainford.

3. In a Replication in the Avowry, preſcribes to have Common Appurtenant, but doth not ſhew and aver that the Cattle were levant & couchant upon the Land, &c. And for that it was held to be naught by the Court Vid. 15 E. 4. 32. But in this Caſe the Iſſue was joined upon the Preſcription; and by the other Fault is allowed as confeſt, and is helped after Verdict by the Statute. Noy. 145. cites 5 Rep. 43. a. Mich. 3 Jac. Jeffry v. Boys.

4. In a *Warrantia Chartæ* upon Warranty, his Anceſtor the Defendant pleaded *Riens per Deſcent*; By the Court, Judgment ſhall be entered for the Plaintiff without Trial if he will; For the Warranty is confeſt *Pro*

*loco et Tempore*; For the Trial may be long and chargeable. Noy. 149. Thompſon v. Jackſon.

5. *Error of a Judgement* in the Palace-Court *in Aſſumpſit, in which Action the Plaintiff was to prove Arreſt* as a Conſideration of the Promiſe, and not producing the Writ the Defendant demurred on the Evidence, but yet the Plaintiff had Judgment, and now the Error aſſigned was, that he ought to produce the Writ; for the King's Writ are Records, and to be proved only by themſelves, which is very true; but here the *Defendant had demurred upon the Evidence, and by that Means had confeſſed the Writ, and the Arreſt is Matter of Fact, though it is to be proved by Matter of Record*, and the Jury might know that there was a Writ; if ſo, then by the Demurrer to the Evidence, all Matters of Fact are confeſſed, which the Jury might know of their own Knowledge. 1 Lev. 87. Mich. 14 Car. 2. B. R. Fitzharris v. Bojoun. See Dyer, 239. See Error (G) 50. S C.

6. In an Action of *Treſpaſs for Breaking* and Entring the Plaintiff's Cloſe, to which Not Guilty the General Iſſue is pleaded, the Defendant cannot give in Evidence, *that the Incloſure was defective*, becauſe thereby the Treſpaſs is confeſſed. Brown's Anal. 14.

7. Aſſumpſit in Conſideration the Plaintiff would deliver to J S. ten Quarters of Malt, to pay for it upon Repueſt, if J. S. did not, and ſets forth, that he did deliver it, and J. S. did not pay for it, and that he requeſted the Defendant ſuch a Day who had not paid it; and at a Trial at Middleſex before Twiſden and Wyndham, the Defendant would have put the Plaintiff to prove the Repueſt, but the Judges would not ſuffer it; for the *Requeſt was traverſable, and not being traverſed* is admitted, and the Iſſue is only on the Aſſumpſit, the Defendant having pleaded *Non Aſſumpſit*. 1 Lev. 166. Paſch. 17 Car. 2. B. R. Anon.

Comb. 131. S. C. but the Caſe was in Treſpaſs for taking his Wife, and held accordingly; But per Holt Ch. J. a Plea that they were not married, or not Covert in Marriage would be good.

8. *In Debt on a Bond*, the Defendant pleaded *Ne unques Accouple in loyal Matrimony*; This admits a Marriage, but denies the Legality of it, whereas a Marriage de Facto is ſufficient, and whether legal or not legal is no ways material. 2 Salk. 437. pl. 1. Trin. 1 W. & M. in B. R. Alleyn v. Grey.

9. Upon Evidence ruled per Ch. J. Holt, that in Debt, *Plene Adminiſtravit* admits the Debt, but otherwiſe in an Action on the Caſe, or in an *Indebitatus Aſſumpſit*; for there the Plaintiff muſt prove the Debt. Mich. 1 W. & M. Saunderſon v. Nichols.

10. *Ejectment by Mortgagee* is not an admitting himſelf out of Poſſeſſion. Skin. 424. Paſch. 6 W. & M. in B. R. Vid. Ejectment, (B) 5. In Andrew Newport's Caſe.

11. *Ejectment* on a Demiſe *by a Corporation aggregate* Verdict Pro Quer in C. B. Error brought, and objected that the Demiſe is *not ſet forth to be by Deed*, Judgment affirmed; For Demiſe is confeſſed to be good *by confeſſing Leaſe, Entry and Ouſter*; and Jury could never have found for Plaintiff if there had not been good Demiſe. 12 Mod. 113. Hill. 8 W. 3. Anon.

12. *Action* againſt an *Adminiſtrator upon a Note*, who *pleaded Plene Adminiſtravit*; and it was *objected, that* this *Note was aſſigned* to J. S. Ruled, that by the Plea the Right of the Action is admitted, and the Property of the Note in another may not now be objected; otherwiſe if he had pleaded *Non Aſſumpſit*. Skin. 650. pl. 8. Trin. 3 W. 3. B. R. Mitchel v. Mees.

13. In *Debt on Bond* brought *by an Adminiſtrator*, if the Defendant *pleads Non eſt Factum*, the Plaintiff in Evidence need not ſhew the *Letters*

*ters of Adminiſtration* ; for this is admited by the Defendant's Plea. L. E. 211. pl. 37.

## (N b) Of what the Jury may or muſt take Notice.

1. A Jury may and muſt take Knowledge of any *particular Record, either Patent, Statute or Judgment, if it be given in Evidence to them* ; For that is their Allegata verbally alledged and produced, if it make to the Iſſue ; Per Hobart Ch. J. Hob. 227. Hill. 12 Jac. in Caſe of Needler v. the Biſhop of Wincheſter, and denied Dyer 129. 2 & 3. Ph. & M. Ibgrave v. Heydon.

## (O. b. 1) Evidence. What may be given on the General Iſſue, upon Not Guilty.

### And what may be given in Evidence in the following Caſes.

1. A Defendant cannot in any Caſe upon Not Guilty pleaded give in Evidnce a *Licence*, but he may give a *Gift* in Evidence. Brown's Anon. 15.

2. What Matters the Defendant may give in Evidence on the General Iſſue pleaded Vid G. Hiſt. C. B. 52. to 54.

3. Where the Defendant pleads the General Iſſue, and ſhews in Evidence, *that the Plaintiff hath no ſuch Cauſe of Action* as is brought, *nor no Cauſe of Action* ; this is good Evidence upon the General Iſſue. Kitch. 237.

4. Upon the General Iſſue *any Thing may* be given in Evidence, which *proves that the Plaintiff had no Cauſe of Action.* Try. per Pais, 7 Edit. 440.

5. Upon the General Iſſue, it is good Evidence for the Defendant to *convey to himſelf the ſame Intereſt and Title by Evidence.* Try. per Pais, 7 Edit. 441.

6. *As in Treſpaſs for Goſhawks, and Not Guilty pleaded,* Evidence *that he had a Licence of that Wood for Years* where they were taken, is good ; For it is his Title. Ibid.

7. After taking the General Iſſue, the Defendant *cannot give in Evidence any Thing that goes in Diſcharge of the Action.* Try. per Pais, 7 Edit. lays it down as a Rule.

8. Regularly by the Common Law, *if the Defendant has Cauſe of Juſtification or Excuſe, he cannot plead Not Guilty* ; For then in Evidence it ſhall be found againſt him ; For that confeſſes the ſpecial Matter and confeſs and juſtify the Battery. Co. Litt. 282. b.

### (O b. 2) Aſſault and Battery.

1. Where the Iſſue in Treſpaſs for Aſſault and Battery is Not Guilty, and the Defendant gives in Evidence *Son Aſſault Demeſne*, the Evidence is not good. Heath's Max. 84. cites Keilway, 55.

2. In

2. In Treſpaſs of Battery of his Servant per quod Servitum Amiſit, the Defendant may plead *Not Guilty*, and give in Evidence *a Juſtification of ſuch* Battery, *which is not any Loſs of* Service *as a Thruſting away.* 2 Roll. (F. 1) pl. 5. cites 14 Jac.

3. In *Treſpaſs* of Battery, and Not Guilty pleaded, the Evidence was, that the Battery was done in the Defendant's *own Defence*, and ill. Brown's Anal. 17.

4. If one *enter upon Land*, whereof I am in legal Poſſeſſion, and I *deſire him to go off* my Land, and he refuſe it, then after this I may uſe Violence, and thruſt him off; But I cannot wound him, or knock him on the Head. Skin. 228. pl. 7. Hill. 36 & 37 Car. 2. B. R. Kingſton v. Booth.

5. Two three or more are doing an *unlawful Act*, as abuſing the Paſſers-by in a Street or Highway, if one of them kills a Paſſer-by, it is *Murder* in all; and whatſoever Miſchief one does, they are all guilty of it; and it is lawful for any Perſon to attack and ſuppreſs them, and command the King's Peace; and ſuch Attempt to ſuppreſs is not ſufficient Provocation to make Killing, Manſlaughter, or *Son Aſſault demeſne* a good Plea in Treſpaſs againſt them; Per Holt. 12 Mod. 256. Mich. 10 W. 3. Aſhton v. ——

6. Treſpaſs *by Baron and Feme for driving a Coach over the Wife*; Per Quod the Husband was put to great Expences in curing his Wife; Per Powel J the *Baron ſhall not give in Evidence what Expences he was put to, but the Surgeon may be examined* to give Account of the Wound, but no farther, for the Baron may bring an Action for the other. Hill. 8 Ann. B. R. Dod and Ux v. Radford.

(O. b. 3) As to Attachment of Goods.

1. If Attachment *and Condemnation be before a Writ purchaſed*, it may be given in Evidence on a General Iſſue, becauſe it is an Alteration of the Property before the Action brought. 1 Salk. 280. pl. 6. Paſch. 5 W. & M. Brook v. Smith.

(O. b. 3) Attaint.

D 212. a pl. 34. Paſch. 4 Eliz. it was agreed for Law in Paramour's Caſe, that if

1. In Attaint, the Plaintiff *ſhall not give more in Evidence, nor produce more Witneſſes than he gave to the petty Jury*; *but the Defendant may give more in Affirmance of the firſt Verdict*; agreed plainly for Law. Dyer 53. b. pl. 11. Trin. 34 H. 8. Rolfe v. Hampden.

the Defendant in Attaint gives new Matter in Evidence to inforce the firſt Verdict, the Plaintiff in the Attaint ſhall have Anſwer to it, and diſprove it as well as he can; but he cannot give other Evidence, nor inforce the Evidence firſt given with other Matter than was given before, &c.

[O. b. 4] Detinue.

1. In Detinue *Defendant pleads Non detinet, he cannot give in Evidence that the Goods were pawned to him* for Money, and *that it is not paid, but muſt plead it*; *but* he may give in Evidence *a Gift from the Plaintiff*, for that proveth that he detaineth not the Plaintiff's Goods. Co. Litt. 283. a.

(O. b. 5.) In Ejectment.

1. If an Ejectment be brought *of twenty Acres* on a Leaſe of twenty Acres, if the Defendant plead Non Ejecit, there if he is found *Guilty but in ten Acres*, the Plaintiff ſhall recover, but he ſhould not, if the Defendant had pleaded Non Dimiſit. Dal. 105. pl. 50. 15 Eliz. Anon.

2. In

2 In an Ejectione firmæ brought by the *Leſſee of a Copyholder*, it is ſufficient that the Count be General, without any Motion of the Licence; and if the Defendant plead Not Guilty, then the Plaintiff ought to *ſhew the Licence* in Evidence. 2 Brownl. 40. Hill. 8 Jac. C. B. Petty v. Evans.

3. *Collateral Warranty* may be given in Evidence, and found by the Jury on Not Guilty pleaded in Ejectione firmæ. 10 Rep. 97. b. per Cur. in Seymor's Caſe, and cites 1 Rep. Chudleigh's Caſe.

4. *Entry and Claim* made upon the Land *within five Years after the Death of the Baron* of the Counteſs of Peterborough to avoid a Fine, ſhe being Iſſue in Tail, proved by one Witneſs, and allowed at a Trial in Bar. Sid. 166. pl. 25. B. R. Mich. 15 Car. 2. Floyd v. Pollard. Keb. 620 pl. 96 S. C. accordingly.

(O. b. 6.) Falſe Impriſonment by Peace-Officers.

1. In any Action upon the Caſe, Treſpaſs, Battery, or of Falſe Impriſonment againſt any Juſtice of the Peace, Mayor or Bailiff of City or Town Corporate, Headborough, Portreve, Conſtable, Tithingman, Collector of Subſidy or Fifteenth in any of his Majeſty's Courts at Weſtminſter, or elſewhere, concerning any thing by any of them done *by Reaſon of any of the Offices aforeſaid*, and all other in their Aid or Aſſiſtance, or by their Commandment, &c. they may plead the General Iſſue and give the ſpecial Matter for their Excuſe or Juſtification in Evidence. C. L. 283.

2. In an Action of Falſe Impriſonment, the Defendant pleaded Not Guilty, and gave in *Evidence the Warrant of a Juſtice of Peace to arreſt the Plaintiff*, and holden good Evidence to maintain the Iſſue, though *he is no Officer who did execute this Warrant*. See the Stat of 7 Jac. cap. 5. It ſeems this is warranted by Words in that Stat. ſc. any others which do any thing by Command of Juſtice of Peace, and other Officers there named. Clayt. 54. pl. 93. Aug. 13 Car. coram Barkley Judge of Aſſize. Wenpeny's Caſe.

3. The Officer cannot juſtify the Impriſonment of a Man *for Non-Payment of Taxes under the general printed Warrant* which the Collectors have ſigned by two Juſtices of Peace. But they ought to have a ſpecial Warrant. Ruled upon Evidence at a Trial in Falſe Impriſonment by Holt Ch. J. at Norwich Summer Aſſizes, 12 W. 3. Ld. Raym. Rep. 740. Maſters v. Butcher.

(A. b. 7) As to Falſe Return of Writs.

1. In Action on the Caſe for a Falſe Return of a Mandamus (which was directed to the Mayor and Aldermen of London) brought againſt the Mayor. He may give in Evidence, *that he voted againſt the Return and was over-ruled* by the Majority to make this Return. And this would be good Evidence upon Not Guilty pleaded, and upon ſuch Proof the Plaintiff would be nonſuited. Carth. 171. Hill. 2 & 3 W. & M. in B. R. Rich v. Pilkington.

2. On Information againſt a Mayor for making a Falſe Return to a *Mandamus*, commanding him to proceed to the *Election of a Town Clerk* for the Corporation in the Room of one B. to which he *returned*, *that* before the Arrival of the Writ *J. S. had been duly choſe and ſworn* into the ſaid Office. And it appeared on Evidence, that the Right of Election was in Thirty Common Council Men; that the Mayor at ſuch a Time before the Arrival of the Writ had ſummoned them to meet

in Order to the Election; that Twenty eight met, that Three Candidates were ſet up, that Two of the Twenty eight voted for one, that Thirteen voted for another, and the Mayor and Twelve more voted for the Third, that the Mayor, pretending to have a caſting Voice, declared this Man duly elected, and at another Court ſwore him in. And the following Points were in this Caſe ruled by Holt Ch. J. 1. That there needs no more Evidence to *prove this Return to be the Mayors*, but the *Copy of the Writ and Return* thereof *in the Crown Office*. 2. That though upon the Conſultation the *Majority* be againſt him, and *make a Return in his Name*, yet it ſhall be taken to be his if he does not come and *diſavow* it. 3. That it is *not neceſſary to prove a Delivery of the Writ to the Mayor*, no more than to a Sheriff in a Falſe Return againſt him. 4. That notwithſtanding the Writ is to be delivered to the Mayor as the moſt viſible Part of the Corporation. 5. That this Action for a falſe Return may be brought againſt the whole Corporation, or againſt any particular Member of it. 6. That the Mayor or other Head Officer of common Right has no caſting Voice; but ſuch a thing may be *by particular Conſtitution*, as by Preſcription or Charter. 7. If there be an *Equality of Votes*, and therefore they cannot chooſe, upon Mandamus they muſt agree, or elſe they ſhall be all brought up as in Contempt, and laid by the Heels till till they do agree, for after a Jury is ſworn they ſhall be impounded till they all agree, but here it ſuffices that a Majority do agree. And here the Mayor was found Guilty. 6 Mod. 152. Paſch. 3 Ann. B. R. The King v. Mayor of Bath.

## (O. b. 8) As to Highways.

Carth. 212. S. C. The Defendant upon a Preſentment that a Highway was out of Repair, removed it by Certiorari and pleaded Not Guilty; Per the other Juſtices contra Holt, it may be given in Evidence that it was no Highway.—Show. 270. 291. S C. and S. P. by Holt Ch. J. but Eyre J. contra, & adjornatur.

1. Per Holt Ch. J. upon a Preſentment for not repairing a Highway, on Not Guilty, you *cannot give any Thing* in Evidence, *but* only *that the Way is repaired*. If they plead they ought not to repair, they muſt ſet forth who ought. You cannot give in Evidence no Highway, but may *traverſe* it. Eyres contra Dolbin, They may give in Evidence that it is no Highway, but *not that they ought not to repair it*. 12 Mod. 13. Mich. 3 W. & M. The King v. the Inhabitants of Hornſea.

2. Upon an *Indictment againſt a Pariſh* for not repairing a Highway, they *can give nothing in Evidence* upon a Not Guilty, *but that the Way is in Repair*; *but if it be againſt a particular Perſon*, *he may give Evidence that others ought to repair it*. Comb. 396. Mich. 8 Will. 3. B. R. The King v. Ireton and Inhabitants in Cumberland.

## [O. b. 9] Maintenance

2. If upon the General Iſſue the Defendant gave in Evidence, That at the Requeſt of the Party he gave him Counſel to ſue out a *Superſedeas*, and good, becauſe no Maintenance; but in that Caſe ought of Neceſſity to plead the General Iſſue. Heath's Max. 81. cites 22 H. 6. 35.

2. But if he in Evidence ſhew a ſpecial Maintenance, as ſworn in a *Jure Patronatus*, and the like that will not ſtand with the *General Iſſue*. Heath's Max. 81. cites 28 H. 6. 6.

(O. b.

(O. b. 10) Parco Fracto.

1. Action upon the Statute of (Parco Fracto) Not Guilty, and Evidence *that he has no Park* is good. Kitch. 237. cites 19 H. 6. fol. ".

(O. b. 11) Reſcous.

1. Upon Not Guilty in *Reſcous*, the Defendant ſhall not give *Non Tenure* in Evidence. Heath's Max. 76 cites 9 H 7. 3.

2. Upon Not Guilty, it is no Evidence to ſay that the *Incloſure was defective*, becauſe thereby the Treſpaſs is confeſſed. Heath's Max. 76. cites 19 H. 8. 6.

(O. b. 12) Treſpaſs.

1. Treſpaſs, Not Guilty, and Evidence, *that the Property was to J. S. who gave them to him, is good.* Kitch. 239. cites 9 H. 6. fo. 11. Br. General Iſſue, pl. 5. cites 5 H. 6. 11. S. P.

2. Treſpaſs, Not Guilty, and Evidence *that the Place where* the Treſpaſs was done *is the Freehold of another, and not of the Plaintiff*, is good. Kitch. 237. cites 4 E. 4. fo. 5.

3. Treſpaſs, the Defendant pleads Not Guilty, and gives in Evidence, *that it is the Freehold of another, and good*; for then the Plaintiff hath no Cauſe of Action. Kitch 238. cites 4 E. 4. 5.

5. Treſpaſs, Not Guilty, and in Evidence *a Leaſe for Years* is good. Kitch. 239. cites 12 H. 8. f. 2.

6. If my Cattle eſcape into the Soil of another through the *Fault of the Fences*, which he ought to repair, I cannot plead Not Guilty and give this in Evidence, becauſe ſuch Evidence *acknowledges the Treſpaſs*, and juſtifies it. Co. Litt. 283. 19 H. 8. 6.

7. If my *Beaſts break into another Man's Cloſe in default of his Incloſure*, I ought to allege the ſpecial Matter by Way of Plea; but it was moved that it might be given in Evidence, tho' not to nonſuit the Plaintiff, yet it might to mitigate the Damages; But per Shelley, that cannot be; for peradventure the Jury might thereby incur the Danger of an Attaint. Kilw. 203. b. pl. 2. 21 H. 8. Anon.

8. Treſpaſs, Not Guilty, the Defendant may give a *Leaſe for Years* in Evidence; Contrary of a *Leaſe at Will*, for this is determinable at Pleaſure. Kitch. 239. cites 25 H. 8. General Iſſue, 82.

9. Treſpaſs, the Defendant pleads *his Freehold, and gives in Evidence a Fine with Proclamation*; it is good, for it is a Title. Kitch. 239. cites 27 H 8. 27.

10. Per Cur. upon Not Guilty, it is good Evidence for the Defendant to ſhew *that the Land belongs to another*, and put the Plaintiff to ſhew Title. Keil. 61. pl. 6. Hill. 20 H. 7.

11. In an Action of Treſpaſs, where the Defendant pleads *Not Guilty*, and *makes the Title by a Stranger*, it is no Evidence to ſay *that he committed the* Treſpaſs *by the Commandment of the Stranger*, but ought to plead the ſame, as he muſt do the Licence of the Plaintiff himſelf. Brown's Anal. 15. Br. General Iſſue, pl. 81. cites 25 H. 8. —Kitch. 240. cites S. C.—S. C. cited by Vaughan Ch. J. Freem. Rep. 44. pl. 52. in Caſe of Fox v. Grundie.

12. In Treſpaſs *Not Guilty* was pleaded, the Evidence was, that *Locus in quo fuit liberum Tenementum of T. S. who licenced* the Defendant to *enter*, by Virtue whereof he *entered* accordingly, but no good Evidence, becauſe it is a *Juſtification*. Brown's Anal. 17.

13. In

13. In Treſpaſs *De Bonis captis*, the Defendant pleads *Non cul.* and gives in Evidence, *that he recovered the ſame Goods by Verdict, and had them delivered to him in Execution*, and good. Brown's Anal. 17.

14. In Treſpaſs, and Not Guilty pleaded, the Evidence was, that the *Property was to J. S.* who gave them to the Defendant, and good. Brown's Anal. 17.

15. *But* in Treſpaſs, where Not Guilty was pleaded, the Evidence was, that the *Property was to J. S.* and that the Defendant *as his Servant*, and by his Commandment, took the Goods in the Count, and ill; for he thereby *confeſſeth* the Treſpaſs, and yet *juſtifies* the ſame. Brown's Anal. 17.

Kitch. 239. cites 16 E. 4. fol. 2.—— Br. General Iſſues, pl. 43. cites 16 E. 4. 1. but adds a Quære, if the Trees were reſerved, as in 14 H. 8.

16. Treſpaſs for taking of Goſhawks, *Not Guilty* pleaded, and Evidence given, *That the Defendant has a Leaſe of the Woods where the Hawks were taken*, and good, becauſe he thereby makes a Title to himſelf. Brown's Anal. 17.

17. Treſpaſs of Goods carried away the Defendant pleads, *that the Property of the Goods was not in the Plaintiff*, and that is no Plea in Treſpaſs, but in Replegiare. And ſome for that ſeem, that this is no good Evidence in Treſpaſs, upon a Plea of Not Guilty. Kitch 238. cites 27 H. 8. fo. 25.

18. Treſpaſs of Goods taken, the Defendant may plead Not Guilty, and Evidence *that he recovered, and had them delivered in Execution*, and is good. Kitch. 239. cites 12 Book of Aſſ. 73.

19. In an Action of Treſpaſs the Defendant pleaded Not Guilty, and if he might give in Evidence, that at the Time of the Treſpaſs the Freehold was to ſuch an one, and *he as his Servant, and by his Commandment entered*, was the Queſtion; and it was ſaid by Coke, that the ſame might ſo be well enough, and ſo it was adjudged in Trivilian's Caſe; for if he by whoſe Commandment he enters has Right, at the ſame Inſtant that the Defendant enters the Right is in the other, by Reaſon whereof he is not Guilty as to the Defendant, and Judgment was given accordingly. 1 Leon. 301. pl. 414. Trin. 31 Eliz. in Dierſly v. Nevel.

20. In Treſpaſs for breaking his Cloſe, upon Not Guilty pleaded he cannot give in Evidence that the Beaſts *came thro' the Plaintiff's Hedge*, which he ought to keep; nor upon the General Iſſue *juſtify*, *by Reaſon of a Rent-Charge, Common*, or the like. Co. Litt. 283.

21. In *Treſpaſs*, *Tender* of 2s. 6d. in Amends was pleaded, and averred that the ſaid Sum was ſufficient; this was upon the new Statute 21 Jac. and *Iſſue* taken *upon the Sufficiency of the Amends*. In this Caſe the Defendant began the Evidence to prove the Amends ſufficient, and was directed to ſhew the Treſpaſs, what it was, and prove the Tender, &c. and the Plaintiff in this Caſe was *not permitted to ſhew* or prove *more Treſpaſſes than one of which he had declared*. And that which the Plaintiff ſets forth ſhall be the Treſpaſs, and not that which the Defendant ſets forth if they vary; then the Plaintiff did prove it to the Value of 5 s. and the Defendant would have left it to the Jury, whether the Treſpaſs of two Beaſts in April in Graſs-Ground could be of that Value, but the Judge *would not permit* it ſo for the *Jury to judge, as if no Proof was when* the Witneſs *had expreſly proved it to the Value of 5 s.* when the Defendant had failed to make Proof what the Treſpaſs was, ſo to apply his Amends tendered to that Treſpaſs, in which he had failed before. Clayt. 70. pl. 122. Aſſiſ. a. Aug. 1639. before Vernon and Hendon Judges.

22. Where

22. Where Not Guilty is pleaded in Treſpaſs, a Releaſe cannot be given in Evidence; for ſuch Evidence and the Defendant's Plea is contrary. A Releaſe *implies a Confeſſion* of the Treſpaſs, *and a Diſcharge* of it by the Releaſe. Jenk. 280. pl. 4.

23. For making a Treſpaſs continuando there *ought to be a Re-entry of the Plaintiff*, and for the not proving thereof the Plaintiff ſhall have Damages only for the firſt Entry. L. of E. 7th Edition, 440. cites Mich. 22 Car. 1.

24. Treſpaſs was brought *Quare Domum & Clauſum fregit*, & Bona aſportavit, &c. where the *Defendant* in truth *did the Treſpaſs by Virtue of a Commiſſion of Bankrupts*. The Court held that the Plaintiff having declared of the Entry into his Houſe the Defendant cannot plead Not Guilty and give the ſpecial Matter in Evidence, but ought to have pleaded the Statute of Bankrupts, and all the ſpecial Matter; but if the Treſpaſs had been laid for taking of the Goods only, he might have pleaded Not Guilty generally. Litt. Rep. 356. 6 Car. C. B. Anon. Ibid. The Reporter adds Quæratione.—

25. In Treſpaſs *Quare Clauſum fregit*, it is a Plea in Abatement to ſay that the *Plaintiff is Tenant in common* with another, but cannot be given in Evidence upon Not Guilty, as it may where one Tenant in common brings Treſpaſs againſt the other. Vent. 214. Trin. 24 Car. 2. B. R. Anon.

26. Where Corn, &c. is taken away at ſeveral Days the right Way is to ſay Tali Die & diverſis Diebus, & Vicibus inter talem Diem & talem Diem; for *if it be laid on a certain Day with a Continuando Plaintiff can give in Evidence but one Day*, though they may chooſe their Day, for that which is done on one Day cannot be continued. Comb. 427. Trin. 9 W. 3. C. B. Anon.

27. In Treſpaſs for *breaking the Plaintiff's Cloſe*, and treading his Graſs, &c. the Defendant upon Not Guilty pleaded, *cannot give any Matter of Right in Evidence*, not even in Mitigation of Damages; Per Holt Ch. J. 6 Mod. 153. Paſch. 3 Ann. B. R. Dove v. Smith.

## (O. b. 14) Trover.

1. Action upon the Caſe of finding his Goods, and converting them to the Uſe of the Defendant, Not Guilty, and *Evidence that they were not Goods of the Plaintiff* is good. 3 Mar. and 33 H. 8. Action upon the Caſe 209. Otherwiſe it is in Treſpaſs. Kitch. 237. cites 27 H. 8. fol. 25.

2. Action upon the Caſe of Finding Goods, and converting them to his own Uſe; the Defendant *pleads Not Guilty, and Evidence that they were pawned to him for* 10 *l.* is good. Kitch. 239. cites 4 E. 6. Br 113.

3. Trover and Converſation brought by the Citizens of Colcheſter, againſt the Farmery of the Toll of the Citizens of London, for taking their Goods; Upon Not Guilty pleaded, there was a Trial at Bar by a Hartfordſhire Jury, where the Defendants confeſſed the Taking the Goods; but that it was for Non-payment of Toll, which the Defendants claimed by Cuſtom; The Citizens of Colcheſter claimed to be free by the Charter of King Richard, and the Citizens of London proved by divers Records and Entries in their Books, that the Citizens of Colcheſter had paid Toll; it was objected againſt the Defendants Evidence; that it was not good upon the General Iſſue, but that they ought to have pleaded the Matter ſpecially; and the Court held accordingly; For it is not like to a General Action of Treſpaſs, for there they ought to have pleaded the Cuſtom ſpecially; but *in Trover any Thing may be given in Evidence on the General Iſſue, which may prove the Converſion to be lawful*; The Jury gave a general Verdict for the Defendant and Judgment accord-

accordingly. Jo. 240. pl. 5. Paſch. 7 Car. B. R. Colcheſter City v. London City.

4. In Trover and Converſion, upon Not Guilty, the Evidence was, that the Goods were taken and *ſold by* Virtue of a *Commiſſion of Sewers*; and it was ruled, that this Matter might be well given in Evidence upon Not Guilty pleaded, as detaining of Beaſts in a Market for Toll. Allen. 92. Mich. 24 Car. B. R. Combs v. Cheney.

7 Mod. 141. S. C. held accordingly.—

5. The Plaintiff brought Trover *as Adminiſtrator*, and declared upon the Poſſeſſion of the Inteſtate; And upon Not Guilty pleaded at the Trial, the Counſel for the Defendant offered to give in Evidence, that the pretended Inteſtate *made a Will and an Executor*; But Holt Ch. J. over-ruled it, and took this Diverſity, That where an Adminiſtrator briegs Trover *upon his own Poſſeſſion*, the Defendant may give in Evidence a Will and an Executor upon Not Guilty; Otherwiſe if it be on the Poſſeſſion of the Inteſtate, (as in the principal Caſe) for there the Defendant ought to plead it in Abatement, and if he does not, he ſhall not give it in Evidence. 1 Salk. 285. pl. 17. Mich. 1 Ann. Blainfield v. Marſh.

6. In Trover for Million *Lottery Tickets*, upon Evidence it appeared, that the *Plaintiff had given to a Goldſmith the Ticket in Queſtion to receive the Money due on them*, that ſome Payments were due and ſome were not, and *gave a Note to pay* the Plaintiff ſo many Million Lottery Tickets; that the Plaintiff's Tickets were delivered to the Defendant by the Goldſmith upon this Note, which was produced and read as Evidence againſt the Plaintiff; And per Holt Ch. J. the Way and Manner of Trading is to be taken Notice of, and the beſt Proof that the Nature of the Thing will afford is only required; When Goldſmiths give their Notes no Perſons are by to be Witneſſes, and their Notes to pay Money or Tickets are Evidence of the Receipt of their Money. If the Exchequer or any private Perſon had paid to the Goldſmith the Money for the Tickets, it had been a good Payment againſt the Owner, but whether it would be ſo where Tickets not due are bought for a valuable Conſideration he doubted, but as the Goldſmith here had Tickets here of the Plaintiff and Defendant, the Delivery of the Plaintiff's Tickets to the Defendant was no Change of the Property or any Conſideration; for though the Owner gave the Goldſmith Power to receive Money for the Tickets, he did not give him Power to change them for other Tickets, and the Plaintiff had a Verdict. If the Money is ſtolen and paid to another, the Owner of the Money can have no Remedy againſt him that received it; But if Bank-Notes, Exchequer-Notes, or Million-Tickets, or the like, are ſtolen or loſt, the Owner has ſuch an Intereſt and Property in them, as to bring an Action into whatſoever Hands they came; Money or Caſh is not to be diſtinguiſhed, but the Notes or Bills are diſtinguiſhable, and cannot be reckoned as Caſh, and they have diſtinct Marks and Numbers on them. 1 Salk. 283, 284. Hill. 12 Ann. Guildhall. Ford v. Hopkins.

## (O. b. 15) Warren.

1. Treſpaſs *in Warren*, Not Guilty and Evidence *that he has no Warren* is good. Kitch. 237. cites 10 H. 6. fol. 17. and 34 H. 6. fol. 7.

## (O. b. 16) Waſte.

1. In Waſte; Upon the Plea of No Waſte done, Defendant may give in *Evidence any Thing that proves it Not Waſte*, As by Tempeſt, Lightning, Enemies, &c. but he *cannot give in Evidence Juſtifiable Waſte*, as to repair the Houſe, &c. Co. Lit. 83. a.

2. If *Leſſee does waſte, and before Action brought he repairs it*, and afterwards Leſſor brings Action of Waſte, *and Leſſee pleads Quod Non fecit Vaſtum*, he cannot give the ſpecial Matter in Evidence. Co. Litt. 283. a.

[O. b. 17] Writ of Right.

1. Debt, and per Lakin in Writ of Right the *Aſſiſe is joined*, and the *Tenant gave in Evidence a Releaſe made in another County, the Grand Aſſiſe ought to find it*; for it is ſaid elſewhere, that *nothing may be pleaded in this Action but Collateral Warranty*, but all others ſhall be given in Evidence. Br. Droit de recto. pl. 48. cites 9 E. 4. 40. Br. Enqueſt, pl. 59. cites S. C.

## (P. b. 1) Evidence. For or againſt what Perſons having Relation to others.

Acceſſory.

1. Indictment of A. as Acceſſory *to B. and C.* Evidence *proves* him Acceſſory *only to B.* this maintains the Indictment. L. E. 286. pl. 37.

2. *Two indicted as Principals*; Evidence *proves one Acceſſory* before, he ſhall be diſcharged of that Indictment. L. E. 286. pl. 40. cites H. P. C. 266.

(P. b. 2) Bail.

1. In Action againſt the Bail, who *pleads Render of Principal in Diſcharge*, there muſt be a *Copy of the Judgment and of the Commitment* given in Evidence. Per Holt Ch. J. 12 Mod. 559. Mich. 13 W. 3. Anon.

(P. b. 3) Bailiff and Receiver.

1. In a Trial at Niſi Prius at Guildhall, it was ruled by Holt Ch. J. that where the Mayor and Commonalty of London had conſtituted J. S. their Bailiff *to receive* their *Rents, and* to make *Demand of them, and to make Entry*; upon Evidence in Ejectment, ſuch General Authority is not ſufficient to authorize a Bailiff to take Advantage, and make Demand of *a Rent accrued due after the Authority given*; For it is a new Right attached, and ought to be a ſpecial Authority for this Purpoſe. Skin. 413. pl. 10. Hill. 5 W. & M. in B. R. Dixon v. Smalley.

(P. b. 4) Baron and Feme.

1. Upon Evidence in an Action upon the *Caſe for Meat, Drink*, Waſhing and Lodging found *for the Wife of the Defendant* by the Plaintiff; the *Proof* was that the *Wife came in a neceſſitous Caſe*, and *ſaid* to the Plaintiff that *ſhe was the Wife of the Defendant, and* that *he had turned her out of his Houſe, and allowed her 50l per Annum, but* that he *would not pay it*; upon which Holt Ch. J. was of Opinion that the Husband is not chargeable, for it being apparent that ſhe did *not cohabit* with her Husband, ſhe ſhall not have Credit to charge him without his Conſent, and though it was proved that he had *paid another who had received and tabled her before* the Plaintiff had received her; yet the Plaintiff was non-

nonſuit; For Holt Ch. J. ſaid if a Wife cohabit with her Husband, and by it gains a Credit, though ſhe *depart without the Leave of her Huſband*, and come to London, and becomes in Debt the Husband ſhall be *charged till Notice* given of her Elopement, for it ſhall be intended to be with the Conſent of her Husband; but after Notice the Husband ſhall not be charged without his Conſent. Skin. 323. pl. 2. Mich 4 W. & M. in B. R. Peirce v. Welden.

2. At Niſi Prius at Weſtminſter, an Action was brought for Money received to the Uſe of the Plaintiff; upon the Evidence it appeared to be *Money ſecretly depoſited by the Wife*, and a *Note* taken for it *in the Name of a third Perſon*, and after the Death of the Wife the Action was brought by the Husband; and in this Caſe it was proved that the *Wife ſaid that ſhe had received the Money depoſited* again; and an Exception was taken that this is not Evidence, Sed non allocatur, for the Matter being tranſacted by the Wife, and the Caſe depending only upon this Tranſaction, that which the Wife ſaid is Evidence. Skin. 647. pl. 4. Trin. 8 W. 3. B. R. Webb v. Plumſted.

3. Though it was pretended that there was a *Recovery in Huſband's* Time, and that they would *prove by the Sheriff who had a Writ of Execution*; yet they having not the *Judgment on which* the Execution was, it was ruled they could not give that in Evidence. Per Holt. 12 Mod. 346. Mich. 11 W. 3.

4. Though Feme Covert *Seal, and deliver a Deed*, yet ſhe may plead Non eſt factum, and give Coverture in Evidence. Per Holt Ch. J. 12 Mod. 609. Hill. 13 W. 3. Anon.

## (P. b. 5) Carriers.

1. A *Box of Jewels* was delivered *to a Ferryman*, who knowing not what was in the Box, threw them over-board into the Sea, and reſolv'd he ſhould anſwer for it. Cited by Roll. Al. 93. Mich. 24 Car. B.R. as was ruled in one Barcroft's Caſe.

2. *Trover lies not againſt a Carrier for Negligence*, as for loſing a Box, *but* it does *for an actual Wrong*; as if he breaks it to take out Goods or ſell it. Per Cur. 7 W. 3. B. R. That a Denial was no Evidence of Converſion, where the thing appeared to be loſt by Negligence, but if that does not appear, or if the Carrier had it in his Cuſtody, when he denied to deliver it, It is good Evidence of a Converſion. Coram Trevor Ch. J. at Niſi Prius at Guildhall. 2 Mod. 655 pl. 4. Anon.

N. B. This Cauſe had been tried at Wells, coram Juſtice Price, and a Verdict for the Plaintiff. But he had certified for a new Trial.

4. A *Box* was ſent from Somerſetſhire by Taunton Carrier to London, *directed to Mr. Were at the Temple; he goes to the Inn to enquire for the Box, and leaves Word that it ſhould be brought to him by a Porter*, this was on the 26th of Dec. when the Carrier comes in, *the Porter belonging to the Carrier, takes this Box and other Goods, and carries them in a Cart to the Temple Gate, where he takes out the Box and enquires for Mr. Were's Chambers, but a Perſon unknown conducts him to the wrong Chambers, where he leaves the Box, and it was never more heard of.* [illegible] the Carrier, his Witneſſes ſaid the Box was directed to Mr. Were's No. 1. in the Temple; but this was denied by Mr. Were, his Chambers were in the Paper-Buildings, but the Box was delivered in Tanfield Court next the Arch and paid for. Two Counts in Declaration on General Cuſtom about Carriers, the other on an Undertaking to carry from Taunton to London, and there to deliver the Box to Mr. Were. There was Money, a Great Coat, a Pye, a Preſident-Book, &c. in the Box. Having proved Goods put into the Box and Value, it was objected that the Delivery to the Porter was a Diſcharge to the Carrier, it being by Mr. Were's Order. But Baron Cummins in Direction to Jury, ſaid that the Queſtion was, whether the Box was delivered according

cording to the ſecond Count; and if Box was delivered to Carrier as directed, and not altered, and if purſuant to Mr. Were's Order, otherwiſe he ſeemed to think that the Carrier was not diſcharged of his Undertaking, and if the Goods were carried out of the Inn by the Porter without the Order of the Party, that the Carrier was liable. But the Jury diſcovering their Intention to find for Defendant the Plaintiff was nonſuited. Coram Baron Cummins at Taunton Aſſ. Hill. Vac. 1727-8.

[P. b. 6] Cuſtom-Houſe Officers.

1. In the Court of Exchequer Ld. Ch. Baron Bury, Montague and Page againſt Price held, that *where an Officer had made a Seizure, and there was an Information upon it, &c. which went in Favour of the Party, who afterwards brings Treſpaſs, the ſhewing theſe Proceedings was ſufficient to excuſe the Officer*; it was competent to make out a probable Cauſe for his doing the Act. Mich. 6 George.

[P. b. 7] Executors and Adminiſtrators.

1. Debt againſt Executors, upon Plene Adminiſtravit pleaded, they gave in Evidence, that they had *redeemed Part of the Teſtator's Goods with their own Money, which he had pawned for the full Value, and that they had paid the full Value of the Reſidue to diſcharge his Debts*, and this was held good Evidence. Dyer 2. pl. 3. in Com. Scacc. Mich. 6 H. 8. But where the Action was on a Debt upon the Teſtator's Bond, there Payment of his Debts, upon Contracts made by the Teſtator, had not been good Evidence to maintain ſuch Plea, becauſe they were not compellable. Dy. 32. a. pl. 2. Paſch. 28 & 29 H. 8. Anon.

2. In Debt againſt Executors, the *Iſſue was upon Aſſets in their Hands on Day of the Action brought, and the Evidence was, that a Sum of Money to the Value of the Debt was brought in on that very Day into the Prerogative Court of Cant. and there delivered to the Executors as a Debt due to the Teſtator, which they paid the ſame Day to a Creditor of the Teſtator, by the Order of, and in the ſaid Court*; Sed non allocatur as an Adminiſtrator, but ſhall be held Aſſets to the Plaintiff, tho' the Writ was purchaſed the ſame Day after Payment of the Money. But it ſhould have been pleaded ſpecially, and then perhaps the Defendant might have aided himſelf thereby; whereupon the Jury found Aſſets generally, Die Impetrationis Brevis, without giving any ſpecial Verdict. D. 208. a. pl. 16. Mich. 3 & 4 Eliz. Anon.

3. The *Plaintiff ſued as Adminiſtrator* for Goods, and Non Detinet was pleaded, and the *Defendant produced in Evidence Letters Teſtamentory* of the ſame Man, who was ſuppoſed to die inteſtate, and it was admitted as good Evidence. Clayt. 66. pl. 115. Aſſiſe July 1638. before Barkeley Judge. Preſton v. Hall.

4. A Man may give in Evidence *any Thing upon the Scire Fieri Inquiry upon a Non devaſtavit, that he might have given in Evidence upon Plene adminiſtravit.* Per Gould J. Ld. Raym. Rep. 591. Trin. W. 3. in Caſe of Rock v. Layton.

5. If an Executor bring *Trover upon the Poſſeſſion of his Teſtator*, upon Not Guilty he ſhould not be put to *prove himſelf Executor*; Secus, if he had brought it *on his own Poſſeſſion.* 7 Mod. 141. 1 Ann. B. R. per Holt Ch. J. at Guild-hall, in the Caſe of Blainfield v. March.

6. *Trover by an Adminiſtrator*, the Plaintiff *declared of a Poſſeſſion in the Inteſtate, and of a Loſs by him in his Life-time*, and then he *lays the*

*Converſion to be in his own Time, &c.* Per Holt Ch. J. the Defendant ſhould have pleaded it in Abatement, and it cannot be given in Evidence upon Not Guilty pleaded, becauſe here the Property is laid in the Inteſtate. But if the Plaintiff had declared upon a Property in himſelf, and it had appeared upon the Evidence that he claimed the Goods but as Adminiſtrator to *J. S.* &c. there the Evidence of an Executor had been a Bar to the Plaintiff, becauſe it would have defeated his Property, upon which his Action is founded. And a Verdict was given for the Plaintiff, and intire Damages. 2 Ld. Raym. Rep. 824. Marsfield v. Marſh.

(P. b. 8) Inn-keepers.

1. At Guildhall upon Evidence the Caſe was, *a Man had a Horſe in an Inn*, and came thither, and *directed that the Innkeeper ſhould not give him any more Food, for he would be reſponſible for it*; and the Queſtion was, if for the Food after this Direction given by the Inkeeper to the Horſe, he who brought the Horſe thither ſhall be charged or not; and Holt Ch. J. at firſt inclined that this is a Diſcharge, and that the Horſe (though he might be retained by the Inkeeper yet) is but in the Nature of a Diſtreſs; and it being in the Cuſtody of the Inkeeper in his Inn, this is a Pound-Covert, and the Horſe ought to be afterwards found and maintained at the Peril of the Inkeeper; but after Mutata Opinione, he directed that this was not a Diſcharge, for then any *Innkeeper* might be deceived, and it is the leſſening of an Innkeeper's Security, who *may detain, and by the Cuſtom of London ſell the Horſe for his Ceeping*, Skin. 648. pl. 6. Trin. 8 W. 3. Gilbert and Berkeley.

2. If a Man brings a *Horſe* to an Inn, and deſire the Maſter to *put him into a Stable till it cools, and then ſend him to Graſs*, if the Horſe be *ſtole before he ſends him to Graſs* he ſhall anſwer for him; though if he had ſent him to Graſs purſuant to the Owner's Deſire he would not be anſwerable; and ſo he ſhall be chargeable till he has performed the Truſt repoſed in him, and as ſoon as he has performed it he ſhall be diſcharged. Per Holt Ch. J. 12 Mod. 484. Paſch. 13 W. 3. in Caſe of Lane v. Sir Robert Cotton.

(P. b. 9) Landlord and Tenant.

1. At Guildhall, in *Ejectment* for a Meſſuage in *London*, it was objected againſt the Title of the Plaintiff that this was a Meſſuage *above* 40 *l. per Annum* Rent, and that the *Cuſtom* of the City is, that there ought to be *Warning given for* the Space of *Half a Year* where the Meſſuage is of ſuch a Rent, and by the Space of a Quarter of a Year where 'tis under ſuch a Rent, and an *antient Book in French* was produced, *in which ſuch Cuſtom was regiſtered*, the which was allowed to prove the Cuſtom; but the *Queſtion* was, if this Cuſtom gave the Party an *Intereſt, or only entitled him to an Action, if* it be *ouſted within the Time*, as in the common Caſes of *Leaſes for Years, or at Will, with Agreement for a Quarter's Warning*; if the Party depart without warning, an Action of *Debt does not lie* for the Rent, *but* an Action on the *Caſe* founded *upon the Agreement*, and though Holt Ch. J. ſaid, that he had heard that North C. J. had ruled upon Evidence that the Cuſtom gave an Intereſt; and it was objected, that if it did not give an Intereſt it was not of any Benefit to the Citizen, who ought to have a reaſonable Time to remove his Effects; yet the Ch. J. inclined e contra, and it was reſerved for his Conſideration. Skin. 649. pl. 7. Trin. 8 W. 3. B. R. Tyley v. Seed.

2. If

2. If the Plaintiff were Leſſee the *Leſſor* might lawfully *enter to ſee Waſte*: and there *to make him a Treſpaſſor* the Leſſee ought *to ſhew ſome Miſbehaviour* in him, as cutting a Tree, deſtroying the Corn, or ſtaying on the Land all Night, &c. Per Holt Ch. J. 12 Mod. 582. Mich. 13 W. 3. in Caſe of Chancey v. Win & al.

(P. b. 10) Maſter and Servant.

1. In an Action upon the Caſe for Money received by the Defendant for the Uſe of the Plaintiff, the Evidence was that the *Defendant was Apprentice to the Plaintiff*, and this was *for Service done in a Ship of the King's, during the Apprenticeſhip*; and the *Indentures of Apprenticeſhip being produced* to prove the Defendant Apprentice to the Plaintiff; it was inſiſted that the *Hand of the Defendant ought to be proved*; to which Holt Ch. J. agreed, unleſs the Indenture be enrolled. Skin. 579. pl. 2. Paſch. 7 W 3. B. R. Anon.

2. If my Servant has a *Note for Money* due to me or other *Goods, which in their Nature are not properly in the Cuſtody of a Servant*, that is Evidence *Prima facie* that he has an Authority from me to apply them to ſuch Uſe as he does after put them to; but the Contrary may be given in Evidence, as that he *came by the Note by undue Means, or* had it *to another particular Purpoſe*; Per Holt Ch. J. 12 Mod. 504. Mich. 13 W. 3. Anon.

3. The *Servants of a Carman run over a Boy in the Street and maimed him, by Negligence*; and an *Action was brought againſt the Maſter*, and the Plaintiff recovered. Ld. Raym. Rep. 739. Anon. The Servants of A. with his Cart run againſt the Cart of B. in which there was a Pipe of Wine, viz. Sack, and overturned it whereby the Sack was ſpoiled, and run into the Street; and an Action was brought againſt the Maſter, and held good by Holt Ch. J. at Guildhall. Ex relatione Majeſtri Place. Ld. Raym. Rep. 739. Anon.

(P. b. 11) Merchant and Inſurer.

1. A. inſured the Freight of a Ship from all Loſes and Damages, which ſhould befall the Ship or Merchandizes in her, excepting only *Perils of the Sea*. The Ship was taken by *Pirates*; and to prove that Pirates are Perils of the Sea, a *Certificate of Merchants* was read in Court that they were ſo eſteemed. But the Court deſired to have the *Maſter of the Trinity-Houſe, and other ſufficient Merchants* to be brought into Court to ſatisfy the Court *Viva Voce* on the Friday following. Sty. 132. Mich. 24 Car. Pickering v. Barkley. Comb. 56. S. P. but no Judgment. Barton v. Wolliford.

2. In an Action brought upon a *Policy of Inſurance* of a Ship, if it appears upon the Evidence, that the *Ship was condemned by Proceſs of Law and ſeiſed*; by this Sentence the Property and Ownerſhip are deſtroyed, and there is no Remedy upon the Policy of Inſurance; Ruled by Holt Ch. J. May, 31. at Guildhall. Paſch. 10 W. 3. 1698. Ld. Raym. Rep. 724. Anon.

3. It was ruled by Holt Ch. J. May, 31. Paſch. 10 W. 3. at Guildhall, that in an Action upon a *Policy of Aſſurance* of a Ship, if the *Plaintiff's Witneſs ſwears, that the Ship was condemned by Proceſs of Law, it is good Evidence* to prove it; *but if the Defendant had offered that Matter* in Evidence *by his Witneſſes*, it would not have been ſufficient without *producing the Sentence of Condemnation*. Ld. Raym. Rep. 732. Anon.

[P. b. 12] Partners.

1. In an *Action on the Case for Money had and received to the Plaintiff's Use*, it appeared upon Evidence, that Layfield and the other Defendants were *Bankers and Partners*, and that the Plaintiff had given Layfield 20 l. for which he received a *Ticket* in the Double-Exchange Lottery, and Layfield undertook to pay what Benefit ſhould happen thereupon; That the Ticket *came up a* 40 *l. Benefit*, and for that Money the Action was brought againſt Layfield and Partners; And it was objected for the Defendants, *That it did not appear that any of them had undertaken to be Truſtees in the Lottery but Layfield, and therefore he only ought to be charged, and not his Partners*; To which Holt Ch. J. anſwered, *That they were Partners in their Trade, and Goldſmiths, and that the Adventurers put their Money in upon the Credit of the ſeveral Goldſmiths that had undertaken to pay the Benefits*; And it ſhould be *preſumed, that the Act of Layfield was the Act of the others*, and ſhould bind them, *unleſs they could ſhew a Diſclaimer or Refuſal to be concerned in it.* 1 Salk. 292. pl. 33. coram Holt Ch. J. at Niſi Prius. Layfield's Caſe.

[P. b. 13] Sheriff.

1. An Action upon the *Caſe againſt a Sheriff upon an Eſcape* ſuffer'd by his Bailiff upon a mean Proceſs, and it was proved in Evidence as neceſſary to make this Caſe *that there was ſuch a Debt*, that *ſuch a Proceſs and Warrant was, and is a due Debt.* And laſtly, *That the Party arreſted was become inſolvent*, otherwiſe he ſhould not have recovered Damages to the Value of his Debt, as here he did upon all this proved Evidence as aforeſaid. Clayt. 34. pl. 59. Aſſiſ. a. Aug. 11 Car. Barkley Judge. Tempeſt v. Linley.

2. In Treſpaſs brought againſt the Sheriff for Goods taken, upon Not Guilty pleaded, he gave in Evidence, that he *levied them in Execution by Virtue of a Fieri Facias.* The *Plaintiff made Title* to the Goods *by a prior Execution, but fraudulent, and by Bill of Sale made of them to him by the Officer*, viz. the *Sheriff Predeceſſor to the Defendant.* And upon this Trial before Holt Ch. J. at Hertford, Lent-Aſſizes 1698. 11 Will. 3. it was ruled by him after Argument of the Counſel on both Sides, that the Defendant, though *Sheriff, ought to give in Evidence a Copy of the Judgment.* But it would have been *otherwiſe if the Treſpaſs had been brought by the Perſon againſt whom the Fieri Facias iſſued.* Ld. Raym. Rep. 733. Lake v. Billers and al.

(P. b. 14) Strangers.

1. If one makes an *Anſwer in Chancery*, which may be prejudicial to his Eſtate, it may be given in Evidence againſt him, but not againſt Alienee. 1 Salk. 286. pl. 19. Hill. 2 Ann. B. R. Ford v. Grey.

6 Mod. 44. it cannot be read againſt Alienee by any claiming under Alienor.

(P. b. 15) Succeſſors.

1. The *Leaſe of a Biſhop not warranted by the Statute* is avoidable by the Succeſſor only and not by himſelf; Per Curiam. Keb. 182. pl. 153. Mich. 13 Car. B. R. in Caſe of Scudamore v. Belliſon.

2. Plaintiff was *nonſuited in Ejectment againſt the former Maſter of St. Catherines* in a former Trial, and this was given in Evidence now againſt the new Maſter, though the Council objected, that the Maſter comes not in Privity, and that there was more given in Evidence here than

than at the former Trial; But per Pemberton Ch J. the Succeſſor *comes in under his Predeceſſor, and is like to an Heir and Anceſtor.* Skin. 15. Mich. 33 Car. 2. B. R. Ld. Brounker and Sir Robert Atkins.

(P. b. 11) Traders.

1. The way and *manner of Trading* is to be taken Notice of, and the beſt *Proof*, that the Nature of the Thing will afford, is only required. When *Goldſmith's* give their Notes, no Witneſſes are by, and their Notes to pay Money or Tickets are *Evidence* of the Receipt of the Money; Per Holt Ch. J. 1 Salk. 283. pl. 14. Hill. 12 W. 3. Ford v. Hopkins.

## (Q. b. 1) What muſt be given in Evidence in Reſpect of the Plea.

Account.

1. Account *of Deceipt by the Hands of J. S.* the Defendant *pleads he was never the Receiver*; and Evidence that J. S. gave that to him is good. Kitch. 232. cites 2 H. 4. fo. 13.

2. Debt upon Arrearages of Account, *he oweth him nothing in Manner and Form*, and *Evidence that there was No ſuch Account* is good. 2 H. 6. fo. 26. Kitch. 237. Br. General Iſſue, pl. 7. cites S. C. & S. P. by Newton.

3. In Debt upon an Account, the Defendant may plead *Nul tiel Accompt* or *Nil debet*, and give in Evidence that there is *no Account between the Parties*. Heath's Max. 9. cites 20 H. 6. 24. Br. General Iſſue, pl. 7. cites S. C. & S. P. by Newton.

4. Upon an Inſimul Computaſſet, the Plaintiff muſt be ſure to prove the *Day of* the Account *and Sum certain*; Agreed upon; otherwiſe he will be nonſuited. L. P. R. 25.

5. In an Inſimul Computaſſet, if the *Plaintiff proves a Penny leſs, or more than is laid in the Declaration* he muſt be nonſuit. Trin. 2 Ann. Hill v. Rebow.

(Q. b. 2) Non Cepit.

1. *Replevin of a Sow and Piggs*, the *Defendant juſtifyed for the Sow*, and *to the Piggs Ne priſt pas*, and it was found by the Jury that the Sow was with Pigg at the Time of the Taking, and farrowed her Piggs and well; And ſo it ſeems that this Matter was given in Evidence, and therefore this is a *Special Taking in Law*. Br. General Iſſue, pl. 88. cites 18 E. 3. and Fitzh. Replevin, 34.

2. Action of *Extortion againſt the Sheriff, who pleads that he took not and Evidence that by Preſcription he hath a Barr Fee of every one which he takes, and is good*; For it is no Extortion. Kitch. 238. cites 21 H. 7. fo. 17.

3. On Non cepit, the Evidence was, that there being a *Contention about ſome Sheep which were then in an Highway, or had been ſeiſed as felons Goods, &c. one P. came to F. and giving Bond to reſtore the Sheep to him who had Right to them, he took the Sheep into his Keeping, &c.* and farther that *the Servants of F. had ſeiſed the ſaid Sheep to his Uſe, yet F. Non Cepit*; Per Cur. 1 Le. 42. pl. 54. Mich. 28 & 29 Eliz. C. B. Wood v. Foſter. Godb 112. pl. 135. Wood v. Aſh and Foſter. S. C. held accordingly; For he that doth ſtay, does not take. —— Ow. 139. S. C. but S. P. does not appear. —

4. In *Replevin* upon Non cepit pleaded, *Property cannot be given in* Evidence; Per Hale. Vent. 249. Mich. 25 Car. 2. B. R. in Caſe of Wildman v. Norton.

(Q. b. 3) Contract.

1. If the Plaintiff in his Declaration miſtake the Contract, either in the Sum or in the Thing ſold, *Nil debet* will be a good Plea. Heath's Max. 80. cites 21 E. 4. 20.

2. The Defendant may give in Evidence, that the Contract *was conditional*, or may plead the ſame as appears there without Traverſe; The like, as it ſeems upon Non Aſſumpſit in Action upon the Caſe. Heath's Max. 79. cites 28 H. 8. Dy. 29.

[Q. b 4] Non Infregit Conventionem.

1. B. *covenants* that he was *ſeiſed of Black-acre in Fee ſimple*, where in Truth *it was Copyhold Land* in Fee according to the Cuſtom; Per Cur. the Covenant is not broken; and the Jury ſhall give *Damages* in their Conſciences according to that Rate that the Country values Fee ſimple Land more than Copyhold Land. Noy. 142. Gray v. Briſcoe.

2. In *Covenant* the *Iſſue* was, *whether the Defendant had made an Eſtate ſufficient in Black-acre to the Plaintiff or not*; and the Evidence was, that the *Eſtate* was *not of ſuch a Value*, and ill, for it is not anſwerable to the Matter in Iſſue. Brown's Anal. 17.

[Q. b. 5] Non Dimiſit.

1. If a Demiſe to the Baron and Feme be pleaded, a Fine *Sur Releaſe* to them is No Evidence to prove the ſame. Heath's Max. 80. cites 50 E. 3. 6.

2. If a Man *leaſe* Land *by Indenture dated the 30th Auguſt* 23 *H.* 8. to have from the Feaſt of St. Michael next enſuing for 21 Years, and *after* the ſame Leſſor by Indenture *reciting the ſaid Leaſe, and that it bore date the 6th of Auguſt* 23 *H.* 8. &c. *leaſes it for Years to commence from the Expiration of the firſt Leaſe, and it is pleaded, that he leaſed by Indenture dated 30th Auguſt* 23 H. 8. as above, and *after by other Indenture, reciting that he had demiſed by Indenture dated the 30th of Auguſt* 23 H. 8. *demiſed it as above*, and Iſſue is taken that he *Non Dimiſit Modo & Forma*. The laſt Indenture may be given in Evidence, tho' the Date of the firſt Indenture be miſtaken, for it is not material, but the Effect of the Iſſue is upon the Demiſe. D. 116. pl. 70. 2 & 3 Mary adjudged.

And becauſe the Words of the Second Leaſe made to Lamborne and R. his W &c. till the End of 30 Years then next immediately after the Demiſe and Indenture of the ſaid Hiſt be fully ended and expired, and were not to have and to hold, &c. for the ſaid Years, &c. after the ſaid firſt Demiſe and Indenture fully ended, &c. the ſaid Leaſe made to L. and his W. was good notwithſtanding the falſe Recital of the 6th Day of Auguſt mentioned in the ſaid Indenture, and that this Recital was as void, and the ſaid Leaſe made to L. and his W. took Effect by the Demiſe, and Habendum, and ſo was the Opinion of all the Juſtices of C. B. upon viewing all the Indentures, by which the ſaid Parties proceeded to Iſſue upon the Demiſe, and it was found with the Plaintiff upon a Verdict at large, and he had Judgment with whom the Author of the Book was of Counſel. Bendl. 39. pl. 71. Mich. 1 & 2 Ph. & M. Mount v. Hodgken.

3. It was held by all the Juſtices that if a Man *leaſes by* his *Deed certain Parcels of Land*, and names them ſeverally, and after the Leſſor raſes the Deed, and puts *one of the Parcels out of the Deeds*, by this all the *Deed is become void*, for the Deed is entire in itſelf, and cannot ſtand in Part and be void in Part. But whether the Leſſee ſhall have Advantage to *pleat this as a Leaſe by Parol* without pleading the Deed, was made a Queſtion, and it was held by Dyer that he might, inaſmuch as it was a Demiſe

a Demiſe of the Lands, and all is of one Effect a Leaſe by Parol and a Leaſe by Deed. Mo. 35. pl. 116. Trin. 4 Eliz. Anon.

4. In an Action of *Debt for Rent*, the Defendant pleaded Non Dimiſit, and the Evidence proved a *Demiſe only in Part*, and it was held that it did not maintain the Iſſue for the Plaintiff. Dyer 200. pl. 22. Paſch. 9 Eliz. Anon. 1 And. 13. pl. 2[illegible] Clifford & Ux v. Sybil. S. C. according y—

Mo 80. pl. 211. S.[illegible]C. adjudged that the Plaintiff cannot have Judgment for any Part, but they ought to ſue again upon Demiſe of ſo much as is found to be demiſed only.——Bendl. 177. S. C.

5. If an *Ejectment* be brought *of Twenty Acres*, on a Leaſe of Twenty Acres, if the Defendant plead *Non eſt*; there, if he be *found guilty but in Ten Acres* the Plaintiff ſhall recover; but he ſhould not, if Defendant had pleaded Non Dimiſit.

6. Baron and Feme Tenants in Tail made a Leaſe to the Defendant reſerving Rent, and the Baron died, and then the Wife died. In Debt by the Plaintiff as Heir for Rent-Arrear, and counted of a Leaſe made by the Baron and Feme, the Defendant pleaded Not dimiſerunt, and upon Iſſue joined the Jury found Quod Dimiſerunt by Indenture, and that the Husband died, and that after his Death the Wife entered, and diſagreed to the Leaſe, and within the Term died. Anderſon held clearly that by this Verdict the Iſſue was found for the Defendant, viz. Non dimiſerunt; For it is now no Leaſe Ab Initio, becauſe the Plaintiff hath not declared upon a Deed; and alſo by the Diſagreement of the Wife, and her Occupation of the Land after his Deceaſe, ſhe hath made it the Leaſe of the Husband only. Le. 192. pl. 274. Mich. 31 & 32 Eliz. C. B. Thetford v. Thetford. 4 Le. 50. pl. 131. S. C. to tidem Verbis.—And. 229. pl. 239. S. C. in an Action of Waſte inſtead of Debt, and the Pleading and Verdict and Judgment accordingly. —3 Rep. 27. b. 28. a. S. C. cited as adjudged accordingly.——S. C. cited as adjudged. And. 350.——

7. On Non Dimiſit, *that the Leaſe is void* for *any Cauſe may be given in Evidence*, or the ſpecial Matter may be ſhewn. 6 Co. 67. b. Mich. 4 Jac. C. B. Finch's Caſe.

8. Upon the Iſſue Non Dimiſit to an Action of Debt *for Rent upon a Leaſe Parol*, the Plaintiff cannot give in Evidence *a Leaſe by Deed*, but he may give a *Leaſe Conditional*, as an Agreement Conditional in Evidence. Brown's Anal. 16.

9. In *Debt for Rent* upon Non Dimiſit, that the Leſſor *Riens avoit* in the Land *at the Time of the Demiſe* may be given in Evidence. Co. Lit. 47.———Dy. 122. pl. 23. Marlaine v. Hardy.

10. Upon Non Dimiſit *Modo & forma*, one ſhall have Advantage of the Date and Number of Years. Heath's Max. 80. cites 1 & 2 Mariæ, D. 116.

11. If *in an Ejectment the ſuppoſed Demiſe be laid to be after the firſt Day within the Term*, altho' that regularly the Declaration has Relation to the firſt Day of the Term, yet ſhall not fictitious Relations hurt, in caſe it be *proved that the Bill was filed after the ſuppoſed Date of the Leaſe*; For it was Matter of Evidence, and examinable. Sid. 432. pl. 23. Mich. 21 Car. 2. B. R. Prodger's Caſe.

## [Q. b. 6] Dower.

1. Upon Iſſue Ne Uunques ſeiſie que Dower, the *Tenant may ſay Seiſee que Dower, and give in Evidence a Releaſe* of Dower; Quod tota Curia conceſſit. Br. General Iſſue, pl. 48. cites 11 H. 4. 33.

2. Upon the Plea of Ne unques ſeiſie que Dower, the Defendant ſhall not give in Evidence *an Eſtate upon Condition, or other Eſtate in the Husband defeated by the Remitter of the Heir* or the like. Heath's Max. 91. cites 30 H. 8. D. 41. Dy. 41. a. pl. 1. Paſch. 30 H. 8.

## [Q. b. 7] Eſcape.

Heath's Max. 80. cites S. C.

1. In *Debt upon Eſcape in the Exchequer againſt the Sheriff of London* of ſuffering a Man by them arreſted by Ca. Sa. and in Execution to Eſcape, the Defendant cannot ſay that he did not Eſcape, and give in Evidence, that he was not arreſted; For the Arreſt is confeſſed if he ſays that he did not Eſcape. Br. General Iſſue, pl. 89. cites 34 H. 8.

3. An Action upon the Caſe *againſt a Sheriff upon an Eſcape* ſuffered by his Bailiff upon a mean Proceſs, and it was proved in Evidence as neceſſary to make this Caſe *that there was ſuch a Debt*, that *ſuch a Proceſs and Warrant* was, and a due Debt and laſtly, *That the Party arreſted was become inſolvent*, otherwiſe he ſhould not have recovered Damages to the Value of his Debt as here he did upon all this proved in Evidence as aforeſaid. Clayt 34. pl. 59. 11 Car. Tempeſt v. Linley.

8 & 9 *W.* 3. 26. *No* Retaking *ſhall be given in Evidence in an Action of Eſcape, unleſs ſpecially pleaded, and Oath made by the Keeper of the Priſon, that ſuch Eſcape was without his Conſent; but if ſuch Affidavit prove falſe, ſuch Keeper ſhall forfeit* 500 *l.*

8 & 9 *W.* 3. 26. *No Retaking or freſh Purſuit ſhall be given in Evidence on the Trial of an Iſſue in an Action of Eſcape againſt the Marſhal, Warden, or their Deputies, or other Keepers of Priſons, unleſs the ſame be ſpecially pleaded, nor ſhall any ſpecial Plea be received or allowed, unleſs Oath be firſt made in Writing by ſuch Defendant, and filed in the proper Office, that the Priſoner eſcaped without their Conſent or privity, and if ſuch Affidavit ſhall appear to be falſe, ſuch Marſhal, Warden, or other Keeper, ſhall forfeit* 500 *l.*

*If the ſaid Marſhal, Wardens, or their Deputies, or the Keeper of any other Priſon ſhall after one Days Notice in Writing for that Purpoſe refuſe to ſhew a Priſoner committed to the Creditor or his Attorney; ſuch Refuſal ſhall be adjudged an Eſcape.*

*And if any Perſon deſiring to charge a Perſon with any Action or Execution, ſhall deſire to be informed by the ſaid Marſhal, Warden, their Deputies, or the Keeper of any Priſon, whether ſuch a Perſon be a Priſoner, the ſaid Marſhal, &c. ſhall give a true Note in Writing to ſuch Perſon or Attorney upon Demand thereof at his Office, or he ſhall forfeit* 500 *l. And ſuch Note in Writing ſpecifying that ſuch Perſon is an actual Priſoner in his Cuſtody, ſhall be accepted as ſufficient Evidence, that ſuch Perſon was at that Time in actual Cuſtody.*

4. It is abſolutely neceſſary to charge the Marſhal in Debt for Eſcape, that he have *Notice of the Party's being charged in Execution*; Per Cur. 12 Mod. 635. Hill. 13 W. 3. Anon.

## (Q. b. 8) Non eſt Factum.

1. Whether upon the Plea Non eſt Factum generally the Defendant may give in Evidence, That the *Plaintiff* afterwards *pulled the Seal off* from the Deed, Dubitatur. Brown's Anal. 16.

2. *But* upon Non eſt Factum pleaded, generally the Defendant may give in Evidence *Minus literatus*. Brown's Anal. 16. If it was read to him different from what it really is. Vide Faits (S).

3. *Two Seal a Deed*, the *Seal of one is broken off*. He ſhall ſay Non eſt Factum upon the ſpecial Matter, as upon a Raſure or Interlining, or where

where the Man is not lettered; and this ſhall avoid the Deed, though the Seal of the other remains entire. Br. Obligations, pl. 43. 3 H. 7. 5.

4. *The like* upon *Delivery* of the *Deed* as an *Eſcrow*. Brown's Anal. 16.—If the Stranger to whom the Deed was delivered as an Eſcrow, delivers it over to the Party before the Condition performed; this may be given in Evidence on an Action brought upon this Bond; Per Brooke Br. General Iſſue, pl. 26. cites 14 H. 8. 28. Per Hale Ch. J. an Eſcrow may be given in Evidence on Non eſt Factum, but Twiſden and Wild J. doubted. 3 Keb. 142. Manning v. Buckner.

5. If in Debt on an Obligation the Defendant plead Non eſt Factum, and upon Trial gives in Evidence, That the *Seal of the Bond* was *broken* off, and put on again, or that any Part of it was raſed, it will be a good Proof to bar the Plaintiff. Heath's Max. 84. cites 5. Rep. 119. and 11 Rep. 27.

6. On Non eſt Factum, it is good *Evidence, that upon Payment of a Sum agreed upon by Obligor and Obligee, the Plaintiff took the Defendants Seal off the ſaid Obligation.* Dy. 112. Upon Demurrer al Evidence. a. pl. 50. Hill. 1 & 2. P. & M. Peers v. Bithop.

7. But if a *Deed* had been *delivered to A. to be given to the Plaintiff, and the Plaintiff refuſes it* is no Evidence on Non eſt Factum; for by the firſt Delivery it was the Defendants Deed, and no ſubſequent Refuſal ſhall have Relation to avoid it Ab initio; Yet *if the Deed had been delivered to A. to be given to B. upon the Performance of Conditions, If A. delivers it before the Performance* of the Conditions, the Maker may plead Non eſt Factum. It is no Evidence if the Plaintiff is a Monk, nor that he is another that bears the ſame Name, yet it is good Evidence that the Bond was made by another who bears the ſame Name with the Defendant. D. 163. 167. pl. 14. Trin. 1 Eliz. Taw v. Bury. And. 4. pl. S. S. C.—Bendl. 75. pl 117. S. C.—S. C. cited 3 Rep. 26. S. —

8 Carus asked the Judges whether *Razure* may be given in Evidence on Non eſt Factum pleaded? Dyer and other Judges anſwered not; becauſe he thereby acknowledges the Deed to have *been once his Deed*, and avoids it by a ſubſequent Matter, and therefore muſt plead ſpecially. Mo. 66. pl. 179. Trin 6 Eliz. Anon. Savil. 71. Manwood v. Harris.

9. In all Caſes when the Obligation *was once his Deed*, and after *before Action brought it becomes no Deed*, either by Razure, or Addition, or other Alteration of the Deed, or by breaking the Seal, in this Caſe though it was once a Deed, yet the Defendant may ſafely plead Non eſt Factum; for without Queſtion at the Time of the Plea which is in the preſent Time, it was not his Deed. 5 Rep. 119. b. Trin. 2 Jac. C. B. in Whelpdale's Caſe.

10. *Coverture* may be given in Evidence Non eſt Factum; but *Infancy* muſt be pleaded; Per two Juſtices. 3 Keb. 228. pl. 40. Trin. 25 Car. 2. B. R. Cole v. Delaune.

11. Upon Non eſt Factum to a Bond, one of the *Witneſſes* being *ſubpœnaed did not appear*; and it was offered to prove that he *owned it* his Bond, but denied. Arg. 12. Mod. 500. Paſch. 13 W. 3. Dillon v. Crawly.

12. Though Feme Covert *ſeal and deliver a Deed*, yet ſhe may plead Non eſt Factum, and give Coverture in Evidence; Per Holt Ch. J. 12 Mod. 609. Hill. 13 W. 3. Anon.

13. *Infancy* is not Evidence to Non eſt Factum, but *Coverture* is. Ld. Raym. Rep. 313. Arg. in Caſe of Thomſon v. Leach.

14. Infancy, or *made by Dureſs*, cannot be given in Evidence upon Non eſt Factum, Lib. 5. Whelpdale's Caſe, 119. becauſe thereby the Bond is not void, but only voidable; otherwiſe the *Bond of a Feme Covert, or Monk*; for there the Bond is void, and ſo Non eſt Factum; and ſo of a Bond made to a Feme Covert, and the Husband diſagrees to it, or by

Husband and Feme Non eſt Factum of the Wife. T. per Pais, [467] 376.

(Q. b. 9) Liberum Tenementum.

1. In *Treſpaſs* the Defendant *pleaded that the Locus in quo, &c. is ſix Acres in D. which are his Freehold*; On Iſſue thereon, if the *Defendant has ſix Acres in D. and the Plaintiff other ſix Acres* there, the *Defendant cannot give in Evidence that the Treſpaſs was committed in his own Land*; for his Plea ſhall be intended to refer to the Plaintiff's Land, for until he names ſpecially the Land, he does not vary from the Plaintiff's Meaning, conſequently the Plaintiff need not make any new Aſſignment. Dy. 23. b. pl. 147. Mich. 28 H. 8. Anon.

(Q. b. 10) Molliter Manus Impoſuit.

Ld. Raym. Rep. 62. cites S. C. and the Court agreed it to be good Law.

1. You cannot juſtify beating of a Man *in Defence of your Poſſeſſion*, but you muſt ſay you did Molliter Manus imponere. Molliter Inſultum fecit in Defence of Poſſeſſion is not good, but a Contradiction. Mod. 36. pl. 86. Hill. 21 & 22 Car. 2. B. R. Jones v. Treſilian.

2. There is a Force in Law as in every Clauſum fregit, and there muſt be a Requeſt, but contra againſt an actual Force. A *Wife may juſtify an Aſſault in Defence of her Husband*, and ſo may *Servant of his Maſter*, but * *Not a Maſter in Defence of his Servant*, becauſe he may have an Action Per quod Servitium amiſit. If a Perſon hold up his Hand to ſtrike the Husband, the Wife may make an Aſſault to prevent the Blow; But a Man cannot juſtify an Aſſault in Defence of his Houſe, Goods, or Cloſe, but muſt plead Molliter Manus impoſuit. 1 Salk. 407. pl. 2. Mich. 7 W. 3. Leeward v. Baſilee.

* Ow. 150. con.

3. If one enters my Ground, the Owner muſt requeſt him to depart before he can lay Hands on him to turn him out; For every *Impoſitio Manuum* is an Aſſault and Battery, and this Breaking of the Cloſe in Law cannot be juſtified without a precedent Requeſt; But if one *breaks down the Gate, or breaks open a Door, or comes into my Cloſe Vi & Armis*, I need not requeſt him to be gone, but may lay Hands on him immediately; for it is but returning Violence with Violence; ſo if one forcibly takes away my Goods, I may oppoſe him without any more ado, for there is no Time to make a Requeſt. An Attempt to take or reſcue any Thing in my Poſſeſſion is an Aſſault on my Perſon, and a Taking from my Perſon. 2 Salk. 641. pl. 12. Ann. B. R. Green v. Goddard.

(Q. b. 11. Ne Infeoffa pas.

1. If a Man *pleads Feoffment of one Jointenant to his Companion by a ſtrange Name, or of a Feme Covert to another Similiter*, the *other may ſay that Ne Infeoffa pas*, and give the Matter in Evidence; Per Cur. and the Court ſhall inſtruct the Jury of the Law. Br. General Iſſue, pl. 73. cites 18 E. 4. 29.

(Q. b. 12) Ne Unques Executor.

1. An Action of Debt was brought againſt J. S. Executor of the Teſtator W. he *imparls*, and therefore he cannot plead to the Writ that he is Adminiſtrator, and not Executor, and therefore, by the Direction of the Court, he pleaded *Ne Unques Adminiſtrator as Executor*, and gave in Evidence that he *is Adminiſtrator*, and not Executor per Curiam. Quod nota. Br. General Iſſue, pl. 61. cites Ed. 4. 4.

2. On

2. On the ſame Plea an Executor gives in Evidence a *Commiſſion ad Colligendum, in which was an Authority ad Venaendum*; But this was an miniſtration, and the Ordinary had no Authority to ſell Goods tho' they were in Danger of periſhing, and the Brief de Colligendo ought to expreſs the proper Name of the Commiſſory or Ordinary. Dy. 255. b pl. 8. Mich. 8 & 9. Eliz. Anon.

3 Upon *Ne Unques Executor, Ne Adminiſter come Executor*, it is good Evidence by Defendant to *produce the Letters of Adminiſtration* by which he adminiſtred, *and that he did not adminiſter before the ſaid Letters*, for then he cannot be an Executor de ſon tort. Dy. 305. b. pl. 61. Mich. 13 & 14 Eliz. Anon.

S. C. cited Skin 365. pl. 9. Mich 5 W & M. in B. R. in Caſe of Harding v. Salkeld, and denied by Holt Ch. J. and Eyres, *cæteris tanentibus*; and Holt ſaid, that he ſhall be charged notwithſtanding.—12 Mod 46. S. C. cited, and denied to be Law; and rather an Evidence to charge the Defendant than diſcharge; they might have been pleaded in Abatement but it is no Plea in Bar.

4. Executor de ſon Tort, pleads Ne Unques Executor, &c. *Execution was againſt him for the whole Debt, viz. 60 l. altho' in Truth he had not medled but with one Bedſtead of ſmall Value.* Noy. 69. Anon. about 39 Eliz. and there ſaid that one Mr. Offley had been charged to 100 l. and he had meddled but with one Bible, therefore take Heed, and plead ſpecial Matter.

5. If Executors, after Ne Unques Executors pleaded, may give in Evidence that the *Parties are living?* Wylde Recorder of London conceived they may; but the Court doubted. 1 Keb. 414. pl. 120. Mich. 14 Car. 2. B. R. Anon.

6. Upon Iſſue of Ne Unques Executor, *Forgery* or other Things in Avoidance of the Will ſhall not be given in Evidence. Sid. 359. pl. 1. Paſch. 20 Car. 2. B. R. Noel v. Wells.

7. In an Action upon the *Caſe* againſt the Defendant *for Goods ſold*, he came and pleaded in Bar, that he was Executor, where the Plaintiff had charged him as Adminiſtrator; and upon a Demurrer adjudged for the Plaintiff, for it was but in Abatement, for the Matter is if he be chargeable or no; and tho' it was ſaid that this was well pleaded in Bar to the Action, as in Robinſon's Caſe, 5 Rep. 32. and that upon Evidence of Ne Unques Executor, he may give Letters of Adminiſtration in Proof, Dy. 305. this was *denied per Holt* Ch. J. and Eyres, *cæteris tacentibus*; and Holt ſaid, that this notwithſtanding, he ſhall be charged, but he ſaid it is *otherwiſe* of Letters *ad colligend. bona defuncti*; but where one ſues as Executor, the Defendant may plead by Way of Eſtoppel that he was Adminiſtrator, &c. Skin. 365. Harding v. Salkeld.

If there be Judgment againſt an Adminiſtrator by the Name of Executor, and he be ſued afterwards as Adminiſtrator, for the ſame Cauſe he may give the former Judgment in Evidence, for whether Executor or Adminiſtrator, he is ſtill chargeable to Plaintiff, and it is no Plea in Bar to ſay Adminiſtrator and not Executor. Cumb. 220, 221. Mich 5 W. & M. in B. R. Harding v. Salkeld. 12 Mod. 46. S. C. accordingly, per Holt Ch. J.—Skin. 265. pl. 9. S. C. accordingly.—1 Salk. 298. pl. 4. S. C. held accordingly.—

8. But *Bona Notabilia* may.—But not that Teſtator was *Non Compos.* Sid. 359. in S. C.

## (Q. b. 13.) Ne Unques ſon Receiver.

1. In a Writ of *Account* as his Receiver, if the Defendant pleads Never his Receiver, &c. He cannot give in Evidence, *that the Plaintiff bailed to him the Money to deliver over to J. S. the which he has done accordingly, &c.* Tho' this ſpecial Matter proves that he is not accountable, becauſe upon the Delivery he was accountable conditionally, (that

(that is to ſay) if he did not deliver it over. D. 196. b pl. 1. cites 3 Eliz. between Sir George Speake v. Hungerford.

[Q. b. 14] Nil habuit in Tenementis.

1. *Debt for Rent* upon a Demiſe for Years, the Defendant pleads Nil habuit in Tenementis, the Plaintiff *replies*, that he had a good, and *ſufficient Eſtate to make the Demiſe* to the Defendant Modo & Forma, &c. Scil. that he was ſeiſed in hit Demeſne as of Fee, upon which Iſſue is joined; and upon Evidence it was objected, that he ought to *ſhew an Eſtate in Fee*; Non allocatur, for the Iſſue is joined upon the good and ſufficient Eſtate to make the Demiſe; and any Eſtate is ſufficient for this Purpoſe, out of which the Eſtate demiſed may be derived; and all added after the Scil. is but Form; but if he had not ſaid, that he had a good and ſufficient Eſtate, but *only ſaid, that he was ſeiſed in his Demeſne as of Fee*, then he had been reſtrained to prove ſuch Eſtate; Per Holt Ch. J. Skin. 624. pl. 18. Mich. 7 W. 3. B. R. Wilſon v. Field.

Ld Raym. Rep 331. S. C. —

2. *Debt* for Rent on a Demiſe by Plaintiff to Defendant; Defendant *pleaded*, that *Plaintiff Nihil habuit in Tenementis*, Plaintiff *replied* that he was *poſſeſſed of a Leaſe for* 41 *Years made to him by the Lord W who had full Power to demiſe*; and though the Judgment was reverſed for a Fault in the Declaration; yet the Replication was held good without ſetting forth a Title, which Holt ſaid was true; and that in that Caſe it was not neceſſary to ſet out a Title, for Nihil habuit in Tenementis was the Iſſue; for if Defendant pleaded Nihil habuit in Tenementis, the Plaintiff may reply, Quod ſatis habuit in Tenementis, viz. in Feodo or any other Eſtate on the Trial whereof he may give any other Eſtate in Evidence; the alledging any particular Eſtate being only Form, the Iſſue being whether he had any thing in the Premiſſes. 12 Mod. 191. Paſch. 10 W. 3. Silly v. Dally.

[Q. b. 15] Non Feoffavit.

1. If one plead Ne Enfeoffa Pas, he may give in Evidence that the *Parties were Joint-Tenants*. Heath's Max. 80. cites 18 Ed. 4. 29.

2. In Treſpaſs, it was reſolved upon Evidence at Barr, that where the Defendant entitles himſelf to Land, by a Feoffment made *to A. to the Uſe of the Defendant of a Manor in which, &c. is Percel*, that that was naught, becauſe *no Attornment is ſhewn* to be made to the Feoffee to the Uſe of A. *though* it was *ſhewn that the Tenants have paid their Rent to the Defendants*. Noy. 146. Evelinge v. Sawyer.

(Q. b. 16.) Non tenet Modo & Forma.

1. *Ceſſavit, that he held divers Lands by entire Service*, he did not hold in Manner and Form, and gives in *Evidence, that he holds by ſeveral Services*, is good, for he hath no ſuch Cauſe of Action. Kitch. 238. 13 H. 7. fo. 24.

(Q. b. 17) Note of Hand.

1. A Note of 5000*l.* from A. in which he owned himſelf indebted to B. his Brother, to whom he *was not any Ways indebted*, and of which Note B. knew nothing, but *A. kept it always in his own Cuſtody, and on his Death it was found among his Papers*, was decreed to be looked upon only as Matter initiate, or intended and never perfected, and the Court

Court ſaid, they eſteemed it as no Debt at all. Williams's Rep. 204. 206. Per Ld. Harcourt. Trin. 1712. Diſhper v. Diſhper.

[Q. b. 18] Plene Adminiſtravit.

1. Note that if Executors plead Plene Adminiſtravit *in Action of Debt*, and give in *Evidence Payment of Legacies*, the Plaintiff in the Action of Debt may demur in Law thereupon; for ſuch Adminiſtration is not allowable in Law before the Debts paid. Br. Aſſets enter maines, pl. 10. cites 33 H. 8.

2. Caſe was brought againſt Executors; they were at Iſſue, upon Nothing in their Hands; it was given in Evidence on the Plaintiff's Part, that a *Stranger was bound to the Teſtator in* 100*l. for Performance of Covenants; which were broken*; for which the Executors brought Debt upon the Obligation depending which Suit, both Parties ſubmitted themſelves to the *Arbitrament* of A. and B. who *awarded*, that the Obligor ſhould pay to the Executors 70*l. in full Satisfaction*, &c. and that the Executors ſhould releaſe, &c. which was done accordingly. And it was agreed by the Court, that by the Releaſe it ſhall be taken in Judgment of Law, that the Executors have Aſſets to the Value of the whole 100*l.* And although the Executors were compelled by the Award to make the Releaſe, yet it was their own Act to ſubmit themſelves to the Arbitrament. 3 Le. 53 pl. 77. Mich. 15 Eliz. C. B. Anon.

3. In Debt againſt an Adminiſtrator, and *Plene Adminiſtravit* pleaded, the Judge did allow him to *give in Evidence Judgments precedent without pleading it*, and Ward Serjeant of the other Side did yield to it. It was alſo Ruled, *That an Acquittance ſhewed in Evidence for* 100*l. paid to a Creditor is good in Diſcharge of an Inventory, and if the Debt was compounded for leſs than the Acquittance mentions, this ſhall come on the other Part to ſhew*; and the rather it was held ſo here, becauſe this Acquittance was from an Officer of the King's for Cuſtoms due, and they do not uſe to take leſs than is due. Clayt. 65. pl. 112. Aſſiſ. a. July 1638. before Barkley, Judge. Baraclough's Caſe.

4. In *Debt upon a Bond* againſt an Executor, who pleads Plene Adminiſtravit, and gave in *Evidence Bonds cancelled and taken in, or Acquittances for Money*, this held not good without Proof of real Payments made, or new Security given, &c. Clayt. 112. pl. 193. March 24 Car. Coram Turner Serjeant. Sot's Caſe.

5. On a Plene Adminiſtravit, Defendant cannot give in Evidence *of Judgments &c. ſince the Iſſue joined, nor ſince the Writ purchaſed*, but theſe muſt be pleaded. For Iſſue is whether Plene Adminiſtravit at that Time. But though he cannot give ſuch Evidence, yet he may plead it. 3 Salk. 153 pl. 4. Hill. 8 W. 3. C. B. Anon.

6. On Plea of Plene Adminiſtravit, *a Judgment* was given in Evidence *againſt the Teſtator*, and that *Execution* had been *taken out againſt the Executor*, and that a third *Perſon gave a Note to the Sheriff for the Money*. This is not Evidence of the Judgments being ſatisfied as when Satisfaction is entered upon Record, or the Money paid or levied by the Sheriff, for on a Ca. Sa. the Sheriff will be liable to an Eſcape, or a Fieri Facias may be ſued againſt the Defendant; Per Powell J. at Exeter, Lent Aſſiſes 1710. Tackle v. Bingham.

7. It is no Plea where he *is charged in Debet and Detinet*, becauſe he is charged for his own Occupation. 1 Mod. 185. in pl. 17. Trin. 26 Car. 2. C. B. Anon.

8. A Bond was put in Suit againſt an Executor who pleaded Plene Adminiſtravit, *that he was a Bond Creditor himſelf and paid himſelf*; on a Trial it appeared there was an *Interlineation of* 50*l. after the Bond was executed*; So at Law the Bond was intirely void. Now Application

was made, that though the Bond be void at Law that it may be conſidered as good Equity for what it was really given. Chancellor, This at moſt can be a Charge at ſimple Contract, for you yourſelves have deſtroyed it's being as a Bond, ſo it is as if it never had been; *ſo can be no Bar to the Payment of a Debt of a ſuperior Nature.* Sel. Caſes in Canc. in Ld. King's Time. 24. Trin. 11 Geo. Anon.

9. Neither is it now neceſſary *to prove the Execution of the Bonds*, but *producing the Bond is ſufficient*, though held otherwiſe formerly; Coram Eyre and Forteſcue apud Weſtminſter, Mich. 6 Geo.

10. On Plene Adminiſtravit, Rent due and paid, if Covenants or Leaſes are produced, muſt give Evidence of their Execution, or of Parties being in Poſſeſſion and paying Rent, it may be ſufficient to ſhew the Right of Leſſor to the Rent; Coram Probyn J. at Wells Summer Aſſiſes 1728.

11. A *Feme ſole Executor made a Deed of Gift* of Teſtator's Goods in *Truſt*, but *continued Poſſeſſion* of them and married J. S. and the *Baron likewiſe had Poſſeſſion* of them. An Action of Debt is brought by a Creditor of Teſtators, and fully Adminiſtered pleaded. The Verdict ſhall paſs for the Plaintiff upon this Evidence, for this *Alienation being fraudent* was void to all Creditors, and ſo as to the Plaintiff the Goods continued the Teſtators, and were Aſſets in the Defendant's Hands. Went. Off. Executors, 189, 190. ſays it was ſo held in B. R.

19. At Exeter, Lent Aſſiſes 1711, it was declared as Holt's Opinion that where *old Bonds cancelled, and delivered up* were given in Evidence by an Executor, the Party muſt prove the Payment of the Money; but of late the Practice had been otherwiſe, for theſe are ſufficient of themſelves, unleſs there be a Suſpicion of Fraud, as when theſe Bond, are to Relation.

## (Q. b. 19) Riens per Deſcent.

1. An Action of Debt was brought againſt *Executors*; they are at Iſſue upon Aſſets in their Hands; it is good Evidence that they have *ſold Land by the Will* of the Teſtator, and have the Money; and ſo is a *Recovery in Treſpaſs* of Goods taken in the Life of the Teſtator. Br. General Iſſue, pl. 4. cites 3 H. 6. 3.

Fitzh. cites S. P. as unanimouſly agreed per totam Curiam in C. B. Paſc. 5 Jac. in Standen's Caſe.

2. In an Action of Debt *upon an Obligation againſt an Heir*, if Defendant pleads Riens per Diſcent, and *Plaintiff maintains that he has Aſſets*, it may well be given Evidence, that the Defendant *before the Writ purchaſed aliened the Aſſets by Fraud, and Covin to defeat the Plaintiff*, and ſo it is void by the Statute 13 Eliz. though it was not pleaded, becauſe it is upon the General Iſſue. Adjudged. 5 Rep. 60. Mich. 33 Eliz. B. R. Gooch's Caſe.

3. In Debt againſt an Heir, he pleads he hath nothing in Fee by Deſcent, and in Evidence it appeared he had *Fee, but depending upon an Eſtate Tail*, and upon this a ſpecial Verdict, ſee by me this Iſſue againſt the Defendant; for he ought to have pleaded this ſpecially, and ſo it was done in Caſe of Traford Hill. 31 Eliz. and concluded Unde debitum Prædictum ſolvere Non Potuit, and ſee of the Rent or Service depending upon this Reverſion, and of what Value they ſhall be, &c. Clayt. 49. pl. 84. Aug. 13 Car. Coram Barkley Judge of Aſſiſe. Anon.

4. *Debt againſt the Heir* upon the Bond of the Anceſtor, &c. *Riens per Diſcent* was pleaded. The *Heir gave in Evidence an Extent againſt him upon a Debt owing by his Father upon Bond to the King*; And it was ruled by Holt Ch. J. that a *Copy of the Bond ſworn, or the Bond itſelf, ought to be given in Evedence* the Suit being by a Creditor, otherwiſe the Extent ſhould not be allowed. And for Want of this Holt diſallowed ſuch Extent. Summer Aſſiſes 1699. at Darby. And next Morning in another

other Trial between Horne and the ſaid Defendant Adderley, the Bond acknowledged by his Anceſtor to the King was produced in Evidence, the Iſſue being the ſame as in the other Action. Ld. Raym. Rep. Rep. 734, 735. Sherwood v. Adderley.

5. In Debt againſt the Heir who pleads Riens per Diſcent; Proof that the *Father was ſeiſed, and that the Heir did enter* after his Death is well enough; for it ſhall be preſumed Fee-ſimple, till the Contrary be ſhewn. T. per Pais, 225.

(Q. b. 20) Robbery. On the Statute of Winton.

1. Upon the Statute of Winton in Caſe againſt the Hundred; The *Evidence muſt be ſtrict Ex Parte* Quer. Many Inſtances have been where Perſons have pretended to have been robbed but never were. 2dly. The *Character of the Perſon robbed ought to be clearly made out*, with ſuch other Circumſtances, as may confirm his Credit. 3dly. That the Party robbed *ought to give Notice* of the Robbery *immediately to the next Conſtable or Vill*, and he need not delay it till he has a Juſtice of Peace his Warrant, for this is not neceſſary, that a Hue and Cry may be levied, for the Intent of the Law is not elſe anſwered, this being intended *for the immediate Purſuit of the Robbers*. 4thly. This Hue and Cry ought not to *deſcribe* the Perſon by his Cloaths, &c. for theſe may be altered, but *the Horſe with his Colour, &c.* Upon a Motion for a new Trial, which was granted, there being ſome contrariety in the Evidence concerning the Deſcription of the Robbers, whether they were Horſemen or Foot-Pads, he ſoon after the Declaring they were on Foot to a Shepherd, but ſwearing on the Trial they were Horſemen. Upon Trial coram Parker Ch. J. Trin. 3 Geo. Regis B. R. Keil v. Hundred of Eltham Middleſex.

(Q. b. 21) Son Aſſault Demeſne.

1. *M. throws a Bottle at C. and C. returns another*; this is juſtifiable in C. and lawful, and though he had wounded M. he might have juſtified it in an Action of Aſſault and Battery. For the firſt throwing the Bottle manifeſts a malicious Deſign. Kel. 128.

2. In *Treſpaſs by Baron and Feme for Battery of the Feme*, the *Defendant pleaded Son Aſſault Demeſne of the Wife*; Plaintiff *replied, that the Defendant was going to wound her Husband*; Defendant demurr'd and Judgment Pro Quer. for the Wife may juſtify an Aſſault in Defence of her Husband; ſo may a Servant of his Maſter, but not a Maſter in Defence of his Servant, becauſe he may have an Action Per quod Servitium amiſit, nor can a Man juſtify an Aſſault in Defence of his Freehold, Houſe, or Cloſe, but can only ſay Molliter Manus impoſuit. 1 Salk. 407 pl. 2. Mich. 7 W. 3. B. R. Leeward and Ux v. Baſilee. Ld Raym. Rep. 562. S.C. accordingly.

3. On Son Aſſault Demeſne, the Evidence was that there had been ſome *conteſt about taking Sea Sand near Penzance*, and *the Wife of one of the Perſons objecting*, &c. *ſtrikes with her Fiſt a Man loading Sand in Pots* on Horſeback; *Words ariſe and the Woman attempts to let the Sand fall out of the Pots by taking out the Pin*, but *the Man ſhoves her from him, and then beats her very much*, but the Judge held this could not be given in Evidence to maintain this Iſſue, for though it was a continuing of the firſt Quarrel, and if the Woman had been kill'd it would have been but Manſlaughter, nor Se defendendo, becauſe this laſt beating cannot be juſtified. Holt Ch. J. always held that *if one ſtrikes me, and then runs away, and I follow and beat him*; In an Action for this, *I cannot plead Son Aſſault Demeſne*, for the Words of the Plea are, Inſultum fecit & ipſum verberaſſe voluit per quod Defendans ſeipſum erga Quer.

ad

ad tunc & ibidem defendebat, &c. Hill. Vac. 1716. Coram Eyre Ch. J. at Launceſton.

4. In *Aſſault and Battery againſt Four; all pleaded Son Aſſault Demeſne*; Evidence that the *Plaintiff ſtruck one firſt, and then another, and then a Third, and then a Fourth.* Every Defendant ought to have pleaded ſingly, and as the Plea was joint the Aſſault ought to have been proved. Per King Ch. J. at the Caſtle at Exon. 1716.

## (Q. b. 22) Nul Tort.

1 In *Attaiat in Aſſize* the *Tenant cannot plead Feoffment upon Condition without Deed, but* ſhall ſay *Nul Tort, and ſhall give this in Evidence*, and the Jury is bound to find this in Pain of Attaint. Br. General Iſſue. pl. 72 cites 18 E. 4. 12.

2. *Aſſize by a Woman* of certain Land the Defendant ſhall not plead Diſcontinuance by the Baron, but ſhall ſay No Tort, and ſhall give the Matter in Evidence. Br. General Iſſue, pl. 64. cites 45 Aſſ. pl.

For this Releaſe after the Diſſeiſin is an implied Confeſſion of the Diſſeiſin, and repugnant to the Plea of No Tort No Diſſeiſin. Jenk. 18, 19. pl. 35.

3. In an *Aſſize* if the Tenant pleads No Tort, No Diſſeiſin, he cannot give in Evidence *a Releaſe after* the Diſſeiſin, *but* he may give in Evidence a Releaſe *before* the Diſſeiſin, for then upon the Matter there is no Diſſeiſin. C. L. 283.

4. If the *Leſſor releaſes to the Leſſee for Years, and his Heirs*, and the *Leſſee upon ouſting of him after the ſaid Releaſe brings an Aſſize* againſt the Leſſor, the Jurors upon Evidence of the ſaid Releaſe may find no Diſſeiſin, for the Releaſe was before the ſuppoſed Diſſeiſin. Jenk 19. pl. 35.

5. *So* upon the General Iſſue in an Aſſize the Recognitors may find a *Feoffment upon Condition*, and that the Plaintiff *entered for the Condition broken.* Jenk. 19. pl. 35.

6. In an *Aſſize* if the Tenant pleads Nul Tort, Nul Diſſeiſin, he cannot give in *Evidence a Releaſe after the Diſſeiſin*, *but* a Releaſe *before* the Diſſeiſin he may, for then there is no Diſſeiſin upon the Matter. Tr. per P. [467] 376.

## [Q. b. 23) Nul Waſte.

1. Waſte, no Waſte done was pleaded, he may give in *Evidence, That the Houſe was burnt by the King's Enemies, or by Thunder, or it was ruinous at the Time of the Leaſe* is good; or that it fell either by Wind or Tempeſt. Br. General Iſſue, pl. 46. cites 12 H. 8. 1.

2. Waſte was aſſigned in Boſcis, viz. *In Succidendo, & Vendendo decem Quercus*, &c. and the Truth was, that the Defendant had *but lopped and ſhred the Oaks.* Whether he may ſafely plead No Waſte done, and give this ſpecial Matter in Evidence? And it ſeems that he well may, as the Waſte is aſſigned. D. 92. a. pl. 16. Mich. 1 Mar. Anon.

5 Rep. 119. b. 8. Cited per Cur and ſays, that the Defendant ought to plead the ſpecial Matter, and cannot plead Nul Waſte done, for the Entry is in the Præter Tenſe, viz. Quod non fecit Vaſtum.

3. In Waſte *aſſigned in Domibus*; the Defendant pleaded *Nul Waſte done*, and gave in *Evidence, that the Houſes were ſufficiently repaired before the Action brought*; The Court held, that this Evidence maintains the Iſſue, but he ſhould have pleaded it in Bar, becauſe now it is confeſſed that there was once a Waſte. D. 276. a. pl. 51. Trin. 10 Eliz. Anon.

4. Waſte

4. Waſte was aſſign'd by Altman *in Fodendo Foſſam in quodam Prato*, the Defendant pleaded No Waſte done; and it was found by a ſpecial Verdict, that the Defendant made the Trench to drain the Water, *Per quod Pratum Melioratur & non Pejoratur.* And it was ſaid for the Plaintiff by Mead, that this Matter ought to have been pleaded in Barr, but by the Opinion of the Court it is no Waſte. D. 361. pl. 12. Hill. 20 Eliz. Altman v. ———

He may better a Thing of the ſame Kind, as by digging a Meadow to make a Drain to carry away Water. Hob 233.

5. In an Action of Waſte in an Houſe, if Defendant pleads No Waſte done, he cannot give in Evidence that it *was ſufficiently repaired before the Writ purchaſed*, becauſe the Waſte is acknowledged at one Time, and therefore ought to plead in Bar. 2 Roll Trial (E. f.) pl. 3. cites D. 10. El. 276. pl. 51.——and 5 Rep. 119. b. Whelpdale's Caſe.

He cannot give in Evidence juſtifiable Waſte, as repairing the Houſe, &c. is, but he may give in Evidence any Thing which proves it no Waſte, as by Tempeſt, Lightning, Enemies, &c. Co. Litt. 283. So he may give in Evidence that they were ruinous at the Time of the Leaſe.

6. In an Action of Waſte, upon the Plea Nul Waſte fait, he may give in *Evidence any Thing that proveth it no Waſte, as* by *Tempeſt*, by *Lightning*, by *Enemies*, and the like; but he cannot give Evidence juſtifiable Waſte, as to repair the Houſe, or the like. If one does Waſte, and before the Action brought the Leſſee repairs it, and after the Leſſor brings an Action of Waſte, and the Leſſee pleads *Quod non fecit Vaſtum*, he cannot give in Evidence the ſpecial Matter. Co. Litt. 83. a.

7. In a Diſpute between the *Lord of a Manor and a cuſtomary Tenant about opening a Copper Mine* (where no ſuch ever was known to be before) *and ſelling the Oar*, it was proved that the Tenants had *uſed to cut Timber from off the Premiſſes, and alſo to dig Stone and ſell it.* Ld. Chan. Cowper ſaid, as to the Evidence that the Tenant might do one Sort of Waſte, as to ſell Timber and diſpoſe of it, this might be by ſpecial Grant; but that it is no Evidence that the Tenant has a Power to commit any other Sort of *Waſte of a different Species*, or that of diſpoſing of Minerals. Wm's Rep. 406. Hill. 1717. Biſhop of Wincheſter v. Knight.

8. *But a Cuſtom* impowering the Tenants *to diſpoſe of one Sort of Mineral*, as Coals, may be an Evidence of their Right to diſpoſe of another Sort of Mineral, as Lead out of a Mine. Ibid. 408.

## (R. b. 1) Proved in Evidence, what muſt, or may be in, or as to the Plea.

### Aſſumpſit.

1. Action upon the Caſe that the Defendant *promiſed* to the Plaintiff *that if the Plaintiff would diſcharge J. T. of ſuch Execution* in which he is *at the Suit of the Plaintiff, that* then *if the ſaid J. T. did not ſatisfy the Plaintiff by ſuch a Day, the Defendant would do it*, and counted accordingly, and they were at Iſſue upon Non Aſſumpſit, and the *Evidence* to the Jury in Proof of the Aſſumpſit, and the Truth of the Matter alſo, *was that the Defendant promiſed the Plaintiff's Wife in the Plaintiff's Abſence, and when he came to his Wife he agreed to it, and diſ-*

*charged J. T. without ſpeaking with the Plaintiff*, and per tot Cur. upon good Argument the Action upon the Caſe lies. Br. Action Sur le Caſe. pl. 5 cites 27 H. 8. 24. 25.

2. When an Action upon the Caſe on *Aſſumpſit* is brought, and *two Conſiderations* or more *are laid in the Declaration*, but they are *not collateral but purſuant*, as A. is indebted to B. in 100 *l.* and A. promiſes B. that in Conſideration he owes him 100 *l.* and in Conſideration that B. ſhall give him 2 *s.* that he will pay B. the 100 *l.* ſuch a Day, if B. brings his Action upon this Aſſumpſit, and declares on theſe two Promiſes, tho' the Conſideration of the 2 *s.* be not performed, yet the Action lies; But if they are *Collateral Conſiderations*, which are *not purſuant*, as if I, in Conſideration that you are my Counſel, and ſhall ride with me to York, promiſe to give you 20 *l.* here all the Conſiderations muſt be proved, otherwiſe the Action cannot be maintained. Arg. ſays, this Difference was taken by all the Juſtices in B. R. 19 El. Le. 296. pl. 105. 28 & 29 Eliz. B. R. in Caſe of Criſp v. Golding.—— If a *Promiſe is founded on two Conſiderations, and Plaintiff declares on one only*, he ſhall never have Judgment. Le. 300. pl. 410. Hill. 31 Eliz. B. R. Simms v. Weſtcott.

3. Upon an Indebitatus Aſſumpſit, the Evidence ought to be *Contract or Receit without Deed*, and not a Specialty, as *an Obligation*, or *Deed of Leaſe and Arrears*, for he ought to ſue upon the Specialty. Mo. 340. pl. 460. Mich. 34 & 35 Eliz. Anon.

4. Indebitatus Aſſumpſit, upon Non Aſſumpſit pleaded, the *Plaintiff ſhall not give any Matter of Specialty in Evidence* to prove his Debt, as a Bond, Indenture of Leaſe, &c. becauſe he may bring an Action of Debt upon Specialty, *but* he ought to give in Evidence *Matter of Contract or Receipt without Deed*. Mo. 340. pl. 460. Mich. 34 & 35 Eliz. Anon.

5. If in *Aſſumpſit upon two Conſiderations*, the *one is good*, and the *other idle*, if that which is good be proved, it is ſufficient, and though he fails in Proof of the other, 'tis not material, becauſe it is vain to alledge it, and it is as if it had not been alledged. Cro. J. 127. pl. 19 Trin. 4 Jac. B. C. Criſp v. Garnel.

Godb. 198. pl. 285 Trin. 10 Jac. S. P. decreed in the Court of Requeſts accordingly in the Caſe of Lea v. Lea.—— 6. In a Cauſe in Chancery *the King under his Sign Manual certified to the Ld. Chancellor a Promiſe made to him in Behalf of another*, and this Certificate was allowed good Evidence. Hob. 213. pl. 271. about the 9th Jac. Lord Abigny v. Lord Clifton.

7. Aſſumpſit upon an Accompt, and the Proof was, that the Plaintiff's Servant did demand ſuch Sum *prout*, &c. of the Defendant, who did *acknowledge the Debt*, and this was holden good Evidence, Quod Nota. Clayt. 98. pl. 165. Aſſiza Aug. 23. 1641. Whitfield J.

8. Upon Non Aſſumpſit pleaded to an Action upon the Caſe, Defendant may give in Evidence *that the Promiſe was conditional*, or he may plead the ſame without Traverſe. Brown's Anal. 15.

9. In Aſſumpſit for 20 *l.* Debt, upon the Evidence it did appear that *Part of the Money was paid*, and the Judgment did *heſitare* if the Plaintiff had not failed in his whole Caſe, becauſe the Conſideration is not as he hath made his Caſe to be, but after he was ſatisfied the Law was otherwiſe, and gave Direction the Plaintiff ſhould recover the Reſidue of the Money not paid, but it ſeems otherwiſe where the *Conſiderations* were *ſeveral*, as for the Price of a *Horſe ſold* to the Defendant, *and for Money lent*, and one Action for both, there both muſt be proved to be due. Clayt. 145. pl. 264. March 1650. Linley's Caſe.

10. Where

10. The Plaintiff had taken a *Diſtreſs for Rent*, and the Defendant *promiſed, if he would re-deliver it to him*, he would pay the *Sum demanded for Rent*; the Diſtreſs was delivered, and now he ſued for the Money upon the Promiſe, and the Plaintiff, in this Caſe was put to *prove there was Rent due*, &c. Nota; for I did not doubt, becauſe the Defendant hath Benefit by Re-delivery of the Diſtreſs, &c. Ergo. Clayt. 139. pl. 250. Aſſiſe Aug. 1649. Thorpe J Gower v. Wilkinſon.

11. Where an Indebitatus is brought *for divers Goods and Merchandizes ſold and delivered*, there it is requiſite for the Plaintiff to *prove more Goods than one particular* Thing ſold, *and* alſo to prove *a Price agreed* upon, otherwiſe the Action will not lie. *But* where a *Quantum Meruit* is laid, there he needs not to prove any Price agreed upon, but only the *Delivery* of the Goods, *and the Value* of them *at the Time* the Delivery. Therefore it is moſt ſecure always in an Action for Goods ſold, or Work done, to lay a Quantum Meruit with an Indebitatus Aſſumpſit; but *if only one particular Commodity ſold*, there you muſt *mention the Commodity ſo ſold particularly* in the Declaration, *and not ſay Goods ſold*. L. P. R. 117.

12. In Indebitatus Aſſ. *Infancy* may be given in Evidence on Non Aſſumpſit. 1 Salk. 279. pl. 4. Paſch. 5 W. & M. in C. B. Darby v. Boucher. S. P. admitted by Hale Ch. J and thereupon the Plaintiff was nonſuited. 2 Lev. 144. Trin. 27 Car. 2. B. R. Seaſon v. Gilbert.—Vent. 170. Mich. 23 Car. 2. S. P. by Hale Ch. J.——

13. In an Action grounded upon a *Promiſe in Law Payment before the Action* brought is allowed to be given in Evidence upon Non Aſſumpſit. But where the Action is grounded upon a *Special Promiſe*, there Payment, or any other legal Diſcharge muſt be pleaded. 1 Mod. 210. pl. 82. Hill. 27 & 28 Car. 2. C. B. Fits v. Freeſtone.

14. In Caſe on *Non Aſſumpſit* the *Statute of Limitations* has not been given in Evidence, *for it ſpeaks of a Time paſt*, and relates to the Time of making the Promiſe. 1 Salk. 278. pl. 1. Coram Holt Ch. J. at Niſi Prius at Hertford. 1690. Anon.

15. In *Aſſumpſit* the Defendant pleaded, *Quod ipſe performavit omnia ex Parte ſua performanda*, and it was ruled, *that this amounts only to the General Iſſue.* Quære, *for the Aſſumpſit is admitted, ſo that this is but a Diſcharge*; and Quære of the Caſe of Hatton and Morſe, *if it be not contra.* 1 Salk. 394. pl. 3 Mich. 2 Ann. B. R. Sea v. Taylor.

16. *Aſſumpſit for Meat, Drink*, &c. *found by the Plaintiff for the Defendant*; upon Evidence it appeared, *that it was found for the Defendant's Apprentice, and not for himſelf*; and held that the Plaintiff could not recover upon this general Count. Coram Prat Ch. J. apud Guildhall. Mich. 5 Geo.

## (R. b. 2) Non Aſſumpſit infra ſex Annos.

1. An Acknowledgment of the Debt within Six Years was ſufficient to revive it, and to prevent the Statute, though no new Promiſe was made. And this was held ſufficient to maintain the Iſſue, viz. that the Teſtator *Aſſumpſit*, becauſe the *Promiſe did not give any new Cauſe of Action*, but only *received the old Cauſe, and was of no other Uſe but to prevent Bar by Statute of Limitations.* Carth. 471. Mich. 10 W. 3. B. R. Heylin v. Haſtings. 5 Mod. 425, 426. Anon. S. P. held accordingly, and ſeems to be S. C.—12 Mod. 223.

S. C. and S. P. held accordingly.——

6 Mod 309. Mich 3 Ann B. R. S. C. the Court said that here the Executor might declare of a Promise to himself; Sed adjornatur; and in Hill. Term upon Conference with all the Judges, it was held that the Evidence did not maintain the Declaration So on this Plea if Evidence be, that Goods were sold above Six Years ago, and that the Defendant being requested to pay denied that he bought the Goods, but further said, prove it and I will pay you; here this Promise, though conditional, as the Condition was performed doth revive the Debt, and will bring it back again within the Statute, for the Defendant waves the Benefit of the Act, as much as by an express Promise. 1 Salk 29. pl. 19. Hill. 13 W. 3. B. R. Heyling v. Haffings.

2. Non Assumpsit infra sex Annos *to an Action as Executor.* On a Trial Proof was, *that there was a new Promise made within Six Years*, but it was *a Promise made to Executor*, not to *Testator*. Et per Cur. he should have declared accordingly. 1 Salk. 28. pl. 16. Mich 3 Ann. B. R. Dean v. Crane.

3. Lent Assizes 1717. Exon coram Baron Price, Plaintiff declared on a Note dated 16 Years ago. Plea *Non Assumpsit infra sex Annos*; Evidence that the *Defendant did own the Note within Six Years, saying he did acknowledge it to be his Hand*, and it was ruled sufficient to bring the Case within the Statute.

(R. b 3) Non Concessit.

1. The Issue *Ne dona pas may be maintained by a Devise.* And upon a Feoffment, a *Lease and Release are good Evidence.* Heath's Max. 80. cites 15 E. 3. Bro. 95.

2. If *Advowson be pleaded to be granted by Deed*, and Issue is taken by a Stranger to the Deed, *that he did not grant by the Deed*, if it can be *proved that he granted it without Deed*, as it may be (as there is held) *or by other Deed it is good, because the Deed is surplus*, and the Effect of the Issue is upon the *the Grant, and not the Deed.* 43 E. 3. 1. b. 2

3. In *Waste* brought *by the Grantee of a Reversion, the Lessee may plead the He in Reversion did not grant by his Deed*, or that nothing passed by his Deed, and give in Evidence that he *never made Attornment, or he may traverse the Attornment*; Per Knightly and Fitzherbert. D. 31. a. pl. 215. Hill 28 H. 8.

4. In a Formedon upon Non Dedit, it is good Evidence *that the Donor had nothing in the Land at the Time of the Gift*; For he cannot traverse that he had nothing at the Time of the Gift Dy. 122 b. pl. 23.

5. An Issue in Trespass was, whether or no Dominus Concessit *secundum consuetudinem Manerii?* And the Evidence was, that the Lord had lately *granted, but never before* that Time; The Jury here must find Non Concessit; for although in Truth Concessit, yet Non Concessit secundum consuetudinem Manerii, which was the Point in Issue. Le. 55 56. pl. 70. Pasch. 29 Eliz. C. B. Kempe v. Carter.

6. If nothing passes by the King's *Letters-Patents*, it is a good Plea, that Non Concessit per literas Patentes. For if nothing passed, then by Consequence Non Concessit. 4 Rep. 71. b. Trin 33 Eliz. C. B. in Hynd's Case.

7. In Debt for Performance of Covenants Defendant pleaded the Grantee of a *Rent-Charge* had *granted it over*, and Issue thereupon, and found for Defendant, and moved in Arrest of Judgment, that *No Attornment is shewn*; and it was held per three Justices to be good, and well aided by the Statute of *Jeofailes*, and though Issue may be taken either upon the Grant or upon the Attornment, yet the Issue upon one being found, the other is implyed. D 31. b. Marg. pl. 215. cites 33 & 34 El. B. R. Gourny v. Sr. Edward Cleere.

8. *If nothing passes by the King's Letters*, one may plead Non Concessit, and give the Invalidity in Evidence. 6 Co. 15. b. Mich. 36 & 37 Eliz. B. R. Eden's Case.

9. *But*

9. *But in Ejectment of a Manor, which conſiſted of Demeſnes, Rents and Service, &c. an Attornment muſt be proved*, becauſe the Rents and Services could not paſs without it. 3 Mod. 36. Mich. 35 Car. 2. B. R. Smith v. Goodier.

10. On Non Conceſſit *to a Grant of a Reverſion*, you *need not prove an Attornment*, for the Traverſing the Grant is an Admittance of the other. 1 Salk. 90. pl. 2. Mich. 5 Ann. B. R. Hudſon v. Jones.

## [R. b. 4] Non Debet.

1. If the *Defendant pleads Nil debet* to an *Action of Debt* upon a *Contract*, he may give in *Evidence that the Contract was conditional*, or he may plead the ſame without *Traverſe*. Brown's Anal. 15.

2. Debt for the *Sale of a Horſe for* 40 *s.* the Defendant may plead *Nil debet*, and give in *Evidence*, *that the Sale was of two Horſes for* 40 *s.* or *of an Ox for* 40 *s.* and good. Brown's Anal. 16. Br. General Iſſue, pl. 44. cites 21 E. 4. 22. S. P.

4. Debt *upon Arrearages of Account* (the Defendant ſaid) that he owes him nothing in Manner and Form, *and Evidence that there was no ſuch Account* is good, for he hath no ſuch Cauſe of Action. Kitch. 238. 2 H. 6. fo. 26. Br. General Iſſue, pl. 7. S. P. cites 20 H. 6. 24.

5. Debt upon *Arrearages of Rent upon a Leaſe for Years*, he owes him nothing, *and Evidence that he did not demiſe* is good. Kitch. 237. cites 7 H. 7. fo. 3.——But I do not obſerve it there.

6. The Defendant upon Nil debet may give *Ne Leſſa pas* in Evidence. Heath's Max. 79. cites 9 H. 7. 3.

7. In Debt for Rent on a Leaſe Parol, the Defendant pleads Riens luy doit, he *may give in Evidence any Matter to ſhew the Title out of the Plaintiff*; Sed Contra, where the Defendant pleads Riens Arrear, ſuch Plea tacitly admits a Title in the Plaintiff. 9 H. 7. 3.——But I do not obſerve it there.

8. One had *Leaſe for Years* of Land of a Stranger rendring Rent, and for the Arrearages brings Debt, the Defendant pleads, *That he owes him nothing*, and may give in Evidence, *that he never was ſeiſed of the Land*; *But*, if he pleads *Riens Arrear*, *or levied by Diſtreſs*, he cannot *give in Evidence as before* as it ſeems. May ſay, *He did not leaſe.* Roll. Trial. 677. pl. 21. 7 El. Tr. 9 H. 7. 3. May ſay, *Ne Leſſa pas.*

9. In *Debt upon an Account*, the Defendant may plead *Nullum tale computum*, or *Nil debet*, and give *in Evidence*, *that there is no Account between the ſaid Parties.* Brown's Anal. 15.

10. Debt for the *Arrears of Rent upon Leaſe for Years*, upon *Nil debet per Patriam* pleaded, it is good Evidence to prove *Quod non dimiſit.* Brown's Anal. 16. But a Demiſe of Part only does not maintain the Iſſue.

D. 260. pl. 22. Bendl. 177. Slyfield v. Sibil. Mo. So. S. C.——And 13. S. C.

11. In Debt upon a *Leaſe*, *Defendant pleaded Payment*, and in Evidence ſhewed *he paid it to Sequeſtrators of the Common Wealth*, the Plaintiff being a Delinquent, and Ruled *this was good Payment to prove the Iſſue*, which was a Payment to the Plaintiff himſelf. Clayt. 129. pl. 231. Aſſiſ. a. Mar. 1648. before Thorpe Serjeant, Judge of Aſſiſe. Anon.

12. If *he who has Rent-Service or Rent-Charge, accepts Rent due at the laſt Day, and thereof makes acquittance*, all the Arrearages due before are by this diſcharged. 3 Rep. 65 b. in a Nota by the Reporter ſays, that it was ſo adjudged in C. B. Hill. 10 Eliz. Hopkins v. Morton. And the Reporter adds, that in the Caſe of Rent-Service and Rent-Charge, he who receives it is not compellible to make acquittance; but the doing it is his own voluntary Act to which the Law does not compel him.

13. In *Debt for Rent, on Reference to the Secondary to ſee if all were paid Ex Motione Haines*, he reported, *that a Note of Receipt of the laſt Half Year's Rent was ſhewed in Diſcharge of all former Arrearages*; but per Cur. this is only Evidence of all, but *it is no Diſcharge of the former Arrear unleſs it be under Hand and Seal*, and then *but by Iſſlepple*, whereupon, paying Coſts, a new Trial was agreed to ſtand on Payment, without entring into the Title. 2 Keb. 346. pl. 25. Paſch. 20 Car. 2. B. R. Coomes v. Denne.

S. P. by Twilden. Mod. 35. pl. 83. Hill. 21 & 22 Car. 2. B. R. Acc. v.—Sid. 151. pl. 18. Trin. 15 Car. 2. B. R. in a Nota ſays, that it was ſo ſaid in the Caſe of Drake v. Beere —Vent. 258. Paſch. 26 Car. 2. S. P. accordingly in a Nota there.—

14. In *Debt for Rent*, if the Defendant pleads Nil debet, he may give *Entry and Expulſion in Evidence*; Arg. ſaid to have been the Opinion of the Judges, and the Court now did not deny it. Mod. 118. pl. 18. Paſch. 26 Car. 2. B. R. in Brown's Caſe.

15. In Debt for Rent on *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. 1 Salk. 278. pl. 1. Coram Holt Ch. J. at Niſi Prius at Hertford 1690. Anon.

16. Debt for 10 *l. Pro eo quod cum* the Defendant had accounted with the Plaintiff of divers Sums as due, and upon that *Account ſtated in Arrear* 8 *l. Per quod actio accrevit* to have the ſaid 8 *l. Cumque idem* the ſaid Defendant *had borrowed of the ſaid Plaintiff* 10 *l.* to be paid on Requeſt, *De quibus quidem ſeperalibus denariis' ſum'*. this Defendant afterwards *ſatisfied* 8 *l.* yet the 10 *l. hath not paid, Plea Nil debet.* On the Trial they gave in Evidence only 8 *l.* It was urged, *that could not be Evidence of the Mutuatus*, for that was one entire Contract, and another Contract for 8 *l.* was not the ſame they had declared upon, and of that Opinion was the Lord Ch. J. Holt. Show. 215. Paſch. 3 W. & M. Seyart v. Rowland.

17. In Nil Debet, a *Releaſe* is good Evidence. 5 Mod. 18. Hill. 6 W. & M. The King v. Grove.

5 Mod. 458. S. C.—12 Mod. 269. 272. S. C. and S. P. accordingly. —Ld. Raym. Rep 496. ſco. S. C. and S. P. accordingly.

18. If a *Citizen is choſen Sheriff of London, and the Mayor and Aldermen refuſe a reaſonable Excuſe*, the Party is not bound by ſuch Refuſal, becauſe he may give it in Evidence *upon Nil debet pleaded in an Action of Debt brought for the Forfeiture*, and there the Validity of the Excuſe will be tried by a Jury. Carth. 483. Paſch. 11 W. 3. B. R. London City v. Vanacker.

19. In Caſe of a *By-Law* on Debt for Forfeiture a reaſonable *Excuſe of Refuſal* may be given in Evidence on *Non debet*. Carth. 483. Paſch. 11 W. 3 B. R. London City v. Vanacker.

20. *Levied by Diſtreſs et Sic* non Debet, *Payment or Releaſe* is good Evidence, otherwiſe of *Raſure*. 1 Salk. 284. pl. 15. Trin 12 W. 3. B. R. Galloway v. Sufach.

3 Salk. 273. pl. 7. S. C. held accordingly —

21. In *Debt* the Defendant may plead a *Releaſe*, becauſe it *admits the Contract*, which is a Colour of Action, and yet he might give it in Evidence upon Nil Debet. Per Holt Ch. J. 1 Salk. 394. pl. 2. 1 Ann. B. R. Hatton v. Morſe.

3 Salk. 273. pl. 7. S. P. in S. C. by Holt Ch. J.—

22. So in *Aſſumpſit* the Defendant may plead *Payment*, becauſe it *admits the Aſſumpſit*, and yet he may give it in Evidence on Non Aſſumpſit; ſo was the principal Caſe, and ſo ruled Per Holt Ch. J. 1 Salk. 394. Hatton v. Morſe.

23. In

23. In *Treſpaſs* on *Not Guilty* the Defendant cannot give in Evidence, that the *Place was an Highway*. 1 Salk. 287. pl. 24. Mich. 5 Ann. B. R. Watſon v. Sparkes.

24. On Riens Arrear nothing is to be given in Evidence, but *Payment or Non Payment*. Per Holt Ch J. Holt's Rep. 567. pl. 45. Mich. 8 Ann. in Caſe of Willet v. Waxcomb.

25. Defendant on ſuch Plea may give in Evidence, that the *Rent Day was not incurred*. Per Powell J. Holt's Rep. 567. S C.

### [R. b. 5] Non Detinet.

1. Upon the Plea of *Non Detinet*, the Defendant cannot give in Evidence *a Mortgage*. Brown's Anal. 15.

2. *Neither* can the Defendant upon ſuch Iſſue give in Evidence, *that he had the Thing of the Plaintiff as a Pledge for Money not yet paid*. Brown's Anal 16.

3. But Quære, *If he may give in Evidence an Agreement after the Bailment?* That doth alter the Property. Heath's Max. 79.

4. In a *Detinue of a Pledge*, if the Defendant pleads *Non detinet*, he ſhall not give in Evidence *How it is his Pledge*, for it is ſpecial Matter. 20 H. 75. 22 H. 6. 33 b. 9 H. 7. 4. b. for the Property continues generally in the Pledger. Roll. Trial. (E. f) pl. 9.

But Defendant may give in Evidence a Gift from the Plaintiff, for

that proves that he detains not the Plaintiff's Goods. C. L 283.

### (R. b. 6) Debt upon Bond againſt an Heir.

1. In Debt on Bond againſt an Heir, he pleaded *Riens per Deſcent*. The Verdict went againſt him, becauſe he *omitted bringing the Settlement to the Trial*. Cited by Holt Ch J. 2 Salk. 647. pl. 16. Mich. 10 W. 3. B. R. in Caſe of Witts v. Solenampton, as in a Caſe which he ſaid he remembered.

2. Debt upon Bond of 1400*l*. The Defendant *pleaded the Statute of Uſury*; and upon a Trial of it Iſſue being joined, before Trevor Ch. J. of C. B. the Sitting after the Term at Weſtminſter, the Queſtion was, whether the Plaintiff ſhould be compelled to give in Evidence a Specification? And this Point was reſerved for his Opinion at his Chambers. Where afterwards it was argued by Serjeant Hooper for the Plaintiff, and by Mr. Raymond for the Defendant; and he held clearly the Negative, becauſe the Bond was admitted by the Plea; and *where the Party is not bound to give the Bond in Evidence, he is not bound to give in Evidence the Specification*. And the Poſtea was delivered to the Plaintiff. 2 Ld. Raym. Rep. 852. Hill. 1 Annæ. Puered v. Duncombe.

### (R. b. 7) Ejectment.

In an Ejectment of *Lands in Kent*, it was agreed, that if Land be alledged to be in Kent it ſhall be *preſumed to be Gavel-kind Land*, if the contrary is not proved; *but* that the ſpecial *Cuſtoms incident* to Gavel-kind *ought to be proved*, as that the Husband ſhall be Tenant by the Curteſy without having Iſſue, &c. 2 Sid. 153. Paſch. 1659. B. R. Brown v. Broker.

2. When *he that ſued an Elegit* brings an Ejectment to try the Title, he muſt in Evidence *ſhew the Elegit* filed. L. E. 263. pl. 28. cites Try. per Pais, 191.

3. Per

3. Per Hale Ch. J. if *A. lets to B. and B. C.* to try the Title, *the general Confeſſion extends only to the Leaſe made to C.* not to that to B. 1 Vent. 248 Mich. 25 Car. 2 Anon.

4. A *Will exemplified under the Great Seal* is not Evidence to a Jury in Ejectment. Per Cur. Cumb. 46. Paſch. 3 Jac. 2 B. R. Anon.

5. Per Cur. 20 or 25 Years Poſſeſſion is a good Title in Ejectment as well as a Bar to an Ejectment.

6. *Where the Leſſor of the Plaintiff has* a ſpecial Title as to enter for a Condition broken where there is *no Eſtate till Entry*, there *needs no actual Entry to be proved*, but the general Confeſſion will ſupply it; So is the modern Practice though ſome Books are al contra. Vent 248. 332. And agreeable hereto was the Opinion of Hale. Holt Ch J. accordingly. 1 Salk. 259. pl. 13. Mar. 26. 1702. at the Aſſizes. Little v. Heaton.

6 Mod. 256. Mich. 3 Ann. B. R. the S. C. and Judgment accordingly. — 3 Salk. 151. pl. 1. S. C. accordingly. —

7. *Scire Facias* by Adminiſtrator *upon a Judgment in Debt* againſt Terre-tenants reciting the Judgment; *Execution awarded*; *Elegit Inquiſition and Lands extended*; on an Ejectment it was held that the Judgment upon the Scire Fecias was a ſufficient Title, and the firſt Judgment need not be given in Evidence. 1. Salk. 276. pl. 4. Mich. 3 Ann. B. R. Trevivan v. Lawrence.

8. In *Ejectione firmæ* upon Not Guilty, upon Evidence to the Jury at the Bar the Caſe was ſuch that Cotewell had a Leaſe for Years of the Prebend of Sutton-Regis in the County of Bucks made in the Time of H. 8. and being expired, he now *claimed under a Leaſe from a nominal Prebendary thereof* founded in the Cathedral of Lincoln: But the *Plaintiff claimed by Letters Patent* thereof from King James, made the Seventh of King James to Brent and his Heirs, who granted the ſame to the Widow of Sir W. R. whoſe Daughter and Heir Sir Gervaſe Elwes married; and the *Poſſeſſion was according to this Grant*; whereupon the Queſtion was, *If* they ought *to ſhew how it came to the Crown?* Hale Ch. J. ſaid that the Statute for Confirmation of Patents, Jac. takes Notice that Prebend did come to the King And in Edward the firſt's Time was a Deviſe, that all that claimed Terra Regis ſhould ſhew how it came to the Crown, which often vaniſhed away, &c. L. E. 263. pl. 30. cites T. per Pais, 230.

9. In late Times in a Trial at this Bar, Mr. Latch did nonſuit the Plaintiff upon a *Claim of Monaſtery Lands*, *although he proved the Houſe had it*, becauſe he did *not make out how it came to the Houſe*; but ſince that Time, the Court have intended it well come to the Houſe, the Poſſeſſion having went accordingly with it. L. E. 263. pl. 30. cites Tr. per Pais, 230.

10. And he ſaid he was of Counſel in a Trial at Bar for an *Impropriation*, where it was inſiſted, that it was *preſentative till Edward the Fourth's Time*, and could not be appropriated without the King's Licence; Quod Cur. conceſſit; and he *could not produce the Licence*; yet becauſe it was *enjoyed ever ſince* Edward the Fourth's Time as appropriate the Court *did intend a Licence*, *and* that the Patent was *loſt before the Enrollment*, and accordingly the Verdict went. L. E, 263. pl. 30.

11. Then the Defendant offered to read a *Copy of a Leaſe out of the Ledger-Book of the Dean and Chapter* of Lincoln, but it was diſallowed by the Court, for the Book itſelf is but a Copy; and a *Copy of a Copy* is no Evidence. And in this Caſe the Court did *preſume the Grant to be loſt*; and thereupon Judgment was for the Plaintiff. L. E. 264 pl. 30. cites Try. per Pais, 230.

12. It has been ruled in Evidence at the Aſſizes, that a *Cottager on the Lord's Waſte* lives there by the Lord's Conſent, and ſo is only a Tenant

Tenant at Will, but this is very doubtful where there has been a *long Poſſeſſion.* Per Prat Ch. J. Mich. 11 Geo. B. R.

13. The Plaintiff was Lord of the Manor of Ewell in Surry, and brought his Bill claiming an Houſe in Ewell built upon the Waſte, it was ſaid by Ld. Chancellor, that the *Lord of a Manor is never ſaid to be out of Poſſeſſion of what is built upon the Waſte that is his*, and that upon a Trial before Judge John Powell touching ſome Cottages or Tenements built upon the Waſte, though the *Lord had not been in actual Survey of the Cottages* or Tenements in Queſtion *for* 60 *Years*, and there had been *ſeveral Fines levied thereon*, by the Opinion of the Judges the Lord had a Verdict 13 July 1726, in Canc. Lloyd v. Bartlet.

(R. b. 8) Ejectment of a Rectory.

1. A Rector to entitle himſelf in an Ejectment brought of a Rectory *muſt give in Evidence Admiſſion, Inſtitution and Induction.* 2dly. His *reading and ſubſcribing the Articles.* 3dly. His Declaration in the Church (within the Time limited by the Statute) of his *full and free Aſſent, and Conſent to all the Things contained in the Book of Common Prayer.* Sid. 220. pl. 8. Mich. 16 Car. 2. B. R. Snow v. Philips. Where the Induction was a good while after the Inſtitution, the Inſtitution is not Evidence of a Preſentation. 1 Vent. 14, 15.

2. But it is not neceſſary to give in Evidence the Title of the Preſenter, for the *Inſtitution upon the Title of a Stranger is ſufficient* Title againſt him who has the Right in an Ejectment, though otherwiſe in a Qua. Imp. Sid. 221. S. C.

(R. b. 9) Eſtovers.

1. In an Action of *Treſpaſs* for taking away Timber, the Defendant pleaded a Cuſtom within the Manor, to have the ſame as Eſtovers *to be burned in Terris & Tenementis*; and Iſſue being taken on the Cuſtom, the Defendant gave *Evidence only of a Cuſtom as to the Meſſuage*; And it was adjudged, that this Evidence did not maintain the Iſſue. Godb 234. pl. 326. Mich. 11 Jac. C. B. The Biſhop of Chicheſter and Strodwick's Caſe.

(R. b. 10) Parco Fracto.

1. Where in Parco Fracto the Defendant did plead Not Guilty, and gave in Evidence, that the Plaintiff *had not a Park by Preſcription, nor by Grant*, and it was held good. Heath's Max. 77. cites 18 H. 6. 22.

(R. b. 11) Per quod Servitium Amiſit, &c.

1. Treſpaſs for beating his Servant *need not be an hired Servant according to 5 Eliz. but one hired for any certain Time.* A Perſon hired to load Corn, not entertained in Plaintiff's Houſe, but went every Night to his own Houſe, is not a Servant within this Action. Clayt. 133, 134. pl. 241. Aug. 1649. Thorpe J. Linley v. Baxter. Clayt. 115. pl. 202. Auguſt, 1647. Green Serjeant. Eaſtburnes Caſe. S. P. ——

2. Where a Treſpaſs is laid with a Per quod, &c. as for Inſtance, Per quod Servitium, &c. or Per quod Conſortium Uxoris amiſit, there *whatever comes under the per Quod muſt be proved*, otherwiſe the Plaintiff

cannot have a Verdict, becauſe that is the Gift of the Action; admitted. 8 Mod. 372. Trin. 11 Geo. in Caſe of Philips v. Fiſh.

(R. b. 12) Policies of Inſurance.

1. Condition of a Bond was, *that after Arrival* of a Ship *from ſuch and ſuch Places*, that *A. ſhould pay ten Pounds, and twelve Pence per* Month for every Pound for every Month; *and if the ſaid Ship be driven back, ſtayed or hindered by diſtreſs of Weather*, or Leakage, ſo that ſhe return not, *then upon Payment of ten Pounds Condition to be void Defendant pleads, that* by Reaſon of the Perils of the Sea, *the ſaid Ship was drowned* in the Sea. The Queſtion was, whether *this was an hindrance within the Words of the Condition*, and holden it was; But Pemberton ſaid, that if they had been *taken by the Turks*, or periſhed any other Ways then by Leakage, or Diſtreſs of Weather, and that had been ſet forth in Pleading it would not have been within the Condition; Judgment for the Plaintiff. Skin. 3. pl 4. Mich 33 Car. 2. B. R. Pim and Elliot.

2. In Trover for a Ship and Cargo, the *Envoice and Bill of Loading was given in Evidence*, the which was oppoſed; becauſe though it be Evidence between the Freighter and the Maſter, yet in this Caſe, the Freighter and Maſter are but as one Perſon, and it ſhall not be Evidence againſt a third Perſon; Non Allocatur; *For the Bill of Loading is always read* in Caſe of a Policy *to prove Goods on Board*, (the which was admitted, *but not to prove the Value*) and here though the Certainty of the Value does not appear, yet inſomuch that the Goods were proved to be bought and paid for by the Plaintiff, and to amount to ſuch a Sum, and that the Envoice and Bill of Loading agreed, and that they were entered, as put on Board ſuch a Ship, and that they were carried to the Place where the Ship was taken, and that when the Ship was taken there were ſuch Goods on Board; and *the Maſter being dead, his Hand to the Bill of Loading was proved*, and the Maſter if he was preſent might be ſworn; and therefore in this Caſe they might prove his Hand; for theſe Reaſons the Bill of Loading was read; upon the Reading of which it was objected, that the Cargo was ſhipped by A. and B. and Company, and B. being dead, the Action brought by A. only is ill, becauſe it appears, that others have an Intereſt who ought to be named; Non Allocatur; for it does not appear, and this ought to be proved, (but in this Caſe it ſeemeth as if it might be preſumed) and if there are others, this is a Matter in Abatement, and it ought to be pleaded; and the Difference is, where it is an Action founded upon a Tort, as here, and Not Guilty pleaded, and where it is founded upon a Contract; for there it is Non Aſſumpſit, becauſe it is another Contract, but the Party may make a Tort joint and ſeveral; and if a Man bring Trover for a Ship, and upon the Evidence it appears, that he has but the ſixteenth Part of it; this is good, and the Intereſt of the others may be given in Evidence in Mitigation of Damages. Skin. 640. pl 4 Paſch. 8 W. 3. B. R. Dockwray v. Dickenſon.

3. In an Action upon the Caſe upon a Policy, the which *warranted*, the Ship ſhall have *four Paſſes*, ſcil. A Paſs from the King of England, from the King of France, from the King of Poland, and the States of Holland, and the Goods were to be the Goods *of ſuch a Poliſh Subject on Board the Ship, vocat. the City of Warſaw*; An Action upon the Policy being brought, it appeared upon the Evidence, that the Paſſes bore Date in April or May, and that the Ship to which they applied theſe Paſſes then was regnant. & vocat. *by another Name*, and that ſhe was not named the City of Warſaw *before the Auguſt following*; and therefore theſe were not good and effectual Paſſes for this Ship, according to the Guarranty of the Policy, the which intended good Paſſes, and not elufory vain Paſſes,

Paſſes, and they being a Fraud upon the Subſcribers, the Policy muſt not bind them; Alſo another Objection was made, the which was, that the Paſſes were for Goods that belonged to the Subjects of the King of Poland, and ſo retained only to them; but the *Goods on Board were* not *of the Subjects* of Poland, but of *Holland*, and therefore not within the Intent of the Policy; It was alſo inſiſted, that the Policy being for *Goods of ſuch a one without Account*, they ought to *prove that they had any Goods on Board*, or had ſhipped any Goods *by Order of a third Perſon*, tho' being without Account they need not *prove the Particulars*; and that ſo was the Practice, which was not contradicted; Per Holt Ch. J. Skin. 404. pl. 41. Mich. 5 W. & M. in B. R. Anon.

## (Q. b. 13) Poſſeſſory Actions.

1. Though all Declarations for ſtopping of Ways, diverting of Water-Courſes, and Diſturbances in Commons are now drawn and founded upon the Poſſeſſion without ſhewing of a Title, yet *upon the General Iſſue, the Plaintiff muſt prove his Title* or be nonſuit; and the *ſetting out the Title againſt a wrong Door it is but Matter of Inducement.* 4 Mod. 421. 423. Paſch. 7 W. 3. B. R. Strode v. Birt. 12 Mod. 97. Birt v. Strode S. C. and Judgement affirmed in Error.—— Skinn. 621.

S. C. accordigly. —S. C. cited as adjudged accordingly. Ld. Raym. Rep. 266.——Vent. 274. Mich. 27 Car. 2. B. R. Seintjohn v. Moody. S P.——Ibid. 319. Mich. 29 Car. 2. B. R. Saunders v. Williams. S. P.——

## (R. b. 14) Quantum Meruit.

1. Aſſumpſit for the Price of a Beaſt, the Plaintiff declared that the Agreement was to pay ſo much as the Beaſt ſhould be reaſonably worth, and the Witneſs proved the Agreement to be, that the Defendant *would give Content for it*; and this was ruled good Evidence to prove the Promiſe laid, and in common Senſe the Words amount to ſo much. Clayt. 148. pl. 271. Aſſiſe Aug. 1650. before Baron Thorpe Judge of Niſi Prius, Bland v. Tenant.

2. So on an Indebitatus Aſſumpſit for Wares ſold, and no Evidence ſhould be given of an Agreement for the certain Price. Twiſden ſaid he ſhould direct it to be found ſpecially. 1 Mod. 295. pl. 39. Trin. 29 Car. 2. B. R. Jemy v. Norrice.

3. In a Quantum Meruit for *Rent*, and Non Aſſumpſit pleaded, an *expreſs Promiſe* muſt be proved. 3 Lev. 150. Trin. 34 Car. 2. in C. B. Johnſon v. May.

4. Aſſumpſit, on Conſideration that he had aſſumed to ſerve Defendant as *Commiſſioner to examine Witneſſes* in a Suit betwixt him and B. that Defendant promiſed to pay him for his Pains. It was alledged, that a Commiſſioner could not have an Aſſumpſit on ſuch a Promiſe, for he ought to be indifferent, and it is unlawful to be paid for ſuch Service; [As a Promiſe, in Conſideration that Plaintiff would take a Special Warrant and Arreſt, to pay ſuch a Sum, is void. Noy. 78.] [If a Man, in Conſideration of Money, undertakes to do Execution, it is not good. 2 Cro. 103.] But per Cur. a Commiſſioner is named by the Party, and it is intended he would favour him, and therefore it is a Challenge to the Favour that he is a Commiſſioner at the Denomination of the Party, tho' no principal Challenge. 1 Inſt. 157. b. And a Commiſſioner takes Pains to attend the Examination of Witneſſes, and therefore deſerves Recompence as well as a Commiſſioner of Bankruptcy, and there is a Difference between him and a Sheriff. Judgment pro Quer. 12 Mod. 9. Mich. 3 W. & M. Stockwell v. Colliſon. Show. 342. Stockhold v. Collington, S. C. adjudged that the Action lies. —Salk. 330. pl. 1. S. C. held accordingly. —

5. If

5. If A *promiſes* B. 10 *l.* in Conſideration that he *would procure* him one who would give him an Annuity of 100 *l. per Ann.* for 900 *l.* B. does not do it, but *procures* him one who grants *it for* 1000 *l.* and A. does agree for that Annuity B. cannot bring *Aſſumpſit* for the 10 *l.* becauſe this varies from the Contract; But he may have a *Quantum Meruit.* 12 Mod. 500. per Powell J. Paſch. 13 W. 3. Anon.

6. A Contract cannot be given in Evidence upon a Quantum Meruit. Baron Price, Lent Aſſiſes at Devon. 1717-18.

7. A Curate to one Vinicomb Rector of Bigbury in Devonſhire, brought and maintained a Quantum Meruit for his ſerving the Cure. Devon. Aſſ. Lent, 1734-5.

## (R. b. 15) Treſpaſs.

1. In an Action of Treſpaſs, *Quare Domum & Clauſum fregit, & bona aſportavit*, the Defendant in Truth committed the Treſpaſs by Virtue of the *Commiſſion of Bankruptcy*; And it was ſaid by the Court, that becauſe the Plaintiff declared for an Entry into his Houſe, the Defendant cannot plead Not Guilty, and give the ſpecial Matter in Evidence, but muſt plead the Commiſſion of Bankruptcy, and all the ſpecial Matter; But if it had been for the taking of Goods only, he might have pleaded Not Guilty generally. Quære rationem, Lit. R. 356. Hill. 6 Car. C. B. Anon.

2. In Treſpaſs *with a Continuando*, it was holden upon the Evidence, that *it is not needful to prove a Re-entry, in caſe the Action is brought againſt the firſt Treſpaſſor*, as it ought to be done where it is againſt a Stranger, as againſt Feoffee, &c. of the firſt Treſpaſſor. Clayt. 5. pl. 8. Auguſt, 7 Car. before Damport, Ch. B. Anderſon's Caſe.

3. In Treſpaſs, the Place where is *in a Common Field*, in a Place called *The two Furlongs*, *this is good without Abuttals*, which are dangerous to prove; and if Abuttalls be in ſuch a Caſe as this of one or two Sides the Parcel of Ground, *it is ſufficient to declare the Place*; and here *one Witneſs ſpake to the Treſpaſs, and another to the Abuttals*, and *the other knew thoſe, but not that it was the Plaintiff's Land*; this does not make a perfect Evidence, and *it was directed* to be the beſt in ſuch a Caſe as this *for both to go to the Land* before, *and he that ſaw the Treſpaſs to ſhew the Place to the other who knows the Abuttals.* Clayt. 108. pl. 184. Aſſiſes April, 8 Car. Whitfield Judge. Brodebent v. Chadwick.

4. For *making a Treſpaſs Continuando, there ought to be a Re-entry of the Plaintiff, and for the not proving thereof the Plaintiff ſhall have Damages only for the firſt Entry.* Tr. per Pais, 234 Cites Mich. 22 Car. 1.

5. Treſpaſs was laid the firſt of May *with a Continuando*, &c and the *Plaintiff could not prove the firſt Treſpaſs, tho' he could prove the Diverſis Vicibus after*, and for this Cauſe he was nonſuit; for the firſt Treſpaſs is the main. Clayt. 141. pl. 256. Auguſt, 1649. before Thorpe J. Walker v. Dawſon.

6. In *Treſpaſs with a Continuando to recover meſne Profits, an Entry and Poſſeſſion of the Land before the Treſpaſs muſt be proved, and alſo another Entry after the Treſpaſs.* Tr. per Pais, 199.

## [R. b. 16] Treſpaſs with a Continuando.

1. In Treſpaſs for breaking his Cloſe with a Continuando, it was moved by Coke, that the Plaintiff needed not to *ſhew a Regreſs* to have Damages for the Continuance of the firſt Entry ſcilicet, for the mean Profits and that appears by common Experience at this Day. Gawdy J. ſaid,

ſaid that whatſoever the Experience be, I well know that our Books are contrary, and that without an Entry he ſhall not have Damages for the Continuance, *if not in Caſe where the Term or Eſtate of the Plaintiff in the Land be determined*, and to ſuch Opinion of Gawdy the whole Court did incline, but they did not reſolve the Point, becauſe a Regreſs was proved. Le. 302. pl. 416 Trin. 31 Eliz. B. R. Rawlins's Caſe, and cites 20 H. 6. 15. and 38 H. 6. 27.

2. Treſpaſs was laid with a Continuando *from ſuch a Day till ſuch* a Day, the Party is not obliged upon Evidence to *prove the preciſe Time alledged* in the Continuando; but he ought to prove a *Treſpaſs at ſome Time within the Time alledged* in the Continuando; but if he will *waive the Continuando*, and give the ſingle Treſpaſs in Evidence, he may. Skin. 641. pl. 5. Paſch. 8 W. 3. Willon v. Powell.

3. Though it is the Practice in Treſpaſs for the Mean Profits, to *lay a Treſpaſs at one Day, and give Damages in Evidence done at ſeveral Days* that is not Law, and ought not to be allowed; but in ſuch Caſe it ought to be laid Diverſis Diebus & vicibus, and then ſeveral Treſpaſſes may be given in Evidence. Per Powel J. Ld. Raym. Rep. 240. Trin. 9 Will 3 in Caſe of Fontleroy v. Aymer.

4. Where the *Plaintiff was ouſted and made a Re-entry* he may bring Treſpaſs, and *declare* that he entered ſuch a Day Continuando, &c. or *that he entered ſuch a Day, Et diverſis Diebus & Vicibus between ſuch a Day and ſuch a Day.* 2 Salk. 639. pl. 7. Hill. 1 Ann. B. R. Monkton v. Pathley.

5. *Of Acts done which terminate in themſelves, and once done cannot be done again, there can be no Continuando*, as *hunting or killing a Hare, or 5 Hares*, but that ought to be alledged that Diverſis Diebus & Vicibus inter ſuch a Day and ſuch a Day he killed 5 Hares, or cut and carried away Twenty Trees; and where a Treſpaſs is laid in Continuance which cannot be cannot be continued, Exception ought to be taken at the Trial; for he ought to recover but for one Treſpaſs; Per Holt Ch J. The Court held that hunting might be continued as well as ſpoiling and conſuming his Graſs, or cutting his Graſs. 2 Salk. 639. pl. 7. Hill. 1 Ann. B. R. Monkton v. Pathley. Ld. Raym. Rep. 977. Trin 2 Ann. S. C.——

[R. b. 16] Trover.

1. In Trover Plaintiff ought to *prove Property of Goods in him*, and at leaſt a *Demand and Refuſal*, and if there be ſeveral Parcels, the orderly Way to give Evidence, is to *make an Inventory* of them, and prove the Property of the Goods mentioned in it, and Demand and Refuſal of them. Per Holt. 12 Mod. 344. Mich. 11 W. 3. Anon.

2. In Trover on Not Guilty plead. d, *every thing may be given in Evidence except a Releaſe*; there may be a ſpecial Plea in Trover, and a Matter of Law may be pleaded. Per Cur. B. R. Hill. 6 Geo.

## (S. b) Where the Onus Probandi lies on the Plaintiff, and where on the Defendant.

1. Iſſue directed out of Chancery was, whether *Land* aſſigned for Payment of a Legacy were *deficient in Value*, and Iſſue was joined upon the Deficiency; the one alledging, that it was not; And per Cur. though *averring that it was deficient* is ſuch an Affirmative as implies a Negative,

yet it is such an Affirmative as *turns the Proof on those that plead it*, if he had joined the Issue that the Lands were *not of Value*, and the other had *averred that they were*, the Proof then hnd lain on the other Side. 12 Mod. 526. Trin 13 W. 3. Berty v. Dormer.

2. *And* if one *plead Infra Ætatem*, which is no more than that he is Not of Age, and Issue is thereupon; he that pleads the Infra Ætatem must prove it; per Cur. 12 Mod. 526 in S. C.

3. A. gives B. a Policy *to receive* 100 *l. if Saragossa were not in the Hads of King Charles such a Day.* In an Action on this Wager, Non Assumpsit was pleaded, and after the Policy had been proved, and Objection was made, that the Defendant ought to prove, that Sarogossa was in the Hands of King Charles, and that *the Plaintiff was not to prove the Breach of the Policy it being in the Negative*, and it was ruled by Parker Ch. J. at Guildhall London Trin. 9 Ann. And though it was objected in my Ld. Hallifax's Case in an Information in Scaccario for not transmitting Ordinario impressos Rotulos into the Remembrancer's Office, &c. the Proof laid upon the Prosecutor; But the Court said, there is a Difference, for this was to charge a Man with an Omission, or Neglect in his Duty or Office, &c. Per Parker Ch. J. at Guildhall Trin. 9 Ann.

4 6 *Geo. cap* 21. *Prohibited or Customable Goods, if seised, &c. Proof of Duty paid, or Condemnation, &c. lies on the Claimer, &c.*

5. Where *a Plea is in the Affirmative*, the Proof lies upon the Defendant. 8 Mod. 180. Trin. 9 Geo. Hilliard v. Phaly.

## (T. b. 1) What shall be Evidence of what.

### Accessory.

1. TWO three or more are *doing* an *unlawful Act*, as abusing the Passers-by in a Street or Highway, if one of them kills a Passer-by, it is Murder in all, and whatever Mischief one does they are all guilty of it; And it is lawful for any Person to attack and suppress them, and command the King's Peace; And such Attempt to Suppress, is not a sufficient Provocation to make Killing, Manslaughter, or *Son-Assault Demesne* a good Plea in Trespass against them; Per Holt. 12 Mod. 256 Mich. 10 W. 3. Ashton v.———

2. Such as *actually accompany another in the Execution of an unlawful Act*, are as much Principals as the very Actors. As *Seconds in Duelling*. Quære Tamen. Hawk Pl. C. cap. 31. pl. 31.

### (T. b. 2) Acting as an Alderman, Justice of Peace, &c. without qualifying themselves.

1. Information for *exercising Office of Alderman and Justice of Worcester, not taking the Oaths within three Months after his Election* to be Alderman; Not Guilty pleaded; tried at Bar. *Proof by Town Clerk, that he was chosen Alderman such a Day*; Then *Copy of the Entry in the Court-Book of Worcester was offered in Evidence for the King*, which being opposed, Holt said, Now here, *to prove that Defendant acted as an Alderman and Justice, you must not only shew the Record (or perhaps* he is not concluded by that Entry in a Criminal Case) *nor can you prove it by Witnesses only*, for then the Defendant may object, here is the Record; *So that it must be proved both Ways.* Then a Copy of the Entry in the Court-Book

Book was read; *but the Names of the Perſons before whom the Court was held were not ſet down*; And Holt ſaid it could not be proved by Witneſſes or Parol who ſet as Judges; but if it had been ſaid Coram A. Mayor, and B. and C. Aldermen & cæteris Aldermannis, it might have been ſupplied by Parol Evidence, but here no one is named; And Sr. Samuel Eyres J. being ſent to C. B. they were all of the ſame Opinion, that it ought not to be admitted in Evidence. Then they gave in Evidence an Order for Relief of the Poor under Defendants Hands as to not receiving the Sacrament within three Months; Objected, that could not be Secundum formam Statuti without producing a Certificate; Holt Ch. J. ſaid, the Want of a Certificate is equally penal; but it is a diſtinct Offence with which the Defendant is not charged. N. B. The Mayor adjourned the Seſſions from the 8th to the 22d January, which was the firſt Day of the Seſſions if within the three Months and before the 22d For though the Seſſions be all but one Day, yet they may, and often do enter their Adjournment Seſſio Inchoat. talí die & continuat' uſque talem diem. Comb. 337, 338. Trin. 7 W. 3. B. R. The King v. Hains, Alderman of Worceſter.

[T. b. 3] Adminiſtration.

1. Title being made to a Term by one as Adminiſtrator, no *Letters of Adminiſtration* produced; the *Book* of the Eccleſiaſtical Court where it was granted, being produced *wherein was entred the Act or Order of the Court for granting it* was allowed good Evidence. Lev. 25. Paſch. 13 Car. 2. B. R. Garret v. Liſter, ſaid by Twiſden to be the Caſe of the Earl of Mancheſter.

2. Twiſden ſaid he had ſeen Adminiſtration given in Evidence *after the Seal broke off*, and ſo of Wills and Deeds. Mod. 11. pl. 34. Mich. 21 Car. 2 B. R. Clerke v. Heath.

3. The very Point of *Hargrave's Caſe*, 5 Rep. 31. was agreed and reſolved. And that that Caſe was after reverſed in the Exchequer-Chamber, but it was for another Cauſe; And Williams ſaid, That he had viewed the very Record of that Caſe accordingly, in which Caſe is, If A. brings *Debt againſt B. as Adminiſtrator to J. S. without ſaying that J. S. died Inteſtate*, yet it is good; For it may be that J. S. made a Will and Teſtament, and yet Adminiſtration might be commited to the Defendant by Refuſal, &c. But *otherwiſe* it is *where* the *Plaintiff is Adminiſtrator*, there he ought to ſhew that Party died Inteſtate. Noy. 137. Sr. Richard Franck's Caſe.

[T. b. 4] Age.

1. *Exemplifications of Depoſitions taken in Chancery* to prove a Perſons being of Age allowed of. Dy. 301

2. To prove the Nonage of a Perſon that made a Will *an Almanack* was produced, *in which his Father had wrote his Nativity*, and it was allowed to be ſtrong Evidence. Raym. 84. Mich. 15 Car. 2. B. R. Herbert v. Tuckall.

3. Where *a Perſon will take upon himſelf to trade and act as of Age*, he ought to be preſumed to be of Age, and no Evidence of Pariſh Regiſters ought to be admitted againſt it; ſaid to be the Opinion of Trevor Ch. J. and Parker Ch. J. Per Page J. Exon. Aſſ. Autum. 1728-9.

(T. b. 5) Agreement.

1. In Aſſiſe, it was *found* by Verdict, *that two Coparceners of a Moor made Par-Party*, and *one leaſed her Part to A. for* Term of *Life, who leaſed his Part to three at Will, who paſtured the Soil of the other Coparcener, and cut Wood*, and *mowed Ruſhes*, and *the other Coparcener quitted Poſſeſſion, and brought Aſſiſe againſt Leſſee for Life, and againſt two of the Tenants at Will*; and it was *found alſo, that the Tenant at Will manured the Soil to the Uſe of the Leſſor, but the Leſſee for Life had nothing of the Profits, and that the other Parcener might have taken the Profits if ſhe would*, and *that the Leſſee for Life did not command his Tenants to take the Profits, nor knew any Thing of it, but he agreed to what they had done, as the Jury thought, inaſmuch as after that he knew that the Tenants at Will had occupied by the Manner, he did not cauſe them to make Grce*; And per Cur. this is no Agreement, and therefore the Leſſee for Life is no Diſſeiſor, and alſo one of the Tenants at Will is not named, who by this Act is a Diſſeiſor and Tenant at Will with the others; therefore by Award the Plaintiff took nothing by her Writ. Br. Aſſiſe, pl. 345. cites 37 Aſſ. 8.

2. An Agreement reduced *into Writing, and variant from the Parol Agreement*, ſhall not be explained away by giving the Parol Agreement in Evidence, and the Jury ought to have no Regard to this Parol Agreement. Vide the Caſe of a Policy of Inſurance Skin. 54. Trin. 34 Car. 2. B. R. Kaines v. Sir Robert Knightly.

10 Mod 507. Mich. 9 Geo in Canc. by Parker C. in Caſe of Hobſon v. Trevor; where

3. The Authorities are many in the Court of Chancery, that *Bonds* have been conſidered as Evidences of Agreements, and Obligors held to a *Specifick Performance*, and not allowed to forfeit the Penalty. 10 Mod. 515. 518. Mich. 10 Geo. per Parker Chanc. in Caſe of Parks v. Wilſon.

the Condition of a Bond was for Performance of a Marriage Agreement, and decreed that the Obligor ſhould not be permitted to forfeit the Penalty, but that the Bond ſhould be conſtrued as an Evidence of the Agreement — Nelſ Ch. Rep. 205. Paſch. 1692. Holtham v. Ryland. S. P held accordingly by Ld. C. Somers — 2 Wm's Rep. 224 per Ld. C. Macclesfield, Mich. 1724. Cannel v. Buckle.

4. A Perſon cannot *declare upon a General Agreement, and give in Evidence a Special one*; Per the Ch. J. at Guild-hall. Barnard. Rep. in B. R. 303. Hill 2 Geo. 2. Pitt v. Norman.

5. The Plaintiff brought his Action upon a Special Agreement entered into by the Defendant, whoſe Brother was in *Execution in the Fleet for running of Goods. The Agreement given in Evidence upon the Opening of the Cauſe was only verbal; that the Plaintiff ſhould endeavour to procure the Defendant's Brother a Pardon; and that, in Conſideration of this, the Defendant ſhould give the Plaintiff* 1000 *l. if he ſucceeded, and what his Labour was worth if he ſhould not.* The *Defendant upon this produced a Bond of* 2000 *l in Evidence, with Condition that the Defendant ſhould give the Plaintiff and one Mrs. Henville* 1000 *l. if the Pardon ſhould be produced in ſix Months.* This *Bond* indeed *was ſince cancelled*; but the Counſel ſaid it drowned the firſt Agreement; and an Agreement is in its own Nature a Thing intire, and therefore it ſhall not be intended that one Part of it was put into Writing, and the other not. The Plaintiff however deſired to give farther Evidence, that the Intent of the Bond was only to reduce one Part of the Agreement in Writing, as it was the Chief, and to bring Mrs. Hattenville to witneſs this. The Defendant's Counſel objected againſt her Evidence, as ſhe was one of the Co-obligees, and therefore intereſted with the Plaintiff. However the *Court allowed to give both theſe Matters in Evidence.* Barnard. Rep. in B. R. Trin. 2 Geo. 2. Brown v. Hatch.

(T. b.

(T. b. 6) Alia Enormia.

1. In Treſpaſs Quare Clauſum & Domum fregit, & Alia Enormia ei intulit, on Nul Culp. Per Curiam, where a Matter ariſes Ex turpi Cauſa, (viz.) An Injury per Defendant to the Daughter of the Plaintiff under Colour that he would marry her, &c The Act may be given in Evidence upon ſuch a Declaration under the (Alia Enormia) becauſe the Law will not compel the Party to ſhew it of Record; But in all other Caſes of Treſpaſs, the Special Matter for which Damages ſhall be given ought to be pleaded, as in Treſpaſs for taking a Horſe, &c. nothing ſhall be given in Evidence, Put what is expreſſed in the Declaration. 1 Sid. 225. pl. 17. Mich. 16 Car. 2. B. R. Sippora v. Baſſet. Keb. 787. pl. 40 Mich. 16 Car. 2. Baſſet v. Shippon, S. C. the Plaintiff gave Evidence that the Defendant came a Suitor to his Daughter, and defiled her, which was the Cauſe of great Damage given; The Court conceived that this may well be given in Evidence, without ſaying Quod Intultum fecit ſuper Filiam, &c. and ſo of the Wife, but this is the better Way; and Judgment for the Plaintiff.——The Alia Enormia ſhall not be intended of Collateral Matter, but of Matter incident to the Act done; Per Roll Ch J. Sty. 202. Hill. 1649. in Caſe of Watſon v. Norbury.———

2. If a Man is *charged with two particular Facts in an Indictment, and divers other Crimes in general Terms*; if the two particular Facts are not proved nothing can be given in Evidence on the Alia Enormia, or the General Charge.

(T. b. 7) Alien.

1. Upon Iſſue of Alien or not, it is no Evidence that *in Deed of Bargain and Sale, he called himſelf a Freeman*, and ſo likewiſe *in a Fine, or that he traded*, tho' 22 H 8. cap 8. prohibites under Pain of all their Goods; for a *Denizen* can only be made by Patent or Parliament, and therefore *ought to be proved by Matter of Record*, and if the Letters of Indenization are loſt, he may have a Conſtat. 2 Bulſt. 33 Mich. 10 Jac. St. Olave's Caſe. So that Proof by Appellation is none at all.

(T. b. 8) Alien in Fee.

1. *In a Conſimili Caſu*, the *Demandant may count of an Alienation in Fee*, and if the Alienation be traverſed Modo & Forma, he *may maintain his Iſſue by an Alienation in Tail for Life*, becauſe they are all alike material. Hob. 105. per Hobart Ch. J. Arg. Trin. 13 Jac.

(T. b. 9.) Anſwer.

1. In ſome Caſes, if a Man *put in two Anſwers*, it is *not ſufficient to* produce and *prove a Copy of one of them*; Per Powell J. Lent Aſſiſes, Devon. 1710.

(T. b. 10) Aſſets.

1. Where the Iſſue is upon Aſſets *en mains del. Executor*, it is good Evidence for the Plaintiff to ſay, *that he ſola the Land by the Appointment of the Teſtator*, &c. Heath's Max. 82. cites 3 H. 6. 3.

2. If the Iſſue is Aſſets *at ſuch a Place*, it is good Evidence to prove Aſſets at another Place; for Aſſets any where *is Aſſets every where*. Mo. 47. in pl. 147. Paſch. 5 Eliz.

3. Upon Plene Adminiſtravit the *Iſſue* being *that Defendant had Aſſets Die Impretrationis brevis Originalis*, viz. —— Die —— It is *not neceſſary that the Plaintiff in Evidence produce the Original, or a Copy thereof*; for the *Day of the Teſte is admitted in Pleading*; Per Windham and Twiſden J. and if it were over-ruled at the Trial a Bill of Exceptions ought to be tendered, but this was not a Reaſon for a new Trial, for by the Opinion of the Ch. J. in Middleſex the Plaintiff was nonſuited. 1 Sid. 226. pl. 21. Mich. 16 Car. B. R. Rogers v. Rogers.

4. In Debt by Husband and Wife againſt an Executor, who pleaded Plene Adminiſtravit, and upon Iſſue it was proved that *Executor* had *diſcharged a Debtor of the Inteſtate out of Ludgate, taking a Bond from him for the Debt*; and it appeared that he *was ſo extreme poor that he was downright ſtarving*, yet the Debt was adjudged Aſſets in the Executor's Hands. Beſides the Executor had not an Inventory, and therefore it was ſaid that they ought to intend Aſſets. 12 Mod. 346. Mich. 12 W. 3. Anon.

5. In *Debt* upon Bond brought *againſt the* Deſendant as *Heir* to his Father, &c. Riens per Diſcent pleaded, the Plaintiff replied Aſſets, and Iſſue thereupon. And the Evidence was, that the Obligor, the Deſendant's *Father*, *deviſed to the Defendant his* Son and *Heir certain Meſſuages in Exchequer-Alley in Fee*, but *chargeable with an Annuity*, or Rent-Charge payable *to the Defendant's Mother*; and it was held by Holt Ch. J. that theſe Meſſuages deſcended to the Deſendant, and were Aſſets, for (by him) the *Difference* is, *where the Deviſe makes an Alteration of the Limitation of the Eſtate*, from that which the Law would make by Deſcent. Ld Raym. Rep. 728. Emerſon v. Inchbird. cites Trin. 13 Will. 3. B. R. Guildhall, London.

6. Action of Debt upon a Bond againſt an Executor, who pleads Plene Adminiſt avit; the Plaintiff's Counſel gave into Court the *Inventory taken in the Spiritual Court*, and put it upon the Defendant to diſcharge himſelf. Holt ſaid, that where in the Inventory it was ſet down *deſperate Debts* thoſe ſhall not be Aſſets, unleſs the Plaintiff can prove that the Defendant has received them. But thoſe Debts which are not ſet down deſperate, whether Arrears of Rent, or any other, ſhall be accounted Aſſets, whether paid or not. 11 Mod. 225. pl. 21. Paſch. 8 Ann. B. R. Anon.

7. A *Perſon having a Judgment againſt* the Anceſtor is no Witneſs to *prove Aſſets upon Riens per Deſcent*. Per Baron Price. Devon Aſſ. 1716, Lent.

8. *Bonds not received and of long Standing* are Evidence of Aſſets, unleſs Cauſe is ſhewn, why the Executor did not call them in. At Devon Aſſizes Lent 1719 Coram King Ch. J.

9. *Trees in a Nurſery* are no Aſſets in the Hands of an Executor. At Devon Lent Aſſizes 1735. Coram Reynolds Ch. B.

[T. b. 11] Aſſumpſit in Reſpect to the Statute of Frauds.

1. On Non Aſſumpſit pleaded to an Indebitatus Aſſumpſit brought, the Plaintiff cannot give in Evidence *a Specialty* as a Bond or Leaſe by Indenture and Rent Arrear; for he may have Action of Debt on the Specialty, but he muſt give in Evidence *Matter of Contract or Receipt without Specialty*; Per tot. Cur. præter Gawdy Mo. 340. pl. 460. Mich. 34 & 35 Eliz. B. R. Anon —— Vid. Cro. J. 505. Bennus v. Gildly.

Cro. E. 638 pl. 37. Holiday v. Hicks. S. C. adjornatur. ——— Ibid. 661. pl. 9 S. C. adjudged for the Plaintiff. —— Ibid. 746. pl. 25. Hill. 42 Eliz. S. C. in Cam. Scacc. and Judgment reverſed. The Declaration was, that he caſualiter perdit the Money; And when he had loſt the Poſſeſſion thereof, he had loſt the Property alſo, becauſe it cannot be known.

2. *Maſter delivered Corn to his Servant to ſell, who* does accordingly, and *converts the Money*; the Maſter may have Trover for the Money. Noy. 12. cites 40 Eliz. B. R. Holliday v. Higgs.

3. Per Mountague Ch. J. If a Citizen of London promiſes to his Daughter's Husband *to give* him *a Child's Portion by the Cuſtom of London*, the Evidence between the Wife and the Children is certain enough, and it is known how much every Child ſhall have. 2 Roll. Rep. 104. Trin. 17 Jac. B. R. Anon.

4. In Evidence to a Jury it was held, that Proclamations whereby the Lord claimed Forfeiture, ought to be proved *Viva Voce*, and *not only by the Court-Rolls*. 1 Keb. 287. pl. 98. Paſch. 14 Car 2. B. R. Pateſon v. Danges.

5. In Debt on *Award*, the Plaintiff counted of a mutual Agreement and Submiſſion ad performand' an Award, which was made, that the Defendant ſhould pay 50 l. to the Plaintiff, Et ſuper Reception' inde, the Plaintiff ſhould deliver up Writings and give a general Releaſe; And per Hynd and Cur. The *mutual Submiſſion* is no Promiſe in itſelf, but only an Evidence of it. 1 Keb. 599. pl. 72. Mich. 17 Car. 2. B. R. Tilford v. French.

6. A Wife in Conſideration, that L. would permit her to enjoy, &c. till Lady Day, &c. promiſed to pay the Rent in Arrear at her Husband's Death, and alſo ſo much for the Time; as to firſt Part it is void being within the Statute, and being *void as to one Part* it *cannot ſtand good as to the other*; For it is an entire Agreement, and the Action could not be brought for one Sum only without Variance from the Promiſe. Note, it did not appear that the Widow was Executrix or Adminiſtratrix to her Husband. 2 Vent. 223-4. Mich 2 W. & M. in C. B. Ld. Lexington v. Clarke.

7. In an Action for the Profits of an Office, it is not neceſſary to ſhew every particular Sum received by the Defendant, but it is good Evidence for the Damage to ſhew the Profits of the Office *Communibus Annis*. 2 Vent. 171. Paſch. 2 W. & M. in C. B. Earl of Mountague v. Ld. Preſton,

8. S. brought Action againſt A. B and C.——A. promiſed *in Conſideration the Plaintiff* would not *proſecute the Action then*, &c. (it being *at the Aſſiſes) he would pay* 10 *l. and the Coſts of Suit*. Action lies on his Promiſe notwithſtanding the Statute; For this cannot be ſaid to be a *Promiſe* for another, but *for his own Debt*. 5 Mod. 205. Paſch. 8 W. 3. Stephens v. Squire.

Comb. 362. S. C. A. was a Party concerned in the former Action, and this is aa original Promiſe, and A. himſelf was liable.

9. At Guildhall; In an Action upon the *Caſe upon mutual Agreements* the Evidence was, a *Note in the Nature of a Bill of Parcels* to this Purpoſe, *Bought by Anne Knight of——Hopper hundred Pieces of Muſlins at* 40 *s. per Piece, to be fetched away by ten Pieces at a Time, and paid for as taken away*. It being objected, that inſomuch there was not any Promiſe to deliver the Goods, and the Plaintiff accounted upon ſuch a Promiſe, that he had failed, it was anſwered that the Agreement being to pay 20 l. when ten Pieces were taken away, and ſo for every ten Pieces; that this *implies a Promiſe* to deliver them, the which ſeems to be Reaſon; but a Promiſe was proved to this Purpoſe, and ſo a Verdict for the Plaintiff. Skin. 647. pl. 5. Trin 8 W. 3. B R. Knight v. Hopper.

10. Aſſumpſit upon 29 Car. 2. cap 3. where the Plaintiff has an *Action againſt the Party for whom an Undertaking is*, there no Action will lie againſt the Undertaker, without the Promiſe be in in Writing; Secus where no Action doth lie againſt the Party; for then the whole Credit it entirely upon the Account of the Undertaker, and the other is looked upon as his Servant, and the Sale and Contract is in Judgment of Law to the Undertaker, though the Delivery be to the other Party as is Servant; i. e. upon the Original Contract or Agreement, but this Dif-

As to the Promiſe being in Writing is never pleaded, as it ought to be, but pleaded on Trial. Cumb. 163. Mich. 1 W. & M. in B. R. Lee v. Baſhpole.

Difference does not hold where the Action is *upon a Matter collateral* to the Contract, there an Action lies. 6 Mod. 249. Mich. 3 Ann. B. R. Bourkamire v. Darknell.

11 A Man promiſed *to pay* a certain Sum *upon the Return of a Ship which happened not to return in Two Years after the Promiſe* made, and on a Queſtion, whether this was within the Statute of Frauds and Perjuries, whereby no Action is to be brought upon any Agreement that is not to be performed within one Year from the making thereof, unleſs in Writing, &c. and held by all the Judges, that it was *not within the Statute*, which extends only to ſuch Promiſes, where, by the expreſs Agreement of the Party, the thing is not to be performed within a Year. 1 Salk. 280. pl. 5. Paſch. 5 W. and M. in C. B. Anon.

12. In Aſſumpſit *upon a Note* for 10*l.* 15*s.* given by the Defendant to the Plaintiff; and Non Aſſumpſit pleaded, upon Trial the Plaintiff produced and proved the Note. The *Defendant in Diſcharge of himſelf produced the Record of a Foreign Attachment*, wherein the ſaid Debt was attached by the City-Proceſs for the Satisfaction of a Debt demanded there of the Plaintiff, and was there condemned; and it was ruled by Trevor Ch. J. that this was a good Diſcharge; but that if the Plaintiff in this Action could have ſhewed the Original, wherein he declared to be precedent to that Attachment, ſo that it had appeared that this Court was poſſeſſed of an Action for the Demand of this Debt before it was attached, then ſhould the Plaintiff have recovered his Debt notwithſtanding ſuch Evidence; But the Declaration in the Record here was betwixt the Time of the Attachment and the Condemnation. 1 Salk. 291. pl. 32 Coram Trevor Ch. J. at Niſi Prius. Savage's Caſe.

13. If a Perſon ſeeing a Surgeon aſſiſting another that had received Hurt in one of his Limbs, ſays to him, pray take Care of the Man or do your beſt for him, or when will you come again &c. theſe Expreſſions do not make the Speaker liable to pay the Surgeon; it amounts to no Employment; Contra, if another ſhould *direct a Surgeon to take Care of a Man*, &c. *or uſe any other Expreſſion, whereupon the Surgeon ſhould lay out Money and Expences, and cure the Man*, &c. Devon, Summer 1710. Coram Parker Ch. J. at Niſi Prius, Palmer v. Barret.

14. In Action on a Promiſe the Plaintiff may give *a Bond* made to him in Evidence of it. Per Parker Ch. J. 10 Mod. 30. Trin. 10 Ann. B. R. Michel v. Reynolds.

15. If a Man enters into a *Bond*, and does not perform the Condition, the Obligee may bring an Aſſumpſit, and give the Bond in Evidence of it. 10 Mod. 30. Trin. 10 Ann. B. R. in the Caſe of Michil v. Reynolds.

16. Indebitatus Aſſumpſit *on Play at Baſſet*. The *Promiſe* as laid, *was to pay the Money to each other, which each other ſhould loſe*; the Evidence was, that the Defendant having loſt his Money did promiſe to the Plaintiff to pay him what Money he ſhould loſe by Bills in London. Baron Price ſeemed of Opinion that it was not ſufficiene Evidence, &c. Caſe ſtated, Wells. Lam. 1711. Langdon v. Herbert.

17. So in the Caſe of **Corke and Baker**, which was tried coram J. Powys at Lewes in Suſſex, which was that the Defendant *promiſed the Plaintiff to marry her within a Twelve-Month after the Death of his Father*. A Caſe was made of it, and argued coram C B. who determined it not to be within the Statute upon the ſame Reaſon neither was it within the other Branch, which ſays the Defendant ſhall not be anſwerable for the Debt or Miſcarriage of another, or upon any Agreement on Conſideration of Marriage, unleſs in Writing.

18. A Promiſſory Note *is prima facie Evidence* ſince the Statute, nor is it neceſſary to prove the Conſideration of it; *But yet Fraud, Cheat, Extortion*,

*Extortion, or Satisfaction may be given in Evidence by the Defendant to avoid it*, If the Consideration was to be proved the Act would signify nothing, and tho' the Note be without any Consideration, yet the Note will be good; Per Parker, Ch. J. Hill. 3 Geo. B. R. Appleby v. Beadle.

19. And by him at the Sittings, upon an Objection being made, that since the Statute a Promissory Note could not be *given in Evidence on a Count for Money lent*, &c. as Evidence thereof, but it was in Nature of a Specialty, it was Ruled e contra; for the Plaintiff may declare upon the Note if he will, or give it in Evidence.

20. At Bodmyn, Lammas 1716. an Objection was, that the *Note* which was given in Evidence, *was given upon Terms* which were *not performed*, & allocatur, per Baron Price; **Balfet v. Barly.** And one **Baldwin**'s Case before Holt Ch. J. was cited, where *above an 100 l. being lost at Play*, the *Loser having a Bill of Exchange endorses it*, and then the Indorsee bringing his Action, on Trial it was ruled, that the *Contract being made void by the Gaming Act, it might be given in Evidence.* So it may where a Note is made upon an *Usurious Contract.*

21. A *Mistress sent her Servant to Market to sell Barley*; when he returned his Mistress asked him what he had done? *He answered that he had sold*, &c. and when she asked him for the Money, he said, She need not trouble herself about that, *he would be answerable to her for it if not paid*, &c. Coram Price at Lanceston, Autum. Cir. 1720. It was held not to be within the Statute.

22. *Overseers undertake to pay for the Cure of a poor Person to a Surgeon*, there must be Evidence of an express Promise to maintain the Action. Price B. at Lanceston, Sum. Ass. 1729.

## (T. b. 12) Attaint.

1. *What was not given in Evidence to the Jurors shall not be* admitted to be *given in Evidence in Attaint*, and so the Plaintiff was nonsuited. D. 129. b. pl. 65. Pasch. 2 & 3 Ph. & M. Heydon v. Ibgrave. Dy. 212. a. pl. 34. a. Pasch 4 Eliz it was agreed. for Law, that if the Defendants in the Attaint give new Matter in Evidence to inforce the first Verdict, which was not given in Evidence before to the first Jury, that the Plaintiff in the Attaint shall have Answer to it, and disprove it as he can, but he cannot give other Evidence, nor inforce the Evidence first given with more Matter than was disclosed before.

## (T. b. 13) Augmentation of Vicarages.

29 *Car. 2. cap. 8. sect. 3. Every Archbishop, Bishop, Dean and Chapter shall before the 29th of September next, cause every Lease or Grant whereupon such Augmentation is made, to be entered in a Book of Parchment to be kept by their Registers; and every other Ecclesiastical Person shall cause every such Lease, &c. made by himself, or his Predecessors, to be entered there, for which no Fee shall be paid, save only 5 s. at most to the Clerk; which Entry being examined by the respective Archbishop, Bishop, &c. and by them attested in the said Book to be a true Copy, and that the Augmentation was for such Use, shall be as a Record, a Copy whereof proved by Witnesses shall be Evidence at Law.*

1 *Geo. 1. cap. 10. sect. 20. All Augmentations, &c. to be made in Pursuance of this Act shall be entered in a Book, and the Entries being approved and attested by the Governors, shall be taken as Records.*

[T. b. 14] Bailiff of a Manor.

1. In Account againſt B. generally as his Bailiff of the Manor of S. he *pleaded, that he was Receiver Abſque hoc that he was Bailiff* The Plaintiff, to prove him Bailiff, gave in Evidence *a Cuſtom* in that Manor *for the Freeholders yearly to elect at their Courts there a Perſon called the Part-Reve of the Ablot's Rents of his Frank Tenants, to collect Rents Ratione tenuræ*, and that ſuch elected Perſon uſed to account, and have Allowance before the Abbot's Auditors, and ſaid that the Defendant was choſen, &c. The Defendant demurred on this Evidence, and per Opinionem Curiæ it will not maintain the Action, for the Count againſt him is as Bailiff generally, and the Evidence charges him ſpecially by Reaſon of his Tenure, therefore he ſhould have made a ſpecial Count. Keil 76. a. pl. 23. Mich. 21 H. 7. Buckfaſt (Abbot) v. Horſwill.

[T. b. 15] Bankrupts.

1. *5 Geo. 2. cap. 30. ſ. 41. Upon Petition of any Perſon, the Ld. Chancellor may order ſuch Commiſſions, Depoſitions, Proceedings, and Certificates, to be entered of Record; and in Caſe of the Death of the Witneſſes proving ſuch Bankruptcy, or in Caſe the ſaid Commiſſions, or other Things ſhall be loſt, a Copy of the Record of ſuch Commiſſions or Things, ſigned and atteſted as herein mentioned, may be given in Evidence to prove ſuch Commiſſions and Bankruptcy, or other Things; and all Certificates which have been allowed, or to be allowed, and entred of Record, or a true Copy of every Certificate ſigned and atteſted as herein mentioned, ſhall and may be given in Evidence in any Courts of Record, and without further Proof taken to be a Bar and Diſcharge againſt any Action for any Debt contracted before the iſſuing of ſuch Commiſſion, unleſs any Creditor of the Perſon that hath ſuch Certificate ſhall prove that ſuch Certificate was fraudulently obtained.*

2. There is no need to produce at the Trial the *Petition made to the Ld. Chancellor*, becauſe it may have been by Parol, though the Practice has been otherwiſe. Ld. Raym. 741. ruled by Holt Ch. J. at Lent Aſſizes at Thetford, Kirne v. Smith and al.

(T. b. 16) Cauſing or Procuring.

1. In an Action on the Caſe brought for a *Falſe Return of a Mandamus*, the Plaintiff was put to prove that the Defendant cauſed the *Return* to be made, which he did in this Manner, viz. he proved that the *Defendant was perſonally ſerved* with an Alias Mandamus; and that he *told the Perſon who ſerved him* with this Writ, *that he would take Care a Return ſhould be made*; and farther, *two Rules of Court were produced*, viz. *one for an Attachment* againſt the Defendant for not making a Return, and *the other to diſcharge that Rule* for an Attachment upon Payment of Coſts, and appearing to the Action, &c. And this was admitted to be good Proof as to that Matter, and the Plaintiff had a Verdict. Carth. 229. Paſch. 4 W. & M. in B. R. Vaughan v. Lewis.

(T. b. 17) Clerk in Orders.

1. Whether a Man be Clerk in Orders or not is triable by his *Ordination*. Per Holt Ch. J. 12 Mod. 452. Paſch. 13 W. 3. in Caſe of Wilmot v. Tiler.

(T. b. 18)

(T. b. 18) Common.

1. In an Action of *Treſpaſs*, the Defendant juſtified, by Reaſon that he, and all thoſe whoſe Eſtate he had, had Common in the Place for ſo many Beaſts beyond the Memory of Man; and the Parties were at Iſſue on the Preſcription, and the Plaintiff gave in Evidence that he had *Common of Vicinage* appendant to his Houſe; and it was reſolved, that the Evidence did not maintain the Iſſue; for although both begin by Preſcription, yet common of Vicinage does not begin by a *bare Preſcription*, but a *Preſcription on Conſideration*, that the other ſhall have Common in like Manner in his Soil. L. E. 235. pl. 37. cites 13 H. 7. 13. Br. Common Pl. 35. S. C. Br. General Iſſue, pl. 96 S. C.

2. In a Replication in the *Avowry*, *preſcribes* to have *Common Appurtenant*, but doth not *ſhew* and aver that the Cattle were *levant and couchant* upon the Land, &c. and for that it was held to be naught by the Court. Vide. 15. E 4. 32. But in our Caſe the *Iſſue was joined upon the Preſcription*. And by the other Fault is allowed as confeſs'd. And is helped after Verdict by the Statute. Noy. 145. Jeffrey v. Boys. cites 5 Rep. 43. a.

3. In the Caſe of a Common you muſt prove the *Uſe* and the *Appendancy*. Per Richardſon Ch. J. Litt. R. 295 Trin. 5 Car. C B.

4. A Traverſe being joined upon Title of Common, it was admitted that a *Releaſe of all Right of Common in that Place* ſhould be given in Evidence, and needed not to be pleaded as he might have done; on the other Part it was ſhewed the *Common* did *belong to Land*, which was *entailed*, which *cannot paſs by Releaſe*, no more than the Land itſelf, &c. can, and for that Cauſe the Iſſue in Tail, who was Plaintiff, here did recover. Clayt. 9 pl. 16. Mich. 8 Car. before Damport Ch. B. Judge of Aſſize. Atkinſon's Caſe.

5. A Replevin was brought for 300 Head of Cattle, viz. ſo many Oxen, ſo many Steers, &c. the Defendant makes Conuſance as Bailiff to J. S. and juſtifies for Damage-Feaſant. The Plaintiff replies, that J. D. and all whoſe, &c. he had in ſuch a Meſſuage, and 40 Acres of Land, Time out of Mind. have had Common, &c. and ſhews he had a Leaſe from J. D. and ſo put in the Cattle to uſe his Common; To which the Defendant rejoins, and juſtifies *ut ſupra*, *abſque hoc*, that they were the Cattle of the Plaintiff levant and couchant upon, &c. *Not only* the *Levancy and Couchancy* is the Meaſure of this Common, *but* the *Property of the Party likewiſe*; For if they be levant and couchant, and yet be a *Stranger's Cattle agiſted* into the 40 Acres, of they be the *Party's Cattle levant and couchant upon ſome other Land*, and not upon the 40 Acres; in either of theſe Caſes they ought not to uſe the Common, for a Man cannot uſe his Common with the Cattle of a Stranger, or with his own Cattle levant and couchant upon any other Land than that in which he hath Common Appurtenant; It is true, if a *Man borrows Cattle to compeſter his Land*, they may be put upon the Common for that he hath a *ſpecial Property in them*, and ſo are ſaid his Cattle, and for this was cited F. N. B. 180. and Roll. Common 402. and of this Opinion was the Court; wherefore Judgment was given for the Defendant. Skin. 137. Mich. 35 Car. 2. B. R. Molliton v. Trevilian.

6. The Defendant *preſcribed for* Common for *all Cattle*, &c. *at all Times of the Year*, but upon Evidence it appeared that they had Time out of Mind Common of Paſture in the ſaid Common for all the Cattle Levant and Couchant, &c. at all Times in the Year *(Sheep only excepted for a certain Time)* Reſolved per Cur. that they had failed in the Preſcription, and that the Evidence would not maintain the Plea; and that *the Preſcription ſhould have been ſpecially pleaded with this Exception*.

Carth.

Carth. 241 Pasch. 4 W. & M. in B. R. The King v. the Inhabitants of Hermitage.

4 Mod. 418. 424. Strode v. Birt, S. C. and S. P. and Judgment affirmed.— Comb. 370. Burk. v. Strode, S. C. and held accordingly, and Judgment affirmed ——

7 Error of a Judgment in C. B in an Action Sur Case, where the Plaintiff declared he was lawfully *possessed of a Tenement*, and that he ought to have Common of Pasture in 1000 Acres, in a Place called, &c. for all Commonable Beasts levant and couchant on the Tenement aforesaid; That the Defendant made Cony-burrows, whereby the Plaintiff could not enjoy his Common, *in tam amplo & beneficiali modo.* Defendant demurred; This Matter is not traversable, for all Right of the Common must be given in Evidence upon Not Guilty, or else Plaintiff cannot recover; and if so, it is to no Purpose to set it forth in the Declaration. 12 Mod. 98. Trin. 8 W. 3. Birt v. Strode.

[T. b. 19] Common Recovery.

1. Tenant for Life suffers a Common Recovery. The Remainder-Man brings his Ejectment. The Plaintiff gave in Evidence a Copy of the Recovery, but no Evidence that there was a real Tenant to the Præcipe. Mr. Baron Price allowed it; For *though the Tenant to the Præcipe must be proved against a Stranger, yet there is not that Occasion for it when it is made against the Party himself that suffers the Recovery.* So a Person claiming by Virtue of a Recovery must shew that there was a Tenant to the Præcipe, because that is in his Privity, but here it is otherwise, for it is not in the Privity of the Remainder-man; he had not the Deeds by which the Tenant to the Præcipe was made, and if this (which is all that the Remainder-man in the Nature of the Thing can do) be not allowed, it is but for the Tenant for Life when he makes a Tenant to the Præcipe by Deed, and the Remainder can never take any Advantage of it. Coram Baron Price, Wincheiter Summer Assises, 5 Geo.

2. In every Common Recovery, it shall be *presumed there was a good Tenant to the Præcipe* till the Contrary be made appear of the other Part, and rather than it shall be void, the *Court will intend, that the Tenant was in by Disseisin.* 2 Lutw. 1549 cites Cro. J. 454, * 435. the Case of Lady Griffin v. Stanhope; And said that so it was ruled by Powel J. of B. R. in a Trial at the Assises at York.

* It shall be intended that there was a good Tenant in the Præcipe, and if it were otherwise the Proof ought to be made by the other Party. Cro. J. 445. in pl. 13. Mich. 15 Jac. B. R. in Case of Griffin v. Stanhope.

[T. b. 20] Consent.

1. It was given in Evidence to prove the Assent to the Ravisher that *she married him, and agreed, and assented in the Sanctuary of Westminster*, though in going to the Sanctuary she was persuaded to dissent, for Loss of her Inheritance, and she said that she would dissent. And that afterwards she was brought into the Star-Chamber before the Counsel, and there it was demanded if she agreed or not, who said that he was her Baron, wherefore she would not relinquish him. And it was said for the Defendant, that the Espousals and all the Assents were by Dures's Force and Fear of the Ravisher, and it cannot be said Assent, unless she be at Liberty freely without Fear or Dures, which seem, to be Law there, but because when she was before the Counsel she might have disagreed, and did not, but assented, therefore it was held free Assent, by which the Assize found for the Plaintiff, and the Plaintiff recovered per Cur. Quod Nota. Br. Ent. Cong. pl. 94. cites 5 E. 4. 58.

2. It is not conclusive Evidence to prove the *Woman's Consent to the Ravisher*, to shew, *that she lived some Years with him as his Wife, and had*

*had a Child by him*, if all the Time she was under his Power, and never at Liberty, 2 Hawk. Pl. C. chap. 23. sect. 58.

[T. b. 21] Contempt.

1. *One Witness sufficient* to prove a Contempt. Toth. 103. cites Mich. or Hill. 13 Car. Sands v. Knighton.

2. Per Cur. on *Affidavit of the Lie given* by any Man to another *in the Hall*, they will bind him to his good Behaviour; so for any Provocations that may induce any Quarrels or Striking. 1 Keb. 558. pl. 77. Trin. 15 Car. 2. B. R. Collins v. Man.

3. A Plaintiff is a good *Witness to prove* a Contempt, and Plaintiff's Oath is sufficient to convict the Defendant, unless the Defendant in his Examination swear clear contrary; Per Ld. King Bridgman. 3 Chan. Rep. 39. Mich. 1669. Nurse v. Guillim. 2 Freem. Rep. 132. pl 159. S. C.

4. One may be committed for a Contempt done to the Court; but *the Matter* of the Contempt *must be certain and not doubtful*, and must be *either in open Court or upon Affidavit made* thereof. (Mich 22 Car. B R.) For else the Party may perchance be wrongfully committed, which the Court will be cautious not to do. L. P R. 305.

5 Where a Man is arrested upon an Attachment the Contempt shall hold good, tho' *No Affidavit* be *filed at the Time of taking forth the Attachment* if it be filed before the Return of it. Vern. 172. pl. 166. Trin. 35 Car. 2. Anon.

6. Defendant was *reported to have fully answered some of the Interrogatories, and to be in Contempt as to others*; and being brought into Court to receive Judgment, the Question was, whether all the Affidavits in a Cause of Lane v Jones, containing the whole Charge against Defendant, ought to be now read, or only such of them as relate to that Part of the Charge, which Defendant, on his Examination, has fully answered. The three Prothonotaries reported, that Defendant being in Contempt, *his Examination goes for nothing*, and Affidavits containing the whole Charge was read. Barnes's Notes in C. B. 190, 191. Hill. 12 G. 2. The King v. Willis.

[T. b. 22] Contents of Deeds.

1. The Substance of a Deed *cannot be proved but by the Deed itself, unless* it is *burnt, or in the Possession of the Plaintiff himself*; and if so, then this Matter as it happens must be sworn, and that the Deed was executed; Per Holt Ch J. 3 Salk. 154 pl. 6. Hill. 8 Will. 3. B. R. Lynch v. Clerk.

2. In an Information for a Riot upon the Person of Sir F W. a Letter of the Prosecutor's was admitted to be read for Defendants; But then they produced a Witness to swear the Contents of another Letter which he *deposed was the same Hand of the Letter produced, but own'd he never saw Sir F. W. write*, and was therefore disallowed. Skin. 673. pl 12. Mich. 8 W. 3. B. R. The King v. Sir Thomas Culpepper.

3. If a Deed be *lost* by an inevitable Accident, it may be proved by a Copy, but not by Parol Evidence, tho' there should be no Copy. Yet it was held, that Parol-Evidence should be allowed to shew the Contents of a *Deed that was not lost*, but was proved to be *in the Possession of the other Party*; for here if the Defendant was wrong'd by the Parol-Evidence, it was in his Power to set all right by producing the Deed. 10 Mod. 8. Pasch. 9 Ann. B. R. Sir Edward Seymour's Case. In a Suit between A. and B A produced a Deed In a Suit afterwards between C and A. it was Viva voce proved that A. in a Cause between A. and B. produced such a Deed which proved so and so, &c. Per Cur. it is good Evidence, for here A may give that very Deed in Evidence if he will, which C. cannot, because it is in A's Custody. Carth. 60. Mich. 1 W. & M. Eccleston v. Speke.

[T. b. 23] Conviction.

1. *Copy* of a Conviction *before Commiſſioners of Exciſe* is good Evidence, without producing the original Book of Entry; and it need not be proved that the Commiſſioners did give the Judgment recited in the Copy of the Conviction. Carth. 346. Paſch. 7 W. 3. B. R. Fuller v. Fotch & al.

(T. b. 24) Copyhold.

1. *Stewards Books, Court-Rolls*, or *Bailiffs Accounts*, are good Evidence in themſelves. Hetl. 46. Mich. 13 Car. C. B. Fawkner v. Billingham.

2. *Proclamations* whereby the Lord claims Forfeiture of a Copyhold, *ought to be proved Viva voce*, and not by the Court-Rolls only; held in Evidence to a Jury. Keb. 287. pl. 98. Paſch. 14 Car. 2. B. R. Pateſon v. Danges. Alias, Ld. Alisbury's Caſe.

3 It ſhall be *preſumed that an Entail is cut off* ſome Way or other, *when many Admittances ſince have been in Fee-Simple.* Scrogs 69.

4. The Diſpute was between the Lord of the Manor and the Deviſee of a Copyhold of the ſame Manor; And it was ruled by Holt Ch. J. Lent Aſſiſes 1693. at Cambridge, *That the Recital of the Will in the Copy of the Admittance was good Evidence of the Deviſe againſt the Lord or any other Stranger; But if the Suit had been between the Heir of the Copyholder and the Deviſee, the Will itſelf ought to have been produced.*

2 He ruled, *That the foul Draught of the Lord of the Manor of the Admittance was good Evidence. Ex relatione magiſtri place.* Ld. Raym. Rep. 735. Anon.

Ibid. per Baron Carter, S P. at Bury Aſſizes, in the Caſe of Street v Roper.—— 5. *A Paper-Book was produced of the Acts of the Court in which the Admiſſions and Surrenders of the Copyhold Eſtates were entered*; but Baron Carter at Thetford Aſſizes held it no Evidence. He ſaid, *That the Roll ought to have been upon Parchment, and in Strictneſs ſhould have been in the Form of Rolls made up in the Courts above*; But that if the preſent Admiſſion had been entred in a Parchment Book, he ſhould have allowed it for Evidence. He ſaid, he did agree that in a late Caſe the Ld. Ch. Baron and two other Barons were of Opinion that ſuch Paper-Book was good Evidence, but at that Time he declared his Opinion to the contrary, and of this Opinion he ſtill continued. 2 Barnard. Rep. in B. R. 405, 406. Hill. 7 Geo. 2. at Thetford Aſſiſes, Chance v. Dod.

6. *But upon producing a Copy of this Admiſſion*, the Baron *allowed it as Evidence*, and ſaid it has often been ſo. 2 Barnard 406. Hill. 7 Geo. 2. Dod.

7. A *Paper-Writing ſigned by the Lord of the Manor teſtifying ſuch Surrender made by the Lord himſelf of Copy-Lands to the Uſe of the Surrenderor's Will, and the Plaintiff's Attorney's Oath that it was ſigned by Hand-writing of the Lord himſelf*, was allowed good Evidence, tho' the Lord himſelf was not preſent in Court to prove it. Per Baron Carter at Thetford Aſſiſes. 2 Barnard. Rep. in B. R. 406. Hill. 7 Geo. 2. Chance v. Dod.

8. *Where a Surrender is in the Hands of the Lord himſelf it is not neceſſary that it ſhould be preſented at the next Court.* Per Baron Carter at Thetford Aſſiſes. 2 Barnard. Rep. 406. Hill. 7 Geo. 2. Chance v. Dod.

9. It was inſiſted, that no *Evidence* could be given *to prove Lands to be Copyhold* but the Rolls themſelves, but Baron Carter was of a different

ferent Opinion. 2 Barnard. Rep. in B. R. Hill. 7 Geo. 2. at Eury Aſſizes in the Caſe of Street v. Roper.

(T. b. 25) Cuſtom of a Manor.

1. To prove *cuſtomary Deſcents* the Court enforced the Parties which maintained the Cuſtom to ſhew *Precedents in the Court-Rolls* to prove the Uſage; and Coke Ch. J. ſaid, without ſuch Proofs that it had been put in Uſe, though it had been deemed and reputed to have been a true Cuſtom, yet the Court could not give Credit to the Proof by Witneſſes. 4 Le. 242. pl. 395. Paſch. 8 Jac. C B. Ratcliff v. Chaplin.

2. To prove that the Cuſtom *of the Manor of S. was deſcendible to the eldeſt Daughter*, it was ſhewn that it was Parcel of the Manor of Odiam which was antient Demeſne, in which Manor ſuch Cuſtom is. But on the other Part it was ſhewn, that it cannot be *Parcel of the Manor of Od.* becauſe it appears by diverſe Records that this Manor of S. was held of the K. by Grand Serjeanty; and though it was agreed there was ſuch Cuſtom in the Manor of Od. yet as the Manor of S. holds by ſuch Service it cannot be Parcel of the Manor of Od. But it was anſwered that this Tenure in Grand-Serjeanty was created by K. E. 2. and if ſuch antient Cuſtom was, it cannot be deſtroyed nor altered by Alteration of the Tenure, and this was agreed by all the Juſtices. Wherefore becauſe diverſe Precedents were ſhewn, that Lands of the Freeholders uſed to deſcend there to the eldeſt Daughter, and that Lands ie S. uſed to be recovered in a Writ of Right Cloſe in the Court there it was left to the Jury to enquire if there was any ſuch Cuſtom; but the Jury could not agree, ſo a Juror was drawn by Conſent and a new Trial prayed, &c. Cro. C. 484. pl. 8. Mich. 18 Car. B. R. Moulin v. Daliſon.

3. It appeared by an *ancient Book of Survey* that by the Cuſtom of the Manor of which the Eſtate was held the Copyholds there ſhould not only go to the youngeſt Son, but alſo in Caſe the youngeſt Son died without Iſſue, it ſhould go *to his youngeſt Brother*, and not to the eldeſt and if no Sons then it ſhould go to the youngeſt Daughter, &c. The Queſtion being, whether upon the Death of the youngeſt Son it ſhould go *to his next youngeſt Brother*, or to the eldeſt; the Chancellor directed an Iſſue for Trial of the Cuſtom. Vern. 489. Mich. 1687. Edwin v. Thomas.

4. A Cuſtom of a Manor ſhould be *proved out of the Books or Surveys* of the Manor, *and not by Parol*; which is bad Evidence. Coram Baron Cummins at Taunton Aſſizes. Hill. Vac. 1727-8.

(T. b. 26) Cuſtom of Merchants.

1. The Cuſtom of Merchants ought to be proved *by thoſe that have had frequent Experience*, and have known Caſes ſo ruled. Skin 54 pl. 7. Trin. 34 Car. 2. B. R.

(T. b. 27) Evidence relating to Deeds.

1. On Non eſt Factum it was found that the Defendant ſubmitted and ſealed the Bond, and *caſt it upon a Table, and the Plaintiff took it without* any other Delivery, or *any other thing amounting to a Delivery*. Held that this is no Delivery. Le. 140. pl. 193. Hill 30 Eliz. C. B. Chamberlain v. Staunton.

2. And this is not like the Caſe lately adjudged here that the Obliger ſubſcribed and ſealed the Obligation, and *caſt it upon a Table, ſaying*,

*ing, this will ſerve*, which was held a good Delivery, the ſpeaking the Words being a Circumſtance by which the Will of the Obligor appeareth that it ſhall be his Deed. Ibid.

3. A Witneſs proved the *Delivery of a Deed*, but could not ſay it was on the *Day of the Date*; Coke Ch. J. directed the Jury to find it according to the Date ſince it was proved to be delivered, and it ſhall be intended to be on the Day of the Date. Roll. R. 3 Paſch. 12 Jac. B R. Stone v. Grubham.

4 The *Contents and Sufficiencies of Deeds* are not to be proved by Teſtimony of Witneſſes, the Conſtruction of Deeds being the Office of the Court. 3 Ch. Rep. 92. 16 June 17 Car. 1. Earl of Suffolk v. Greenvill.

5. Plaintiffs were the Defendants Siſter's Children, and on a Bill againſt Defendant (being an Infant) to diſcover a Deed, the Queſtion was, if the Defendant's Father had ſettled Lands on Plaintiff's Mother; the Proof was, that about Two Years before her Marriage he had *put* her *in Poſſeſſion of theſe Lands*, and had *articled* on her ſaid Marriage *to ſettle them* on her and her Heirs, and the *Defendant (then an Infant) was a Witneſs* to the Articles. But though there was no other Proof of ſuch Deed of Settlement, yet the Court decreed for the Plaintiff, but it was conceived a hard Caſe to decree an Equity on a Deed which had no other Proof N. Ch. R. 94. Kingſton v. Manwaring.

Skin. 2 pl. 2. S. C. and S. P. accordingly.—

6. Where there is a *Common Seal* put to a Deed of *Corporation* that is Title enough *without a Witneſs to prove it*, or that the major Part of the College be agreed, and if it be ſaid, that it was put to by the Hand of a Stranger that ſhall be proved on the Side that ſays ſo, Sic dictum fuit. Skin. 2. Mich. 33 Car. 2. B. R. in the Caſe of Ld. Brounker v. Sir Robert Atkins.

7. *Indenture inrolled* of Bargain and Sale is good Evidence, though it is *not proved to be executed* by the Bargainor. Cumb. 247. Paſch. 6 W. & M. in B. R. Smart v. Williams.

8. A Deed *to lead the Uſes of a Fine Sur Conceſſit* need not be proved *per Teſtes*. Try. per P. 209.

9. *To prove the ſealing* and Delivery of a Deed, *and not know the Party that did it*, is not good Evidence; *but if he knows the Party upon Sight of him* it is good enough. Try. per Pais, 172

10. Upon a *bare Recital* in a Deed *of a Deed of Uſes on a Fine*, Proof muſt be made that there was ſuch a Deed. 6 Mod. 45. Mich. 2 Ann B. R. Ford v. Ld. Grey.

11. A *Copy of a Deed leading the Uſes of a Fine, and enrolled for ſafe Cuſtody only*, was allowed to be read as Evidence at a Trial at Law. 2 Vern. 471. pl. 429. Mich. 1704. Combes v. Spencer.

12 *Leaſes made in Breach of Articles* not ſuffered to be read as Evidence. Jan 20, 1702. Ld. Peterborough v. Germain.

13. *Atteſted Abſtract of a Deed* no Evidence. Jan. 20, 1702. Ld. Peterborough v. Germain.

14 A Mortgage Deed was produced in Court, dated 11 *April* 1710. and ſome of the *Officers of the Stomp Office* attending *affirmed that by the Stamp on that Deed it could not be made in the Year* 1710, *but in the Year* 1711 *or after*; becauſe that Stamp was not uſed before the Year 1711, ſo that there was a ſtrong Preſumption it was antedated on Purpoſe to over-reach the Settlement on the Plaintiff, whereupon the Ld. Chancellor ordered a Trial at Law. 9 Mod. 97. p. 10. Geo. 1. Osborn v. Lea.

(T. b. 28) Demand of Rent.

1. Where a Demand is made of Rent in Order to avoid a Leaſe, it *muſt be made of the laſt half Year only.* Coram Prat Ch. J. apud Croydon Aſſiſes in Autumn, 1720.

(T. b. 29) Denizen.

1. Denizen or not cannot be ſufficiently proved but by Matter of *Record*; Per Williams J. 2 Buls. 34. Mich. 10 Jac. Olave School's Caſe in Southwark.

[T. b. 30] Deſcent.

1. *Dugdale's Baronage* not allowed in Evidence to prove a Deſcent. 2 Jones 164. Mich. 33 Car. 2. B. R. Piercy v. ———

2. *Chart of Pedigree*, no Evidence of itſelf without ſhewing the *Books and Record whence deduced* to prove Deſcent. 2 Jones 224. Mich. 34 Car. 2. B. R. Earl Thanets Caſe.

[T b. 31] Devaſtavit.

1. In Debt againſt Executors ſuggeſting a Devaſtavit, an *actual Devaſtavit muſt be proved as well of Money as of other Chattels*; For now the Party is chargeable in his own Right. 2 Keb. 676. pl. 55. Trin. 22 Car. 2. B. R. Kettle v. Stellye.

[T. b. 32] Deviſe of Land.

1. Held in Caſe of a Deviſe of Land, that the Shewing the *Will under Seal* and Proof that it was *examined by the Original* is good Evidence without ſhewing the Original. Clayt. 57. pl. 98. July 1638, before Barkley, Judge of Aſſiſe, Lodges Caſe.

2. The Point in Iſſue was, *if J. S. deviſed Lands to J. N. and his Heirs* or not; the *Finding a Deviſe to B. for Years Remainder to J. N. and his Heirs* is not a Finding according to the Iſſue; For the Iſſue is upon an immediate Deviſe in Poſſeſſion. Jo. 224. pl. 5. Paſch. 6 Car. the King v. Newdigate.

3. *Copy of a Will* examined at the Prerogative Office is not Evidence to make Title to Lands by Deviſe. Cumb. 248. Paſch. 6 W. & M. in B. R. Smart v. Williams.

4. A *Will* under which a Title is made for the Plaintiff *muſt be ſhewn to the Court itſelf, and not only a Copy* of it, which they refuſe to admit. Keb. 117. pl. 23. Mich. 13 Car. 2. B. R. Eden v. Chalkhill.

[T. b. 33] Diſfranchiſement.

1. A Diſfranchiſing of a free Burgeſs of Newcaſtle *by an Act of Common Council* was allowed without producing the Charter; Per Tracey J. York Aſſ. 1714.

[T. b. 34] Earneſt Money paid. The Effect thereof.

1. Earneſt Money paid on an Agreement for Goods binds the Bargain, but *the Money muſt be paid on fetching away the Goods*, becauſe no other Time of Payment is appointed. The Earneſt only binds the Bargain, and gives the Party a Right to Demand; but then a Demand without Payment of the Money is void. After Earneſt given, the Vendor can-

not ſell the Goods to another without a Default in the Vendee, and therefore *if the Vendee does not come and demand the Goods, the Vendor ought to go and requeſt him*, and then if he does not come and pay, and take away the Goods in convenient Time, the Agreements is diſſolved, and he is at Liberty to ſell them to any other Perſon. 1 Salk. 113. pl. 2. Paſch. 3 Ann. Coram Holt Ch. J. at Guildhall. Langfort v. Tyler.

[T. b. 35] Ejectment.

1. If a *Leſſee brings an Ejectment and has a Verdict*, and afterwards *the Reverſioner brings an Ejectment likewiſe*, the Reverſioner ſhall have Advantage of the Verdict and give it in Evidence; Per Cur. Hardr. 472, Hill. 19 & 20 Car. 2. in Scacc. in Caſe of Ruſhworth v. Pembroke (Counteſs) and Currier.

[T. b. 36] Election of Parliament Men.

1. A. was *duly choſen* Parliament Man, but B. was returned, and upon a Petition to the Houſe of Commons, A. was voted well choſen, and the *Return amended*. In Caſe brought by A. for a falſe Return; it was adjudged, that as this Caſe was it did not lie, becauſe it *appeared upon Record, that he was returned*. But if inſtead of an Action on the Caſe he had brought an Action on the Statute, it would have been well; For there the Clerk's Notes would have been Evidence. Holt's Rep. 629. 635. Mich. 5 Ann. Kendall v John.

[T. b. 37] Endowment.

1. Though there can be no Proof of an Endowment, but becauſe of *long Poſſeſſion and being Preſentative*, decreed to be enjoyned 9 Car. A Caſe between Grimes and Smith in the Exchequer-Chamber. Toth. 270. cites Neale v. Liſter, about 39 Eliz.

2. A *Deed found in the Archives of the Chapter* was admitted to prove an Endowment of the Vicar, being but concurrent Evidence, *though it appeared not to have been ever ſealed and delivered*. 2 Keb. 126. pl. 79. Mich. 18 Car. 2. B R. in Caſe of Smith v. Rawlins.

3. *Payment* is Evidence of the Endowment of a Vicarage, and no Man can prove other Endowment, and a Conſultation was denied. 2 Keb. 729. pl. 13. Hill. 22 & 23 Car. 2. B. R. Brigham v. Robſon.

[T. b. 38] Entail.

1. If there was a *Gift in Tail, Reverſion in the Crown before the Statute De Donis*, and the Poſſeſſion hath been Time whereof in Purchaſors, if the Poſſeſſion cannot be proved to be in the King after the Statute of W. 2. it ſhall be intended to be made Poſt prolem Suſcitatam, and before the Statute De Donis. Cro. J 445. pl. 13. Mich. 15 Jac. B. R. Griffin v. Stanhope.

2. *An old Inquiſition finding an Entail created about two hundred Years ſince* was ſet up to defeat a Purchaſe; Ld C Parker ſaid, that if there was not the cleareſt Proof imaginable of ſuch an Entail, the Jury was in the Right not to find it. Wms. Rep 671. 673. Mich. 1720. Leighton v. Leighton.

3. A Deed of Entail in King James the Firſt's Time was proved by an Inquiſition Poſt Mortem finding it in Hæc Verba. 2 Ld. Raym. Rep. 1292 Mich. 8 Ann. B. R. Burridge v. the Earl of Suſſex.

[T. b. 39]

[T. b. 39] Entry and Suſpenſion.

1. In Ejectione Firmæ in Evidence to the Jury, where three ſeveral Parcels of Land lay in one County, and the Lady Argol having Right (as ſhe thought) to let them all to the Plaintiffs who brought the Action, and the Lands were in the Hands of three ſeveral Leſſees of Cheyny. She made a Leaſe by Deed, and delivered it as an *Eſcrow* to J. S. and made likewiſe a Letter of Attorney to J. S. to enter in her Name upon all the Lands, and to deliver unto her Leſſees the Deed as her Deed. Witneſs proved, that ſhe entered upon one Leſſee in the Name of all the Land; And Jones J. thought it well done, becauſe it the Freehold be in one, though there be ſeveral Leſſees for Years, Entry *in one Acre in the Name of all is good enough*; Yet Brideman held there ought to be Proof of the Entry of the Leſſees into all Acres. At laſt it was fully proved, that the Entry of the Attorney and the Leſſees was into all. Lat. 71. Paſch. 1 Car. Argol v. Cheyny. Palm. 402. S. C. & P. thought the Entry of the Attorney to be good. Jones, Doderidge and Crew. J. held it good, becauſe in one County.

2. In Evidence to the Jury on a *Writ of Entry ſur diſſeiſin*, the Demand was for a Manor, and *Non Diſſeiſivit* pleaded for Tenant, Demandant gave in Evidence, that the Tenant had entered into the *Demeſnes of the Manor* and put him out; Counſel for the Tenant put the Demandant *to prove, that it was a Manor*, and that the Tenant had received the Attornment of the Tenants, becauſe a Manor cannot ſubſiſt without Tenants, and the Demandant failing to prove this was nonſuited. Arg. Lat. 62. Paſch. 1 Car. cites Delabar v. Hudſon.

3. In Evidence to a Jury, it was offered as Evidence of an Entry *a Note thereof ſubſcribed by the Perſon that entered*, and the *Witneſſes thereto were dead, and their Hands only proved*, and that it was done by Direction of Hyde J. of the C. B. who teſtified it, which after ſome Doubt the Court would not admit, *without proving actual Entry, eſpecially being to avoid a Fine*; but they admitted what Hyde ſaid, as a good *Inducement to the Jury, but no* convincing Evidence. 1 Keb. 502. pl. 62. Paſch. 15 Car. 2. Fryer v. Combes.

4. At a Trial at Niſi Prius in Middleſex, *a Fine and five Years* being given in Evidence upon *Ejectment in Bar of the Title of the Leſſor of the Plaintiff, the Plaintiff ſhewed, that at the Time of the Fine levied he was an Infant*, and that *within three Years he came to the Lands* in Queſtion, *and at the Gate of the Houſe ſaid to the Tenant that he was Heir of the Houſe and Land* which he held, *and forbad him to pay more Rent* to the *Defendant*; Upon which it was demanded, if he entered into the Houſe when he made the Demand; and it was ſaid that no; upon which it was ſaid that the Claim at the Gate was not ſufficient the which was agreed; But then it was proved, that he entered *the Houſe when he made Claim*, the which being eo Inſtante it was well enough; Per Holt Ch. J. though the Claim was but at the Gate, *but after it appearing that there was a Court before the Houſe, ſo that though the Claim was at the Gate*, yet it *was upon the Land, and not in the Street*, and therefore it was ruled to be good without Queſtion. Skin. 412. pl. 8. Hill. 5 W. & M. in B. R. Anon.

5. In proving Entry *and Claim it is neceſſary, firſt to prove the Claim to be upon the Land claimed (without ſpecial Cauſe) Secondly, that it be animo clamandi.* 6 Mod. 44. Mich. 2 Ann. B. R. Ford v. Ld. Grey. 1 Salk. 285. pl. 10. S. C. that it muſt be upon the Land.

6. A *Deed of Title to Leſſor of the Plaintiff of a Vill except Black-acre*, the Statute of *Limitations being pleaded*, and an Entry and *claim* being offered in Evidence to avoid it, they were put to prove the Entry to have been

been *in another Place than was excepted.* 6 Mod. 45. Mich. 2 Ann. B. R. Ford v. Ld. Grey.

If an Entry be in Part only (though never ſo ſmall) and Leſſee re-entered, yet the Rent is ſuſpended, for Part of Profit is taken from the Leſſee. 1 R. ab. 940 —Leſſor enters lawfully as by Surrender, Forfeiture, &c. into Part the Rent is extinct as to Part. Co. Litt 148. b. ——Ejectment and Diſturbance of Common and Incloſure againſt Commoner is not Suſpenſion 2 Roll. Rep. 415. Mich 21 Jac. B. R. Sanderſon v. Harriſon.——Cro. J. 679. pl. 16. S. C. adjudged.——

6. On Plea of Entry and Suſpenſion, there *muſt be an actual Ouſter* and refuſing to let the Party occupy; Coram Baron Cummins at Taunton Aſſiſes, Hill. Vac. 1727-8.

### (T. b 40) Eſtate at Will.

1. No Eſtate at Will can be *without Entry*, for that is Oppoſitum in Objecto. His Entry proves his Intent to hold at Will. Arg. Mar. 70. Mich. 15 Car. in Caſe of Leake v. Dawes.

### (T. b 41) Falſe Impriſonment.

1. Every *Reſtraint of Liberty* implies a taking in Law; as if A. comes into B's Houſe to eat and drink, &c. A detains B in his Houſe, an Action of Falſe Impriſonment lies 3 Bulſ. 98. Mich. 13 Jac. in Caſe of Withers v Henley.

2. If an Arreſt be by Proceſs out of an inferior Court in a *Cauſe not ariſing within their Juriſdiction*, the Party arreſted may have Action againſt the Plaintiff, who ſhall be intended conuſant where the Cauſe of Action aroſe, but not againſt the Judge or Officer who has entered the Plaint, or the Officer who has executed it. But the proper and juſt *Remedy is againſt the Plaintiff.* 2 Jo. 214. Trin. 34 Car. 2. B. R. Olliet v Beſſey.

3. *A. has a Chamber adjoining to the Chamber of B. and* has *a Door that opens into it, by which there is a Paſſage to go out*; and *A. has another Door, which C. ſtops ſo that A. cannot go out by that.* This is no Impriſonment of A. by C. becauſe A. may go out by the Door in the Chamber of B. though he be a Treſpaſſer by doing it. But A. may have a ſpecial Action upon his Caſe againſt C. Ruled by Holt Ch. J in Evidence at a Trial at the Summer Aſſizes at Lincoln 1699 in an Action of Falſe Impriſonment. And the Plaintiff was nonſuit. Ld. Raym. Rep. 739. Wright v. Wilſon.

4. The Ld. Ch. J of B. R. in the late King's Reign ſigned a *Warrant for apprehending the Plaintiff, and the Defendant being a Conſtable arreſted him on the ſame after the late King's Demiſe*, and thereupon the Juſtices of Seſſions granted a Warrant for his Commitment. Eyre Ch. J. held that the Warrant of the Ld. Ch. J. became void by his late Majeſty's Demiſe, ſo that the Impriſonment having been upon a void Proceſs, an Action of Falſe Impriſonment now brought by the Plaintiff well lies. Gibb. 80. Trin. 2 & 3 Geo. 2. at Niſi Prius in Middleſex. Anon.

### (T. b. 42) Falſe Return.

1. On an Information for a Falſe Return to a Mandamus, there *needs no other Evidence to prove the Return to be the Mayor's but the Copy of the Writ and Return in the Crown Office*; that *though* upon a Conſultation *the Majority be againſt him, and make a Return in his Name, yet it ſhall be taken to be his if he does not* come and *diſavow it.* That this is not neceſſary to prove a Delivery of the Writ to the Mayor, no more than to a Sheriff

a Sheriff in a Falſe Return againſt him. 6 Mod. 152. Paſch. 3 Ann. B. R. The Queen v. Chapman.

(T. b. 43) Fee Farm Rents.

1. *Old Rent Rolls* admitted to be Evidence to prove Fee Farm Rents, for being very ancient it cannot be ſuppoſed they were made with a View to ſerve the preſent Purpoſe. MSS. Tab. 12. April 2, 1729. Newburgh v. Newburgh.

(T. b. 44) Fees.

1. *No Court has a Power of ſettling* the Fees of its Officers, ſo as to conclude the Subject, *but* thus far they may go, as *to judge what are reaſonable Fees*; and in a Quantum meruit by the Officer for ſuch Fees, the Judges aſſeſſing them reaſonable may be good, but not concluſive Evidence to a Jury; and ſo of the Table of uſual Fees of a Court not newly erected; and after it is *once found reaſonable by a Jury*, then it may become concluſive Evidence, and ſo it has been adjudged, 15 Car. 2. between Beal & Prior for the Fees of the Regiſterer of the Office of Inſurance. Per Holt Ch. J. 12 Mod. 609. Hill. 13 W. 3. B. R. in Caſe of Ballard v. Gerrard.—cites Hard.

(T. b. 45) Fines levied.

1. If a Fine be *pleaded in the ſame Court*, there it Suffices to be *exemplified in the ſame Court*, *but* if a Man pleads it *in another Court* he ought to ſhew it exemplified *under the Great Seal of England in Chancery*, if he will plead it, but he may *give in Evidence the Seal of C. B.* Br. Monſtrans pl. 68. cites 24 E. 3. 46.

2. In a general Iſſue the *Juſtices may find* of themſelves a Fine if they know of it, though not ſhewn by any of the Parties, and if it be true that there is ſuch a Fine, they may find it *by Credit of any that have ſeen it*; and the *Part indented* ſhewn forth is uſual Teſtimony of the Truth of ſuch Fine. Pl. C. 410. b. Mich. 13 & 14 Eliz. in Caſe of Newys and Scholaſtica v. Clarke.

3. Whatever the *Jury may take Cognizance of* themſelves may be given in Evidence by *Words* or *Copies*, or other Arguments of Truth; as of Fines or *Recoveries*. But in Pleading a Man cannot make to him Title in any Caſe by Record without ſhewing it under the Great Seal; or as Weſton J. ſays, muſt bring it under the Great Seal by a Day affixed; but ſuch Day ſhall not be given where it is given in Evidence, and the finding it by the Jury is ſufficient; and they may find it of themſelves, though it be *not ſhewn to the Jury* in Evidence, and ſo may do it on Circumſtances inducing Verity. Pl. C. 411. Mich. 13 & 14 Eliz. in Caſe of Newys and Scholaſtica v. Clarke.

4. A Fine with Proclamations, when given in *Evidence*, ought to have the Proclamation *indorſed* on it, and it is not enough to ſay that it is Secundum Formam Statuti. Held in a Trial Per Scroggs Ch. J. 2 Show. 126. pl. 105. Trin. 32 Car. 2. B. R. Anon.

5. If a Fine be given in Evidence with *Five Years Non claim*, &c. the Fine muſt be ſhewed with the *Proclamations under Seal*, and the *Chirograph* will not ſerve. Try. per Pais, 209.

6. *Counterpart* of a Deed without other Circumſtances is not ſufficient, unleſs in Caſe of a Fine, in which Caſe a Counterpart is good Evidence of itſelf. 1 Salk. 285. pl. 23. Mich. 3 Ann. B. R. — 6 Mod. 225. Anon.

7. The *Caption and Covenant are never given in Evidence to prove a Fine*, they not being of the Eſſence of the Fine; Per Cur. 10 Mod. 45. Mich. 10 Ann. in Ld. Say and Seal's Caſe.

(T. b. 46) Right of Fiſhery.

1. In Caſe of a *private River the Lord's having the Soil is good Evidence to prove that he has the Right of Fiſhing*, and it puts the Proof upon them them that claim Liberam Piſcariam But in Caſe of a River that flows and reflowa, and is an *Arm of the Sea*, there Prima facie it is common to all; and if any will appropriate a Privilege to himſelf, the Proof lies on his Side; Per Hale Mod. 105. pl. 14. Hill. 25 & 26 Car. 2. B R. Anon.

[T. b. 47] Fraudulent Conveyance, or Sale.

1. Action in the Caſe for *Fraudulent Sale of Horſe* to the Plaintiff, *as the proper Horſe of the Defendant, ubi revera* it was the Horſe of J S. becauſe the Plaintiff could not prove *that the Defendant knew it not to be his own Horſe*, (for the Declaration muſt be, that he did it fraudulently, and knowing it not to be his own Horſe) the Defendant having bought the Horſe in Smithfield, but not legally toll'd; the Plaintiff was nonſuited. Allen 91. Mich 24 Car 2. B R. Sprigwell v. Allen.

2. In Ejectment Plaintiff declared, that A. was ſeiſed in Fee of a Manor, and in 1647. for the Conſideration of 5000 *l* paid to him, made a Feoffment to J. S. and J. N. and their Heirs in Truſt for B. Defendant made a Title under the Marriage-Settlement of A. who in 17 Jac. married E. M. and then ſettled the ſaid Manor upon himſelf for Life, and on his Iſſue in Tail, and that the Defendant was Heir in Tail. But on the other Side it was inſiſted, that this *Settlement was fraudulent againſt the Purchaſer, and that it could not be thought otherwiſe, becauſe both the Original and Counter-part was found in A's Study after his Death.* An Objection was made to the Settlement itſelf, which recited, *That whereas a Marriage was intended betwixt the ſaid A. and M. now in Conſideration thereof, and of a Portion, he conveyed the ſaid Manor to the Feoffees, to the Uſe of himſelf for Life*, but doth not ſay, *from and after the Solemnization of the Marriage*; ſo that if ſhe had not married A. yet after his Deceaſe ſhe would have enjoyed the Eſtate for Life Upon the whole Matter the Jury found for the Defendant. 3 Mod. 36. Mich. 35 Car. 2. B. R.

3. Upon a Queſtion, whether a *Conveyance made by a Bankrupt a ſhort Time before Act of Bankruptcy committed were fraudulent or not?* Theſe Points are agreed by the Court; *1ſt*, That a Sale being *to a near Relation of the Party's* was ſome Mark of Fraud, tho' not a concluſive one, becauſe Relations might be real Creditors, or give a valuable Conſideration. *2dly.* The *Non-Payment of Money at the Time* of executing the Deed is another. *3dly.* It is ſome Evidence of a *Bona fide Conveyance*, that the *Deed mentions Money paid*; *but* that had need of *other corroborating Circumſtances, as Enjoyment, &c.* 12 Mod. 439. Hill. 12 W. 3. R. Anon.

(T. b. 48) Hand-Writing.

1. In the Biſhop's Trial it was declared by Powel J. *That in Civil Actions a ſlender Proof was ſufficient to make out a Man's Hand*, as by a Letter to a Tradeſman, or Correſpondent, or the like; *But in Criminal Caſes the Proof ought to be poſitive and ſubſtantial, not by Belief.*

*Belief*. This was in proving Ld. Chicheſter's Hand, but the Court was divided.

2. On a Trial at Bar about a Will, one of the Witneſſes would not ſwear that he ſaw the Teſtator ſeal and publiſh his Will. Holt Ch. J. ſaid If there be three ſubſcribing *Witneſſes to a Will*, this is ſufficient within the Statute; For otherwiſe it would be in the Power of a third Perſon to defeat the Will, and therefore, *if proved to be his Hand, and that he ſet it as a Witneſs to the Will, it is ſufficient to ſatisfy the Statute*. Skin. 413. pl. 9. Hill. 5 W. & M. in B. R. Davrell v. Glaſcock.

3. Where there are *two Witneſſes to a Deed who are dead*, if there be *full Evidence to prove one of their Hands, and any Evidence that Endeavours have been uſed to find one to prove the other's Hand*, it is ſufficient, for perhaps the Witneſs might be a Stranger, and it would be a hard Task to prove his Hand; Per Cur. Cumb 248. Paſch. 6 W. & M. in B. R. in Caſe of Smart v. Williams.

4. To prove a Hand-Writing *by Similitude*, and *by thoſe who have knowen the Hand*, tho' the Party was not ſeen to write it, was allowed ſufficient Proof of a treaſonable Writing in Sidney's Caſe; for this is ſaid to be *as much Proof as the Thing is capable of*, eſpecially where the Writing is *found in his Poſſeſſion*. Sid. Try. 51. Yet Sidney ſaid, it had been declared in the Lady Carr's Caſe to be no lawful Evidence in Criminal Cauſes. L. E. 279. pl. 19. Cites Sidney's Try. 32.

Compariſon of Hands was held not to be good Evidence in Treaſon, unleſs the Papers are found in the Cuſtody of the Perſon himſelf, and not of another. Skin. 579. Crosby's Caſe.—12 Mod. 72. S. C. And per Cur. it is not ſufficient for the original Foundation of an Attainder, but may be well uſed as a circumſtantial Evidence, if the Fact be otherwiſe proved; as in my Lord Preſton's Caſe, his attempting to go with them into France, and principally where they were found on his Perſon; but here, ſince they were found elſewhere, to convict on a Similitude of Hands, was to run into the Error of Colonel Sidney's Caſe. 12 Mod. 72. Paſch. 7 W. & M. King v. Crosby.

5. In an Action of Debt *upon an Obligation*, and *Non eſt Factum* pleaded, a Witneſs was ſworn who ſaid, that his *Hand was ſubſcribed as a Witneſs, but he did not ſee the Obligation ſealed and delivered*; Upon which the Court demanded of him, if ever he ſet his Hand as a Witneſs but where he ſaw the Sealing and Delivery; and he ſaid that No; but that he never ſaw it; upon which *one was ſworn to prove the Hand of the other Witneſs who was dead*, the which was oppoſed; but Holt Ch. J. ſaid, that a Man ſhall not loſe his Obligation, becauſe they have *tampered with his Witneſs*, and he allowed the Plaintiff to prove the Obligation by Compariſon of Hands of the other Witneſs. Skin. 639. pl. 2. Paſch. 8 W. 3. B. R. Blurton v. Toon.

7. At Summer Aſſiſes at Warwick 1699, a *Deed* was produced *to which there was two Witneſſes, one of whom was blind*. It was ruled by Holt Ch. J. that ſuch Deed might be proved by the other Witneſs, and read; or might be proved, without proving that this blind Witneſs is dead, or without having him at the Trial, proving only his Hand. And ſo it was done in this Caſe. Ld. Raym. 734. Wood v. Drury.

8. Debt upon Bond by G. as Executor of C. againſt N. which C. happened to be the only ſurviving ſubſcribing Witneſs, and his Subſcription was proved by Parity of Hands. Per Parker Ch. J. that G. being diſabled by proving the Will, is as if there was no Witneſs in Being, where Parity of Hands may be allowed. So in Caſe of Depoſitions in Chancery, which were taken before any Intereſt accrued to the Deponent, and *in Caſe of a Will, if an Intereſt accrue to the Witneſs ſubſcribing, &c. after he had made his Subſcription, this may be proved by Parity of Hands*. Hill. Vac. 37. at Guild-hall Sittings, Godfry Executor of Chamberlain v. Norry.

9. Where

9. Where a Witneſs would ſwear to the Hand-writing of another, he muſt be able to ſay, that he has *ſeen ſuch a Perſon write*, unleſs where there has been any fixed Correſpondence by Letters, and that it can be made out *that the Party writing ſuch Letters is the ſame Perſon that atteſted the Deed*, and then that will be ſufficient. Per Raymond Cn. J. Gibb. 196. pl 9. Hill. 4 Geo 2. Ld. Ferrers v. Sherley.

10. If a *Witneſs to a Deed is dead*, it is ſufficient to prove his Hand without the Hand of the Party. Per Pratt Ch. J. Trin Vac. 1719.

11. Caſe on *Promiſſory Note for* 10 *l. atteſted by two Witneſſes, one of them ſaid that his Name was very like his Hand, but he never ſaw the Note executed, for he remembred* the Time, *when he was called in* to witneſs ſome Writings between the Parties *there were only two Half Sheets, and each of them ſtampt, but no ſuch Paper as the Note was atteſted by him, the other Witneſs ſaid the ſame.* Upon which the Plaintiff produced the two Half Sheets, and the Witneſſes ſwore to the Execution of them. Whereupon Pratt Ch. J. left it to the Jury, on the Similitude of the Hands between the Deeds proved and the Note, and the Jury found for the Plaintiff. N. B One of the Deeds mentioned the Sum of 10 *l* paid by the Defendant to the Plaintiff, by which the Jury thought was intended the Note under his Hand. Paſch. 6 Geo. at Nifi Prius Carbone v Cotton.

12. *Two Witneſſes* to a Bond, *one in Bedlam and mad, and the other in Africa*, on Order to prove an Exhibit *Viva Voce* in Chancery, a Witneſs proved this Fact, and their Hands to the Bond as if dead. Per Ld. Chan Trin. 5 & 6 Geo 2. Canc.

13. If *both Witneſſes are beyond Sea* proving the Hand of the Party is not ſufficient, but in ſuch Caſes *it is uſual to prove the Hand only of one of the Witneſſes, and that they are beyond Sea*, and proving both their Hands not neceſſary, (ut dicitur.) Trin. 5 & 6 Geo. 2. in Caſe of Smith v. Richards.

14. Similitude of Hands no Evidence, but *ſaying that he was well acquainted with his Writing, and knew it to be the Party's*, is ſo. Per Bury Ch. B. at Francia's Trial, pa. 18.

## [T. b. 49] Heir.

1. In Evidence to a Jury to prove J. S. to be Heir to W. S *the Court would not accept the Pedigree drawn by a Herald at Arms for Evidence, nor will ſuffer the Jury to have it with them*, but it is only Information for Direction. 2 Roll Abr 687. I. f pl. 2. cites Paſch. 8 Jac. B. Plumpton v. Robinſon. Paſch. 12 Jac. B. without any Proof by Office, or other ſubſtantial Matter; Per Curiam.

2. An *Act of Parliament's Reciting* T. S. to be Heir does not make him ſo; Per Cur. 12 Mod. 384. Paſch. 12 W. 3. Anon.

## (T. b. 50) His Freehold, Money, &c.

2 And. 48. pl. 36. Anon. Seems to be S. C. & S. P. held accordingly by three Juſtices, but one doubted.

1. His Freehold muſt be intended *his own* Freehold, and *in his own Right*, and finding that it was the Freehold *of the Avowants Wife* is not ſufficient. Cro. E. 524. pl. 52. Mich. 38 & 39 Eliz. B. R. Bonner v. Walker.

2. In

2. In *Treſpaſs* the Defendant pleads, that the Place where is his Freehold, and gives in Evidence *a Fine with Proclamations*; it is good Evidence, becauſe it is a *Title*. Brown's Anal. 16.

3. The Declaration is, that the Plaintiff was *robbed of* 10 *l. de Denariis ipſius Querentis*; and upon the Evidence it appears, that the Plaintiff was the *Receiver* of the Lady Rich, and had received the ſaid Money *for the Uſe of* the Lady; and Exception was taken to it; but it was not allowed; for the Plaintiff is accountable to the Lady Rich for the ſaid Money. L. E. 52. pl. 5.

(T. b. 51) Impriſonment at the Time of the Outlawry.

1. Error to reverſe Outlawry for one who was *in Priſon at the Time of the Outlawry under the Cuſtody of the Biſhop of E. in his Priſon*, and the Biſhop certified that he was in his Priſon at the Time of the Outlawry, &c. and another would have averred for the King that he was at large at the Time, &c. and was not permitted contrary to the Certificate of the Biſhop; Brooke ſays and ſo ſee, that the Certificate of the Biſhop is as credible in other Caſes, as in Caſe of Baſtardy. Br. Certificate de Eveſque, pl. 23. cites 15 E. 3.

(T. b. 52) Incumbent.

1. In a Suit for *Tithes* in the Spiritual Court, the Defendant *pleaded, that the Plaintiff* (the Parſon) *had not read the thirty nine Articles*, and *the Court put the Defendant to prove it though* a Negative; whereupon he moved for a Prohibition which was denied; for in this Caſe the Law will preſume, that a Parſon has read the Articles, for otherwiſe he is to loſe his Benefice, and when *the Law preſumes the Affirmative then the Negative is to* be proved. Rep. 83. pl. 29. Mich. 12 Jac. B. R. Monke v. Butler.

2. In Caſe of *Tithes*, &c. If the *Plaintiff* be a Parſon, Vicar or other *Eccleſiaſtical Perſon, and claims* the Tithes *in Right of the Church*, or Benefice whereof he is Incumbent, he is in Strickneſs *bound to prove his Inſtitution and Induction, and all Things elſe required by Law to qualify him to be the Incumbent* of the Church to which the Tithes belong, and yet if ſuch Plaintiff hath been *for ſeveral Years in Poſſeſſion*, he is not ordinarily put to prove thoſe Matters, unleſs the Defendant in his Defence ſhews ſome Reaſon why the ſame ought to be proved, &c. But the *Law has not determined how many Years* ſuch Plaintiff ought to be in Poſſeſſion to excuſe his being put to ſuch Proof. But that ſeems to be left to *the Judge's Diſcretion*, though I conceive *three or four Years* may ſuffice. L. E. 128. pl. 98.

In Ejectment of a Rectory, Leſſor of the Plaintiff after proving his Inſtitution, and Induction was required to prove his reading and ſubſcribing the thirty nine Articles, and his declaring in the Church his Aſſent and Conſent to all the Things contained in the Common Prayer-Book, and this ought to be done within the Time limitted by the Statute which appoint them. Sid. 220. pl. 8. Mich. 16 Car. 2. B. R. Snow v. Philips. ——— And it was ruled per Cur. that in Ejectment, Admiſſion, Inſtitution and Induction is good Title without ſhewing any Right in the Preſentor; For upon the Preſentment of a Stranger it is good Matter to bar him that has Right in Ejectment, and put him to his Qua. Imp. Ibid.

(T. b. 53) In Cuſtodia Mareſchalli.

1. The Entry of the Comitttiur will not charge the Marſhal in Eſcape, unleſs the Party be in Cuſtody. Sid. 220. pl. 5. Mich. 16 Car. 2. B. R. Conny v. Jacob.

2. To prove a Perſon in Cuſtody of the Marſhal of B. R. it is ſufficito *ſhew a Charge againſt him*, &c. if *on mean Proceſs without proving any Committitur* upon the Roll, *but if* he is to be conſidered as a Priſoner *in Execution*, there *the Committitur* upon the Roll muſt be proved. 1 Sid.

247. pl. 5. Hill. 16 & 17 Car. 2. B. R. in Caſe of the King v. Povey, & al

3. N. B. after a Committitur in the Office the *Marſhal muſt be ſerved with a Rule*, or there muſt be *a Committitur in the Marſhal's Book* upon a Reddidit ſe. 1 Salk. 272, 273. pl. 3. Mich. 13 W. 3. B. R. Watſon v. Sutton.

[T. b. 54] Inrolment.

1. Upon Evidence agreed by the Court, that if the *Bargainor continues Poſſeſſion after Inrolment*, that he is a Diſſeiſor For the Statute transfers the Frank-Tenement to the Bargainee. Noy. 106. Bellingham v. Allopp.

2 In a Trial at Bar between Thirle and Madiſon it was ſaid by Glyn Ch J. that if *divers Perſons do ſeal a Deed*, and *but one* of them *acknowledge the Deed*, and the Deed is thereupon enrolled, this is a good Enrollment within the Statute, and may be given in Evidence as a Deed enrolled at a Trial. Sty. 462. Mich. 1655. B. R. Thurle v. Madiſon.

[T. b. 55] Inſimul Computaſſet.

Noy 87. S C. accordingly.

1. In an Inſimul Computaſſet the Evidence *ſhall not be on the Value of the Goods*, but on the Account only. Latch. 169. Trin. 2 Car. Wood v. Whitherick.

2. *Aſſumpſit for* 20*l* upon Account, and upon the Evidence it *did appear to be another Sum* than 20*l*. and it was ruled againſt the Plaintiff, and he was nonſuit, and the Judge held where an Action is for 10*l*. upon a *Contract* for a Horſe, and the *Witneſs doth not prove the very Sum but differs* 1 *d*. *or* 12 *d*. in this Caſe it ſhall be found againſt the Plaintiff, and cited the Opinion of Walter Ch. B. to be ſo, but for the Importunity then was contented a ſpecial Nerdict ſhould be found. But the Court above did rule the Caſe againſt the Plaintiff. Quod Nota in Aſſumpſit, where Damages only are to be recovered, for in ſuch Caſes if Debt had been brought it is clear, becauſe he doth not hit the *Contract*, it ſhall be againſt the Plaintiff. Clayt. 87. pl. 147. July 16 Car. before Foſter Judge of Aſſize, Ramſden's Caſe.

3. Aſſumpſit upon an Inſimul Computaverunt, and Non Aſſumpſit pleaded, and the Plaintiff produced a *Writing without Seal*, *which teſtified the Debt* to prove his Caſe, but it was held no good Evidence, for it is another thing, and he ſhould have declared Quod Indebitatus Aſſumpſit, &c. and upon this the Plaintiff was urged to be nonſuit. Clayt. 87. pl. 146. July 16 Car. before Foſter Judge of Aſſize. Kirbie v. Emerſon.

4. No Inſimul Computaſſet but on Account ſtated. 2 Mod 294. Hill. 29 & 30 Car. 2. C. B. Roſe v. Standen.

5. To prove an Inſimul Computaſſet it was *proved that the Defendant and Plaintiff's Wife reckoned that the Defendant had borrowed at one Time* 40*s at another Time* 40 *s. and at another Time* 4*l*. and this came to 8*l*. and he promiſed to pay it; Sir Bar. Shower urged that this could not maintain an Inſimul Computaſſet, for that it was only a reckoning on one Side, for there was neither Payment nor Deduction on the other, and at that Rate ſaying one and one was two would make an Account, but Holt Ch. J. over-ruled him, that it was good Evidence of an Account, and ſo they had a Verdict Quoad comput. pro Quer' & quoad Reſid' pro Defend'. Show. 215. Paſch. 3 W. & M. Styart v. Rowland.

(T. b. 56) Inteſtacy.

1. In Debt it was agreed, that *Teſtament proved under the Seal of the Ordinary is no Eſtoppel to the Plaintiff in Debt againſt Adminiſtrators to ſay that the Debtor died Inteſtate*, and therefore it ſeems that this is no Record to bind, as judicial Acts ſhall bind at the Common Law. Br. Ordinary, pl. 4. cites 44 E. 3. 16.

2. Error was aſſigned, that one pleaded (cum Teſtamento Annexo qui obiit Inteſtat') which is abſurd, and repugnant; it is well (per Cur) for though one makes a Will, yet if he *makes no Executor* he is an Inteſtate. Cumb. 20. Paſch. 2 Jac. 2. B. R.

(T. b. 57) Judgment.

1. Action ſur Caſe for a *Falſe Return of Nulla bona ſur Fi' fi'*, when there were Goods ſufficient; and the Plaintiff declared on a *Judgment in Communi Banco*, and on Evidence produced a *Copy of a Record*, Mich. 8 W. wherein was *writ in the Margin Cook* (who is one of the Pothonotaries of the Commou Pleas) *but there was no Placit' coram, &c. at the Top*, for which Omiſſion the Defendant inſiſted that there was no *fair Copy of a Record* that it did not appear who this Cook was. That the Plaintiff *declared of a Plea held before Sir G. Treby*, and it did *not appear that the Record produced* by him *was ſuch a one*, and of that Opinion was Holt Ch. J. who tried the Cauſe, which the Plaintiff perceiving was nonſuit. 12 Mod. 127. Trin. 9 W. 3. Crawley v. Blewet snd Wolt.

[T. b. 58] Legitimo modo acquietatus.

1. In Caſe for a *malicious Indictment of the Plaintiff for Barretry he ſet forth that he was Debito Modo inde exoneratus*, and at the Trial to prove this he *produced a Nolle ulterius proſequi by the Attorney General*; but the Chief Juſtice held ſtrongly that the Evidence did not maintain the Declaration, and that the Non Proſ. was only putting the Defendant Sine Die, and that New Proceſs might be made out upon the ſame Indictment, and that it would be hard to allow a Man that gets off by a Non Proſ. to maintain an Action for a malicious Proſecution. Indeed had he pleaded Not Guilty, and the Attorney General had confeſſed it, that would have done. 6 Mod. 261. Mich. 3 Ann. B. R. Goddard v. Smith.

[T. b. 59] Levancy and Couchancy.

1. Upon an Iſſue whether Levant and Couchant, Hale Ch. J. held that the *foddering of the Cattle in the Yard* was Evidence of Levancy and Couchancy. Per Holt Ch. J, 1 Salk. 169. pl. 2. Hill. 2 Ann. B. R. Emerton v. Selby.

[T. b. 60] Lewdneſs.

1. Being *catched in a Houſe of Bawdry*, or a diſorderly Houſe *at a ſeaſonable Time* is not Evidence of a lewd Perſon, Per Holt Ch. J. but ſeveral *Affidavits* being afterwards read of her Lewdneſs, the Court committed her till ſhe find Sureties of Good Behaviour. 12 Mod. 566, 577. Mich. 13 W. 3. Elizabeth Caxton's Caſe.

(T. b. 61)

(T. b. 61) Libel.

1. The *Finding two or three Copies of a Libel in a Perſon's Chamber, without diſcourſing of it, or delivering of it out*, is no Publication; Per Cur. 2 Keb. 502. pl. 66. Paſch 21 Car. 2. B. R. The King v. Fitton.

Comb. 358. Hill 8 W. 3. S. C. and S. P.

2. *Depoſitions before a Juſtice of Peace*, the Deponent being dead, is Evidence only in Felony, but not in Information for Libel againſt the Government. 1 Salk. 281. pl. 8. Hill. 7 W. 3 The King v. Paine.

3. If a *Libel* be made *in Writing, and afterwards burnt, and one remembers the Contents, and dictates to another, who writes it*, the Writer is Maker of a Libel; He *that takes a Copy of a Libel in Writing*, tho' he be not the Author, is guilty of making a Libel. Per Holt Ch J. Comb. 359. Hill. 8 W. 3 B. R. in Caſe of the King v. Paine.

4. Indictment for compoſing, writing, making and collecting ſeveral Libels, *In uno quorum continetur inter alia juxta tenorem, & ad effectum ſequentem*, (ſetting out the Words;) Jury found Verdict of Not Guilty as to all except *Scriptio & Collectio*. And after Exception in Arreſt of Judgment, held per Curiam, *1ſt*. That it is not neceſſary to ſet forth all the Libel, but if any Thing qualifies that which is ſet forth, it muſt be given in Evidence. Regularly where a Man ſpeaks Treaſon, *God ſave the King* will not excuſe him. *2dly. Ad Effectum* ſingly had been naught, for the Court muſt judge of the Words themſelves, and not of the Conſtruction the Proſecutor puts upon them, but *Juxta tenorem* imports the Words themſelves; for it is the Tranſcript *3dly*. Writing and Collecting is criminal, not but that Collecting had been better out of the Caſe. *Bare copying out of a Libel* by one that is neither Contriver or Compoſer, is criminal. *The Nature of a Libel conſiſts in putting the infamous Matter into Writing*, not in the infamous Matter; For if *a ſpeaks ſuch Words, unleſs ſuch Words are put into Writing, it is no Libel.* In all Caſes where a Man does that Act which makes a Thing to be what it is, he is, and muſt be conſtrued the Doer of the Thing. If A. contrives any treaſonable Matter, and another writes down the Contrivance, the Writer is as guilty as the Inventor. *4thly*. The *bare having a Libel is not a Publication. If a Libel be publickly known, the having a written Copy of it is an Evidence of a Publication*, but *otherwiſe where it is not known to be publiſhed* Writing a Copy of a Libel is writing a Libel, but whether it be ſo or not, when the Jury finds a Man guilty of writing a Libel, he muſt be taken to be guilty of writing the Original, and a Copy could not be given in Evidence. The *Copy of a Libel is a Libel*; for ſuch a Copy contains all Things neceſſary to the Conſtitution of a Libel, i. e. the ſcandalous Matter and the writing; and it has the ſame pernicious Conſequence, for it perpetuates the Memory of the Thing, and ſome Time or other comes to be publiſhed. Such Copying is not a Publication, only Evidence of a Publication. *5thly* Objection, Writing a Copy may be a lawful Act, as by the Clerk that draws the Indictment, or by a Student who takes Notice of it. But anſwered, that the Matter, abſtractedly conſidered, is unlawful, but if the Writing was innocent, there ought to be a ſpecial finding of theſe particulars which diſtinguiſh and excuſe it. *What an Officer or Student does is not a Libel, becauſe it is not done Ad Infamiam of the Party, but to bring the Offender to Puniſhment.* The Writer is held to be a Contriver Mo. 813. 9 Co 59 b. *6thly*. When a Libel appears under a Man's own Handwriting, and no other Author is known, he is taken in the Manner, and it turns the Proof upon him, and if he cannot produce the Compoſer, it is hard to find that he is not the very Man. Making is the Genus, and Compoſing and Contriving is one Species; Writing

Writing a ſecond Species, procuring to be written a third Species. 2 Salk. 417. Hill. 10 W. 3. B R. The King v. Bear.

5. Printing a Libel is publiſhing it; *and if a Man is not able to give an Account how he came by it, it makes him the Printer, and of Conſequence the Publiſher.* So the Delivery by a Printer to S. is a Publication by the Printer, and the Receiver is an Actor in that Publication, if he does not forthwith carry it to a Magiſtrate; If a Libellous Paper be *found in a Man's Cuſtody, (as upon a Shelf in one's Houſe or Shop, which was S's Caſe)* it ſhall be thought he printed it, unleſs he can give a good Account how he came by it to excuſe himſelf. Per Parker Ch. J. Hill. Vac. 3 Geo at Guild-hall Sittings. Rex v. Strahan.

To which is added, that S was a Bookſeller, and it could not be ſuppoſed but he had theſe Papers by Way of Trade, too foreign to ſuppoſe any one left them in his Shop And whereas another Libel was found in his Pocket, it could not be ſuppoſed but it was concealed there for a private Sale, no one taking upon him to ſell ſuch Things in publick, and S. being informed againſt for publiſhing theſe Libels, he was found Guilty.

## (T. b. 62) Liking Goods &c.

1. If Goods be bought upon Liking, the Vendee muſt return them, otherwiſe his detaining or *not ſending them back* is a ſufficient Evidence of a Liking; So if he declares *his Diſlike, but after diſpoſes of them*; So if Goods be ſold on Liking, and *before the Day* on which Party by the Agreement is to return them, he ſells or diſpoſes of all or Part of them, it is a Liking; and *Time of Liking*, or diſliking of Goods *is eight Days.* 12 Mod. 309. Mich. 11 W. 3. Burch v. Story.

## (T. b. 63) Limitations.

1. If an *Aſſumpſit is made to perform a Thing upon Requeſt or Notice*, and *more than ſix Years paſs after the Promiſe*; yet *if the Notice or Requeſt be within ſix Years before the Action this is good*, and not reſtrained by the Statute; the Cauſe of Action was not before Notice or Requeſt. If on an Aſſumpſit a Damnification be Part at one Time and Part at another, here he may have an entire Action after the laſt Time, and this is out of the Statute. 1 Jo. 329 Mich. 9 Car. B. R. Pecke v. Ambler.

Jo 194 pl 4 Mich. 4 Car. B. R. Shutford v. Percowe. S. P. held accordingly. —Though the Promiſe was made ten Years before, yet the Cauſe of Action is the Non Payment upon Requeſt after the Thing done or happening, and if the Action be brought within the Time of the Statute after the Breach, it is well enough. Cro. C. 139. pl. 14. S. C.—Godb. 437. pl. 522. S. C. adjudged accordingly. —

2. On a Trial at Niſi Prius before Holt Ch. J. it was held by him, that the Plea *Non Aſſumpſit infra ſex Annos ante impetrat' br'is Original'.* Repl Aſſ. infra ſex Annos ante impetrat' br'is præd. viz *ſuch a Day*, &c. there in Evidence you *need not ſhew the Original.* Show. 272. Trin. 3 W. & M. Edwards v. Thomſon.

3. *So* in a *Plene Adminiſtravit*, where the *Date is mentioned upon Record*, there you need not ſhew it in Evidence, though it were *only by Way of, Viz.* Show. 272. Edwards v. Thomas.

4. On an *Indebitatus* for 9 l. the Defendant pleaded *Non Aſſumpſit infra ſex Annos*, on which Iſſue was taken. The Plaintiff proved a *Debt of 9 l. due ten Years before*, and an *Acknowledgment* of the Debt *within ſix Years, and an Offer to pay 5 l.* for the whole; Per Hale the Plaintiff was nonſuited, for the Acknowledgment of the Debt is no more than is done by the Plea, but there *muſt be a new Promiſe of the Debt* within ſix Years to make that Action hold, and here the Promiſe or Offer to pay 5 l. gives no Action for the 9 l. L. E 175 pl. 51. cites Baſs v. Smith, Suffolk Summer Aſſiſes 1668 ——T. per Pais, 187.

6 Mod. 309. Mich. 3 Ann. Dean v. Crane. S. C. the Court faid, that the Executor might declare of a Promife made to himfelf. Sed Adjornatur,

5. Action on the Cafe brought by an Executor upon feveral *Promifes laid to have been made to the Teftator*, the Defendant pleads the Statutes of Limitations upon which Iffue was joined. It appeared upon Evidence, that the *Teftator had been dead feven Years before the Action* was brought; But the Executor gave in Evidence *a Promife made to himfelf within one Year*, which was the Point faved at the Trial; A Verdict was given for the Plaintiff; Per tot. Cur. although the Owning of the Debt is a Continuation of it, and takes away all Prefumption of its having ever been paid, and conſequently brings it out of the Statutes; yet this Verdict did not maintain the Iſſue, and was ſet aſide, becauſe the *Promiſe being made to the Executor, could not be made to the Teſtator Infra ſex Annos.* 11 Mod. 37. Hill. 3 Ann. B. R. Green v. Crane.

and that in Hill. Term upon Conference with all the Judges, it was held, that the Evidence did not maintain the Declaration —— 1 Salk. 28. pl. 16. S. C. and per Cur. the Plaintiff ſhould have declared of the Promiſe to himſelf.——

6. W. *poſſeſſed of a Term for a thouſand Years aſſigned* it to *P. for collateral Security* againſt a Bond in which P. was bound jointly with W. for the Debt of W. in 1655. P. died, leaving R. *his Son his Executor.* W. *died leaving C. his Wife his Executrix, and D his Daughter his Heir.* In 1674, *R.* Executor of P, and the Executrix of W. and *D.* the Heireſs of W. *aſſigned this Term* of 1000 Years *to J. H. with Condition that upon Payment of 200 l. the Conſideration of the ſaid Aſſignment by C. the Executrix, &c. receiven the Profits till* 1691, *and paid the Intereſt to the ſame Time*; And per Holt Ch. J. it was ruled at Maidſtone Lent Aſſiſes, 13 W. 3. in an Ejectment brought by the Executor of J. H. 1ſtly, That he was not barred by the Statute of Limitations, becauſe the Statute did not prejudice at the Time of the Aſſignment, there being but nineteen Years elapſed, and then the Joining of him in the Aſſignment who had the Title to take Advantage of the Statute, gives a new Title; 2dly, Per Holt Ch J. if a Man makes a *Mortgage for collateral Security*, although the *Mortgage is not in Poſſeſſion for twenty Years and more*; yet if the *Intereſt be paid upon the Bond according to the Agreement* of the Parties, it ſhall not be barred by the Statute of Limitations. Ld. Raym. Rep 740. Harcher v Fineux.

7. A Debtor who publiſhes *an Advertiſement in a News-Paper, that all Debts due from him ſhould be paid*, this will revive Debts barred by the Statute of Limitations, ſo as that they ſhall be paid. Chan. Prec. 385. pl. 265. Paſch. 1714. in the Caſe of Andrews v. Brown.

8. *So one who by Will directs that his Debts ſhall be paid, or makes any Proviſion for the Payment of his Debts in General*, thereby receives a Debt barred by the Statute of Limitations. Chan. Prec. 386. Paſch. 1714. in Caſe of Andrews v. Brown.

9. So an acknowledgement and a *Promiſe to pay a Debt* which *is barred by the Statute of Limitations*, is ſufficient to maintain an Aſſumpſit for Recovery of it; But a *bare acknowledgment is not.* Chan. Prec. 387. in Caſe of Andrews v. Brown.

## (T. b. 64) Living or *Dead*.

The Baron's Brothers and others ſwore, that the Baron being a Miniſter

1. *In Dower* the Iſſue was, whether the Husband was dead or living, two Witneſſes produced by the Defendant proved the ſame *Argumentatively* only; but not directly, but there being *No Proof of the Life* of the Baron, the Proof of Defendant was allowed; and Judgment for her. And. 20. pl. 42. Paſch. 2 Eliz. Thorn v. Roſſe.

parted this Kingdom 1ſt Mary Propter Religionem, and was abſent theſe ſeven Years in Germany, and that no Merchant of Germany, nor Engliſh Perſon who has travelled there can hear any Tidings of him;

him; wherefore they think in their Conſcience, that he is rather dead than alive, and no Witneſs being produced of his living, the Plaintiff recovered. Dyer 185. pl. 65. Paſch. 2 Eliz. S. C. Thorne v. Rolt.——Bendl. 86 pl 151. S. C. and the Pleadings——And 20. pl. 42 S. C. the Widow examined Witneſſes who proved nothing poſitively, but by Argument, but the Tenant brought no Proofs, and the Demandant had Judgment.——Mo. 14. pl. 35. S. C. adjudged, that Feme recover her Dower.——

2. Generally *Perſons are preſumed to be living if the Contrary be not proved.* 2 Roll. Rep. 461. Mich. 22 Jac. B. R. Throghton v. Walton.

3. 19 *Car.* 2. *cap.* 6. *S.* 2. *If ſuch Perſons for whoſe Life any Eſtates ſhall be granted, ſhall abſent themſelves ſeven Years, and no Proof be made of the Lives of ſuch Perſons in any Actions commenced for Recovery of ſuch Tenements by the Leſſors or Reverſioners, the Perſons upon whoſe Lives ſuch Eſtate depended ſhall be accounted as dead; and the Judges ſhall direct the Jury to give their Verdict as if the Perſon abſenting himſelf were dead.* A Leaſe was made in Reverſion to L. D. for ninety nine Years to commence after the Death or other ſooner Determination of the Eſtates of J. D. the Father and J. D. the Son Leſſees in Poſſeſſion of the like Term, if they or either of them ſo long lived In Ejectment, the Death of J. D. the Son was poſitively proved, but as to the Father Proof was, that he was reputed dead, and not heard of in fifteen Years, Holt Ch J. was of Opinion, that this Caſe is within the Statute, becauſe L. D. the Leſſor of the Plaintiff in Ejectment had a Term in Reverſion in the Lands, and ſo was a Reverſioner within the very Letter of the Statute; and the Defendant not being able to prove that J. D. the Father was alive at any Time within ſeven Years laſt paſt the Plaintiff had a Verdict Carth. 246. Trin. 4 W. & M. at Exon Aſſiſe. Holeman v. Exton——

4. 6 *Ann. cap.* 18. *Such Nominees or Tenants of particular Eſtates on Affidavit in Chancery by any Claimant to the Reverſion, &c. that they have Cauſe to believe ſuch Perſons dead ſhall be ordered to be produced, and if not produced ſhall be taken to be dead; but if it appears afterwards, that ſuch Nominee or Tenant was alive, ſuch Tenant, &c. may re-enter, and recover the Meſne Profits.*

## [T. b. 65] Loſt Deeds.

1. A *Releaſe* was offered to be depoſed, that it had been *ſeen by ſome at the Bar*, it being affirmed, that by caſual Means it was loſt; but the Lord Chancellor ſaid the *Oath ſhould be, that he ſaw it ſealed and delivered*, and not that he ſaw it after it was a Deed; For in Munſon the Juſtices Caſe, a Deed was brought into the Chancery, and a Vidimus upon it, being but a counterfeit Copy, and after the Fraud diſcovered, and the true Deed produced, therefore no Allowance to be given of a Deed without producing the Deed, or *proving the Execution thereof*; and here appears what Want we have of Notaries and their Deputies. Cary's Rep. 43, 44 cites Nov. 1 Jac.

2. A Deed of Uſes was loſt, and to ſupply it Evidence was given, that the loſt Deed had *formerly been ſhewn in Evidence* in the Exchequer upon an Alienation there queſtioned, the Land being holden *in Capite*, and the Record thereof was ſhewn, and this was allowed for Evidence. Clayt. 89. pl. 151. July 16 Car. before Foſter Judge of Aſſiſe, Wharton's Caſe.

3. In Caſes where Charters have been *loſt by Fire, Burning of Houſes, Rebellion, or where Robbers have deſtroyed them*, the Law, in ſuch Caſes of Neceſſity, allows the Proof of Charters without ſhewing them. Jenk. 19. at the End of pl. 35. *Neceſſitas facit licitum quod alias non eſt licitum.* S. P. accordingly, as to Deeds burnt, 10 Rep 92. b cites 28 Aſſ. pl 3.

but that in 12 Aſſ pl 16. the Judges would not ſuffer a Deed to be given in Evidence which was not produced and ſhewn to the Jurors. But Ibid. 63. a. the Court ſaid, that in the firſt Caſe of the Caſualty by Fire, there ought to be great Circumſpection and Diſcretion in the Judges.

4. A Proof *that there was a Revocation* is ſufficient for the Heir *without producing the Deed itſelf*, which was *taken away by the Defendant himſelf*. Keb. 12. 13 Car. 2. B. R. Negus v. Reynall.

5. A *Leaſe recited in a Releaſe* was admitted to be proved by the Witneſſes of the Releaſe, without ſhewing the Leaſe itſelf, which was *embezzelled by* Herbert *Leſſor of the Plaintiff*. Keb. 12. pl. 28. 13 Car. 2. Negus v. Reynall.

6. The Leaſe was loſt, but three Witneſſes *ſwore there was ſuch a Leaſe*, and others ſwore that it was *burnt*, and taken out of the Plaintiff's Trunk *by the Defendant*, which per Cur. is Title ſufficient to an Eſtate without producing the Deed; *contra* to a Debt, becauſe the Party muſt ſay *Hic in Curia prolat.* 2 Keb. 483. pl. 22. Paſch. 21 Car. 2. B. R. Moreton v. Horton and Thorner.

7. Recital of a *former Patent* in an after Patent is no Evidence, without producing the firſt Patent. 2 Lev. 108. Trin. 26 Car. 2. B. R. Cragg v. Norfolk.

8. In a *Quare Impedit*, the Plaintiff declared upon a *Grant* of the Advowſon to his Anceſtor, and in his Declaration ſays *Hic in Cur' prolat'*, but indeed he had not the Deed to ſhew. Serjeant Baldwin brought an *Affidavit* into Court, *that the Defendant had gotten the Deed into his Hands*, and prayed that the Plaintiff might take Advantage of a *Copy thereof*, which *appeared in an Inquiſition found temp. Ed.* 6. Cur. When an Action of Debt is brought upon a Bond to perform Covenants in a Deed, and the Defendant cannot plead Covenants performed without the Deed, becauſe the Plaintiff had the original Deed, and perhaps the Defendant took not a Counterpart of it, we uſe to grant Imparlaces till the Plaintiff bring in the Deed, and upon Evidence *if it be proved that the other Party has the Deed, we admit Copies* to be given in Evidence. But here the Law requires that the Deed be produced; You have your Remedy for the Deed at Law. 1 Mod. 266. pl. 17. Trin. 29 Car. 2. C. B. Anon.

9. A *Recovery was ſuffered in Ireland in the Time of Oliver Cromwell, and the Original was loſt, but Proof was made that there was an Original.* The Queſtion was, Whether the Court might cauſe an Original to be put upon the File, and ſo ſupply the Loſs of it? The Judges ſent out of Ireland hither to ſearch for Precedents, for which they were much blamed by the Chancellor, for that by the Law an Original might be ſupplied, Proof being made of it, though the Recovery were ſuffered in the Time of another King, and ſo he ſaid it had been frequently done; That Originals in King James's Time had been ſupplied in King Charles's Time, &c. 2 Freem. Rep. 30. pl. 33. Hill. 1677. Tregunell's Caſe.

10. *Aſſignment of a Leaſe to Plaintiff's Leſſor* is good Evidence without the original Leaſe. Per Holt. Cumb. 340. Trin. 7. W. 3. B. R. Aſtley v. Child.

11. *A Jointure Deed was loſt.* It was proved *that long ſince the Jointreſs levied a Fine Sur Concepit, and demiſed the Lands to W. for* 99 *Years, if ſhe ſo long lived, for ſecuring the Payment of* 400 *l. who aſſigned the ſame to M. and both joined in a Leaſe for* 60 *Years to J. S if the ſaid Jointreſs ſhould ſo long live, at the yearly Rent of* 260 *l.* This was admitted a ſufficient Proof of the Jointure. 5 Mod. 211. Paſch. 8. W. 3. Barley's Caſe.

12. And to the like Purpoſe they *produced Depoſitions in Chancery, which they offered to be read, the Bill and Anſwer being taken off the File, and loſt; But they offered to give an Account that it was once filed, which was by the Six Clerks Book, and produced an Inrolment of the Decree, which mentioned both Bill and Anſwer.* And the Court being of Opinion, that the Jointure-Deed being loſt, they might ſupply the Proof by Memo-

rials

rials thereof, ſince it was impoſſible to ſhow the Deed itſelf, the Plaintiff had a Verdict for ſo much as was in Jointure. 5 Mod. 210, 211. Paſch. 8 W. 3. Barley's Caſe.

13. Where a Deed is loſt or burnt, a *Copy*, or *Counterpart*, or the *Contents* will be admitted to be given in Evidence, but not except it be *proved that there was ſuch a Deed executed.* Skin. 673. pl. 12. Mich. 8 W. 3. B. R. in the Caſe of K. v. Sir Thomas Culpepper.

14. In Ejectment, the Plaintiff claimed a Title under a Settlement of his Mother's Anceſtor, but could not produce the *original Settlement*, of which he gave this Evidence, viz. He proved *That it came to the Hands of the Lady Baltinglaſs who was Tenant for Life, and died, and who, having committed a Forfeiture by ſuffering a Common Recovery, brought the Deed to Mr. Grange to adviſe with him about it*; He *proved likewiſe, that it was produced before a Maſter in Chancery in a Suit there depending, and that a Copy of it was made, but that Lady Baltinglaſs got the Copy away*; *That this Copy was produced at a Trial at Law upon a Power as to making Leaſes, in which there was a ſpecial Verdict found, and the Settlement was ſet forth in hæc verba, the Record of which Verdict was now produced*; He proved, *that a Bill in Equity was exhibited againſt my Lady Baltinglaſs, to avoid a Leaſe made by her, and that the Settlement was ſet forth in this Bill, and admitted by the Lady in her Anſwer*, ſo the Plaintiff had a Verdict upon this Evidence. 5 Mod. 384. 386. Hill. 9. W. 3. Matthew v. Thompſon.

15. Where an *old Term* was granted by a Biſhop to Queen Eliz. and by her aſſigned over, and by her Aſſignee aſſigned over, as is ſuppoſed, to J. S. who, and ſeveral Generations after him, have had and *continued in Poſſeſſion*, but the *Houſe* of one of the Family being *burnt in the Year* 1643, where it is alſo *ſuppoſed the original Aſſignment was burnt*, and twelve Years afterwards a *Grant of the Reſidue* of the Term *mentioned to be a Term of above* 70 *Years*, was held to be a good circumſtantial Evidence to prove the Grant of the Term from the Aſſignee of Queen Eliz. L. P. R. 556. cites Mich. 11 W. B. R.

16. *Recital of a Leaſe in a Deed of Releaſe* is good Evidence of a Leaſe againſt Releaſor, and all claiming under him. 6 Mod. 44. Mich. 2 Ann. B. R. Ford v. Grey. 1 Salk. 286. pl. 19. S. C. and S. P. accordingly.—

17. *Bare Recital* of a Deed is not Evidence; but if it could be proved *that ſuch Deed* had been loſt, it would do, if it were recited in another. 6 Mod. 45. Mich. 2 Ann. B. R. Ford v. Grey.

18. Note, A Settlement of Sir G. Binion, under which the Plaintiffs, who were his Siſters, claimed, being loſt, but being *proved in Chancery by the Plaintiffs themſelves Thirty Years ſince, who were not then concerned in Point of Intereſt, but are ſince entitled by that Deed*, it was ordered that a Copy of the Deed ſhould be admitted to be read at Law, and likewiſe that the Plaintiffs Depoſitions ſhould be read to prove the Deed, although they now claim under the Deed. 2 Freem. Rep. 260. pl. 329. Trin 1702. Lady Holcroft and al. v. Smith.

19. *Counterpart* of ancient Deed loſt is good Evidence *with other Circumſtances*, but not of itſelf. But of a Deed *leading the Uſes of a Fine* is good Evidence of it. 6 Mod. 225. Mich. 3 Ann. B. R.

20. The *Counterpart of an ancient Deed was admitted in Evidence*, and *a ſpecial Verdict being found in the Caſe, finding the original Deed it concluded Prout per the Counterpart it did appear*; and this was done to preſerve the Precedent; cited by Holt Ch. J. 6 Mod. 225. Mich. 3 Ann. as in Ld. Hale's Time, Mayow v. Comb.

21. And now all the Court held that *the Counterpart of the ancient Deed which might be loſt, was good Evidence with other Circumſtances, but not of itſelf* without other Circumſtances; *but that the Counterpart of a Deed*

*a Deed leading the Uſes of a Fine* was of itſelf good Evidence. 6 Mod. 225. Mich. 3 Ann. B. R. Anon.

S. C. in a MS. Rep. is thus, viz. A Deed under which Sir Ed. Seymour made Title in an Ejectment on a Trial at Bar in B. R. was in the Hands of my Lady his Mother-in law, who was in Poſſeſſion of Maiden-Bradley (the Lands in Queſtion) and was the Defendant. It was proved that after the Death of his Father in Devon, the Deed was ſeen at his Houſe in Dover Street, Weſtminſter, and there read over to the Attorney of Sir Edward Seymour and others, who had a Commiſſion from the Prerogative Office to inſpect the perſonal Eſtate of his Father, and afterwards it was put into the Scrutore, which was carried to Maiden-Bradley in Wiltſhire, where it was again taken out of the Scrutore and read over by my Lady's Attorney in the Preſence of ſeveral Perſons. This was held good Evidence of there being ſuch a Deed; Per Parker Ch. J. Powel and Powys, though it was objected there ought to have been ſome Account given of the Execution of this Deed, and by whom. It was ſworn by one Witneſs that the Father's Name was to the Deed, and by another Witneſs that Sir Robert Clayton's Name (a Truſtee) was to the ſame alſo, but who the reſt were that ſigned, ſealed and delivered it could not be proved, nor who were the Witneſſes indorſed on the Back of the Deed, and it was held that the proving the Deed in this Manner could do no harm, for if it was not true it was in the Power of the Defendant to ſhew the contrary. But when the Plaintiff's Witneſſes came to prove the Contents of the Deed, and particularly the Uſes, there was ſome Variance in the Evidence, and the Plaintiff was thereupon nonſuited. Paſch. 9 Ann. B. R. Sir Edward Seymour's Caſe.

22. In a Trial in Ejectment between Sir Edward Seymour and his Mother in Law, the Court allowed the Contents of a Deed to be given in Evidence by *Witneſſes*, who *put the Contents of it in Writing upon Memory 4 or 5 Days after the reading the Deed.* The Court ſeemed of Opinion that in Caſe a Deed was loſt by ſome inevitable Accident, that there it might be proved by Copy. But in Caſe there was no Copy the Contents of it could not be proved from the Memory of thoſe that knew the Deed, and though it was hard for a Man that had no Copy to loſe the Benefit of his Deed, yet the admitting that Sort of Evidence would be greater. But here the Opinion of the Court was founded upon a particular Reaſon; for *the Deed by which the Plaintiff was to prove his Title was not loſt but proved to be in the Hands of the Defendant*; ſo that in this Caſe the Danger of allowing this Sort of Evidence is none at all; for if the Defendant was wronged by any Parol Evidence it was in his Power to ſet all right by producing the Deed. 10 Mod. 8 Paſch 9 Ann. B. R. Sir Edward Seymour's Caſe.

(T. b 66) Malicious or vexatious Proſecutions, &c

2 Keb. 572. pl. 85. S. C, —

1. In an Action upon the *Caſe* for *maliciouſly proſecuting of an Indictment for Perjury* againſt him, of which he was acquitted, upon Not Guilty pleaded it appeared upon the Evidence that the *Defendant was a Juſtice of Peace, and procured ſome as Witneſſes to appear againſt him*, and his own Name was indorſed upon the Indictment to give Evidence. The Court agreed this did not make him a Proſecutor; for if a Juſtice of Peace knows any Perſon that can give Evidence againſt one that is indicted, he ought to cauſe him to do it. But it was proved on the Defendant's Side, that this *Indictment was drawn up by an Order of the Seſſions*; Wherefore Kelynge Ch. J. ſaid that the Plaintiff deſerved to be bound to his good Behaviour for bringing the Action. 1 Vent. 47. Mich. 21 Car. 2. B. R. Girlington v. Pitfield, S. C.

2. *Nonſuit* is ſufficient Evidence that there was no Cauſe of Replevin, at leaſt it is Evidence of a Vexation. Per Holt Ch. J. 12 Mod. 547. Trin. 13 W. 3.

3. In Caſe for a malicious Proſecution for Felony, brought after Acquittal, it was agreed that the *Declaration muſt agree with the Indictment ſubſtantially*; and here the Indictment being for ſtealing *Unum Sintinculum*, Anglice a Callico Quilt, and the Declaration *Unum Sinitunculum*, it was adjudged a material Evidence; but the Declaration having beſides laid *generally, that he charged the Plaintiff with* Felony before a Juſtice of Peace, it was held ſufficient to maintain the Action; and likewiſe that it was neceſſary here for Defendant to *prove a Felony committed*,

*committed, and a probable Cauſe of Suſpicion.* 12 Mod. 555. Trin. 13 W. 3. Anon.

(T. b. 67) Manor and Contents of a Manor.

1. In Ejectment, a Leaſe was pleaded of a Manor, whereof the Fields in which were Parcel. Iſſue was joined Quod Non Dimiſit Manerium. It was found, *that there were not any Freeholders, but diverſe Copyholders, and that it was always known by the Name of a Manor*; Adjudged, that this ſhall paſs for him who pleaded the Demiſe of the Manor. Arg. 2 Brownl. 223. Hill. 7 Jac. B. R. cites Finch v. Durham.

2. A. In forma pauperis had a Decree againſt C. for the Manor of B. that the *Contents of the Manor were doubtful.* C. ſhewing ancient Deeds, that proved divers Parcels of the Lands claimed by Force of the Decree by A. to be of another Manor, which notwithſtanding the Lord Chancellor, Egerton ordered, that it ſhould be put to Jury, and they to find as the Contents of the Manor had gone by *uſual Reputation ſixty Years paſt*, and not to have it paired, and defalked by ſuch antient Deeds. Cary's Rep. 33, 34.

(T. b. 68) Mariners Wages.

1. If a *Ship* be *bound for the Eaſt-Indies, and* from thence *to return to England*, and the *Ship unlades at a Port in the Eaſt-Indies, and takes Freight to return to England, and* in her Return *ſhe is taken by Enemies*; The Mariners ſhall have their Wages for the Voyage to the Eaſt-Indies, and for Half the Time that they ſtayed there to unlade, and no more; Ruled by Holt Ch. J. June 4, 1700, at Guildhall at Niſi Prius. Ld. Raym. Rep. 739. Anon.

(T. b. 69) Marriage.

1. *Conſtant Reputation* ſhall be allowed Proof of Marriage and *Orders*; Per Holt Ch. J. Cumb. 202. Paſch. 5 W. & M. in B. R. Dr. Harſcot's Caſe.

2. What can be greater Evidence in a Court of Law to ſhew that there was No Marriage *than a Sentence in Spiritual Court* carried on in a regular Suit, and pronounced in the Life-time of the Parties, that they were guilty of *Fornication*, and Proof of the Commutation Money paid by the ſuppoſed Father. 8 Mod. 182. Trin. 9 Geo. in Caſe of Hiliard v. Phaley.

3. *Entry* of Marriages *in a Church-Book* no Evidence of the Marriage, *unleſs the Identity of Perſons be proved or ſtrengthened with Proof of Cohabitation or Allowance of Parties.* MSS Tab. Jan. 28th, 1718. Draycott v. Talbot.

4. For the Proof of a Marriage was given in Evidence *Cohabitation for twenty Years*, that they came from Lincolnſhire to London, *lodged together* in Wild-Street, that the Husband was a Papiſt, and were married by ſuch a one who was the Portugal Ambaſſador's Chaplain, for which Reaſon no other Perſon was preſent, that he in his Life-time *acknowledged ſhe was his Wife, and deſired the Witneſſes to uſe her as ſuch*, and that a little before and *on the Day of his Death, declared in the Preſence of* his Phyſician, and ſeveral others now produced as Witneſſes, *that he was married to her.* 8 Mod. 180. Trin. 9 Geo. Hiliard v. Phaley.

5. A. and M. were married at the *Fleet-Priſon by different Names*, and an Entry was made in the Regiſter there of the Marriage there ſuch a Day, between Robert Marſhall and Anne How, of &c not being the Names either of the Man or Woman; This was adjudged in the Spiri-

tual

tual-Court to be a good Marriage, and that Sentence affirmed in the Delegates; and on a Trial at Bar between a Daughter of that Marriage and a Daughter of a former Marriage, the Father being dead, it was found a Marriage. Wms. Rep 676. Mich. 1720. Pool v. Sacheverel.

6. A Marriage was not allowed on a Trial, it being ſignified to the Court, that a *Sentence in the Arches* had been given that there was *No Marriage*, and the Temporal-Courts muſt give Credit thereto till it is reverſed, it being a Matter of meer Spiritual Cognizance. Carth. 225. Paſch. 4 W. & M. B. R. Jones v. Bow.

[T. b. 70] Marriage Agreement.

1. In Debt upon an Obligation, Cook Ch J. ſaid, and that ſo was the Opinion of the Civilians, that a Diſagreement to the Marriage had under the Age of Conſent *at the Age ought to publiſhed in Court*, otherwiſe the Iſſue may be baſtarded; For a Diſagreement *in Writing is not ſufficient* Diſagreement, nor a good Proof. Noy. 153. Anon.

2. Agreement on Marriage was to *ſettle 500 l. per Ann.* Jointure. Lands were ſettled, but they were worth only 400 l. per Ann. Decreed by Jeffries Ch. J. to make up the Lands 500 l. per Ann. and this on the Evidence of the Father and Uncle, that when the *Husband* propoſed the Treaty of Marriage he *offered to ſettle 500 l. per Ann. and after took Notice the Jointure ſettled was not of that Value, and talked of making it up ſo much.*——But no Covenant or Agreement proved whereby he bound himſelf to make a Jointure of that Value, and the Portion not equivalent; But the Husband *was truſted to draw the Settlement.* Vernon 17. Mich. 1681. Benſon v. Bellaſis.

Ld. Raym. Rep. 386. S. C.— 12 Mod. 214. S. C. & S. P.— If ſuch a Promiſe is not in Writing, Defendant may give in Evidence the Statute of 29 Car. 2. 3. Vid. 3 Lev. 65. Philpot v. Wallet.——S. C cited 2 Salk. 438. by the Reporter.——If the Woman's Promiſe does not bind, the Man's Promiſe is but Nudum Pactum, and therefore it is Actionable either on both Sides, or on neither Side. 1 Salk 24. pl. 4. S. C.——

3. In an Aſſumpſit *on a Contract to marry*, any *lawful Impediment* may be given in Evidence, as that the Parties were within the Levitical Degrees, &c. for this makes the Promiſe void; but it is otherwiſe of a *Pre-contract*; Per Holt Ch. J. 5 Mod. 412. Mich. 10 W. 3. Harriſon v. Cage, & Ux.

4. S. was indicted for forcibly taking, carrying away, marrying, and carnally knowing P. R. a Virgin having an Eſtate, &c. Holt Ch. J. ſummed up the Evidence, and gave the following Directions to the Jury. 1. You are to know that if ſhe *was taken away by Force, and afterwards married, though by her Conſent*, yet is he guilty of Felony; for it is the taking away by Force that makes the Crime, if there be a Marriage though by her Conſent. 2. In the next Place it is to be obſerved, that ſhe was taken by Force, and a Stratagem was uſed to give an Opportunity thereunto, and the Arreſt was but a Colour. 3. You may conſider upon the Evidence how far the Priſoner was concerned in the firſt Force, it is true he was not at the Arreſt, and did not appear till ſhe was brought to H's Houſe, and under the Pretence of bailing her, ſhe was carried to the Vine Tavern, where there was a *Parſon ready*, and the Marriage was had in ſuch a Manner as you have heard; Now it is left to you to determine whether the Marriage was not the *End of the Arreſt*; and if ſo how it could be poſſible for ſuch a Force to be committed to effect the Priſoner's Deſign, and he not Privy to it. 4. If it can be imagined he was not privy to the colourable Arreſt, yet *ſhe was under a Force when he came to her at H's Houſe, and from thence ſhe was carried by Force into the Vine Tavern, where ſhe was married.* That is a forcible taking by him at H's Houſe, and though when

when she was at the Vine Tavern she did express her Consent to be married, yet it appears that even then she was under a Force, and had no Power to help herself. She was also under a Force when she was carried to B's, and put to Bed; nay, when she was *carried to the Justice of the Peace, even then she was under a Force*, and all that she said was not freely, but out of Fear; such a Fear would avoid any Bond, for she was under Imprisonment; but however, if the first Taking was by Force, and she had consented to the Marriage, the Offence is the same, it is Felony. He was convicted and executed. Holt's Rep. 319. Mich. 1 Ann. B. R. Swensden's Case.

5. If there be an Express *Promise of the Marriage* by the Man, and it appeared that the Woman *countenanced it*, and by her Actions *behaved herself so as if she agreed to the Matter*, though there be no actual Promise, yet that shall be sufficient Evidence of a Promise of Marriage *on the Woman's Side*. Per Holt Ch. J. 6 Mod. 172. Pasch 3 Ann. B. R. Hutton v. Mansel. 3 Salk. 16. S. C held accordingly. —Ibid 62. pl. 5 S. C. held by Holt Ch J. accordingly.

[T. b. 71] Modus Decimandi.

1. The Surmise to have a Prohibition was, *that the Inhabitants of D.* of which he is an Inhabitant, *have paid unum Mod. Decimand.* and they were at Issue; and he proved only *that he himself had paid it*; and yet well and no Consultation, for every Particular is included in the general, and proved by it, and it appears sufficient Matter for a Prohibition, and to oust a Spiritual Court of their Conusance. 2dly. Agreed, that where the Statute appoints Proof of the Surmise to be *by two*, it is sufficient if two affirm *that they have known it to be so*, or *that the common Fame is so*. Noy. 28. Anon.

(T. b. 72) Money received or laid out to a Man's Use.

1. In an Action upon the Case for Money received by the Defendant for the Use of the Plaintiff, the Evidence was, that the *Defendant was Apprentice to the Plaintiff*, and this was for *Service done in a Ship* of the King's during the Apprenticeship, and the *Indentures* of the Apprenticeship being produced to prove the Defendant Apprentice to the Plaintiff, it was insisted that the *Hand of the Defendant ought to be proved*, to which Holt Ch. J. agreed, *unless the Indenture be enrolled*. Skin. 579. pl. 2. Pasch 7 W. 3. B. R. Anon.

2. In Case for Money had and received to the Plaintiff's Use, the Evidence that the *Plaintiff's Wife was Executrix*, and that *the Money was paid to the Defendant as due to her*, and the Plaintiff was nonsuited, for it being paid *without any Authority from the Husband*, it *remains as a Debt due to the Executrix*, and the Action ought to have been by Baron and Feme as Executrix, and if the Baron had died, the Feme might bring an Action for it, but *if the Money had been received by Authority from the Husband, then it had been as his Receipt, and as his Money*, and the Action in his Name alone had been well, and the Money would have been Assets in her Hands. 1 Salk. 282. pl. 10. Pasch. 8 W. 3. B.R. Anon.

3. Action upon the Case was brought for Money received to the Use of the Plaintiff, the Defendant would have given Evidence upon Non Assumpsit, that the Money was *condemned upon a common Attachment within the City of London*, the which was opposed, because the Condemnation was *after the Action* commenced *in the Courts above*, to which it was answered, that though it was after the Action commenced, yet it was *before Non Assumpsit is pleaded*, and so well enough; Non allocatur; for the Difference is where the Condemnation is before the Action

tion commenced, there the Defendant may plead Non Aſſumpſit, and give the Attachment in Evidence, but where the Condemnation is after the Action commenced the Defendant ought to plead it. Skin. 639. pl. 3. Paſch. 8 W. 3. B. R. Briat v. Gyll.

4. In Account the Caſe on Evidence was this, *A. gives a Note to B. upon C.* for B to receive it *for the Uſe of A. B. owes C Money*, and *C. upon this Note diſcharges B.* thereof, whereupon A. brings his Action againſt B and it lies. 12 Mod. 509. At Niſi Prius at Guildhall. Coram Holt. Paſch. 13 W. 3.

5. *A. orders B. to receive Money from C.* for him, *B. orders C. to pay* the Money *to D.* to whom B. owes Money; C. accordingly does pay it; A. ſhall maintain an Action againſt B. as for ſo much Money received to his Uſe. Per Holt Ch. J. 12 Mod. 565. Mich. 13 W. 3. Anon.

6. *So if* in that Caſe *B. had drawn* a Bill *upon C.* for the Money, or *generally for ſo much* Money, *if C. has no Effects of B's* in his Hands; his anſwering ſuch Bill is a Payment of A's Debt to B. for which A. may maintain his Action againſt him. Per Holt C. J. 12 Mod. 565. Mich. 13 W. 3. Anon.

7. In an Action for Money laid out to Defendants Uſe; it was held upon Evidence, that *Promiſſory Note given to the Plaintiff's Teſtator to allow a young Student at Cambridge 20 l. per Annum*, would not maintain the Declaration, though *it appeared the Teſtator had laid out this Sum yearly for the Defendant, becauſe the Defendant refuſed to do it himſelf.* Barnard Rep. 301. Hill. 3 Geo. 2. 1727. Goody. v. Moſely.

## (T. b. 73) Mortuary.

1. On Iſſue whether Mortuaries were due by Cuſtom or not, the *Account-Book of receiving them by an Impropriator was allowed* at Wincheſter Lent Aſſizes 1719. Coram King Ch. J. in a Rumſey Cauſe, and he ſaid he could not diſtinguiſh this from a Parſon's Book, which was always in the Exchequer Per Curſum Scaccarii, though he could not give a Reaſon for it.

## (T. b. 74) Murder of Baſtards.

The Statute of 18 Eliz. concerning Baſtard Children, does not extend to the Caſe of a Child born of a Woman married, whoſe Husband was not within the King's Dominions when the Child was begotten or born.

1. 21 *Jac.* 1. 27. *If any Woman be delivered of a Child, which being born alive would have been a Baſtard, and ſhe endeavour privately, either by drowning or ſecretly burying thereof, or any other Way by herſelf or others to conceal the Death thereof, that it may not come to Light, whether it were born alive or not, but be concealed: The Mother ſo offending ſhall ſuffer Death, as in Caſe of Murder, unleſs ſhe can prove by one Witneſs that the Child ſo intended to be concealed was born dead.*

Two Orders were made for the reputed Father (not the Husband) to maintain it; but it was moved to quaſh it, becauſe the Statute of 18 Eliz. gives the Juſtices no Juriſdiction but where the Child was born out of lawful Matrimony; and becauſe it was not alledged in the Order that the Husband was beyond Sea for the Space of Forty Weeks before the Birth of the Child, and it is not ſufficient to ſay that he was beyond Sea at the Time of the Conception, becauſe that is what in Nature cannot certainly be known. And for this laſt Reaſon the Orders were quaſhed; but the Court bound the Defendant by Recognizance to appear at the next Quarter Seſſions for Middleſex, being inclinable to bring the Caſe within the Statute of 18 Eliz. becauſe of the frequent Miſchiefs of this Kind which have happened among Seamens Wives. Carth. 469, 470. Mich. 10 W. 3. B. R. The King v. Alverſton.

[T. b. 75] Nonage.

1. If the Queſtion upon a Writ of *Error* brought to *reverſe a Fine or Recovery* for Nonage, Whether the Party be of full Age, or within Age? It ſhall be tried by the Court by *Inſpection* of the Party during his Infancy, and not by a Jury. Hill. 22 Car. 1. B. S. But there muſt be other *concurrent Proof* made to the Court, as well as by viewing the Party, viz. by producing the *Pariſh Regiſter-Book* where the Perſon was chriſtened, *and* alſo *Affidavits* of ſome Perſons who can ſwear to the Time of the Birth; For the Court may be deceived, if they ſhould rely only upon the View of the Party. L. P. R. 46.

(T. b. 76) Non Aſſumpſit.

1. There is a *Diverſity between Aſſumpſit in Fact and Aſſumpſit in Law*; For *on Aſſumpſit in Fact*, and Non Aſſumpſit pleaded, *a Releaſe cannot be given in Evidence* to toll the Aſſumpſit, *but only in Mitigation of Damages*; *But upon Aſſumpſit in Law*, and Non Aſſumpſit pleaded, *a Releaſe may be given in Evidence*, becauſe the Aſſumpſit is tolled by it; Agreed per Cur. Sid. 236. pl. 3. Hill. 16 & 17 Car. 2. B. R. Beckford v. Clarke.

Quære, if upon Non Aſſumpſit pleaded (be it in Fact or in Law) the Defendant may give in Evidence Performance. Ibid.

2. In an Indebitatus Aſſumpſit for Money lent, the *Defendant* pleaded Non Aſſumpſit, and *gave Infancy in Evidence*, and it was agreed by ten Judges, that upon the General Iſſue ſuch Evidence had been of late admitted. 1 Salk. 279. pl. 4. Paſch. 5 W. and M. in C. B. Darby v. Boucher.

And tho' the Money lent was laid out in Neceſſaries, yet that will not by Matter Ex Poſt Facto entitle the Plaintiff to an Action; This was held clearly by Treby Ch. J. in S. C. Ibid.—

3. *Feme Covert may* plead Non Aſſumpſit, *and give Coverture in Evidence*; becauſe Coverture makes it no Promiſe. 6 Mod. 230. Mich. 3 Ann. B. R. Anon.

(T. b. 77) Non Compos.

1. *Deviſing a greater Eſtate* in Land *to a younger than to an elder Son*, and *limiting a Remainder over in Tail on either of his ſaid Sons dying with* (inſtead of *without*) *Iſſue*, is no Evidence of Teſtator's being Non Compos. 8 Mod. 59. Mich. 8 Geo. Burr v. Davall.

(T. b. 78) Non eſt Factum.

1. In Debt upon an Obligation the Iſſue was *Non eſt Factum*; The Jury found that the Defendant did ſeal and deliver it as his Deed, but that *after the Day of the Iſſue joined, the Seal was pulled off from the Obligation*. The Plaintiff had Judgment; For it was the Defendant's Deed at the Time when the Iſſue was joined, and the Trial ſhall relate to it, altho' the Deed was cancelled afterwards. Cro. E. 120. pl. 8. Mich. 30 & 31 Eliz. B. R. Michael v. Stockwith.

Ow. 8. Michael's Caſe, S. C. and Judgment for the Plaintiff —— Goldsb. 83. pl. 2. S. C. adjudged for the Plaintiff, for there was no Fault in him.

2. Non eſt Factum *cannot be pleaded generally upon the Statute of Uſury, or the Statute of Sheriffs*; Per Cur. Heb. 72. in pl. 86.

3. If

3. If *two Men are bound jointly, and the one is ſued alone*, he may plead this Matter in Abatement of the Writ, but he cannot plead Non eſt Factum; For it is his Deed, tho' it be not his ſole Deed. Co Litt. 283. a

4. *Feme Covert* may plead Non eſt Factum *to a Bond*, and give Coverture in Evidence. 6 Mod. 230. Mich. 3 Ann. B. R. Anon.

(T. b. 79) Notice.

1. Upon Iſſue of Notice *to a Patron upon Refuſal for Illiterature*, Quære. If fixing a Note to the Church-Door will be ſufficient Evidence. Dy. 327. b. b. pl. 7. Mich. 15 & 16 Eliz. Anon.

2. *Being told* by Perſons of good Credit all along the Road *of the Parl. Prorogation*, is good Evidence of Notice in an *Action of Falſe Impriſonment*. 2 Show. 300 pl. 302. Paſch. 35 Car. 2. B. R. Verdon v. Deacle.

1 Salk. 115. pl 2 S C. before Holt C. J. at Niſi Prius at Guild-hall.

3. If a *Husband and Wife cohabit*, and the *Wife deals ſeparately*, her Contracts ſhall charge the Husband; for Cohabitation is ſufficient Evidence of Notice. 6 Mod. 162. Paſch. 3 Ann. B. R. Langford v. Adminiſtrator of Tyler.

(T. b. 80) Not taking the Oaths.

11 & 12 Geo 2. S C. cited in Caſe of Rice v. Oakefield.

1. *Record of Seſſions* given in Evidence to prove the Plaintiff had not taken the Oaths, per Holt Ch. J. this Record is Evidence. Indeed, if there is a Miſentry, it may be ſupplied and corrected by other Evidence, for he ſhould not be concluded by the Miſtake or Negligence of the Officer; But ſtill 'tis a Record, and ſome Proof, tho' not a compleat Proof, and might be left to the Jury. 1 Salk. 284. pl. 16. Mich. 12 W. 3. Thurſton v. Slatford.

2. *Upon any Trial for Forfeiture for not taking the Oaths, &c or making ſuch Regiſtry as aforeſaid, a Certificate thereof under the Hands of the proper Officer ſhall be allowed as Evidence of the Defendant having taken the ſaid Oaths, or ſubſcribed ſuch Declaration of Fidelity, or taken the Effect of the Abjuration Oath reſpectively as aforeſaid.*

(T. b. 81) Nul Diſſeiſin.

1. If in Aſſiſe the Tenant pleads Nul Tort Nul Diſſeiſin, he *cannot give in Evidence a Releaſe after the Diſſeiſin*, but a Releaſe before the Diſſeiſin he may; For then upon the Matter there is no Diſſeiſin. Co. Litt. 283. a.

(T. b. 82) Number of Acres in a Fine.

1. On Trial in the North, whether *Lands* were comprized *in a Common Recovery* or not, being as *deſcribed but 28 Acres, yet the Fact was they were 120 Acres*; Yet *bene*, becauſe the Intent of the Party is what is to govern in theſe Caſes, and theſe 28 Acres ſhall not go according to Statute, but the Eſtimation of the Parties. Per King Chan. Trin. Vac. 1727.

(T. b. 83) Nuſances.

1. In an Indictment for *erecting Poſts and Rails* in a Highway, it was held neceſſary to *prove, that the Party indicted did ſet them up* for a Continuation of them, or not ſuffering them to be removed, would not ſerve.—Hale Ch. J. ſaid if there be no ſpecial Matter to fix it upon o-

thers

thers, the Parish, where the Highway is, ought to repair it of common Right. Vent. 183. Hill. 23 & 24 Car. 2. B. R. Austin's Case. The Reporter makes a Quære, why not the County? as in the Case of Common Bridges. 2 Inst. 701.

2. To hinder the Course of a navigable River is against Magna Charta 23. And any Thing that aggravates the Fact, though not directly to the Issue may be given in Evidence upon it, as here taking of Money to let People pass. And it is no Exception to a Witness here, that he *contributes to carry on the Suit*, or that this publick Nusance was *to his private Nusance*; Per Holt Ch. J. 12 Mod. 615. Hill. 13 W. 3. the King v. Clark.

3. It was ruled by Holt Ch. J. at the Sittings at Westminster, Hill. 9 W. 3. B. R. in an *Indictment for a Nusance*, that the *Building of a House in a larger Manner than it was before, whereby the Street became darker*, is not any publick Nusance by Reason of the Darkening. Ld. Raym. Rep. 737. The King v. Webb.

4 *A Thing may be a Nusance at one Place, and not so at another*, as in Cheapside; As stinking Dy-Water is not so at Taunton or Wellington being in the Way of Trade; Coram Pengelly Ch. B. at Taunton Assises, Lent 1729-30.

## [T. b. 84] Original Writ.

1. The *Certificate from the proper Officer* is the only Way of Trial *what the Original in the* Action was, and he having certified, that a Quare Clausum Fregit was the Original, the Court is bound to give Credit to this Certificate, Arg. and the Court was of the same Opinion. 10 Mod. 318. Mich. 2 Geo. 1. in Case of Doucett v. Chaplin cites Cro. J. 108. 479. Noy. 4. Cro. C. 272. 281. Brownl. 96. Yelv. 108.

## [T. b. 85] Parcel of a Manor.

1. Of Land being reputed Parcel of a Manor *in the King's Case*, How and How *in the Case of a common Person*. 2 Roll. Prerogative, 186. [L b] pl. 5.

2. When the *Priories* were suppressed a Commission issued, and a Certificate was made upon all the Possessions and the Value which belonged to the Priories, and therefore it is good Evidence upon an Issue, if Land was Parcel of a Priory or not, that *the Certificate makes no mention of it*. Litt. R. 36. Trin. 3 Car. C. B. Anon.

## [T. b. 86] Payment Modo & Forma.

1. *Feoffment on Condition, that the Feoffor paid so much Money at such a Day and Place.* The Defendant *pleaded, that he paid the Money at the Day and Place Modo & Forma, and gave in Evidence before the Day*, and produced an Acquittance testifying the same; And adjudged ill, for by his Pleading he has made the Day and Place Parcel of the Issue, and so restrained himself thereto; but this should have been specially pleaded. Mo. 47. pl. 41. Pasch. 5 Eliz. Anon.

D 222 b. pl. 22. S. C. & S. P. held accordingly at Nisi Prius at Guildhall, because he pleaded the Payment precisely at the Time and Place mentioned in the Indenture — Dal 48. pl. 7. S. C. in totidem Verbis with Mo — Godb. 10 pl. 14. Mich. 24 Eliz. C. B. Anon. S. P. held accordingly; And Ld. Ch. J. Dyer said, that the Plaintiff's Counsel might have demurred upon the Evidence.—

2. In Debt upon a *Bond* of 40 l. for the Payment of 20 l. at a Day and Place certain; The Defendant *pleaded*, that he had *paid* the said 20 l. *according to the Condition*, upon which they were at Issue; and at the

Nisi Prius, the Defendant gave in Evidence, that he had paid the Money to the Plaintiff before the Day, and the Plaintiff had accepted it. All which Matter the Jury found specially, and referred the same to the Justices; And it was said by the whole Court, That that Payment before the Day was a sufficient Discharge of the Bond; but because the Defendant had not pleaded the same specially but generally, that he had paid the Money according to the Condition, the Opinion was, that they must find against the Defendant, for that the special Matter would not prove the Issue; And the Lord Dyer said, That the Plaintiff's Councel might have demurred upon the Evidence. Godb. 10. pl. 14. Mich. 24 Eliz. C. B. Anon.

And. 198. pl. 233. S. C. held, that Payment before that Day is Payment at the Day

3. In Debt upon Bond, the *Condition was for Payment* of a lesser Sum *at a certain Day and Place.* The Defendant pleaded Payment at the Day and Place. The *Jury find that he paid before the Day at another Place, and that the Plaintiff accepted it.* All the Court held, that Payment before the Day was Payment at the Day, and Judgment for the Defendant. Cro. E. 142 Trin. Eliz. C. B. Bond v. Richardson.

as to observing the Intent and Sense of the Condition, and that the Condition is thereby discharged; but otherwise it is of Payment after the Day, and that the Day is material. —— Mo 267 pl. 417. Band v. Richardson, S. C. adjudged for the Defendant —— Ow 45. S. C. adjudged accordingly. —— Le. 311. pl 432 S. C. reported to be adjudged for the Plaintiff, but seems to be misprinted (Plaintiff instead of Defendant) and that by the very Reason there given, viz. For (it says) the Day is not material, nor the Place, but the Payment is the Substance —— Sav 96. pl. 176 S. C. adjudged, that Payment and Acceptance before the Day is as good as Payment at the Day, and the Plaintiff was barred. —— S. C. cited D 222 b. Marg. pl. 22. adjudged accordingly. —— But D Ibid in the principal Case there. Pasch 5 Eliz. Anon. it was held by Dyer, Browne and Welshe Justices contrary to the Opinion of Serjeant Harper, that the Jury is not bound on such Evidence to find the Payment according to the Issue, because the Truth is contrary. —— Dal. 48. pl. 7. S. C. held by Dyer, Browne and Welshe, that the Pleading ought to be special —— So in Case of a Covenant and a Recognizance, for Performance of it, the Court held, as to the Payment at another Place, and before the Day, that the Acceptance was fully sufficient to excuse the Recognizance as well as the Covenant upon which the Recognizance depended —— Cro. J. 434, 435. pl 2. Mich. 15 Jac. B. R. in Case of Holms v. Broket, S. P. admitted. —— Godb 10. pl 14 Mich. 24 Eliz. C. B. the S. P. admitted. —— 10 Mod. 147 Hill. 11 Ann. B. R. the S. P. admitted ——

4. The *Receipt* in the Mortgage-Deed and Condition of Redemption on Repayment of the Money, and Defendant's *Oath that he paid it*, the Court inclined was Evidence enough of Payment of *Mortgage-Money* after 10 Years against any Person; But the Plaintiff standing upon it that it was not sufficient as against the Plaintiff, who claimed as Jointress, there was farther Evidence. Chanc. Cases, 119. Hill. 20 & 21 Car. 2. Goddard v. Complin.

5. The Case was, that a Bargain and Sale was *pro diversis considerationibus* generally, and this was admitted in Evidence to prove Money *revera* paid; and if it be paid *by one of the Bargainees*, this *is sufficient for all to raise the Use unto all.* See if it is paid to one of the Bargainors, if that be not *good* also. Clayt. 145. pl. 263. Mar. 1650. Harley v. Thomson.

2 Wms's Rep. 295. Trin. 1625 S. P. in Case of Coppin v. Coppin.

6. It was said by Glyn Ch. J. at a Trial at Bar, that if a *Deed expresses a* Consideration of *Money* upon the Purchase made by the Deed, yet this is no Proof upon a Trial that the Monies expressed were paid, but it *must be proved by Witnesses.* Sty. 462. Mich. 1655. Thurle v. Madison.

7. A *Goldsmith's Note* promising to pay is Evidence of his receiving Money. 1 Salk. 283. pl. 14. Hill. 12 W. 3. Ford v. Hopkins.

8. Adjudged, that where the Issue is Payment at the Day and Place, in such Case, Payment *before the Day, or at any other Place* is good Evidence, for Payment before the Day, is Payment at the Day. 3 Salk. 156. pl 13. Mich. W. 3. Anon.

9. If a Man *contracts for Goods*, and *after his carrying them away gives* the Seller *a Goldsmith's Note for the Money*, this does not amount

to

to Payment; *But if it were given at the Time of the Contract*, it would be prima facie Evidence that it was taken in Payment. And if a Man upon a Contract made before takes ſuch a Bill, and keeps it till the Party on whom it is drawn becomes inſolvent, in an Action brought by him upon that Bill againſt the Buyer he ſhall be barred; but he ſhall recover the Debt upon the original Contract; Per Holt Ch. J. 12 Mod. 408. Trin. 12 W. 3. Anon.

10. If I ſet my Name as a *Witneſs to a Receipt*, this *is not in Teſtimony of the Receipt of the Money, but of the Party ſetting his Hand.* Holt Ch. J. Exeter, Lammas 1706

11. A *Receipt of the laſt Half-Year's Rent*, is Evidence that all before was paid. Tr. per Pais, 7th Edit. 315.

12. Plaintiff ſold to the Defendant 100 *l.* South-Sea Stock for 400 *l.* the Defendant upon the Tranſfer produced a Note of Mitford's and Martin's of 500 *l.* which the Plaintiff received, and gave him a Note on Mr. Brand his Goldſmith for 100 *l.* which the Defendant received. The 500 *l.* Note was given between 12 and 1 at the S. S. Houſe, and Mitford and Martins lived in Cornhill, ſo that the Plaintiff might have gone immediately and received the Money; but inſtead thereof, about 4 that Afternoon, being the 19th of October, he gives the 500 *l.* Note in at the Bank, who at 11 the next Morning ſent a Servant to receive the ſame. Mitford and Co. paid from 8 till 9 that Morning, and then ſtopped. The Ch J ſaid *The Plaintiff was not obliged to go immediately to receive the Money after the Receipt of the Note, tho' the Goldſmiths lived ſo near, but had a convenient Time by the Law allowed*, and left it to the Jury whether this was ſo, and they found for the Plaintiff that it was not, and that there was no Laches in the Plaintiff. Coram King Ch. J. apud Guild-hall, Hill. 7 Geo. Holms v. Barry.

13. The ſame Day the like Caſe was in B. R. coram Pratt Ch. J. inter Moor and Warner, and differed only in this, that the Plaintiff here *ſent the Note himſelf, and went the next Day about* 10 *to receive the Money*, and the like Direction and Verdict was given as in the former Caſe.

14. *P. had a running Account with B. a Banker, in whoſe Hands he had* 3000 *l. B paid him* 1000 *l. for which P. inſtead of a Receipt, gave him a Promiſſory Note, who aſſigned it to H. B. became a Bankrupt; H. ſued the Note*; and on the Trial, P. not being able to prove that B. at the Time of the Aſſignment was a Bankrupt, H. recovered; Now Bill is brought for an Injunction, and to have a Diſcovery whether the Aſſignment was not made after the Time it bore Date. It was inſiſted, that tho' this was a Promiſſory Note, it ſhould be conſidered only as a Receipt, he having at that Time Money in Hands, and could not be imagined he intended to be liable on the Note at the ſame Time that ſo much Money was due to him; and if ſo, the 1000 *l.* ſhould be taken as ſo much Money paid and deducted out of the 3000 *l.* ſo ſhould come in for his diſtributive Share of 2000 *l* of the Bankrupt's Eſtate, and not to be a Creditor for 3000 *l.* and pay the 1000 *l.* Ld. Chancellor, *If People are ſo careleſs to give Notes inſtead of Receipts, it is more fit they ſhould ſuffer than innocent People who know nothing of their Tranſactions.* Bill diſmiſſed Sel Caſes in Canc. in Ld. King's Time, 42, 43. 11 Geo. Pakenham v. Bland and Hoskins.

15. Where *Diſcounts are allowed by Courſe of Trade for prompt Payment*, or on balancing Accounts at a firſt Time, theſe Allowances are as actual Payments, and ſo to be underſtood and taken; Per Ld. Chan. King, 25 April 1729

16. One of the ſubſcribing Witneſſes to a Conveyance, the Conſideration whereof was 8 *l.* ſaid, that *he ſaw Gold paid at the Time of executing the Deed, and that after the Execution he heard the Vendor acknowledge*

*ledge that he had received his Purchaſe-Money*; But Ld. Ch. Hardwicke ſaid this is not ſuch a ſufficient Proof of the Payment of the Conſideration-Money in a Deed as may be expected. Barn. Chan. Rep. 189. Paſch. 1740. Fleetwood v. Templeman.

(T. b. 87) Pedigrees.

1. At a Trial at the Bar between Baxter and Foſter, concerning the Title of Land, a Copy of an *Inſcription upon a Grave-Stone* in London was admitted in Evidence to prove a Pedigree. L. P. R. 552. cites Mich. 1656. B. S.

2. *Charter of Pedigree*, is no Evidence of itſelf, without ſhewing the Books and Records whence it is deduced, to prove *Deſcent*, though the Heralds ſwore that the Pedigree was deduced out of the Records and ancient Books in the Office. 2 Jones 224 Mich. 34 Car. 2. B. R. Earl of Thanet's Caſe.

3. A *Copy of an Inſcription on a Tomb-ſtone*, allowed to prove a Pedigree. Sty. 208.

Though Herald's Books are allowed to prove a Pedigree, yet this is becauſe they have not better Evidence

4 *Herald's Books* are allowed to prove a Pedigree, but that is becauſe they have not better Evidence, and this is their proper Buſineſs about which they are employed, and therefore there is ſome Credit to be given to them, but they do not deſerve much, becauſe they are ſo negligently kept. Skin. 623. pl 17. Mich. 7 W. 3. B. R. in Caſe of Steyner v. the Burgeſſes of Droitwich.

and Holt Ch. J. ſaid, that though an old Manuſcript found among the Evidences of a Family may be Evidence, becauſe an Original, yet a Copy would not. Skin. 623. pl. 17. Steyner v. the Burgeſſes of Droitwich.——

5. Inter Zouch and Waters apud Guildford Lent Aſſizes 5 Geo. A *Book out of the Herald's Office* was allowed to prove the Plaintiff was not deſcended from one William Zouch of Pilton, as alſo an *old Book of my Lord Oxford's Library* mentioning the Pedigree of William Zouch of Pilton, which was ſigned by himſelf.

(T. b. 88) Perjury.

1. Evidence to prove a Perjury may be *given Viva Voce*; agreed. Sid. 51. pl. 16. Mich. 13 Car. 2. B. R. Wicks v. Smallbrook.

2. Exception was taken to a Witneſs, that he was *convicted of Perjury*, and they offered a *Copy of a Verdict*, on which there was *never any Judgment in Oliver's Time*. But the Court would not admit the Evidence, becauſe all is diſcontinued by the Alteration in the Government. But it was agreed, that Evidence might be given *Viva Voce* to prove him perjured; the other Side to eſtabliſh the Witneſſes Credit, produced *a Pardon* of the Perjury; But per Cur. that will not do, for it cannot reſtore him to his Credit. Sid. 51. pl. 16. Mich. 13 Car. 2. B. R. Wickes v. Smallbrook.

3. *Jews* were *ſworn* as Witneſſes by Keeling Ch. J. at Guildhall *on the Old Teſtament only*, and afterwards on its being moved in B. R. if this was an Oath by the Stat. 5 Eliz. cap. 9. which might be aſſigned for Perjury, and the Court held that it was, and within the General Words of Sacro Sancta Evangelia; *ſo of the Comon-Prayer Book that has the Epiſtles and Goſpels*; but by Windham that of a *Pſalm-Book* only it is not ſo. 2 Keb. 314. pl. 25. Hill. 19 & 20 Car. 2. B. R. Robeley v. Langſton.

4. An

4. An Information was for Perjury in Ejectment, the Defendants juſtify upon Not Guilty; and now upon Evidence to prove this Perjury, one was produced to prove *what one, ſince dead, ſwore upon the firſt Trial*, and it was allowed. Per 2 Juſtices againſt Keeling Ch. J. Raym 170. Mich. 20 Car. 2. B. R. Taylor v. Brown.

5. *Depoſitions of Witneſſes before Commiſſioners in Chancery* are not to be allowed as ſufficient Evidence to convict one of Perjury, &c. Comb 38. Mich. 2 Jac. 2. B. R. The King v. Baſpole.

6. Upon an Information of Perjury in an Affidavit in C. B. made before Commiſſioners in the Country in a Cauſe there, *a Copy of the Affidavit* produced, and proved to be made uſe of by him, upon a Motion in the Cauſe was held to be good Evidence; But a Copy of an Affidavit only produced againſt a Man, without Proof that he made it, uſed it, or was concerned in the Cauſe will not do. Show. 397. Trin. 4 W. & M. K. v. James. Carth. 220. S. C.—

7. In an Indictment in Perjury *upon an Anſwer in Chancery*; ruled firſt, that the Complainant in Chancery is no Witneſs pending the Suit. *2dly.* That if the Bill be diſmiſſed he is a Witneſs. *3dly.* The *Bill being taken off the File*, it is no Evidence, for it *is not a Record after* it is taken off the File. *4thly.* Though the Bill taken off the File be no Evidence, yet a *Copy* of the Bill made *when the Bill was upon the File* was read. *5thly.* There being but the Oath of the Proſecutor, and ſo *Oath againſt Oath*, the Defendant was acquitted. Skin. 327. pl. 6. Mich. 4 W. & M. Fanſhaw's Caſe.

8. In an Indictment of Perjury before Holt Ch J. at Guildhall ruled in Evidence, Firſt, That though the Perjury be *aſſigned in an Affidavit made at Serjeant's Inn*; yet it is good if it be in *Cheapſide, or any other Place within the ſame County*. *2dly* That it ought to be proved that the Affidavit *was read*, and uſed *againſt the Party*, for without uſing it the bare making of an Affidavit, without producing and uſing it will not be ſufficient. Skin. 403. pl. 39. Mich. 5 W. & M. in B R. The King and Queen v. Taylor.

9 A Falſe *Oath any Way conducive to the Matter in Iſſue, or a Guide to the Jury, though* it be *but circumſtantial*, is Perjury. 12 Mod. 142. Mich. 9 W. 3. King v. Griebe.

10. If it be *Matter that tends to the Diſcovery of Truth*, though but a *Circumſtance*, as that ſuch a one *wore a blue Coat whereas he wore a red*, it is Perjury; but if he tell an *impertinent Story nothing to the Purpoſe*, then it is not ſo. 12 Mod. 142. Mich. 9 W. 3. King v. Griebe.

11. If a Man *ſpeaks to the Credit of a Witneſs*, which is not directly to the Iſſue, yet if falſe, that is Perjury. 12 Mod. 142. Mich. 9 W. 3.

12. At a Trial, the *Queſtion was upon Money lent*, and it being objected, that it was *improbable, the Plaintiff being a cautious Man, ſhould lend ſuch a Sum without a Note*; *a Witneſs* was produced to *prove that he had lent a greater Sum to a Perſon* then in Court *without a Note, which Perſon ſwore he did not*; and upon Motion to file an Information of Perjury againſt him for the Oath, Court held it reaſonable. 12 Mod. 142. Mich. 9 W. 3 King v. Griebe.

13 *Mandamus to admit* Morris *to the Freedom of the City of Lincoln*, he having ſerved *Seven Years Apprentice*, which the Mayor refuſed, becauſe would not take the *Freeman's Oath*, he being a Quaker, but offered to make a ſolemn Affirmation according to the late Act, 7 *W.* 3. *cap*, 34. And the Court were of Opinion, that he ought to be admitted on his ſolemn Affirmation; for the Office of Freeman is *no Place of Profit or Office in the Government* within the Statute; By his ſerving the Apprenticeſhip he had a Right in the Freedom, and his Admiſſion whereunto the taking *of an Oath is not eſſential*; but only by Cuſtom; and the *Intent of the Act was*, that unleſs in thoſe Caſes excepted by Proviſo, Carth. 448. Paſch. 10 W. 3. B.R. The King v. Maurice Mayor of Lincoln.

viſo, the Affirmation of a Quaker ſhould be as available as his Oath; and though it was returned in this Caſe, that every Freeman had the Liberty to run a Cow upon the Common within the ſaid City, yet that will not alter the Caſe. 12 Mod. 190. King and Morrice v. the Mayor and Commonalty of Lincoln.

14. To convict a Man of Perjury a *probable* Evidence is not enough; but muſt be a *ſtrong and clear Evidence, and more numerous than the Evidence given for the Defendant*, for elſe it is only Oath againſt Oath. Per Parker Ch. J. 10 Mod. 194. Mich. 12 Ann. B. R. in the Caſe of Q. v. Muſcot.

15. A Perſon *ſwore that he ſaw and read ſuch a Deed*, and *it proved* on the Trial *to be only the Counterpart* which he ſaw, and yet held no Perjury, becauſe only a *Miſtake*. 10 Mod. 195. a Caſe cited by Parker Ch. J. in Caſe of Q. v. Muſcot.

16. Parker Ch. J. held that Perjury may be committed in *circumſtantial Matter*; but it muſt be a *very material Circumſtance, a Circumſtance of that Weight, that without it he could not hope to find Credit with the Jury*. 10 Mod. 195. in Caſe of Q. v. Muſcot.

17. In an Indictment for Perjury in an Anſwer in Chancery, though at Common Law. yet the falſe Oath muſt be voluntarie & corrupte, and therefore if it appeared that the falſe ſwearing was *in a Point not material*, it was an Evidence that the Oath was not corrupt, and ſo it was determined in the Caſe of the **King v. Muſket** in Ch. J. Parker's Time, upon which the Defendant was acquitted; and that to convict a Perſon of Perjury there *muſt be more Evidence than a ſimple Oath*, otherwiſe it would be only Oath againſt Oath. In this Caſe *the Perjury was alledged to be in Anſwer to a Bill filed ſuch a Term*, and *the Copy of the Bill produced was an amended Bill* by Order of the Court *of a ſubſequent Term*, Objected, that this was not the Bill to which the Anſwer was put in, for that was to the original Bill, Sed non allocatur, *for the amended Bill is Part of the original Bill*. Coram Eyre and Forteſcue J. apud Weſtminſter. Mich. Vac. 6 Geo. The King v. Waller.

[T. b. 89] Poſſeſſion.

1. The Law does ever favour Poſſeſſion as an Argument of Right, and does incline rather to long Poſſeſſion without ſhewing any Deed, than to an antient Deed without Poſſeſſion; And *after a long Poſſeſſion Omnia Preſumi debeant Solenniter eſſe acta*. 2 Inſt. 118. 362.

2. Poſſeſſion of ſixty nine *Years maketh no Title in* Law *to a Common, if the Commencement thereof can be ſhewed ſince the Time of the Reign of R.* 1. but the ſaid long Poſſeſſion is great Evidence, and a ſtrong Preſcription of the Right of Common, & Stabitur Preſumptioni donec Probetur in Contrarium. 2 Inſt. 477. 2 Mod. 277, 278.

3 In Ejectment on a Trial at Bar, the Statute of Limitations was inſiſted on; and this Point was ruled by the Court, That the Poſſeſſion *of one Jointenant* is the Poſſeſſion of the other, ſo far as *to prevent the Statute of Limitations*. 1 Salk. 285. pl. 19. Hill. 2 Ann. B R. Ford v. Grey.

4. Ejectment at Launceſton Summer Aſſiſes 1732. Coram Forteſcue A. that where in Order to remove an Objection of twenty Years Poſſeſſion, Evidence was given of an Entry *about fifteen or ſixteen Years back*, this bare Entry is not *ſufficient, unleſs ſomething more was done*, or there had been ſome Proceedings after it

5. Where the *Tenements of a Manor are ſold to ſeveral Perſons, and the Manor divided into Parts*, the Enjoyment is the proper Evidence to whom Parts of any of the Waſte of Manor do belong; Coram Pengelly Ch. B. at Exon Lent Aſſiſes 1729-30.

[T. b. 90]

[T. b. 90] Preſcription.

1. Where *ſeveral Interruptions* are proved to be made, it is an Evidence *againſt the Cuſtom.* Ley. 56. Trin. 7 Jac. in Borough of Doncaſter's Caſe.

2. The Defendants preſcribed *for Common for all Cattle, &c. at all Times of the Year.* In the Evidence it appeared *the Sheep were excepted for ſome Time in the Year*; Reſolved per Cur. that they had failed in the Preſcription, and the Evidence did not maintain the Plea; and that the Preſcription ſhould have been ſpecially pleaded with this Exception. Carth. 241. Paſch. 4 W. & M. in B. R. the King v. the Inhabitants of Hermitage, &c.

3. A Preſcription is capable of Proof by ſhewing an Uſage of ſuch a Thing *by ancient Witneſſes*, which is an Evidence of a Preſcription; Per Holt Ch. J. 12 Mod. 683, 684. Hill. 12 W. 3.

4. Upon an Iſſue whether the Tenentes occupatores ought *to repair a Fence* (which is a Thing not of common Right) though by Tenentes is meant Owners of the Fee-ſimple, and by Occupatores thoſe that claim under them, and the Preſcription is only annexed to the Tenentes, yet it will be good Evidence on a Traverſe of Preſcription, that the Tenants for Years have from Time to Time fenced and repaired, for perhaps the Eſtate has not ſince Time of Memory been in the Poſſeſſion of the very Owner of the Fee. 1 Salk. 336. Mich. 9 Ann. B. R. Starr v. Rookesby.

11 Mod. 168. pl. 4. Paſch. 7 Ann. B. R. the S. C. the Court ſeem to incline that the Preſcription was not ſufficiently laid.

[T. b 91] Priority of Birth.

1. A Man *had eight Sons*, the three *laſt were all born at a Birth.* Queſtion on Ejectment, which was the Eldeſt? they were baptized by the Names of Stephanus, Fortunatus and Achicus. Declarations of the Father were proved, that Achicus was the Youngeſt, and he took theſe Names from St. Paul in his Epiſtles. The Son of Fortunatus was Leſſor of the Plaintiff and e contra, it was proved from the Declarations of one *M. F. who was a Relation and at the Birth, and upon the Birth of the ſecond Child took a String and tied it round the Arm to know the one from the other*, &c. Objection was made, that the Declaration of this Woman was not Evidence ſeeing it was ſince the Death of the fifth Son (the ſaid Stephanus, and all the other Sons dying before him without Iſſue) when there was a Diſcourſe about this Matter, but *what this Woman ſaid ſoon after the Birth was allowed in Evidence, when there was no Proſpect of a Controverſy*; Per Reynolds Ch. B. at Devon. Aſſiſes Lent 1731.

[T. b. 92] Rape.

1. A Woman's poſitive Oath of a Rape without *concurring Circumſtances* is ſeldom credited. If a Man can *prove himſelf* to be in another *Place, or* in other *Company* at the Time ſhe charges him with the Fact, this will overthrow her poſitive Oath; So if ſhe is wrong in the *Deſcription of the Place*, where it was impoſſible the Man could have Acceſs to her at that Time; as if the Room was locked up, and the Key in the Cuſtody of another Perſon, this will take off much from her Evidence; And I remember one particular Caſe at Hertford Aſſiſes, where the Woman depoſed, that a Gentleman raviſhed her in a Pond that was dry at that Time, and the Priſoner brought Evidence to ſhew, that the Pond was then full of Water, and upon this the Jury acquitted him. 5 5 Readings on the Statute Law. 49.

[T. b 93]

(T. b. 93) Records.

A Record muſt be pleaded Sub Pede Sigilli, or elſe the Court cannot judge of it, but if a Record be given in Evidence, tho' it be not Sub pede Sigilli, the Jury may find it, if they have any other good Matter of Inducement to prove it. Per Roll. J. Sty. 22 34. S. C.——Hardr. 120. Arg. cites S. C. That in Evidence to prove to a Jury a Diem clauſit extremum out of the Exchequer, the Record itſelf could not be found, but a Warrant for it, and an Entry of it in the Docket Book was proved, and upon Demurrer it was adjudged no Evidence, becauſe a Record cannot be proved but by itſelf.

1. It was agreed clearly, that the Court, *for reaſonable Cauſe at their Diſcretion, may permit any Matter* to be ſhewn to prove a Record. Aleyn 18. Trin. 23 Car. B. R. Wright v. Pindar.

Mod. 117. pl. 17. Green v. Proud, S. C. but there it is ſaid that an Exemplification of a Recovery was exhibited, but not proved a true Copy, becauſe it was antient, and ſaid that the Court Rolls were burnt at Baſing-Houſe in the Wars.——

2. In Ejectment upon a Trial at Bar for Lands in Antient Demeſne, there was Proof given of a *Recovery ſuffered in the Court of Ancient Demeſne to cut off an Entail along Time ſince, and that the Poſſeſſion had gone accordingly*, but the Recovery itſelf was loſt, and no Copy of it was produced; But the Court admitted other Proof of it to be ſufficient, and ſaid, *that if a Record is loſt, it may be proved to a Jury by Evidence*, as the Decree in the Reign of H. 8 for Tithes in London is loſt, yet it has been often allowed that there was one. 1 Vent. 257. Paſch. 26 Car. 2. B. R. Anon.

So the Decree in H 8. Time for Tithe is loſt, yet it has been often allowed that there was one. Vent. 251. Anon.

3. The Matter of a *Record loſt* may be proved by other Evidence, Cited per Holt Ch. J. as the Caſe of the Univerſity of Oxford for a Preſentation by Conviction of Recuſancy of Earl of Salop 1 Salk. 285. pl. 16. Mich. 12 W. 3. B. R. in the Caſe of Thurſton v. Slatford.

(T. b. 94) Rector of a Church.

1. In *Ejectment* for a Rectory, the Leſſor of the Plaintiff, after his proving his Admiſſion, Inſtitution and Induction, muſt likewiſe *prove his reading the Articles, and his ſubſcribing them*, and his Declaration in the Church of his full and free *Aſſent and Conſent to all Things contained in the Book of Common Prayer*, and that this was done within the Time limited by the Statute. Sid. 220. pl. 8. Mich. 16 Car. 2. B. R. Snow v. Phillips.

[T. b. 95] Releaſe.

1. A *Deed of Feoffment* may be given in Evidence as a Releaſe, if it be *without Livery*. Clayt. 32. pl. 55. Aſſiſe Auguſt, 11 Car. Ballard v. Sitwell.

2. If *Award* be, that a general Releaſe to the Time of Award may be given, a *Releaſe to the Time of the Submiſſion* is a good general Releaſe. 12 Mod. 8. Mich 4 W. & M. Anon.

3. In Indebitatus Aſſumpſit, and Non Aſſumpſit pleaded, Defendant produced in Evidence a *Deed of Compoſition which Plaintiff had ſigned to take 7 s. in the Pound, and a Receipt of the Money* which was paid to him, *and in this Deed was a Covenant from the Creditors that they would upon being paid releaſe*, &c. Per Ch. B. Reynolds, this being a Covenant to releaſe, is not to be as Evidence of a Releaſe, which he would have allowed; for what diſchargeth the Promiſe or Debt may be given in Evidence, and this differs from a Covenant not to ſue, which in the Player's Caſe, Clayton v. Kinaſton, was held to amount to a Releaſe; and

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he ſaid *the Acceptance of the 7 s. in the Pound was a Satisfaction*, and Plaintiff ought not to recover. Devon Aſſiſes, Lent 1731. King v. Hill.

4. Non eſt Factum was pleaded to a Releaſe made to A. and B. and now to prove this Deed it was given in Evidence, that A. *formerly in an Action with him had pleaded this Releaſe in Bar*, and that the Releaſe was entered upon the Record in *hac verba*, and now that Record was ſhewed forth and read, being proved to be a true Copy; and this was admitted for Proof of this Releaſe. Clayt. 62. pl. 108. July 1638. before Barkley Judge of Aſſiſe. Anon.

[T. b 96] Reputation of being Part.

1. E 6. *granted the Manor of E. &c. cum Pertinentiis & omnes Terras, Boſcos, &c. (antehac cognit', uſit', accept' & reput', ut Membrum vel Parcel' Manerii predict')* On a Writ of Intruſion for Woods, the Defendants pleaded this Grant, and averred that the ſaid Woods of L. and S. &c. *Ad tunc et antea fuerunt reputat' ut parcel' maner' præd' Domin' & Judic' pro Regin'*; For as to the Objection that *(Ante hac)* is uncertain as to the Time, when Parcel, whether 10, 20, or 100 Years, &c. Per Cur. it refers to the Poſſeſſion and Time paſt, and there being no former Time or Poſſeſſion mentioned it ſhall refer to the laſt Time Poſſeſſion paſt in the Crown. Yet the Word *Reputat' was too uncertain* to be referred as it is here pleaded, *without ſaying that it had been Time out of Mind Parcel*; And is not like Caſes of Common Fame and Voice to arreſt a Perſon ſuſpected, or for the Reputation of an Infant Baſtard, which are Things perſonal and tranſitory, and as a ſmall Time may induce and make a Reputation, ſo it may deſtroy its Continuance; It is a Thing of Common Right, and doth not oppugn any Verity, but to make Things of Inheritance to be reputed Parcel of a Manor, when in Truth they are not Parcel *In Facto & Jure*; this is againſt Common Right, and cannot be induced without a Preſcription. Common Appendant is created at the Time of the Tenure, and ſo need not be claimed by Preſcription as Common Appurtenant muſt, which can have no Effect, nor be claimed but by Preſcription. But if the Defendant made it iſſuable by pleading that theſe Woods were, and had Time out of Mind been reputed Parcel, &c. *tho' in the Caſe of a common Perſon Proofs of ſuch an Iſſue may be by vulgar and common Reputation of the People of the Vill, or of other Vills, &c yet in the Caſe of the King the Evidence muſt be by Matters of Record or Writing*, as by expreſs Valuation thereof between the Prince and the Subject in the Particulars of the Purchaſe, or in the Surveys and Books of Accounts of the Auditors, Receivers, Bailiffs, &c. always entered and anſwered in the Rolls as Parcel of the Manor. Co. Ent. 380 b. 381. The Queen v. Wilkin and Imber.

2. *Bargain and Sale of the Chaſe of W. with all Profits* thereunto belonging, or therewith uſed, or *reputed*, or known *as Part thereof*; the *Queſtion was, whether certain Woods* lying on one Side of the Chaſe *paſſed*; the Evidence was, that *they had been ſevered from the Chaſe by a Hedge, and ſometime the Demeſnes of another Lord*, than he who owned the Chaſe, *but* on the other Side the Evidence was, that *the Deer had uſed to browſe in theſe Woods for the Space of 60 Years*, and that *the Keeper of the Chaſe had his Walk there for ſo long Time*; adjudged that though they ſhall not paſs by thoſe Words (all that his Chaſe of W.) yet they ſhall paſs by the enſuing Words (or reputed &c) for the Uſage for ſo long was ſufficient to ground a Reputation, that they were Parcel of the Chaſe. 2 Sid. 1. Mich. 1657. B. R. Dodſworth's Caſe.

Freem Rep. 207. pl. 212. S. C. adjudged accordingly —See Pollexf. 410. to 425. An Argument prepared by the Reporter in S C in a Writ of Error, but thee being a Miſtake in the Writ it abated the Record not being removed, and ſo it never was argued.——

3. In a ſpecial Verdict in Ejectment, the Caſe was, there were *Lands*, which in Truth *were not Parcel of the Manor, and yet were reputed as ſuch*; and a Grant was made of the Manor, and all Lands reputed Parcel thereof; the Jury found that *theſe Lands were formerly Parcel of the Manor, but divided from it, and afterwards united again to it, and in the Poſſeſſion of him who held the Manor, and have ſince been demiſed by Copy of Court-Roll*; and per Curiam, theſe are great Marks of Reputation, and therefore the Londs ſhall paſs; But if the Jury had found that the Lands in Queſtion had been reputed Parcel of the Manor and had found no more, it would not have paſſed; becauſe the Reputation ſo found might be intended a Reputation for a ſmall Time, ſo reputed by a few, or by ſuch as were ignorant and unskilful. 2 Mod. 69. Paſch. 26 Car. 2. C. B. Lee v. Brown.

4. *Conſtant Reputation* ſhall be allowed Proof of *Marriage* and Orders. Per Holt Ch. J. Cumb. 202. Paſch. 5 W. & M. in B. R. Dr. Harſcot's Caſe.

[T. b. 97] Requeſt.

1. If three *aſſume to pay* or give, &c. upon Requeſt, &c. If the *Requeſt* be made *to one of them it is* good. Noy. 135. Breerton's Caſe.

2. It was ſaid by Wylde Recorder of London, and not denied by any one, That on a ſpecial Requeſt alledged in the Declaration, that a Requeſt *at any other Time, though ſeveral Years before* may be given in Evidence; But on a *Sæpius Requiſit'*, it was agreed, that a Requeſt *any Time* may be given in Evidence. Sid. 268. pl. 19. Trin. 17 Car. 2. B. R. King v. Bray.

[T. b. 98] Reſignation.

1. In a *Quare Impedit* it was reſolved and agreed by all upon Evidence at Bar, 1ſt. That a Reſignation *to a Proctor* does not make the Church void, untill it be *accepted by the Biſhop* and acknowledged before him; So that a Preſentation in the mean Time was void. 2d. The ſpecial Verdict finds an *Inſtrument under the Seal of the Biſhop upon which was indorſed*, that the Reſignation was acknowledged and accepted by the Biſhop; Yet that is no abſolute finding that it was a Reſignation in Facto. Noy. 147. Smith v. Foaves.

[T. b. 99] Retainer of a Chaplain.

1. *Having ſeen* the Retainer under the Hand and Seal of the Peer that gives the Qualification, is good Evidence of the Retainer. Litt. Rep. 1. Hill. 2 Car. C. B. King v. Frankwell.

2. But a *Copy* of the Retainer *entered in the Faculty Office* was not allowed. Litt. Rep. 1. Hill. 2 Car. C. B. King v. Frankwell.

[T. b. 100] Reviver of Promiſes.

In *Aſſumpſit*, upon *Non Aſſumpſit infra ſex Annos* pleaded, the Evidence was, *That after the ſix Years the Defendant aſſumed to pay, if the Plaintiff would come to Account*; and it was ruled by Holt Ch. J. at Hertford, Lent Aſſiſes 1701. March 25. that this did not revive the Promiſe, becauſe it was not an actual Promiſe. Ld. Raym. Rep. 741. Sparling Executor of Sparling v. Smith.

(T. b. 101.)

[T. b. 101] Revocation.

1. Upon a Trial at Bar, the Plaintiff made Title by an Act of Parliament, 16 & 17 Car. 2. the Defendant's Defence was upon a Proviſo in that Act, which ſaved all Rights to the King, and Eſtates before 1639, made with Power of Revocation by Sir Robert Carr the Father, and then not actually revoked. The Defendant would have ſet up a Settlement made before that Time, and proved it ſealed and delivered before that Time; and to prove that it was not actually revoked by Sir Robert Carr, offered an Abſtract of the Deed, and a Caſe made upon it, with an Opinion all under the Hand of Mr. Juſtice Ellis, with the Depoſitions of Mr. Juſtice Ellis in Chancery, in a Caſe between Sir Robert Carr the Son and his Mother, wherein it appears to be a Deed in Force after Sir Robert Carr's Death, tho' now cancelled and cut in Pieces; yet the Court refuſed it as Evidence, and would not allow the Deed to be read. Skin. 205. Mich. 36 Car. B. R. Scroop v. Carr.

[T. b. 102] Right of Soil.

1. The Court ſeemed to incline that the Soil of a *Path Way* belonged to him *that had the Land on both Sides*, and that is the Caſe as well of a *Highway* as of a *Path Way*; And it is good Evidence to prove ſuch Matter, *who hath uſed to cut down the Trees, or cleanſe the Way*. Cited 2 Le. 148. pl. 182. Trin. 30 Eliz. B. R. in Caſe of Berry v. Goodman.

[T. b. 103] Riot.

1. To make a Perſon guilty of a Riot, there muſt appear to be an *unlawful Aſſembly of three or more* Perſons, *with Intent to do an unlawful Act which muſt be done.* Arg. and agreed per Holt and Powell J. 11 Mod. 100. 102. pl. 8. Mich. 5 Ann. B. R. Queen v. Solely & al. 2 Salk. 594. pl. 3. S. C. accordingly.

[T. b. 104] Sale by a Sheriff.

1. *In an Ejectment upon a Sale by the Sheriff of a Term for Years on Fi. Fa.* it is *not neceſſary to produce a Copy of the Judgment*, as in Caſe of an Elegit or Outlawry, for in this latter Caſe the Exigent and Judgment muſt be produced. Devon. Lent 1711. Coram Powys.

[T. b. 105] Scienter.

1. *Giving a* Party *Notice of a Dog uſed to bite Sheep* is ſufficient to ſupport the Scienter, if any Damage afterwards happens; Coram Baron Cummins at Taunton Aſſ. Hill. Vac. 1727-8.

(T. b. 106) Seats in a Church.

1. In an Action for a *Diſturbance as to a Seat in the Church*, the Plaintiff *ought to prove the Reparation in Evidence*, though he does not alledge it in his Declaration, and becauſe he did not do it the Iſſue was directed againſt him by Hale Ch. B. For it appeared by the Evidence, that the Pariſh had built and repaired the ſaid Seat. Sid. 203. Paſch. 16 Car. 2. at Winchester Aſſiſes, Stevens's Caſe.

(T. b. 107) Seiſin in Fee of the King and others.

1. Upon *Iſſue, that the King was not ſeiſed of B.* Tempore Confectionis Litt. Patentium in Dominico ſuo *ut de feodo*, it is good Evidence, that the

the King *made a Gift in Tail of B to A. Remainder to C in Tail*, and that *after A being attainted of Treaſon, the King was ſeiſed of B. and continuing in Poſſeſſion after A's Death without Iſſue made the Letters-Patent*; For by the Death of A. without Iſſue, the Remainder veſted immediately in C. and his Entry being ſaved to him by the general Words of 33 H. 8. cap. 2. And the King having only the Reverſion in Fee in him at the Time of the Grant, cannot be ſaid ſeiſed in Dominico ſuo ut de feodo, though there was a Rent and Tenure incident thereto. Dy. 100. Culpeper v. Buſh

2. Seiſin of *Tenant to the Præcipe being in an ancient Recovery* was allowed without proving; Per Hale Ch. J. Mod. 117. pl. 17. Paſch 26 Car. 2. B. R. Green v. Proude.

Mod. 122. pl. 28. Anon. but S. C.—

3 *Recovery of Damages* in Caſe for Diſturbing of an *Office* does not give Seiſin *to maintain Aſſiſe* of the Office. 2 Lev. 108. Trin. 26 Car. 2. B. R. Cragg v. Norfolk.

4 On Iſſue of Seiſin in *Fee, Proof of a Receipt of Rent of ſix Years* ſeemed not ſufficient Evidence of that Seiſin, but no one appearing on the other Side, Prat Ch. J. left it to the Jury, who found accordingly.

(T. b 108) Settlement.

1. Plaintiffs were the Defendant's Siſters Children, and on a Bill againſt Defendant (being an Infant) to diſcover a Deed, the Queſtion was, If Defendant's Father had ſettled Lands on Plaintiff's Mother.— The Proof was, that about two Years before her Marriage he had *put* her *in Poſſeſſion* of theſe Lands, and had *articled* on her ſaid Marriage *to ſettle them* on her, and her Heirs; and the Defendant *(then an Infant) was a Witneſs* to the Articles. But though there was no other Proof of ſuch Deed of Settlement, yet the Court decreed for the Plaintiff.—But it was conceived a hard Caſe to decree an Equity on a Deed, which had no other Proof. N. Ch. R. 94. 16 Car. 2. Kingſton v. Manwarring.

(T. b. 109) Simony.

1. Upon a long ſpecial Verdict, the Queſtion came to be this, Whether or no a *Sale of an Advowſon with a Covenant to preſent ſuch a Perſon as the Bargainee ſhall nominate* be a Simonical Contract, the *Church at that Time being full of an Incumbent by Uſurpation*, and *a Quare Impedit then pendant* to remove him, and by which he is afterwards removed. The Court ſeemed clearly to hold that it was Simony; for that the Preſentation by Uſurpation being avoided, the the Church ſhall be now ſaid void from the Death of the laſt Incumbent, and ſo pleaded without taking Notice of the Uſurpation, which was a mere Nullity and the Judgis an Eſtoppel for all Men to ſay the Church is full; and if the Church ſhould be ſaid to be full upon an Uſurpation, that this would be a Means to elude the Statute; for then it is but getting one to uſurp, and the Patron may ſell the Avoidance to whom he pleaſes, and then bring a Quare Impedit, and remove the Uſurpation, and ſo the Grantee come in. Skin. 90. pl. 7. Hill 37 Car 2. C. B. Walker and Hamerſley.

2. A *Bond was produced conditioned to pay* 100 *l. a Year generally*, and they ſaid, that an Action *of Debt was brought upon it*; Whereupon A. the *Obligor brought Bill in Chancery* to be relieved againſt it, by which he *aſſigned its being entered into for a ſimoniacal Cauſe*, to which it was anſwered in Chancery by the Obligee, that A was preſented by C. but *it appeared, that C. who preſented A. acted as Servant for B the Obligee who was the Patron*. And upon producing the Anſwer and other Proceedings on the Bill, Ld. Ch. J. Bridgman admitted the Bill in Chancery for Evidence

dence; but had No Proceedings been upon it, he would not have allowed it. Sid. 221. pl. 8. Mich. 16 Car. 2. B. R. Snow v. Philips.

3. An Incumbent *promoted* by Simony *in the Civil Wars when there were No Biſhops, and* conſequently *No Adminiſtration and Juſtification*, as the old Statute appoints; yet this was held to be Simony. Sid. 221. Snow v. Philips.

4 No Evidence of Simony ſhall be given, unleſs the *Party* ſuppoſed to be guilty of it be *then living*, or were in *Life-time convicted* of the ſaid Simony at Common Law, or in ſome Eccleſiaſtical Court. 1 *W. & M. cap.* 16. *Sec.* 2.

(T. b. 110) Sola & ſeperalis Paſtura.

1. It would not be ſufficient to prove an Uſage for the ſole Paſture to ſhew, that the *Tennats had only fed it*, unleſs it were proved alſo, that the *Lord had been oppoſed in putting in his Cattle, and the Cattle impounded* from Time to Time; Per Hale Ch. J. Vent. 165. Mich. 23 Car. 2. B. R. Hoskins v. Robins.

[T. b. 111] Solvit ad Diem.

1. Upon Riens Arrear, Payment before the Day is good Evidence to maintain the Iſſue, for thereby the Debt is diſcharged; Contra *when it concerns an Act to be done*, for an Act at one Day is not an Act at another. If an Executor pleads Payment at the Day by himſelf, Payment before the Day by the Teſtator is not ſufficient, tho' it diſcharges the Duty at the Day. Dal. 48. pl. 7. Anno 5 Eliz. Anon.

2. Upon Iſſue of Payment according to the Condition, the Condition was, *That if the Obligor would pay* 10 *l. immediately after the Obligee ſhall enfeoff him of a Mill*, &c.. it is no Evidence *that he paid* 5 *l. before and* 5 *l after*, for the Money was no Duty till the Feoffment, and ſo it cannot be intended Parcel of that Sum; *Contra where a certain Day is limited*, for then it is a Duty before the Day. On Plea of Payment at the Day the Jury find Payment before, and good, becauſe Payment before is Payment at all Times. Dy. 222. b. pl. 22. in Marg. cites Trin. 9 Eliz. Anon.

3. In Debt upon a *Bond* of 40 l. for the Payment of 20 l. at a Day and Place certain; The Defendant *pleaded that he had paid* the ſaid 20 *l. according to the Condition*, upon which they were at Iſſue, and at the Niſi Prius the Defendant gave in Evidence, *that he had paid the Money to the Plaintiff before the Day, and that the Plaintiff had accepted of it*; All which Matters the Jury found ſpecially, and referred the ſame to the Juſtices. And it was ſaid by the whole Court, that that Payment before the Day was a ſufficient Diſcharge of the Bond; But becauſe the Defendant had not pleaded the ſame Specially, but Generally, that he had paid the Money *according to the Condition*, the Opinion was, that they muſt find againſt the Defendant, for that the Special Matter would not prove the Iſſue; And the Lord Dyer Ch. J. ſaid, *That the Plaintiff's Counſel might have demurred upon the Evidence.* Godb. 10. Mich. 24 Eliz. C. B. Anon.

4. If a *Bond be of* 20 *Years ſtanding*, and *no Demand proved thereon, or good Cauſe of ſo long Forbearance ſhewn upon a* Solvit ad Diem, Holt Ch. J. ſaid he ſhould intend it paid; *A fortiori* on a Note, if it be any conſiderable Sum. 6 Mod. 22. Mich. 2 Ann. B. R. Anon.

(T. b. 112) Submiſſion to Arbitration.

1. In Aſſumpſit Defendant pleaded a Submiſſion of *all Matters in Difference* to Arbitrament, and and Award, &c. The Plaintiff denied the Submiſſion Modo & Forma, Iſſue was joined. The Evidence was a Submiſſion of *all Matters touching Accounts*, and becauſe Plaintiff could not prove other Matters in Difference but Matters of Account, it was allowed good Evidence, and he was nonſuited. Allen. 90. Mich. 24 Car. B. R. Johnſon v. Rawle.

(T. b. 113) Such Liberties.

1. Where the Vill of L. claims Liberties by Grant of the King by theſe Words, *Such Liberties and Franchiſes as the Vill of N. has*, &c. they ought to ſhew *Record or Preſcription proving what Liberties* and Franchiſes *N, has*, and then well, as it ſeems there. Br. Patents pl. 31. cites 20 E. 3 and Fitzh. Avowry 129.

(T. b. 114) Surrender of Leaſe, Office, &c.

This was a Leaſe granted in King Edward 6th's Time for 99 Years by a Prebendary, to

1. In the Caſe of Jay and Rider, as it was told me, Wyndham ſaid. that *Contract by Truſtee to make a new Leaſe* is a preſent Surrender of the old Leaſe of Ceſtuy que Truſt, being by his Aſſent; which Foſter and Twiſden doubted; but all agreed ſuch Contract to be good Evidence to a Jury of a Surrender; and it was ſo found by Verdict. 1 Keb. 285. pl. 23. Paſch. 14 Car. 2. B. R. Anon.

commence after other Leaſes expired, Leſſee employed Friends to take new Leaſes of ſucceeding Prebendaries in Truſt for him. The Queſtion was, whether this was a Surrender of the antient Leaſe, for the Court ſeemed to think that it was good Evideuce againſt ſo antient a Leaſe. But the next Day the Jury came and found that it was not a Surrender; and (the Reporter ſays) it ſeems not reaſonable that a Leaſe in Truſt, and which is in another Perſon, and made in majorem cautelam ſhall be a Surrender. Sid. 75. Gie (al. Gee) v. Rider.

(T. b. 115) Tender.

1. Where a *Tender* is to be *pleaded to an Indebitatus Aſſumpſit, it muſt be a tempore Confectionis Promiſſionis*, &c. and therefore if the Money be demanded afterwards, the Plea will be againſt the Defendant, and then the beſt Way is to pay the Money into Court; the Plea of Tender is not good if alledged after a Requeſt. 1 Lutw. 227. Hill. 2 & 3 Jac. 2. Johnſon v. Mapletoft.

2. As to Tender of Goods to be loaded *on board a Veſſel*, Holt Ch. J took a Difference between *Cumberſome* and *Portable Goods*. That if a Tender be made of Cumberſome Goods to a Ship, which is not moveable from one Part of the Key to the other, I am not bound to carry them to the Ship-ſide; But if I *bring them to a convenient Place* from whence I may load them on board, *and offer the Maſter to ſend them on board*, this is a good Tender. Show. 149. 150. Paſch. 2 W. & M. Stone v. Gilliam.

3. If *Refuſal* be *averred*, it is good Evidence of a Tender to the Perſon, which would be good at any Time of the Day, becauſe the averring of a Refuſal implies the Defendant's being preſent, who ought to accept it; but if the Party were not preſent, it ought to be ſhewed, that he did not come, and that you were there, and made Tender on the Time of the Day on which the Law appoints it to be done; and that is the laſt Time of the Day on which it may be done conveniently; Per Holt

Holt Ch. J. 12 Mod. 531. Trin. 13 W. 3. in Caſe of Lancaſhire v. Killingworth..

(T. b. 116) Things done at a former Trial.

1. None can be admitted to give Evidence of Things done at a former Trial, *without the Proceedings thereat be proved.* 12 Mod. 555. Trin. 13 W. 3. Anon.

(T. b. 117) Tithes diſcharged.

1. To prove a Diſcharge of Tithes by unity of Poſſeſſion in the Time of the Abbot, and at the Time of the Diſſolution two Perſons teſtified that they had *ſeen a Deed of Appropriation of the Parſonage to the Abbot*, for which Reaſon they *verily thought* there was a Unity of Poſſeſſion at the Time of the Diſſolution. But it was ruled to be no Proof, for it may be intended not to continue, and a Conſultation was granted. But they ſaid, that *Hearſay* ſhall be allowed for a Proof. Cro. E. 228. Stranſham v. Cullington.

2. On the 2 E. 6. to prove a Diſcharge of Tithes by *Unity*, preciſe Proof need not be made; but it is ſufficient to ſwear that ſince the 31 H. 8 it has been *always reputed* to be diſcharged by Unity; or that he had commonly heard it to be ſo, or the like. 2 Roll. R. 125. Mich. 17 Jac. B. R. Congley v. Hall.

So of a Modus 2 Roll. R. 434 Trin. 21 Jac. B. R. Paget's Caſe.

3. And *in Caſes of Tithe to ſupport their Payment Evidence is allowed more extenſively than in any other Caſe.* A Paper 1639. ſigned, &c. to prove a Compoſition for Rabbets on Brampton Burroughs by the Predeceſſor of the preſent Vicar, &c. was read by the Barons (Page Hæſitante) though no direct Proof that the Defendant claimed under the Perſon that ſigned it the Warren (that is, Burroughs) &c. it appearing that it was of an ancient Date, that the Eſtates mentioned in it were as Defendant now had, and there being Proof of the Hand-writing of one of the Witneſſes, &c But afterwards held that it was not ſufficient to ſupport Plaintiff's Demand for the Uncertainty, as that there might be a Warren at another Place, or a Piece of Ground ſo called, or the Compoſition might be for other Tithes ariſing out of the Warren. Hill. Vac. 1718. Gregory v. Lutterel. Books of Accounts, Memorandums, &c. of a preceding Vicar may be made uſe of as Evidence for a Succeſſor to ſupport his Demands in Caſe of Tithes, &c. Per Bury Ch B. and Baron Price in my Lord Arundel's Caſe, Wiltſhire (E. R.) and per Cur. in Shobrook's Cauſe.

4. Every Compoſition is an Evidence of the Right and Duty of Tithes for which the Compoſition is made, yet in the Biſhop of Exeter's Caſe it was held that a general Compoſition may include a Modus as well as Tithe in Kind where the Modus's were for ſeveral Matters, for ſome Years they may be more, in ſome Years leſs, and ſo may be compounded for; and though this Compoſition continues 40 Years yet the Modus ſhall continue. Hill. 6 Geo. in the Exchequer.

5. In Suit for Tithes the Defendant may prove that the Plaintiff got his Living by *Simony*, or did *not read the Thirty nine Articles*, &c. or is guilty of ſome Act or Omiſſion which makes his Benefice void, or he may prove a *Leaſe or Grant of the Tithes*, or ſome *Agreement* of Compoſition, or a *Modus Decimandi*, or that the *Benefice is above 8 l. Value* per Ann. and that the Plaintiff has *accepted another Living without a Diſpenſation*, &c. L. E. 129. pl. 100. cites Law of Tithes, 424, 5.

(T. b. 118)

(T. b. 118) Trees.

1. It was ruled by Holt Ch. J. at Lent Aſſizes at Wincheſter upon a Trial at Niſi Prius 1697-8. 1. That if *A plants a Tree upon the extremeſt Limits of his Land, and the Tree growing extends its Root into the Land of B. next adjoining.* A. and B. are Tenants in common of this Tree. But if all the Root grows into the Land of A. though the Boughs overſhadow the Land of B. yet the *Branches follow the Root*, and the Property of the whole is in A.

2. *Two Tenants in common of a Tree*, and *one cuts the whole Tree*; though the other cannot have an Action for the Tree, yet he may have an Action for the ſpecial Damage by this Cutting; as where one Tenant in common deſtroys the whole Flight of Pidgeons. Ld. Raym. Rep 737, 738. Waterman v. Soper.

3. A. *demiſed* Ground to B. which was *Paſture, except the Trees*; B. put in his *Cattle* to feed, which *barked the Trees*. A. cannot have Treſpaſs againſt B. Ruled by Holt Ch. J. upon a Point made and referred to him at the Aſſizes at Bury in Lent 12 W. 3. upon hearing of Counſel ſeveral Times, though at firſt he was of a contrary Opinion. Ld. Raym. Rep. 739. Glenham v. Hanby.

(T. b. 119) Trover.

1. If *A. takes Goods* and then *B. takes them from A.* Trover lies either againſt A. or B Sid. 438. pl. 3. Hill. 21 and 22 Car. 2. B. R. Wilbraham v. Snow.

2. In an Action of Trover and Converſion, and *nothing proved but a tortious taking of the Cattle by Way of Treſpaſs, and driving them away*, and it was ruled a good Ground for this preſent Action, and a Converſion ſhall be intended, otherwiſe when he comes to them by Trover, there an actual Converſion ſhall be proved. Clayt. 112. pl. 191. March 24 Car. 2. Beckwith v Elſey.

3. On Trover *in England*, a *Converſion* may be given in Evidence *in Ireland*. 1 Salk. 290. Brown v. Hedges.

4. In Trover, *though the Thing be redelivered, yet there is a Converſion*, but the Redelivery may be given in Mitigation of Damages. 2 Lall. Regr. 384.

5. Upon an Action of *Trover* brought againſt one for converting a Gold Ring of the Plaintiff's to his the Defendant Uſe, to which *Not Guilty* is pleaded, it will be good Evidence to prove the Converſion, *that the Plaintiff demanded the Ring, and that the Defendant refuſed or denied to deliver it.* Brown's Anal. 14.

6. In Trover on Not Guilty pleaded, it *appeared* in Evidence, that the *Defendant was Tenant by the Curteſy* of Lands in Ireland, and had *cut down and ſold the Trees* from off the Eſtate, and that the *Reverſion belonged to the Plaintiff* and two others in Coparcenary; and upon a Caſe made for the Opinion of the Court, it was reſolved in B. R. 7 Annæ, That *in Local Actions*, as in Treſpaſs Quare clauſum Fregit, the Plaintiff cannot *prove a Treſpaſs but where he lays it, nor lay it in any other Place than where it is.* But it is otherwiſe *in Actions tranſitory*, as Trover; Ergo in this Caſe he may lay the Converſion here, and prove it to be in Ireland. L. E. 145. pl. 7.

[T. b. 120] Truſt.

1. *Copyhold for three Lives was granted to Baron and Feme and J. S. for their ſeveral Lives ſucceſſive*, and by the Copy it appeared that the *Fine paid was the Money of the Baron and Feme.* Ld. C. Macclesfield decreed, that J. S. is in Equity to be intended but as a Truſtee for the Baron and Feme and the Survivor of them, and that it being mentioned in the Copy that the Fine was paid by them is ſtrong Evidence of its being ſo, which though the Court will not look upon as concluſive, yet any Evidence to contradict it ought to be very clear, and full in order to prevail. Wms. Rep. 781. Hill. 1721. Benger v. Drew.

[T. b. 121] Vexatious Proſecution.

1. Caſe was brought for *maliciouſly Holding to ſpecial Bail without Cauſe*; The *Sheriff's Warrant* to the Bailiff was ſaid in ſuch Caſe to be good Evidence. 12 Mod. 273. Hill. 11 W. 3. Robins v. Robins. Ld. Raym. Rep 503, 504. C S. and S. P. — 1 Salk 15. pl. 6. S. C.—

2. A *Non Prof. in a former Suit* is Evidence of a Vexatious Proſecution. 12 Mod. 501. Paſch. 13 W. 3. Anon.

[T. b. 122] Unity of Poſſeſſion.

1. On a Prohibition for *Tythes* Unity of Poſſeſſion in the Time of the Abbot at the Time of the Diſſolution was ſurmiſed, and proved it by the Teſtimony of one H and another who ſaid they had *ſeen a Deed of Appropriation* of the Parſonage to the Abbot, for which they verily thought that there was an Unity of Poſſeſſion at the Time of the Diſſolution; and this was ruled no Proof, for it may be intended not to continue, and a Conſultation was granted, but they ſaid *Hearſay* ſhall be allowed for a Proof. Cro. E. 228. pl. 17. Paſch. 33 Eliz. B. R. Stranſham v. Cullington.

[T. b. 123] Uſage of Granting Officers by Spiritual Perſons.

1. On Queſtion whether an Office had been uſually granted in Reverſion, or the like by a Biſhop which depends upon the Uſage, the Evidence was, the Plaintiff ſhewed a *Grant of* 4 *E.* 6. *to one in Reverſion, and confirmed* 1 *Eliz. and that* 7 *Eliz. the Reverſioner ſurrendered and took a new Grant to him and another*; Per Cur. this is a good Inducement to believe that the Office was anciently ſo granted in Reverſion, but being Matter of Fact it was left to the Jury, and they found for the Plaintiff. Cro. C. 279. pl. 19. Mich. 8 Car. B. R. Young v. Stowell. Jo. 310. pl. 24. S. C. accordingly.

2. In an Indebitatus Aſſumpſit brought for the Profits of the Office of Chancellor to the Biſhop of Landaff, which was granted to two to hold Conjunctim and Diviſim, and to the Survivor of them according to ancient Cuſtom, one of them died, and the Biſhop conſtituted another againſt whom the Action was brought by the Survivor; It was held, that the *Shewing that* ſuch or the *like Grants were made ſince* 1 *Eliz.* is Evidence, that ſuch were alſo made before the Statute. 4 Mod. 16, 17. Paſch. 3 W. & M. in B. R. Jones v. Beau. Carth. 213. Jones v. Bew. S. C. and the Grant to two adjudged good.— 12 Mod. 10. S. C. held, that ſuch Office may be granted to two.— Show. 228. S. C. adjudged.—

[T. b. 124] Uſury.

1. The Statute of Uſury mentions three Things, viz. Loans, Bargains, and Cheviſance. An Information was brought upon the Statute for an Uſurious Loan of Money, and the Informer gave Evidence an *Uſurious Contract upon a Bargain for Wares*; this does not maintain the Information, but if the Information had been general upon an Uſurious Agreement and given a *Loan* in Evidence, in ſuch Caſe it had been good enough, becauſe every Loan is an Agreement. Le. 95. pl. 125. Mich. 29 Eliz. in Scacc. Sir Walſtan Dixey's Caſe.

2. In the Caſe of one Dalton. Where in Debt upon an Obligation where the Statute of Uſury was pleaded, it was ſaid by Popham, if a Man *lend* 100*l. for a Year, to have* 10*l.* for the Uſe of it. If the Obligor *pays the* 10*l. twenty Days before it be due*, that does not make the Obligation void, becauſe it was not corrupt; *But if* upon making the Obligation it had been *agreed, that the* 10*l. ſhould have been paid within the Time*, that ſhould have been Uſury; becauſe he had not the 100 l. for the whole Year, when the 10 l. was paid within the Year; And Verdict was given accordingly. Noy. 171. Anon.

3. In an Action of Debt upon a Bond, the Defendant after Oyer pleads the Statute of Uſury, and that it was upon an Uſurious Contract &c. upon Evidence it appeared, that the *Wife of the Plaintiff* uſed *to lend Money* to be paid *by the Week*, and that ſhe lent to the Defendant 20 l. *to be paid by* 20*s. by the Week, &c. and* 1*s. and* 6*d. by the Week for Intereſt, and that the* Defendant paid *the* Intereſt which amounted to 30s. *when the Money was lent*, and that *Wife exacted and received it*; and upon this Evidence, Holt Ch. J. ruled it to be an Uſurious Contract by the Husband ſufficient to diſcharge and avoid the Obligation *Civiliter*, though not ſufficient to charge the Husband *Criminaliter*; and it was found for the Defendant. Skin. 348. pl. 17. 5 W. & M. in B. R. Barnett and Tompkyns.

4. Upon an Uſurious Contract pleaded, the *Proof lies all upon Defendant*; for by his Plea he confeſſed the Debt; Per Holt Ch. J. 12 Mod. 517. Paſch. 13 W. 3. Anon.

(T. b. 125) Way.

1. In the Caſe of a Way, you muſt prove the *Locus a quo & ad quem*, and *over what Land*; Per Richardſon Ch. J. Litt. R. 295. 5 Car. C. B.

2. In Treſpaſs the Evidence for the *Defendant* was, that he *had a Barn, and purchaſed a Way over the Plaintiff's Land to that Barn*, and *afterwards he bought other Lands lying contiguous to that Barn on the one Side, and to a Haven on the other Side*, and carried Carriages by that Way to the Barn, and through it over his own new purchaſed Land to the Haven. And by Hale Ch. B. if I purchaſe a general Way to ſuch a Place, I may go from thence on my own Ground whether I pleaſe, tho' I purchaſe the Ground after the Way purchaſed. Trials per Pais, 7th Edit. 433. cites Summer Aſſiſe, Norfolk 1665. Heynſworth v. Bird.

(T. b. 126) Will.

1. *Probation of a Teſtament before the Commiſſary* ſuffices; which the Juſtices agreed. Br. Certificate de Eveſque. pl. 30 cites 7 E. 4. 14.

2. *Probate of a Will of Lands* is no Evidence, but the Will itſelf muſt be produced. Arg. 2 Cnan. Caſes, 202. Mich. 26 Car. 2. Rothwell v. Huſſey.

There can be no Proof of a Will in Writing but the Will itſelf. Cumb. 395. Per Holt Ch. J. Pulleſton v. Warburton. Mich. 8 W. 3. B. R. But where the Will is not of Lands ſo that the Spiritual Court has Juriſdiction of the Cauſe, the Probate is an undeniable

deniable Evidence, which ſhall conclude all others from ſaying the contrary. 12 Mod. 136. King v. Raines.

3. If a Will contain Lands to the Value of 100000 *l.* yet the eccleſiaſtical Court may cite them to bring in the Original to be proved Per Teſtes, and this Court ought not to prohibit them; but if they will not after Proof deliver back the Original, then this Court will intermeddle, and a Proof of the Will cannot be by *Copy*; for if the *Original be burnt or loſt, &c.* a *Copy of their Regiſtry* hath been often given in Evidence, but a *Copy of a Copy* cannot. Per Jefferies Ch. J. Skin. 174. pl. 3. Paſch. 36 Car. 2. B. R. Anon.

4. Will *exemplified under the Great Seal* is not Evidence to a Jury in Ejectment. Cumb. 46. Paſch. 3 Jac. 2. B. R. Anon.

5. *Two ſeveral Wills* may be made *of ſeveral particular Things*, and one ſhall not revoke the other. Arg. agreed by both Sides. Show. 553. Mich. 4 Jac. 2. in Caſe of Hitchins v. Baſſet. Parl. Caſes, 148. Hungerford v. Noſworthy, S. C and P.

——Hard 375, 376. Mich. 16 Car. in Scacc. Seymour v. Noſworthy S. P. 3 Mod. 208 S. C. & S. P. agreed. — 2 Salk. 592. pl. 1. S. C. held accordingly, and Judgment affirmed in Dom. Proc. ——

6. After Teſtator's Death *one Sheet was found in one Houſe* and a *ſecond Sheet in another Houſe*, yet adjudged a good Will. Cited per Dolben J. Cumb. 174. Mich. 1 W. & M. in B. R. cites it as the E. of Eſſex's Caſe ——Show. 69. S. C. and S. P.

7. At a Trial at Bar it was ruled per Holt Ch. J. that if there are *three ſubſcribing Witneſſes*, this is ſufficient within the Statute of Frauds and Perjuries, though *upon Trial one of them would not ſwear that he ſaw the Teſtator ſeal and publiſh* his Will; for otherwiſe it would be in the Power of a third Perſon to defeat the Will of the deceaſed; and therefore if it be proved to be his Hand, and that he ſet it as a Witneſs to the Will, it is ſufficient to ſatisfy the Statute. Skin. 413. pl. 9 Hill. 5 W. & M. in B. R. Sir Marmaduke Dayrell v. Glaſcock.

8. At a Trial in Ejectment, Summer-Aſſizes 10 Will. 3. 1698. at Canterbury in Kent, upon the Evidence it appeared, that a *Will was made* by William Horne *in* 1647 of the Lands in Queſtion, which Will *was loſt, but mention was made of it in the Kalendar* (which is the Index of the Regiſter *of the Spiritual Court*) *and alſo in the Seal Book.* A *Commiſſion iſſued in April* 1648 *to examine the Executors* upon their Oaths, &c. *and that being returned, Probate was granted the* 11*th of May* 1648, *which* Probate *was produced in Evidence.* And Holt Ch. J. allowed it to be good Proof of the Will, but he reſerved it for his further Conſideration, and afterwards the Parties agreed. But Holt Ch. J. afterwards, as well in B. R. as at Niſi Prius, upon other Trials declared, that he held it to be good Evidence, and that he continued of his former Opinion; and he then ſaid, that without Doubt *the Regiſter's Book* is good Evidence to prove a Will. Ld. Raym. Rep. 731. St. Leger v. Adams.

9. *Copy of a Regiſter* is not Evidence to prove a Will. Per Holt Ch. J. admitted at Maidſtone Aſſizes in Lent 1701. Ld. Raym. Rep. 744. in Caſe of Dike v. Polhill.

10. *Book for regiſtering Wills with the Probate, and Poſſeſſion accordingly*, is good Evidence of a Will for Land. Per Ward Ch. B. Devon Sum. Aſſizes 1705. 4 Ann. For Hale Ch. J. allowed the Probate, and conſtant Poſſeſſion in like Caſe.

11. On a Trial at Bar the Queſtion was, whether there was a Will or no Will? The Plaintiff produced a *Deed indented* made *between two Parties the Man and his Son*; And the *Father did agree to give the Son ſo much, and the Son did agree to pay ſuch and ſuch Debts and Sums of Money*; And there were *ſome particular Expreſſions reſembling the Form of a Will*,

*Will*, as that he was ſick of Body, and did give all his Goods and Chattles, &c. But the Writing was both *ſcaled and delivered as a Deed*, and they gave Evidence that he *intended it for his laſt Will*, which the Court ſaid was a good Proof of his Will. L. E. 93. pl. 18.

12. In the Caſe of Rice and Oatfield B. R. 11 & 12 Geo. 2. it was ſaid, that where *all three Witneſſes to a Will denied their own Hands*, that *other Evidence were admitted to prove their Hands*, and *that they ſaw the Will executed, and the Witneſſes ſign their Hands*, and held good, and Verdict thereupon. Pike v. Dadmarine. Qu.

13. A *Bill to eſtabliſh a Will for Land*, and *no Notice was taken of the third Witneſs whether dead or not*, but if living he ought to have been examined alſo, Sed non allocatur, becauſe this would have been good Evidence at Law, the other Witneſſes proving that they ſaw the other Witneſs ſubſcribe his Name as a Witneſs; it is common Practice at Law, and why not good in Equity. King Chanc. Mich. Vac. 1725.

[T b. 127] Witneſs intereſted.

1. The Law gives the Party tried his Election to prove a Perſon offered as Evidence, intereſted two Ways; viz. either by *bringing other Evidence to prove it*, or elſe by *ſwearing the Perſon* himſelf on a *Voyer dire* But though he may do either he cannot have Recourſe to both. Per Parker Ch. J. 10 Mod. 193. Mich. 12 Ann. B. R. Q. v. Muſcot.

## (U. b. 1) Evidence. Demurrer to it.

It ſeems it ought to be ſuch a Matter that the Judge may take to be doubtful. Heath's Max. 95. cites S. C.——

1. MATTER *in Law* ſhall not be given in Evidence to a Jury, but the other may *demur* upon it; For Lay Gents cannot diſcuſs Matter in Law, as it ſeems there; but it is not expreſsly adjudged there. Br. General Iſſue, pl. 51. cites 9 H. 6. 33.

Br. General Iſſue, pl. 51. cites S. C.—

2. Upon a *Matter in Law* the other Party may demur in Law, for it belongs not to the Lay-Jury to judge thereof; but that, it ſeems, ought to be ſuch a Matter that the Judge may take to be doubtful. Heath's Max. 95. cites 9 H. 6. 33.

Heath's Max. 83. cites S. C. —Otherwiſe if the Deed be Time out of Mind, for ſuch a Deed, although it were the King's Patent, cannot be pleaded. Heath's Max. 83, cites 12 H. 4. 24.

3. Where the Iſſue is upon *Preſcription*, if the Plaintiff give in Evidence a *Deed within Time of Mind*, the Defendant may demur upon the Evidence. Br. General Iſſue, pl. 55. cites 34 H. 6. 36.

4. In *Debt againſt an Executor* the Defendant did plead *Plene Adminiſtravit*, and gave in Evidence a *Redemption of a Pledge with his own Money*, upon which the Plaintiff did demur, and by *Aſſent of both Parties* the Jury was diſcharged, Quod Nota. Heath's Max. 96 cites 6 H. 8. 2, Dyer,

5. And ſo ſeems Experience at this Day, that in Demurrer on Evidence the *Conſent of both Parties* is requiſite. Heath's Max. 96.

6. The Plaintiff in Annuity by Preſcription ſhewed a Deed in Evidence within Time of Mind; and the Defendant prayed, that the Evidence

Evidence might be entred, and he would demur upon the ſame, and the Plaintiff would *not agree to it*, Quod nota. But if the Court think the Evidence good, the other Side may deſire the Juſtices to Seal a *Bill of Exception*, which in the Writ of Error he may alledge, and not in Arreſt of Judgment, ex rigore Juris. Herth's Max. 95, 96. cites 34 H. 6. 36. and Tatam's Action upon the Caſe, 27 H. 8.

7. In Debt upon a *Bond* of 40 *l.* for the Payment of 20 *l.* at a Day and Place certain. The Defendant *pleaded that he had paid* the ſaid 20 *l. according to the Condition* upon which the were at Iſſue; and at the Niſi Prius the Defendant gave in *Evidence that he had paid the Money to the Plaintiff before the Day*, and that the Plaintiff had accepted of it; all which Matter the Jury found ſpecially, and referred the ſame to the Juſtices. And it was ſaid by the whole Court, that the Payment before the Day was a ſufficient Diſcharge of the Bond; but becauſe the Defendant had not pleaded the ſame ſpecially, but generally, that he had paid the Money *according to the Condition*, the Opinion was that they muſt find againſt the Defendant, for that the ſpecial Matter would not prove the Iſſue. And the Lord Dyer Ch. J. ſaid, that the Plaintiff's Counſel might have demurred upon the Evidence. Godb. 10. pl. 14. Mich. 24 Eliz. C. B. Anon.

8. If a *Plaintiff in Evidence ſhews any Matter in Writing, or of Record, or any Sentence in the Eccleſiaſtical Court*, and the *Defendant offers to demur* thereto the *Plaintiff may not refuſe to join in Demurrer*, but he muſt do it, or wave his Evidence. *So if the Plaintiff produce Witneſſes to prove any Matter in Fact upon which a Queſtion in Law ariſes, if the Defendant admits their Teſtimony to be true, he may demur upon it*, for Matter of Law ſhall never be put in the Mouth of Lay Gents; So may the Plaintiff demur upon Evidence of Defendant, Mutatis mutandis 5 Rep. 104. a. Trin. 42 Eliz. B. R. Baker's Caſe. Cro E. 751. pl 9 Middleton v. Baker. S. C. and S. P. per tot Cur. accordingly But in this latter Caſe of Evidence by Witneſſes, the other, unleſs he pleaſeth, ſhall not be compelled to join, becauſe the Teſtimony is to be examined by a Jury, and the Evidence is certain, and may be enforced more or leſs, but both Parties may agree to join in Demurrer upon ſuch Evidence.

9. The Jury may *upon their own Knowledge* give a Verdict without Evidence. In no Caſe may one demur upon Evidence, unleſs he will admit the Evidence to be true. Nor without the *Conſent of the other Party* (as it ſeems) who according to the Opinion of many may put himſelf upon the Jury to find a Verdict, which they may do either generally or ſpecially at their Pleaſure; Which if they do ſpecially, they avoid all Occaſions of Attaint. Heath's Max. 95. cites Fogaſſa's Caſe in which there was but one Witneſs.

10. And ſo in the Caſe of Fogaſſa, the King's Attorney did demur upon the Evidence, and that (as it there appears) whether the other would *agree or not*. But whether ſo in Newſe and Scholaſtica's Caſe. Quære. Heath's Max. 95.

11. Demurrer upon *Evidence cannot be for a Thing that the Jury may know of their own Connuſance*. 1 Lev. 87. Mich. 14 Car. 2. B. R. Fitzharris v. Bojun.

12. Where a *Judge admits that for Evidence which is not, there the Party muſt not demur*; For if he does, he admits the Evidence to be good, but denies the Effects of it, and therefore in ſuch Caſe he *muſt bring his Bill of Exceptions; and ſo it is if the Judge will not admit that for Evidence which is Evidence*; Per Holt Ch. J. 3 Salk. 155. pl. 10. Mich. 12 W. 3. Thurſton v. Slatford.

13. The *Judges of the Court cannot try a Matter of Fact* in Queſtion, upon a Demurrer to an Evidence, and therefore the *Plaintiff and Defendant muſt agree upon it*, and conſets it. Trin. 23 Car. B. R. for elſe

the Court will not proceed to deliver their Opinions touching the Matter in Law demurr'd upon, becauſe if the Matter of Fact be not agreed, there can be no Judgment given in the Cauſe, which Way ſoever the Matter in Law fall out to be. L. P. R. 550.

14. Demurrer to Evidence need not be drawn up in Form immediately, but the *Subſtance muſt be reduced into Writing while the Thing is tranſacting*, becauſe it is to become a Record; Per Holt Ch. J. 1 Salk. 288, 289. in pl. 26. Paſch. 7 Ann. B. R. in Caſe of Wright v. Sharp.

15. *Wherefoever the Evidence does not warrant, prove and maintain the very ſame Thing that is in Iſſue, that Evidence is defective*, and may be demurred upon. Trial per Pais, 7th Edit. 467. lays it down as a Rule.

16. *On a Demurrer* it is the ſettled Rule of the Court, that *they cannot move for Injunction* for this Reaſon; till the Demurrer is argued it is not not certain that the Cauſe is in Court. Sel. Caſes in Canc in Ld. King's Time, Trin. 11 Geo. 1. in Caſe of the Duke of Chandois v. Talbot.

## (W. b) Bills of Exceptions.

At Common Law before

1. 13 *E.* 1. *Weſtm.* 2. *Cap.* 31. Enacts that *when any that is impleaded* the making of this Act, a Man might have had a Writ of Error for an Error in Law, either in redditione judicii, in redditione executionis, or in proceſſu, &c. And, this Error in Law muſt be apparent in the Record, &c for the Writ of Error ſays, Quia in Recordo & proceſſu, &c. Error intervenit manifeſtus, &c. Or for Error in fait, by alledging Matter out of the Record, as Death of either Party, &c. before Judgment; Now the Miſchief before this Statute was, that when the Demandant or Plaintiff, or the Tenant or Defendant did offer to alledge any Exception (as in thoſe Days they did Ore tenus at the Bar) praying the Juſtices to allow it, and the Juſtices overruling it ſo as it was never entered of Record, this the Party could not aſſign for Error, becauſe it neither appeared within the Record, nor was any Error in fait, but in Law; and ſo the Party grieved was without Remedy, for whoſe Relief this Statute was made. 2 Inſt. 426, 427.

This Act does extend as well to the Demandant or Plaintiff as to the Tenant or Defendant in all Actions real, perſonal and mixt; regularly it extends not to a Stranger to the Record, which is not to come in lieu of the Tenant, &c. For example, if the Bailiff of a Franchiſe demand Conuſance, and the Jugices over rule the ſame he cannot pray the Juſtices to inſeal a Bill, becauſe he is no Party to the Record; but yet one that offered to be received, and is denied, albeit he be none of the Parties to the Writ, yet becauſe he is privy in Eſtate, and to be in Loco Tenentis, he ſhall have the Benefit of this Act, and ſo it is of the Vouchee, though he be no Party to the Writ, becauſe he is In Locis Tenentis. 2 Inſt. 427.

Albeit the Letter of

2. *before any of the Juſtices* this Branch ſeemeth to extend to the Juſtices of C. B. only by Reaſon of theſe Words, Et ſi forte ad Querimoniam de facto Juſtic' venire facias Dominus Rex recordum coram eo (which is by Writ of Error into B. R.) yet that is put but for an Example, and this Act extends not only to all other Courts of Record (from upon Judgment given in them a Writ of Error lies in B. R.) but to the County-Court, the Hundred and Court Baron, for therein the Judges were more likely to err; and albeit, of Judgments given in them a Writ of Error lies not, but a Writ of falſe Judgment in the Court of C. B. yet the Caſe being in the ſame or greater Miſchief, the Purview of this Statute does extend to thoſe inferior Courts. 2 Inſt. 427.—Agreed that a Bill of Exceptions lies on a Trial in B.R. by Weſtm. 2. cap 31. 2 Show. 147. pl. 127. Mich. 32 Car. 2. B. R. in Caſe of the City of London v the unfree Merchants.—Reſolved per Cur. that a Bill of Exceptions lies not in this Court upon a Trial at the Bar; for the Words are, that he ſhall have Remedy Coram Domino Rege which extends not to themſelves to over-rule their own Judgments, and therefore extends only to Niſi Prius and inferior Courts; it is true that in the Caſe of **Enfield v. Pill** in this Court on a Trial at the Bar in a Canterbury Cauſe upon a Mandamus, there was one ſealed but at the Trial there were only Two Judges preſent, viz. Rainsford and Jones, but Jones doubted, although if they determined the Matter then they could not proceed, he therefore did ſubmit to the Lord Ch J. and afterwards it was ſo ſtrongly doubted that they never proceeded to any Determination to this Day. 2 Show 827, 288. pl. 286. Paſch. 35 Car. 2. B. R. The King v. Smith.———

3. *doth*

3. *doth alledge an Exception, praying that the Juſtices will allow it, which if they will not allow,* This extends not only to all Pleas dilatory and peremptory, &c. and (as has been ſaid) to Prayers to be received, Oyer of any Record of Deed, and the like, but alſo to all the Challenges of any Jurors, and any material Evidence given to any Jury, which by the Court is over-ruled. 2 Inſt. 427.

4. *if he that alledged the Exception do write the ſame Exception,* Here is an expreſs Commandment given to the Juſtices; and yet if one refuſe, and any of the other inſeal the Bill it ſufficeth, but if they all refuſe it is a Contempt in them all; for it lies not in the Power of the Juſtices that denied to perform the Purview of this Act to take Advantage of their own Wrong, and the Party grieved may have a Writ grounded upon this Statute to the Juſtices commanding them to put their Seals Juxta Formam Statuti, & hoc ſub Periculo quod incumbit nullatenus omittatis. 2 Inſt. 427.

5. *and require that the Juſtices will put to their Seals for a Witneſs the Juſtices ſhall ſo do; and if one will not another of the Company ſhall.* Albeit the Party grieved be dead, yet his Heirs or Executors, &c. according to the Caſe, ſhall have a Writ of Error upon this Bill of Exception. 2 Inſt. 427.

6. *S. 2. And if the King upon Complaint made of the Juſtices, cauſe the Record to come before him, and the ſame Exception be not found in the Roll, and the Plaintiff ſhew the Exception written, with the Seal of a Juſtice put to the Juſtice ſhall be commanded that he appear of a certain Day, either to confeſs or deny his Seal.* Albeit ſome have holden, that the Juſtices may bring in the Bill under their Seal, and acknowledge it, yet the ſurer Way is to follow the Order preſcribed by the Act. 2 Inſt. 427, 428.

7. *S. 3. And if the Juſtice cannot deny his Seal they ſhall proceed to Judgment according to the ſame Exception, as it ought to be allowed or diſallowed.* On the other Side, if the Judge deny his Seal, then may the Plaintiff in the Writ of Error take Iſſue thereupon, and prove it by Witneſſes, for it lieth not in the Judge in this Caſe to fruſtrate this excellent Law made for Advancement of Juſtice and Right. 2 Inſt. 428.

8. In Aſſiſe the Array was challenged, *becauſe the Plaintiff was Sheriff of Fee* of the ſame County, ſcil. the Lord Clifford *Sheriff of Weſtmerland, and R. is his Under-ſheriff and of his Fee and Robes, and by R. was the Pannel arrayed*, and the Country ſummoned, to which it was ſaid, that R. was Sheriff and ſworn to the King as Sheriff, and amerced as Sheriff, by which the Juſtices took the Aſſiſe, wherefore upon Bill thereof aſſigned it was afterwards reverſed by Error for this Challenge Quod nota, and therefore the firſt Matter is a good principal Challenge. It ſeems, that it had not been reverſed if the Bill aſſigned had not been, becauſe it is Matter in Fact. Br. Challenge, pl. 97. cites 9 Aſſ. 8.

9. In Aſſiſe the *Defendant ſaid, that the Sheriff was beyond Sea, and had no Under-Sheriff nor other Miniſter to ſerve the Proceſs, and the Juſtices would not enquire of it, nor make an Examination* of him who put in the Return; But the Plaintiff ſaid, that he was examined, &c. but the Juſtices awarded the Defendant to anſwer, and the Defendant of this *took Bill of Exception of two Juſtices, which was brought into* B. R. *by the Hands of the one only, and without Sci. Fa. or Day in Court*, and therefore Proceſs was made after againſt the Juſtices Ad cognoſcend' ſigilla ſua who came in and acknowledged their Seal, by which it was awarded, that the Delivery in of the Bill by one Juſtice or *both after acknowledging their Seal* is good, and the *Party was warned by Sci. Fa. ad audiendum errores before that the Bill was put in*, by which the Defendant ſaid, that he ought to be *warned De novo* & Non Allocatur; For the *Bill is* In an Aſſiſe, upon a Plea or Evidence not allowed by the Judges, a Bill of Exceptions is made according to Weſt 2. chap. 31. but it is not entered of Record; the Plaintiff has Judg-.

*is Parcel of the Record ab initio.* Br. Error, pl. 50. cites 11 H 4. 52 65. 92.

ment, a Writ of Error is brought upon this Bill; the Defendant in the Writ of Error who was Plaintiff in the Aſſiſe, and the Plaintiff in the] Writ of Error both confeſs, that this is the Bill that was ſealed. This is inſufficient without awardind a Scire Facias to the Judges according to the ſaid Statute Ad cognoſcendum vel dedicendum Factum, for this would be in vain. Jenk. 78. pl. 52.

10. *And* after the *Plaintiff*, to be ſure, *ſued another Sc. Fa.* againſt the Defendant *Ad audiendum errores*, and after it was adjudged, that this laſt Sci. Fa. was not good, to which the Juſtices of C. B. agreed. Ibid.

Br. Error, pl. 50. cites 21 H. 4 52.

11. *And Bill* of Exceptions *ſhall remain with the Party*, therefore *it is not of Record till the Juſtices have certified it*, and acknowledged their Seal. Ibid.

Note, Error in the principal Judgment ſhall reverſe the Acceſſory & e contra.

12. If a Man *pleads* in any Action, and the *Juſtices will not allow thereof*, and the *Party makes his Bill upon it*, and prays that the Juſtices will ſeal this his Bill of Exceptions or Plea, and if they do not according as is contained in the Statute of Weſtm. 2 cap. 3. the Party grieved ſhall have a Writ of Error, and may aſſign Error upon that Bill ſealed, and alſo in the Record or in one of them at his Pleaſure. But this *Bill ought to be ſealed by the Juſtices before Judgment given by them*, and not after. F. N. B. 21 (N) cites 11 H. 4. 52. 65. 92.

If a Judgment be againſt a Parſon in Annuity, in a Scire Facias againſt the Succeſſor he ſhall not plead in Bar of Execution, that the Judgment was erroneous, and if he does ſo, Execution ſhall be awarded; And if he after brings Error on the Judgment if on the Scire Facias he aſſigns Error on the principal Judgment this is not good, altho' the whole Record of the Judgment be received in the Sci. Fa. And therefore if the Judgment be affirmed on the Sci. Fa. yet he may have Error on the Principal, and thereby reverſe the Judgment on the Sci. Fa. and he ſhall be reſtored to all that he loſt on the Sci Fa. F.N.B 21. (N) in the new Notes there cites it adjudged 11 H. 4. and Ibid. cites 9 H. 6. 15. accordingly.—Ibid. in the Notes there (d) cites 11 H 4. 52 per Hul. that the Bill of Exceptions is no Part of the Record before that it be acknowledged (viz entred.) And 21 H. 4. 65. By good Opinion one of the Juſtices may deliver the Bill into Court without a Sci Fa yet in that Caſe a Sci Fa. iſſued, and the Juſtices came and acknowledged their Seal, and it was held, that this Acknowledgment of the Juſtices might be long Time after the Writ of Error bronght and after the Sci. Fa. awarded, and that no new Sci. Fa. ſhall iſſue; For it is now become Parcel of the Record ab initio as in the Caſe of Diminution alledged after a Sci. Fa. the Defendant ſhall not alledge Diminution in the Bill of Exceptions, but ought to have ſhewn his Caſe when the Juſtices came to ſet their Seals; And ſays ſee 2 H. 4. 92.——Br Error, pl. 52. S C——See alſo 11 H. 4. 67. and Note that 11 H 4. 32. per Gaſcoign and Huls. it was held clearly that the Bill may be ſealed after the Record removed by Writ of Error.——

13. In *Cui in Vita*, the *Writ was abated inaſmuch as the Demandant in the Writ did not make mention of whoſe Demiſe he claimed*, where the *Tenant had had the View twice before*, and therefore the Tenant was ouſted of the View, but it was agreed, that if he was grieved in this Caſe, that he might have Bill ſealed of all this Matter to have thereof Writ of Error. Br. View, pl. 103. cites 10 H. 7, 8.

14. *Where the Evidence is not good in Maintenance of an Iſſue*, or where the *Parties vary in the Law upon a Challenge* or the like, by which the Party takes Bill of Exceptions ſealed by the Juſtices by the Statute of *Weſtm.* 2 which wills that this ſhall be uſed in Writ of Error, and Scire Facias to confeſs or deny his Seal, but *ſhall not alledge it in Arreſt of Judgment* Quod nota. Br. Repleader, pl. 1. cites 27 H. 8.

15. If there be a Thing *given in Evidence which ought not*, the Court above cannot remedy it, except it be returned with the *Poſtea*. Brownl. 207. Paſch. 5 Jac. Hall v. White.

16. If

11. If one *offers to demur upon Evidence, and is overruled*, and after Judgment a Writ of Error is brought, this cannot be aſſigned for Error; But *it is a proper Caſe for a Bill of Exceptions*, and the Remedy which the Statute in that Caſe appoints. Adjudged Cro. C. 341. Hill. 9 Car. Cart v. St. Davids Biſhop.

If a Judge at a Trial does erroneouſly overrule a Matter offered in Evidence, the regular Way is to tender a Bill of Exceptions; yet if upon ſuch a Matter the Party will not ſuffer the Trial to go on againſt him it is good Cauſe of a new Trial; Per Cur. 7 Mod. 53. Mich. 1 Ann. B. R. Watts v. Roſwell.

12. The *Statute of Weſtm. 2 cap.* 31. which gives Bill of Exceptions does not extend to any Caſe where *Priſoners* are *indicted at the Suit of the King*; For the Statute intends to remedy the Overruling of Evidence in Civil Pleas between Party and Party only. Sid. 85. pl. 13. Trin 14 Car. 2. B. R. the third Reſolution in the Caſe of the King v. Sr. H. Vane and Lambert.

Lev. 68. S. C. held accordingly. —S. C. cited Raym. 480. Hill. 34 & 35 Car. 2. B. R. in a Nota there.— Keb. 324. pl. 52. S. C. held accordingly.— Kel. 15. S. C. held accordingly.— Goldsb. 137. pl. 39 Hill. 43 Eliz. Blunt's Caſe. S. P. held accordingly.—S. P. 8 Mod. 206. Arg. in the Caſe of the King v. Brecknock Corporation.—2 Hawk. Pl. C. S. P. and cites S. C. and State Trials Vol. 1. fol. 918 —Raym. 486. S. C. cited as reſolved.

13. Bills of Exceptions for that the Judges of B. R. in Ireland would not direct the Jury, that the Probate of a Will before the Archbiſhop of Canterbury (the Teſtator dying in his Province) was concluſive Evidence, but only told the Jury that it was good Evidence, and ſo left it to the Jury; And per Cur. the Bill of Exceptions lies not, for *though the Evidence be concluſive*, yet the *Jury may hazard an Attaint if they will*, and the *proper Way had been for the Defendants to have demurred upon the Plaintiff's Evidence*. Raym. 405. Mich. 32 Car. 2. B. R. Chicheſter v. Philips.

2 Jo. 146. Philips v. Chicheſter. and mentions alſo Probate before the Biſhop of Fernes; to which the other Party ſhewed in Evidence Letters of Adminiſtration of Goods under the Seal of the Primate of Ireland. The Title was, for a Leaſe for Years in Ireland claimed by the Leſſor of the Plaintiff under the ſaid Adminiſtration, and upon the firſt Opening of the Cauſe, Judgment was affirmed.—

14. A Bill of Exceptions *will lie at a Trial at Bar as well* as at the Niſi Prius; For the Words of the Statute are "that the Juſtices ſhall "ſign it," which Words Juſtices being in the plural Number cannot be well underſtood of any other Juſtices than thoſe of the Courts at Weſtminſter; Held per Cur. 3 Salk. 155. pl. 10. Mich. 12 W. 3. Thurſton v. Stratford.

15. Evidence was offered at the Aſſiſes and refuſed, but no Bill of Exceptions was then tendered, nor were the Exceptions reduced to Writing; ſo that the Trial went on, and a Verdict was given for the Plaintiff; Then next Term the Court was moved for a Bill of Exceptions; Holt Ch. J. you *ſhould have inſiſted on your Exception at the Trial*, if you acquieſce you wave it, and ſhall not reſort back to your Exception after a Verdict againſt you, for perhaps if you had ſtood upon it, the Party had other Evidence, and would not have put the Cauſe on this Point; Indeed the Statute appoints no Time, but the Reaſon of the Thing requires that the Exception ſhould be reduced to Writing when taken and diſallowed, like a ſpecial Verdict or Demurrer to Evidence, and though it need not be drawn up in Form, the Subſtance muſt be taken in Writing while the Thing is tranſacted, becauſe it is become a Record; and ſo the Motion was denied. Holt's Rep. 301. pl. 34. Paſch. 7 Ann. Wright v. Sharpe.

## (X b.) Iſſues out of Chancery.

1. SCIRE *Facias upon a Recognizance in the Chancery* brought in the Chancery, the *Defendant pleaded Releaſe*, the *Plaintiff denied it*, and *ſo to Iſſue*, and the Record *and all the Action and Proceſs was ſent into B R. to be tried*, *and* there the *Plaintiff was nonſuited*, and *brought a new Scire Facias there*, and well; For there was the Record after the ſending it out of Chancery, contra, if the Chancery had ſent only the Tenor of the Record; note the Diverſity. And it is ſaid elſewhere, that the Chancery ſhall make the *Venire Facias*, and award it the Sheriff returnable in B. R. *Scil. Coram nobis ubicunque tunc fuerimus in Anglia*; For all is the King's B. Juriſdiction. pl. 41 cites 24 E. 3. 45.

S. P Br. Juriſdiction, pl. 28. cites 24 E. 3. 45.

2. Upon Iſſue join'd in Chancery, *Venire Facias* ſhall iſſue *returnable in B. R.* and there the Record ſhall be ſent; For the Chancery cannot try by Jury. Br. Proceſs, pl. 154. cites 13 E. 4. 8.

3. *If upon Traverſe of Office in Chancery* they are at Iſſue, the *Venire Facias* ſhall iſſue from Chancery returnable in B. R. and therefore the *Chancery ſhall not award ſicut alias*; For they *cannot record that the Sheriff did not ſend the Writ*; For the Return is not to be in this Court, and therefore the *Alias* ſhall be in B. R. Br. Ven. Fac. pl. 29. cites 13 E. 4. 8.

4. Whether a Perſon, to whom another had got Adminiſtration, was *dead or not?* Chan. Caſes, 50. P. 16 Car. 2. Scot v. Rayner.——N. Ch. R. 93. S. C.

5. *Whether the primary Intention in felling Timber was to do Waſte* or not? Chan. Caſes, 96. 19 Car. 2. Thomas v. Porter and the Biſhop of Wincheſter.

6. Vendor covenanted againſt Incumbrances, and an Iſſue was directed whether the *Purchaſor had Notice of a L. for a Year.* 3 Ch. R. 24. 20 Car. 2. Savage v. Whitebread.——So of a *Rent-Charge* N. Ch. Rep. 118. Harding v. Nelthorp.

7. Land being charged with a Rent and no ſufficient Diſtreſs being found, which being complained of by Bill, and the Plaintiff ſeeking to charge the Perſon, it was referred to a Trial at Law *if there was any Fraud to hinder the Plaintiff of his Diſtreſs.* Ch. Caſes, 147. Mich. 21 Car 2. Davy v. Davy.

8. After a Decree had been inrolled 31 Years, a Trial was directed on this Iſſue, *whether a Defendant was dead before the Decree* which was *enrolled 31 Years before?* 3 Ch. R. 49. 22 Car. 2. Yeavely v Yeavely.

9. Whether a *Judgment was ſatisfied?* Finch's Rep. 3. Mich. 25 Car. 2. Bryan v. Kent & al.

10. Whether *a Bond was diſcharged in Teſtator's Lifetime, or how much Money was paid thereon?* Finch. R. 33. Mich. 25 Car. 2. Braithwait v. Davis.

11. Trial at Law directed to prove a *former Grant.* Fin. R. 41. Mich. 25 Car. 2. Pit v. Corbet, Thornborough, & al.

12. *Quantum Damnificatus?* Bond for Fidelity of Apprentice. Fin. R. Hill. 25 Car. 2. Triſt v. Buckeridge.

13. A Trial at Law is directed for the Plaintiff to try his Right to a Reverſion of Lands, *after the Death of the Defendant Wainwright*, ſo the Plaintiff deſires he may try the ſame when he ſhall think fit; but the Defendant inſiſts, *that the Plaintiff ought to be confined to a convenient Time*, which was pray'd might be the Rule in this Caſe, and that the Defendant might not be kept in ſuſpence, and to wait on the Plaintiff's Convenience, when he ſhall think fit to try the ſame. This Court

Court ordered it to be tried in Eaſter Term next, or the Iſſue to be taken Pro confeſſo. 2 Chan. Rep. 124, 125. 29 Car. 2. fo. 102. Oliver v. Leman and al.

14. Whether the Plaintiff was *born in lawful Wedlock?* Fin. R. 325. Mich. 29 Car. 2 Devereux v. Devereux and Thelwell.

15. If a *Will be re-publiſhed or not?* 2 Ch. R. 30 Car. 2. Cotton v. Cotton.

16. *To aſcertain Damages occaſioned by Deviation* in a Voyage. Vern. 21. Mich. 1681. Newland v. Horſeman.

17. *If the Lord of a Manor had the Grant of a free Warren*, and if he had then, *if there was ſufficient Common left for the Tenants?* Vern. 22. Mich. 1681. How v. the Tenants of Bromſ.

18. *Compos, or Non Compos* was directed Forty Years after the Death of Teſtator, of which Eighteen were in the Infancy of the Heir. Vern. 195. Mich. 1683. Lyford v. Coward.

19. *Will, or no Will* after Forty Years, of which Eighteen were in the Infancy of the Heir? 2 Ch. Caſes, 150. Mich. 35 Car. 2. Lyford v. Coward.——Vern. 195. S. C.

20. Whether *J. S. who had committed a Forfeiture* for Treaſon in the Iriſh Rebellion, *and J. S. who was Ceſtui que Truſt of Lands* was the ſame Perſon? Vern. 439. Hill. 1686. Kildare (Earl of) v. Euſtace.

21. *Cuſtom of a Copyhold Manor as to Deſcent.* Vern. 489. Mich. 1687. Edwin v. Thomas

22. Agreement for ſo many Load of Coals at ſo much per Load; Plaintiff ſuggeſted, that Defendant had made his Waggons of a larger Size to defraud him. Iſſue directed as to *over Size of the Waggons.* 2 Vern. R. 462. Mich. 1704. Brandlin v. Owen.

23. Whether a *Bond was executed or not?* Chan. Prec. 238. Hill. 1704. Acton v. Acton.

24. An Iſſue was directed in a Matter where Plaintiff had *a proper Action at Law*, and the Plaintiff under no Impediment in Reſpect of bring ſuch Action. 2 Vern. R. 503. Tr. 1705. Gilbert v. Emerton; Per Wright K—— But an Iſſue refuſed to be directed for the ſame Reaſon, in the Caſe of Peers v. Bellamy, cited in the Caſe above 2 Vern. R. 504.

25. Iſſue at Law directed on a Rehearing of Exceptions taken to a Decree made by Commiſſioners of *Charitable Uſes*, after that Decree had been twice confirmed, 2 Vern. R. 507. pl. 456. Trin. 1705. Corpus Chriſti College v. Naunton Pariſh in Glouceſterſhire.

26. An Iſſue was directed, *Whether J. S. did execute Marriage Articles in the very Words of the Counter-Part produced*; It was objected, that the Iſſue was too narrow, and that it ought to be, *Whether he executed any, and what Articles?* Decree was reverſed. But there was another Point; Ideo Quære MSS. Tab. Tit. Iſſue. cites 28th Feb. 1707. Kelley v. Bellew.

27. It is improper to direct an Iſſue, *Whether there be a Truſt or No*, eſpecially where it *appears by Implication from the Nature of the Caſe.* MS. Tab. tit. Iſſue. cites 8 March 1724. Eyre v. Bark.

28. Whethe *Money given for the Benefit of his Children by a Perſon much in Debt ſix Hours before his Death was fraudulent or not?* Sel. Ch. Ca in Ld. King's Time, 77. July 14 1725. Duffin v. Furneſs.

29. Bill brought to have a Trial at Law for the *Bounds of a Manor.* Mr. Talbot informed the Court, that in the Caſe of the Biſhop of Durham, which was parallel to this, it was ordered, that *each Side ſhould give a Note to the other of what each claimed as their Bounds*; and if the Jury find Bounds different from the Note given from either Side, that thoſe *different Boundaries ſhould be indorſed on the Poſtea*; And ſo it

was

was ordered here; only it *being a Trial at Bar it was to be indorſed on the Habeas Corpus* (ſame Order made Nov. 4, 1726, between Hughes and Grames) Sel. Caſes in Chan. in Ld. King's Time, 60, 61. Mich. 12 Geo 1. Lethulier v. Caſtlemain.

30. Whether by the *General Words of a Deed the Lands in Queſtion were intended to paſs?* 2 Wms's Rep. 563. Hill. 1729. Coker v. Farewell.