



John Adams
Library.



IN THE CUSTODY OF THE
BOSTON PUBLIC LIBRARY



SHELF NO

A 438

372

WE allow of the Printing and Publishing of the
Book Intituled, *A General Abridgment of Law
and Equity*, Alphabetically digested under proper
Titles, &c. By *Charles Viner*, Esq;

W. Lee.

W. Fortescue.

J. Willes.

E. Probyn.

F. Page.

Law. Carter.

J. Fortescue A.

W. Chapple.

T. Parker.

M. Wright.

Ja. Reynolds.

Tho. Abney.

T. Burnett.

John. Adam

A
General Abridgment
O F
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 :
PRINTED for the Author, by Agreement with the *Law-Patentees.*

✓

X A
ADAMS

37.7

0.15

A T A B L E

O F T H E

Several TITLES, with their Divisions and Subdivisions.

| | | | |
|--|----|--|--------|
| Judicial &c. | | | |
| Act. What is. | A | | |
| Opinion or Determination. | B | | |
| Jure Patronatus. Vid. Presentment (P. c) &c. | | | |
| Jurisdiction. Vid. Courts.—Vid. Trespafs (C. a) | | | |
| Juries and Jury. Vid. Trial. | | | |
| Jus Patronatus. Vid. Presentment (P. c) | | | |
| Justices. | | | |
| Who have been Justiciaries of England. | A | | |
| Chief Justice. | B | | |
| Of Nisi Prius. Vid. Courts. | | | |
| Their Original. Vid. Trial (U. b. 2.) | | | |
| Their Power. Vid. Trial (U. b) | | | |
| Justices of Peace. | | | |
| Where they may be named | | | |
| Custodes Pacis. | A | | |
| Of Conservators of the Peace, and | | | |
| The Original of Justices of Peace. | B | | |
| Power | | | |
| Within the County. | C | | |
| Out of the County, or within Corporations where there are particular Justices. | D | | |
| And Jurisdiction, | | | |
| What. | | | |
| By what Words. | E | | |
| Warrants. | | | |
| Of the Form &c. of them in General. | F | | |
| Executed. How. | G | | |
| Bail. Of Bail taken by them. | H | | |
| Proceedings, How. | I | | |
| Mandamus lies to them. In what Cases. | | | |
| Vid. Mandamus (K) | | | |
| Qualification. | K | | |
| Punishable. Vid. False Imprisonment (C) | L | | |
| By Action. | M | | |
| Pleadings in Indictments or Actions against them. | N | | |
| Determination of their Authority. | | | |
| What is, and the Effect thereof. | O | | |
| Justices of Oyer and Terminer. | | | |
| Their Power and Authority, and of what they may inquire. | A | | |
| Constituted. How ; and Power determined. | B | | |
| Commission Executed, How ; and of Proceedings before them. | C | | |
| Their Proceedings. | | | |
| Returned into other Courts. | D | | |
| | | | |
| Justices of Gaol-Delivery. | | | |
| And the Difference between them and Justices of Oyer and Terminer. | A | | |
| Justices Itinerants, | A | | |
| Punished. | B | | |
| Their Original and Power. | C | | |
| Justice Seat. Vid. Court. | | | |
| Justicier. Vid. Justices (A) | | | |
| Justification. Vid. False Imprisonment.—Vid. Trial (Z. g. 2) | | | |
| Of what. Vid. Actions for Words. | | | |
| In Trespafs. Vid. Trespafs (B. a) &c. | | | |
| What Things a Man cannot justify doing is his own Franktenement. Vid. Trespafs (Q. a. 2) | | | |
| By Servants, Bailiffs &c. on Command. Vid. Trespafs (C. a) | | | |
| Deteiner till Satisfaction. By whom. | A | | |
| Vid. Deteiner. | | | |
| Of what. | B | | |
| King's Bench. Vid. Court. | | | |
| King's Silver. Vid. Fines (F. b. 6) | | | |
| Land. | | | |
| Where Land shall be taken as Money, or Money as Land | A | | |
| Where Money is ordered to be laid out in Land and settled, Chancery will decree the Payment, or enforce the laying it out. | B | | |
| Vid. Devise. | | | |
| Grant or Devise of | | | |
| Lands lying in several Places. Good. | C | | |
| Vid. Fines (E. a. 2) W. a) | | | |
| Grant. Good, where Grantor has several Lands in the same Place. | D | | |
| Landlord and Tenant. Vid. Estate. | | | |
| What Removeable by the Tenant. | A. | | |
| Evidence for or against them, Inter se Vid. Trial. | | | |
| Lapse. Vid. Action———Vid. Grant (H. a. 2)———Vid. Length of Time.———Vid. Presentment (O. a) &c. | | | |
| In Common Matters. Vid. Conditions.—Devise —Limitations. —Negligence. —Portions.—Trust—Grant (H. a. 2) | | | |
| Lateran Council. | A | | |
| Latin. Vid. Misnomer (A. 2) | A | | |
| Latitat. Vid. Limitation (C) | | | |
| What it is and the Intent of it. | A | | |
| Law. | | | |
| What is, or may be said to be, or not to be Law. | A | | |
| Division of the Law | B | | |
| | | | Common |

A TABLE of the several TITLES.

| | |
|---|--|
| <p>Common, Canon, Civil, Statute, Which shall be preferred, in what Cases. C Of Constable and Marshal. Vid. Courts.</p> <p>Law Books. Vid. Books.</p> <p>Lawful Prize. A</p> <p>League and Truce. Vid. Prerogative. (M. a)</p> <p>Leases. Vid. Estate. Lease and Release. Vid. Conveyances. Lease, Entry and Outlet. Vid. Ejectment.</p> <p>Lect. Vid. Court.</p> <p>Legacy. Vid. Devise.</p> <p>Legal Estate. Vid. Estate.</p> <p>Length of Time. Vid. Dismission. —Vid. Limitations.—Vid. Trial. How it shall affect—Annuities.—Awards.—Bankrupts.—Bonds.—Decrees.—Devisees.—Entails.—Error.—Frauds.—Heirs.—Judgments. Mesne Profits.—Mortgages.—Non Compos.—Pischary.—Possession.—Purchasers.—Qualifications by taking Oaths &c.—Quo Warranto.—Recognizances, Statutes &c.—Trusts.—Vicaridges.—Water Courses.—Wills. A</p> <p>Less Sum demanded than due. Vid. Miscasting.</p> <p>Letter of Attorney. Vid. Attorney.</p> <p>Levant and Couchant. A Vid. Distress.—Vid. Trespass.</p> <p>Levari facias. Vid. Execution.— Vid. Outlawry.</p> <p>Levied by Distress. Vid. Rent— Vid. Distress.</p> <p>Ley Gager. O The Manner of doing it. Lies. How, of Part. M. 7 At what Time. P For what Things. C Touching Realty. E Part Real part Personal. F In what Action it lies. Vid. Traverse (K. a) G By other Hands, I Bailment, Contract. H What Person may wage his Law. K By Attorney, in what Cases. K. 2 Against whom. L In what Cases it lies For a Collateral Respect. M And the Reason thereof. M. 2 Not where a Man is compellable to do the Thing. D Ousted in what Cases. By Examination of Plaintiff. N. 2 Matter of Record. A Specialty. B In one Action where a Bar in another. Q Failure, what shall be said a Failure. R Eitoppel. What Plea Defendant may plead after he has made his Law, or after what Plea he may wage his Law. S Defendant or Plaintiff compellible to wage his Law. In what Cases. M. 3 In what Cases and the Effect. Where there are two Defendants, and one does or tenders his Law, and the other makes Default at the Day. M. 4 Abatement of Writ. M. 5 'Tho' he might traverse &c. M. 6</p> | <p>Examination of Plaintiff. In what Cases Defendant upon tendering his Law, may pray that the Plaintiff or his Attorney be examined. N</p> <p>Libel. Vid. Prohibition (B. a. 3) A What is Who shall be said to be the Contriver, Maker or Publisher, Or be punished as such. What is the distinct Power of the Court and Jury as to Libels. D Punishment. How. And what ought to be done with Libels when met with. C Pleadings. E Publication. What. F</p> <p>Liberties. Vid. Franchises.—Vid. Prerogative (U. c) By Prescription. Vid. Prescription (R)</p> <p>Libraries. Vid. Books. A</p> <p>Licence. Vid. Clergymen (D)—Vid. Evesque (L)—Vid. Grant (E. a) How it differs from, or is a Grant. A Good. B By whom. Servant, Bailiff, &c. Vid. Bailiff. E, 2 Pursued. How. C Extent thereof. D Countermandable. E Determined. F Actions and Pleadings. G</p> <p>Lien. —Vid. Marriage (B. a) (C. a) What is a Lien. On the Lands. A Agreement. B Waived, by what Act. C Descends on whom. D</p> <p>Lieu Couus. Vid. Fines (R) (E. a) Recovery Common.</p> <p>Life. A</p> <p>Limitation. Time of, At Common Law, and before the 21 Jac. 1. A Of Accounts. F Between Merchants. F. 2 Actions on the Case. G Persons beyond Sea, Imprisoned, Feme Coverts, Non Compos. H Debt. I Detinue. I. 2 Error. K Formedon. L Rent. M Seisin. N Trespass, Trover, &c. O Words, Slander &c. Q Extends. To what it extends touching Realty. D Personalty. E Prevented as to Real Actions. B Personal Actions. C Avoided and Action restored, by what Act. Q Time limited. How to be computed. P Criminal Matters. Vid. Treason. W Pleadings. S In what Cases the Statute must be pleaded, or may be given in Evidence. R Equity. Relief in what Cases against the Statute. T</p> |
|---|--|

With their Divisions and Subdivisions.

| | |
|---|------|
| Proceedings; What within the Statute. | U |
| Lis Pendens. | |
| What is. | A |
| The Force and Effect thereof. | B |
| Pleadings. | C |
| Liberty and Seisin. See Feoffment. | |
| Liberty out of the Hands of the King. | |
| See Forfeiture (X) | |
| Locall. See Trial (Q. a) | |
| Lodger. | |
| Or Guest in private Houses. Who is considered as such, and his Power. | A |
| Favour'd or punished. | B |
| Longitude. | A |
| Lord of a Manor. See Manor (X) | |
| Lord and Tenant. See Copyhold. See Trespass (Q. a. 2) | |
| Lord, Mesne, and Tenant. See Mesne. | |
| Lost Deeds. | |
| In what Cases Actions lie at Law tho' the Deeds are lost. See Facts (B. a. 3) | |
| Where Actions shall be brought on the Counter-part. See Facts (B. a. 4) | |
| Relieved in Equity. See Facts. (U. a) | |
| Lunatick, Non Compos, and Idiot. | |
| Custody to whom, and How. | A |
| Power of Committee, and Allowances. | B |
| What Interest the King has in his Lands &c. | B. 2 |
| Actions or Suits in Right of Lunatick. In whose Name, and where he must be Party. | C |
| By or against a Lunatick. | C. 2 |
| Idiot bound. By what Act. | C. 3 |
| Acts or Grants &c. of Lunatick &c. confirmed or avoided. | D |
| Avoided. How. And by whom. | D. 2 |
| Other Matters. | D. 3 |
| How the Lunacy shall be tried, and what is a good Return. | E |
| Office found. Of the finding an Idiot, and who shall be said on Idiot &c. | E. 2 |
| Forfeitures by Lunaticks. | F |
| Punishable in what Cases. | G |
| Marrying or intermeddling with a Lunatick. See (H) | |
| Lord, or Copyholder, Lunatick. | I |
| Offences by others | |
| In respect of the Lunatick. | |
| How punished. | H |
| Enabled to transfer. | K. |
| Pleadings. | L |
| Maercline. | |
| To whom it belonds. See Trees. | A |
| Magistrate. | |
| His Power. | A |
| Mathem. | |
| What. | A |
| Justification. | B |
| Punished. How. | E |
| Appeal. See Appeal. | C |
| What Court may take Cognizance of it, And how. | D |
| Bar. | C |
| Mainprise. See Bail. | |
| In what Actions, Suits, or Things, Persons may be mainprised in | |
| Writ of Error. | A |
| Audita Querela. | B |

Maintenance.

| | |
|--|------|
| Embracery. | |
| What is. | A |
| Champerty. | |
| What shall be said such. | B |
| Statutes as to Champerty. | B. 2 |
| In what Actions it may be. | C |
| Lies. In what Cases. | C. 2 |
| Who shall have it, and against whom | C. 3 |
| Writ, Proceedings, Count, and Pleadings. | C. 4 |
| Maintenance | |
| At Common Law. | D |
| What shall be said Maintenance. | E |
| At what Time it may be done; [or rather at what Time being done, it shall be said Maintenance.] | F |
| Justifiable | |
| By what Persons. | G |
| Consanguinity | H |
| Affinity. | I |
| Master for the Servant. | K |
| Servant for the Master | L |
| In respect of | |
| Privity | |
| Lord and Tenant. | N |
| Collateral Prejudice. | P |
| Men of Law. | M |
| Him that has Right or Possibility. | O |
| A Stranger. | |
| Acts of Charity. | Q |
| Gift of the Action. | R |
| Conveyances or Securities for Maintenance. What becomes of them. | S |
| Actions and Process. How, and against whom. | S. 2 |
| Pleadings. | T |
| Evidence. See Trial (W. g) | |
| Punishable. How; by Actions or Indictments. | U |
| Judgment | W |
| Maintenance of Writs. | |
| In what Cases Plaintiff must or can maintain it. | A |
| Election in what Cases to maintain it or not. | A. 2 |
| At what Time. | A. 3 |
| How, and what is sufficient Maintenance. | B |
| Where Defendant pleads Jointenancy or Sole Tenancy, or one makes Default, or pleads Non-tenure. See Jointenants. | C |
| As to what Part. | D |
| Major Part. | |
| What Act of theirs shall bind the rest. | A |
| Malice. See Murder. | |
| Malicious Prosecutions. See Actions. | |
| Manamus. See Apprentices. | |
| What it is &c. | A |
| Lies; In what Cases. | A |
| To Restore &c. to | |
| Colleges and Schools. | B |
| Returns good in such Cases. | B. 2 |
| Corporations and Freedom. See Resignation (A) | C |
| Returns good in such Cases. | C. 2 |
| Church Preferments, or Offices relating to Churches. | D |
| Offices relating to | |
| Manors | E |
| Corpe. | |

A TABLE of the several TITLES,

| | |
|--|--|
| <p>Corporations ; and Pleadings. E. 2 Law Common or Civil. F In General. And Pleadings. G To enforce Things to be done Relating to Corporations; and Pleadings. H Colleges. H. 2 Spiritual Courts ; and Pleadings. H. 3 Inferior Courts of Law. I Justices of Peace &c. K Manors. L Nuisances. M Officers of Courts. N Poor and Church-Rates, and Taxes, Officers &c. O Directed To whom P Brought How Jointly or not. Q Return thereof Good or not In General. R By whom and when. S Traversed, and taking Issue on it. T Punishment and Remedy of Ill, or False, or no Return. U Peremptory ; granted in what Cafes. W Exceptions to the Writ, and at what Time. X Judgment, and what shall be recovered. Y Discretionary Power of the Court in grant- ing or refusing it. Z</p> <p>Manor. How it may be. A Incident to it, what. See Grant (Z) A. 2 Consists of what, or what is a Manor. I Appendant. What may be. See Appen- dant (A) B. 2 What shall be said to be. C See Appendant. Parcel What may be. B What shall be said to be. C After Severance. D Manor in Reputation. See Grant (E) F. 2 Severance. Of Parcel, by what Act. P Things severed, where they shall be a- gain Parcel. Q Reversion What passes by a Grant as Parcel of the Reversion. Things se- vered Q. 2 By what Act or Grant, (as Lease &c.) that which was Parcel shall be so sever- ed, as that by Grant of the Manor the Reversion shall not pass. R Extinguishment of Services. O Seignior, as to Parcel, or all. R. 2 By Merger in the Crown. See Tenure (1) pl 8. Destruction. By what Act or Thing. F Suspended. N Division. Making one Manor into two. G Reviver. By what Act. H After it has been in the Hands of the Crown. H. 2 Passes: By what Words. L What Things relating to a Manor. M What passes by the Word (Manor) See Grant (Y) K</p> | <p>Demefnes of the Manor. What. C. 2 Pleadings. S Customary Manor. Its Power. T Forfeited. U Tried. How. W Lord of a Manor. Who ; and his Power. X Manlaughter. See Murder. Marches of Wales. See Wales. A Margin. A Mariners. Wages. Considered, How. A Payable or lost. In what Cafes. And how much. A. 2 Suable for in what Court. And when. B See Admiralty. How they ought to behave on particular Oc- casions. C Under what Regulations a Mariner must be. D Privileged or indulged. How. E Punishable. F</p> <p>Market. Fairs D Kept at what Place. G Stallage. B Who shall have it as Heir. Borough English. B. 2 What Things Strangers may do. C Clerk of the Market. His Antiquity, and Power. A. 2 Markets and Fairs. What they are. A. 3 Of the Manner of Warning and holding a Fair. I. 2 On what Days. I. 3 Of the Toll-book-Keeper, and Property altered by Sale in Market or Fair. I. 4 Who may go to Fairs or Markets to sell there. I. 5 Property altered. What shall be said a Contract in Market Overt to change Property. E What Place shall be said the Market. H What Things may be sold out of the Mar- ket. H. 2 Grants or Patents for Fairs or Markets. I Forfeiture of the Fair. By what Act or Thing. F Of the Goods sold there, or Value of them. F. 2 Proceedings, Pleadings, and Judgment. How. F. 3 Pleadings of Goods bought in Market. K Equity. L</p> <p>Marque and Reprizal. See Prero- gative (N. a) Marriage. Contract What is, and how dissolved. See Trial. A Sentenced ; and how. B Actions on Contracts. C Pleadings and Evidence. C. 2 What is or amounts to a Marriage, or shall be said Evidence thereof. D See Baron and Feme. Good In regard of The Person marrying generally with- out Consent or Licence. D. 2 The Person to whom. Degrees prohib- bited. E The</p> |
|--|--|

A TABLE of the several TITLES.

| | |
|--|---|
| <p>The Licence and Registering, Banns and Place where, and Punishment of marrying otherwise; what. And in what Cases. E. 2</p> <p>Prior Marriage. See Bigamy.</p> <p>Perform'd How; and by whom. F</p> <p>See Baron and Feme (A)</p> <p>De facto,</p> <p>Of what Force in Law as to others. F. 2</p> <p>Dissolved,</p> <p>For what Cause. G</p> <p>By Disagreement,</p> <p>At what Time, and what shall be said</p> <p>Disagreement, and the Effect thereof. G. 2</p> <p>Countermand</p> <p>Of what. H</p> <p>Brocade-Bonds &c. I</p> <p>Conditions</p> <p>Annexed to Portions.</p> <p>In what Case the Breach forfeits the Portion. K</p> <p>Determined. K. 2</p> <p>Settlements</p> <p>By Agreement before Marriage.</p> <p>What is a good Performance,</p> <p>In regard of the</p> <p>Manner, L</p> <p>Varying from the Agreement E. a</p> <p>Matter. M</p> <p>Good</p> <p>Against Creditors &c. O</p> <p>After Marriage. See Jointress &c. (E)</p> <p>Without Articles or Agreement precedent. Good in what Cases. N</p> <p>Broke in to by Decree. F. a</p> <p>Construction.</p> <p>How much shall be said to be settled. Z</p> <p>Varying from the Agreement or Articles. E. a</p> <p>Agreements unperform'd.</p> <p>Decreed, P</p> <p>After the Death of Husband or Wife. Q</p> <p>Of both. R</p> <p>How.</p> <p>Where there is a Failure on one Side S</p> <p>Where there is a Waiver of the first Agreement. T</p> <p>Where there is a Variance between the Agreement and Settlement. E. a</p> <p>What shall be said a Satisfaction. U</p> <p>By Reason of the Baron becoming Bankrupt. U. 2</p> <p>Upon what Evidence on 29 Car. 2. 3. W</p> <p>As to the Limitations &c. to be made upon. X</p> <p>Upon Limitations contained in the Covenant. Y</p> <p>Promises.</p> <p>Construction.</p> <p>How much. A. a</p> <p>Lien.</p> <p>Where the Covenant is a Lien</p> <p>On the Lands. B. a</p> <p>On the Personal Estate C. a</p> <p>Portions</p> <p>To be paid, or Settlements to be made, On Condition precedent. D. a</p> <p>Pleadings.</p> <p>How the Marriage is to be pleaded. G. a</p> <p>Where it is an absolute Gift of Chattles to the Husband. See Baron and Feme.</p> <p>Forcible Marriage. The Offence thereof. H. a</p> <p>Marshal and Marshalsea. See Fees. (C)</p> <p>The Office, and Grants of it. A.</p> <p>Jurisdiction of the Court, and what Matters are triable there; and Pleadings. A. 2</p> | <p>Of Matters between the Marshal and the Prisoners. B</p> <p>Between him and the Plaintiffs. C</p> <p>See Office (M)</p> <p>Marshalsea &c. Honey. (See Prisoners &c.)</p> <p>Martial Law. See Law (B)</p> <p>Master and Servant. See Apprentices. See Aid (P)</p> <p>With respect to others,</p> <p>Master.</p> <p>Chargeable for what.</p> <p>Act of Servant. A</p> <p>Debts contracted by Servant. A. 2</p> <p>Damages done by Servant. B</p> <p>Who shall be said a Master to be Chargeable. C</p> <p>Bound by what Acts, or Consent of Servant D</p> <p>What Act of the Servant shall be said the Act of the Master. E</p> <p>Servant,</p> <p>Chargeable in what Cases. See Action (B. c) &c.</p> <p>Contract by him. F</p> <p>Damage done by him. G</p> <p>What is lawful to be done by the one for the other. H</p> <p>Compellible to serve. Who. And who shall be said Labourers within the Statute. I</p> <p>Retainer, what within the Statute. I. 2</p> <p>Inter se.</p> <p>Power of the Master over the Servant. K</p> <p>Discharge of Servant from his Service.</p> <p>How. What amounts to it, or shall be good Cause of Departure. L</p> <p>Actions. By the Master against the Servant for Neglecting or Refusing to do his Service &c. M</p> <p>For Defrauding or Stealing from him. M. 2</p> <p>Actions.</p> <p>What and How at Common Law, and by Statute; and of the old Statutes, and 5 Eliz. 4. N</p> <p>By Matter,</p> <p>On Account of the Servant. O</p> <p>See Action (B. c) for Deceit.</p> <p>Remedy for Inticing away or Hurting Servant. See Trespass. See Apprentices.</p> <p>For Work done and Things acquired by the Servant. O. 2</p> <p>For Goods sold by, or Promises made to the Servant. O. 3</p> <p>By Servant against others.</p> <p>See Actions (C. c)</p> <p>On Account of the Master's Goods. P</p> <p>By others against the Master, or Servant Q</p> <p>See Actions (S. b) &c.</p> <p>What; or the Gift of the Action. See Action (M. c)</p> <p>Pleadings</p> <p>In Actions,</p> <p>On the Statute. R</p> <p>By the Master against others in respect of the Servant. S</p> <p>By others against Master and Servant, or one of them. T</p> <p>Between the Master and Servant. U</p> <p>Artificers U. 2</p> <p>By the Servant against others. W</p> <p style="text-align: right;">Evidence</p> |
|--|---|

A TABLE of the several TITLES,

| | |
|--|--|
| <p>Evidence. See Trial (X. g) (B. f. 22) Trial where. X Servant Punished Criminally in what Cafes. See (M. 2) Master in Chancery. (See Chancery.) A Reports made by him. See Reports. Master of a College. See College. See Grant (C. 2) Master of a Ship. Power and Duty, As to Casting Goods over Board.—Cocquets. —Colours.—Customs.—Cutting down Masts and Rigging.—Dispo- ing of the Ship or Goods.—Entries. —Going from Port to Port.— Goods.—Importing them from what Place.—Mariners.—Other Ships and their Anchors.—Pilot.—Sail- ing.—Ship.—What Ship and Ma- riners to make Use of.—Tackle. A Chargeable in what Cafes. B Owners. How far bound by his Contract, or Default. B. 2 Actions &c. By him. C Against him. D Pleadings and Evidence. E Master of the Rolls. His Power &c. A Matrim. Notes. A Maihem. See Maihem. Mavor. See Corporations. Measures. See Weights and Measures. Medietas Lingue. See Trial (G. a. 2) Melius Inquirendum. What it is, and the Effect thereof. A Grantable. In what Cafes and How. B At what Time. C Memorandum. See Indorsement. A Menace. See Durefs. See Tres- pafs (A. 2) Sufficient to avoid Things. What. A Tho' made by a Stranger. B Justifiable in what Cafes, and how far. D Punishable in what Cafes and How. C Of what Persons; and Proceedings, and Plead- ings. E Merchants. See Trade. See Bills of Exchange. What Regard the Law pays them, and their Usages. A Who are said to be Merchants. B Merger. See Extinguishment. See Devise. See Prerogative (X. c) See Portions (I) In what Cafes There may be. A Shall be. B Where the Estates are in different Rights and Respects. A. 2 Of what Estates, Copyholds. C Fee Simple. D Fee Tail. E Life Estates. F Terms for Years. G Trust Terms, In Equity. H By what Act. I</p> | <p>Mefine. Writ of. Lies For whom. I In respect of Estate. F Against whom. K Where there are several. A Statute 13 E. 1. cap. 9. A. 2 Of what Things. B For what Cafes. D In what Cafes. G At what Time. H Before Notice or not. H. 2 Acquittal. What good Cause to have it. C Inforced How, and what amounts to it. C. 2 Equality. What is to have Acquittal. E Ousted or set Aside, by what. E. 2 What the Mefine may do in case of the Te- nant. H. 3 How to be brought; Actions and Pleadings. L Process and Proceedings. L. 2 Judgment. When. M How. And of what. M. 2 Of forejudger in what Cafes, and the effect thereof. N Actions. Lord Mefine and Tenant. Actions by the one against the other. In what Cafes there must be a Join- der. O Inter fe where the one Purchafes of the other. Q Pleadings. L Replications. P How the Mefine shall be said to hold, by Common Law, or Custom. R Extinguishment of Mefnalty. S Mefine Profits. See Diffifin (L) See Ejectment. See Recouper. Who shall have them being claimed by several. A From what Time. B Actions. Who shall have Action for them. At what Time, after the Estate deter- mined. C What Action. D Other Remedy for them, and how and what must be done to intitule the Party. E Account for them. Who shall have it. F Against whom, The Heir. G Recovered. What shall be, as or in lieu of the Mefine Profits. H Against whom and in what Cafes. I See Error (F. a) Pleadings. And what Evidence must be given in Actions for them. K Mefenger. See Serjeant at Arms. Metes and Bounds. What may be done by Metes and Bounds. A Mill. Customs to grind at Mills Extend to whom and what. A Who may erect a Mill, and where. B Actions. For Diverting Water-courfes. C Other Matters. D Pleadings.</p> |
|--|--|

With their Divisions and Subdivisions.

| | |
|--|--|
| <p>Pleadings. E</p> <p>Mines. See Prerogative (K. a)</p> <p>How to be used A</p> <p>Who may digg for Mines in respect of Estate. A. 2</p> <p>Pass what, by grant of Mines. B</p> <p>Misapplication. See Purchasor.</p> <p>Miscasting.</p> <p>Judgment prevented by the Plaintiff's Miscasting. A</p> <p>Miscontinuance. See Discontinuance.</p> <p>Misdemeanor. See Indictment.</p> <p>Misemployment. See Charitable Uses.</p> <p>Misentry. See Amendment.</p> <p>Misfealance. See Actions, and other proper Titles.</p> <p>Misinformation. See Fraud (H. a)</p> <p>Misnomer. See Indictment (W) See Nofmes (A) (A. 3)</p> <p>Corporations. See Corporations. See Grant (A)</p> <p>What is in Particular in Christian and Surnames, Idem Sonantia. A</p> <p>By Altering the Name into another Language. A. 2</p> <p>By Omissions. B.</p> <p>Difference between a Misnomer in Grants, Obligations &c. and Judicial Proceedings. B. 2</p> <p>Pleadings. C</p> <p>In what Cafes it is a good Plea. C. 2</p> <p>By whom. See Abatement. C. 3</p> <p>At what Time. See Imparllance. C. 4</p> <p>Estoppel, in what Cafes. C. 5</p> <p>Abatement of Writ by what Misnomer, Names of Baptism. C. 6</p> <p>Known by the Name and the other Want of Addition. See Addition. C. 7</p> <p>Wrong Addition. See Addition.</p> <p>Where a Different Person of the same Name appears, or is pleaded to be so. C. 8</p> <p>Advantage. At what Time the Misnomer must be taken Advantage of. C. 4</p> <p>See Appearance (D) — See Error (L. b)</p> <p>How to take Advantage of it in Pleading. See (C)</p> <p>Of the Place where. C. 9</p> <p>Replication; Rejoinder. C. 10</p> <p>Equity. D</p> <p>Misprision. See Grants (Q. 2)</p> <p>Miscital. A</p> <p>See Eitate. See Grants (R. 3) &c.</p> <p>Indictment. Prerogative (Q. b)</p> <p>Mistake. See Devise.</p> <p>Of Time. A</p> <p>Words. B</p> <p>Other Things. See Fines — Miscasting</p> <p>In Grants. See Grant (Q. R. 3) &c.</p> <p>Mitigation. See Damages. See Trial.</p> <p>Modo & Forma. A</p> <p>See Trial (F. g) &c. See Traverse.</p> <p>Moieties. See Baron and Feine.</p> <p>Where a Grant shall take Effect by Moieties. A</p> <p>Entry &c. into Moiety, in what Cafes good. B</p> <p>Count and Pleadings. C</p> <p>Money. See Land (B)</p> <p>Bringing it into Court. See Bringing &c.</p> <p>Followed; in what Cafes it may be. A</p> <p>Restitution in what Cafes, and what Actions lie for Money, as Trover Detinue &c. B</p> | <p>Pleadings and Judgment. C</p> <p>Ordered to be laid out in Lands and settled; in what Cafes Chancery will decree the Payment, or enforce the laying it out. See Land (B)</p> <p>Devised over. See Devise.</p> <p>Monopolies. See Prerogative (D. e) &c.</p> <p>Monster. A</p> <p>Monstrance.</p> <p>Of Deeds. See Faits (M. a) &c. See Voucher (G. a) De Droit. See Prerogative.</p> <p>Mortdancestor.</p> <p>Statutes. A</p> <p>Points of the Writ; and Inquired in what Cafes. B</p> <p>Lies.</p> <p>In what Cafes, and of what. C</p> <p>Of what Seisin. C. 2</p> <p>Against whom and by whom. D</p> <p>In what County, or Place. E</p> <p>Writ and Proceedings. F</p> <p>Pleadings. See Traverse. G</p> <p>Plea Good; what is; in abatement or in Bar. H</p> <p>Reviver of Action what is. I</p> <p>Pleadings over. K</p> <p>Issue, what Good, and where, and when tried. L</p> <p>Tried. How. Where there are several Tenants. L. 2</p> <p>Evidence. L. 3</p> <p>Verdict, and what shall be inquired. M</p> <p>Judgment.</p> <p>Given where and How, and of what. Damages &c. N</p> <p>Mortgage.</p> <p>What it is. A</p> <p>What a Mortgage and what a Purchase. B</p> <p>Disputes between</p> <p>Mortgagor and Mortgagee. C</p> <p>Mortgagor, Mortgagee and Mortgagee. D</p> <p>Mortgagor and Assignee of Mortgagee. E</p> <p>Mortgagee not Joining. E. 2</p> <p>Mortgagee and Mortgagee. F</p> <p>Mortgagee and Assignee of Mortgagor. G</p> <p>Mortgagee and Creditors. H</p> <p>Mortgagee and after Purchasors. I</p> <p>Tenant for Life, and Remainder-man &c. of the Lands mortgaged. K</p> <p>Mortgagee and Assignee of Mortgagee. L</p> <p>Incumbrances bought in. See Incumbrances (C) &c.</p> <p>Proviso</p> <p>To make Interest Principal, or to enlarge or lessen it. M</p> <p>Payment or Tender.</p> <p>By whom. See Tender (B) N</p> <p>To whom it may be. See Tender (C) O</p> <p>What is Good. O. 2</p> <p>In Proportions. K</p> <p>Discharged by what Act. P</p> <p>Redemption.</p> <p>By whom. Q</p> <p>Against whom. Q. 2</p> <p>In what Cafes. R</p> <p>By other Mortgagees, after Foreclosure. S</p> <p>Of what. R. 2</p> <p>On what Terms. T</p> <p>At what Time. U</p> <p>See Length of Time (A) pl. 23 to 34.</p> <p>How.</p> <p>In Cafes of Ejectment &c. By 7 Geo. 2. 20. U. 2</p> <p>Equity of Redemption disposable. How &c. U. 3</p> <p>Account</p> |
|--|--|

With their Divisions and Subdivisions.

| | |
|--|--|
| <p>Account. Where Mortgagee shall Account for the Profits. W</p> <p>Allowances, X</p> <p style="padding-left: 20px;">To Mortgagee.</p> <p style="padding-left: 20px;">To Mortgagor his Executors &c. tho' Redemption be denied. X. 2</p> <p>Interest upon Interest, or how much. X. 3</p> <p>Foreclosure, Y</p> <p style="padding-left: 20px;">In what Cases and of what &c.</p> <p style="padding-left: 20px;">Opened in what Cases. Z</p> <p style="padding-left: 20px;">By 4 & 5 W. & M. 16. A. a</p> <p>Equity. B. a</p> <p style="padding-left: 20px;">Mortgagee relieved, or not against Forfeitures.</p> <p>Pleadings, C. a</p> <p style="padding-left: 20px;">In Law or Equity relating to Lands Mortgaged</p> <p>Mortmain. A</p> <p>Statutes. A. 2</p> <p>What is. B</p> <p>By. B. 2</p> <p style="padding-left: 20px;">Estoppel. B. 3</p> <p style="padding-left: 20px;">Covin.</p> <p>Prohibited, B. 4</p> <p style="padding-left: 20px;">In What Cases. To whom.</p> <p>Forfeiture, C</p> <p style="padding-left: 20px;">And to whom.</p> <p style="padding-left: 20px;">Entry for Forfeiture, C. 2</p> <p style="padding-left: 20px;">In what Cases.</p> <p style="padding-left: 20px;">At what Time. C. 3</p> <p>Licences to Alien. D</p> <p style="padding-left: 20px;">How granted and to whom.</p> <p style="padding-left: 20px;">Licence, or Ad quod Damnum necessary in what Cases. D. 2</p> <p style="padding-left: 20px;">Writ of Ad quod damnum. How it shall be. D. 3</p> <p>Pleadings. E</p> <p>Mortuary. A</p> <p>The Efficient Cause. A. 2</p> <p>Statutes.</p> <p>Paid. B</p> <p style="padding-left: 20px;">In what Cases.</p> <p style="padding-left: 20px;">By whom. C</p> <p style="padding-left: 20px;">To whom. D</p> <p style="padding-left: 20px;">How. E</p> <p style="padding-left: 20px;">Remedy at Common Law and now. F</p> <p>Motion.</p> <p style="padding-left: 20px;">In Court. What may be done upon Motion. A</p> <p style="padding-left: 20px;">By whom it may be made. B</p> <p style="padding-left: 20px;">Time. C</p> <p style="padding-left: 20px;">At what Time a Motion may be made, for what. C</p> <p style="padding-left: 20px;">Quashed on Motion. What. D</p> <p style="padding-left: 20px;">Done. E</p> <p style="padding-left: 20px;">What must be done or will be required, in Order to obtain the Thing moved for. E</p> <p style="padding-left: 20px;">Without Motion; What. F</p> <p style="padding-left: 20px;">Notice to be given, In what Cases and at what Time. G</p> <p style="padding-left: 20px;">To whom and How. H</p> <p>Movable Estate. See Estate (C)</p> <p>Hulier. See Descent.</p> <p>Multiplying. See Tenures.</p> <p>Murder or Manslaughter.</p> <p style="padding-left: 20px;">What is; and of the ancient Punishment thereof. A</p> <p style="padding-left: 20px;">Of what Persons it may be. B</p> <p style="padding-left: 20px;">By what Persons it may be. C</p> <p style="padding-left: 20px;">Of Officers; and Pleadings. D</p> <p style="padding-left: 20px;">How. E</p> <p style="padding-left: 20px;">By Malice forethought; and what shall be said such. E</p> | <p style="padding-left: 20px;">By Intention to do a lets Mischief only. F</p> <p style="padding-left: 20px;">Without Intention. But G</p> <p style="padding-left: 20px;">In doing an unlawful Act, or an Act not warranted by Law.</p> <p style="padding-left: 20px;">In assisting Persons doing an unlawful Act. H</p> <p style="padding-left: 20px;">By, or of, one interposing where 2 are Fighting or Quarrelling. I</p> <p style="padding-left: 20px;">By Accident, or acting idly only. K</p> <p style="padding-left: 20px;">By want of Care, and whence Mischief may probably ensue. L</p> <p style="padding-left: 20px;">By Event. M</p> <p style="padding-left: 20px;">By Quarrels and Provocations; And what shall be said such. N</p> <p style="padding-left: 20px;">By one of the Company, where it is Murder in another. O</p> <p style="padding-left: 20px;">Being in Company with; and what Privy will make a third Person Guilty of Murder or Manslaughter. O. 2</p> <p>Justifiable. P</p> <p style="padding-left: 20px;">In what Cases; and Pleadings.</p> <p style="padding-left: 20px;">By Officers, or Persons having Warrants. Q</p> <p>Excusable. R</p> <p style="padding-left: 20px;">Amounts to Petit Treason, in what Cases. S</p> <p style="padding-left: 20px;">Intending and attempting to murder, but not doing it; In what Cases it is Felony. T</p> <p style="padding-left: 20px;">Trespass or Murder; What is. U</p> <p style="padding-left: 20px;">Indictment, good or not. W</p> <p style="padding-left: 20px;">Bill found, and Verdict How. And Proceedings and Judgment. X</p> <p style="padding-left: 20px;">Tried; Where. See. Trial. Y</p> <p>Mute.</p> <p style="padding-left: 20px;">Punishment thereof by Pain fort & dure, or otherwise. In what Cases by the Common Law or by Statute <i>Westm. 1. 3 E. 1. cap. 12.</i> A</p> <p style="padding-left: 20px;">The Manner of the Punishment by Pain fort & dure. B</p> <p style="padding-left: 20px;">Avoided by pleading, at what Time. C</p> <p style="padding-left: 20px;">What shall be said to be standing Mute. D</p> <p style="padding-left: 20px;">Inquiry thereon, in what Cases and of what; by what Jury and How. E</p> <p style="padding-left: 20px;">Forfeiture and Pleadings. F</p> <p>Names. See Nomes.</p> <p>Naturalization. See Alien.</p> <p>Necessity. See Murder (P) See Waste. See Trespass.</p> <p style="padding-left: 20px;">Excuse. Of what Things it may be an Excuse. A</p> <p style="padding-left: 20px;">What Things shall be made Valid by it, which would not otherwise be so. B</p> <p>De Crecas Regnum.</p> <p style="padding-left: 20px;">How considered and the Force thereof. A</p> <p style="padding-left: 20px;">Necessary and Grantable. In what Cases and How. B</p> <p style="padding-left: 20px;">Directed, Executed, and Discharged. How. C</p> <p>Negative.</p> <p style="padding-left: 20px;">Things. A</p> <p style="padding-left: 20px;">Pleadings. B</p> <p>Negative Pregnant.</p> <p style="padding-left: 20px;">What it is. A</p> <p style="padding-left: 20px;">What Plea shall be said to be Negative Pregnant. B</p> <p style="padding-left: 20px;">Helped by Verdict in what Cases. C</p> <p>Negligence.</p> <p style="padding-left: 20px;">Advantages lost by Negligence. A</p> <p style="padding-left: 20px;">Bar of Right in what Cases, or only a Postponing. B</p> <p style="padding-left: 20px;">Relieved in Equity. C</p> <p style="text-align: right;">Negro</p> |
|--|--|

With their Divisions and Subdivisions.

| | | | |
|---|------|--|------|
| Negro. | | | |
| Of what Consideration in the Eye of the Law, and what Actions lie for taking them. | A | Relation. | E |
| Ne unques Accouple. See Trial (P). | | To what Time. See (D) | G |
| Good Plea. In what Cafes. | A | Of one where it is of others | G |
| Nient Comprize, or Not Parcel. | A | For what Thing, or in what Actions. | G |
| See Fines (L. b. 2) | | In what Cafes the Nonfuit of the Plaintiff againft one fhall be for others. | H |
| Nient Dedire. | | In what Actions. | H |
| What amounts to it. And in what Cafes Nient Dedire amounts to a Confeflion. | A | At what Time. | I |
| The Difference between Nient Dedire and Confeflion. And the Effect of the Nient Dedire. | B | In one Thing where it fhall be in another. | K |
| Aided by it. Who. Strangers. | C | Where it fhall be a Bar of other Action and peremptory. | L |
| Night. | A | Of calling for the Plaintiff. | M |
| What may be done in the Night. | A | Entry thereof; when, where and how. And Pleadings. | N |
| Night-walkers. | A | Judgment. | O |
| Nil dicit. | A | Costs. In what Cafes. | P |
| Nil habuit in Tenementis. | A | See Trial. | |
| Nobility. | A | Non-tenure. | |
| Nolle Profequi. See Judgment (G) | | Pleadable. | |
| Nonfuit (F. 2.) | | In what Cafes or Actions. | A |
| Nonsente. | | At what Time. | |
| The Effect thereof. | A | And after other Plea. | B |
| Nonfuit. | | After what Plea pleaded. | B. 2 |
| What is or fhall be faid a Nonfuit. | F. | See Estoppel (E) | |
| The Difference between a Nonfuit, Retraxit, Nolle Profequi, Non pros. and Departure, and the Nature and Effect thereof. | F. 2 | By whom. See Estoppel (E) | C |
| In what Action it may be, and in what Cafes. | A | How. | |
| What Perfons may be nonfuit in Refpect of being Actor &c. | B | Of all, or Parcel. In what Cafes. | D |
| For what. | B. 2 | Plea of Non-tenure. | |
| Who may be. | C | Avoided How. By Replication. | E |
| At what Time. See (E) | D | Judgment and Execution. In what Cafes after fuch Plea pleaded the Plaintiff may have Judgment, and fue Execution at his Peril. | F |
| | | Nolines or Names. | |
| | | Names of | |
| | | Men. | |
| | | By what Name they fhall be called. | A |
| | | What are diftinct and feveral Names; Christian Names. | B |
| | | Dignity. What is, and How to be expreffed. | C |

JUDICIAL, &c.

(A) *Act* Judicial. What is.

1. **G**ranting *Commissions* by Lord Chancellor is *not* a judicial Act, but only an Act of Service. D. 212. pl. 33. Pasch. 4 Eliz.
 2. *Admitting a Copyholder* is not any judicial Act; For there need not be any of the Suitors there, who are the Judges. Le. 289. Trin. 26 Eliz. B. R. in Lord Dacre's Case.
 3. *Examining a Feme Covert Copyholder* by the Steward of a Manor is a judicial Act. Cro. E. 717. Mich. 41 & 42 Eliz. C. B. in Case of Erish v. Reeves.
 4. A *Recognisance* is a judicial Act. Arg. Noy. 157. in the grand Case of the Habeas Corpus.
-

(B) Judicial *Opinion*, or *Determination*.

1. **J**udicial Decisions, as far as they refer to the Laws of this Kingdom, are for the Matter of them of *three Kinds*. 1st. They are either *such as have their Reasons singly in the Laws and Customs* of this Kingdom; as who shall succeed as Heir to the Ancestor; what is the Ceremony requisite for passing a Freehold? what Estate, and how much the Wife shall have for her Dower? And many such Matters, wherein the ancient and express Laws of the Kingdom give an express Decision, and the Judge seems only the Instrument to pronounce it; and in those Things, The Law or Custom of the Realm is the only Rule and Measure to judge by, and in Reference to those Matters, the Decisions of Courts are the Conservatories and Evidences of those Laws. Or 2dly. they are *such Decisions, as by Way of Deduction and Illation upon those Laws are form'd or deduc'd*; as for the Purpose, whether of an Estate thus or thus limited the Wife shall be endow'd? whether, if thus or thus limited, the Heir may be barred? and infinite more of the like complicated Questions. And herein the Rule of Decision is; first, the Common Law and Custom of the Realm, which is the great Substratum that is to be maintain'd; and then Authorities or Decisions of former Times in the same or the like Cases; and then the Reason of the Thing it self. 3dly. Or they are *such as seem to have no other Guide but the common Reason of the Thing, unless the same Point has been formerly decided*, as in the Exposition of the Intention of Clauses in Deeds, Wills, Covenants &c. where the very Sense of the Words, and their Positions and Relations give a rational Account of the Meaning of the Parties, and in such Cases the Judge does much better herein, than what a bare grave Grammarian or Logician, or other prudent Men could do; For in many Cases, there have been former Resolutions, either in Point, or agreeing in Reason or Analogy with the Case in Question; or perhaps also, the Clause to be expounded is mingl'd with some Terms or Clauses that require the Knowledge of the Law to help out with the Construction or Exposition;

Both which do often happen in the same Case; and therefore it requires the Knowledge of the Law to render and expound such Clauses and Sentences; and doubtless a good common Lawyer is the best Expolitor of such Clauses &c. Hales Hist. Com. Law, 68, 69. cites Plowden 122, to 130. 140. &c.

So an Opinion given in Court, if not necessary to the Judgment given of Record, but
 2. An *Extra-judicial Opinion*, given in or out of Court, is no more than the Prolatum or Saying of him who gives it, nor can be taken for his Opinion, unless every Thing spoken at Pleasure must pass as the Speaker's Opinion. Vaugh. 382. Mich. 25 Car. 2. C. B. In Case of Bole & al. v. Horton.
 that it might have been as well given, if no such, or a contrary Opinion had been broach'd, is no Judicial Opinion, nor more than a *Gratis Dictum*. Ibid ——— But an Opinion, tho' erroneous, concluding to the Judgment, is a Judicial Opinion, because delivered under the Sanction of the Judges Oath, upon Deliberation, which assures that it is, or was, when deliver'd, the Opinion of the Deliverer. Ibid.

Justices.

(A) Who have been * *Justiciaries of England*.

* See Spelm. Glofs. 329. &c. Verbo Justitia als. Justitarius.

I. 1 D. 2. **R**obert Earl of Leicester [was] made Justiciar of England. Speed 456. b.

—The first

Justiciaries after the Conquest were *Odo Bishop of Baieux in Normandy*, Half-Brother by the Mother to the Conqueror, and *William Fitz Osborn*, who was Vice-Roy, and had the same Power in the North that Odo had in the South, and was the Chief in the Conqueror's Army. Brady's Preface to the Norman History. 151. (B). —Dugd. Chron. Series, 1.

The next Justiciaries were *William Earl of Warren in Normandy*, a Great Commander in the Battle against Harold, and *Richard de Benefacta*, alias Richard de Tonebridge, Son to Gilbert Earl of Brion in Normandy, and were constituted in 1073. Brady's Preface &c. 151. (B). —Dugd. Chron. Series, 1.

In a great Plea between Lanfrank and the said Odo *Goisfrid Bishop of Constance in Normandy*, was Justiciary. Brady's Preface &c. 151. (C). —Dugd. Chron. Series, 1.

In the Beginning of **William Rufus**, Odo was again Justiciary. *William de Carilefo Bishop of Durham*, a Norman, succeeded Odo. And then follow'd *Ranulph Flambar* in 1099. Afterwards in the Reign of H. 1. in 1100. *Hugo de Boeland* a Norman was Justiciary, and after him, his Son *Richard Basset* was; Then *Roger Bishop of Salisbury* was Justiciary and Chancellor. The next, in the Time of King Stephen, was *Henry Duke of Normandy*, afterwards King H. 2. And in H. 2. Time was *Robert de Bello monte Earl of Leicester* in 1168. But *Alberic de Vere*, Earl of Guisnes, is said to have been Justiciary before him; and after Robert Earl of Leicester, *Richard de Lucie* was made Justiciary. After him in 1180. *Ranulph de Glanvil that famous Lawyer*, was made Justiciary. After him, *Hugo de Putaceo* commonly call'd Pufus, Putac, or Pudfey, Nephew to King Stephen by his Sister, was made Justiciary in the North Parts beyond Trent, and *William de Longo-Champo*, or Long-Champ, Bishop of Ely, was at the same Time by Richard the 1st. made Justiciary, on the South Parts on this Side Trent. Then, after the Deprivation of William Bishop of Ely, *Walter Arch Bishop of Roven in Normandy* was made Justiciary of all England. Brady's Preface &c. 151. (D) (E) (F) 152. (A) (B) (C). See Dugd Chron. Series, 1, 2, 3, 4, 5.

2. **William Longchamp**, Bishop of Ely, Chief Justiciar and Ld Chancellor to R. 1. Speed. 473.

3. **Fitzpeter** Chief Justiciar in the first of John. Speed 487.

4. **Hubert de Burgh** Earl of Kent, Chief Justiciar 1 D. 3. Speed. 513.

The Chancellor was the first in Order on the left Hand of the Justiciary, and as he was a great Person in Court, so he was in the Exchequer; For no great Thing pass'd but with his Consent and Advice; that is, Nothing could be sealed without his Allowance or Privy. But the Justiciary

5. And after him, **Stephen Segrave**. Speed 521. The Chief Justiciar is the Minister of Regal Command in the Absence of the King. Speed 487.

Justiciary surmounted him and all others in Authority, and he alone was endow'd with, and exercised, all the Power which afterwards was executed by the four Chief Judges, viz. The Ch. J. of B. R. the Ch. J. of C. B. the Ch. B. of the Exchequer, and the Master of the Court of Wards. Brady's Preface to the Norman History. 153. (B).—As long as the Power of the Justiciar continu'd, the Aula Regis was one Court, and only distinguish'd by the several Officers; For all the Officers were united under the Justiciar, and he was the Governor and Superintendent of the Courts. G. Hist. View of the Exchequer. 10.

6. Towards the latter End of the Norman Period, the Power of the Grand Justiciar was broken, so that the Aula Regis, which before was one great Court, where the Justiciar presided, was divided into four distinct Courts, viz. Chancery Exchequer, King's Bench, and Common Pleas. Gilb. Hist. View of the Court of Exchequer. 7. cites Madd. 2. 4.—It determin'd about the 45 H. 3. Brady's Preface &c. 154. b.

(B) * Chief Justice.

Fol. 95.

1. **I**n the Book called *Modus tenendi Parliamentum*, it is said, that when the Parliament is assembled, debet Cancellarius Angliæ vel Capitalis Justiciarius Angliæ, scilicet, qui tenet Placita coram Rege, vel alius idoneus Honestus & facundus Justiciarius vel Clericus per ipsos Cancellarium & Capitem Justiciarum electus Pronunciare Causas Parliamenti, primo in Genere & postea in Specie, Stando.

* Some Remains there are to this Day of the Great Office of the Capital Justiciary in the Chief being under the Norman

Justice of B. R. All England, as to keeping the King's Peace and Dignity of the Crown, his Jurisdiction, and is therefore stiled Chief Justice of England. Brady's Preface to History. 153. (D).

2, 8 R. 2. cap. 2. That the Chief Justice of the Common Bench be assigned among others to take Assises and deliver Gaols, but as to the Chief Justice of the King's Bench, it shall be as for the moit Part of 100 Years last past was wont to be done. 13 H. 4. cap. 2. This is confirmed, and that no Chief Justice of the King's Bench be in any wise hereafter made Justice to take Assises in any County within the Realm of England, but only in the County of Lancaster; And that this Statute hold Place, and be in Force as long as it shall please the King for Salvation of his Prerogative.

3. Rot. Parliamenti 4 H. 4. 1. Numero. 49. The Commons pray, that the Chief Justice of the King's Bench be not Justice of Assise in any County, nor any Justice elsewhere, unless in the same Bench.

(C) Answer.

1. Be it done as hath been used heretofore.

Justices of Peace.

(A) * Justices of Peace. [Where they may be named Custodes Pacis.]

* Justices of the Peace are Judges of Record, appointed by the Queen to be Justices

1. **I**f an Indictment taken upon the Statute of 5 Eliz. for using the Art of an Ironmonger, not being brought up in it as an Apprentice

within certain Limits for the Conservation of the Peace, and for the Execution of sundry Things comprehended in their Commission, and in diverse Laws committed unto their Charge. Lamb. Eiren. 3. cap. 1.

prentice for seven Years, be certified in B. R. That at the General Sessions of the Peace of the King for the Bill of Andover in the County of Southampton, Coram A. B. and C. D. Custodibus Pacis, ac Justiciariis dieti Domini Regis infra Villam prædictam &c. Tho' the Statute gives Power to Justices of Peace to Hear and Determine the Offences against the Statute; yet it is a good Indictment taken before them, being named Custodes Pacis, and not Justices of the Peace as the Statute names them; For it is all one. Tho' I myself objected that every Constable is Custos Pacis. For it was said, that the Course and Form of all Certioraries to remove such Indictment is to name them Custodes Pacis, tho' the use in Pleadings be to name them Justices of the Peace. Pasch. 10 Car. B. R. between the King and Little, adjudged; this Matter being moved by myself in Arrest of Judgment.

2. An Order made by two Justices of Peace was said to be made *Coram Custodibus Pacis nec non Justiciariis*; It was mov'd to quash the Order; For that all Justices of the Peace are Keepers of the Peace, but all Keepers of the Peace are not Justices; and further argued, that since the Statute of 34 E. 3. cap. 1. They have not been called Conservatores Pacis only. But the Court over-rul'd the Exceptions, and adjudged the Order good. 11 Mod. 141. Mich. 6 Ann. B. R. the Queen v. Bonner.

(B) Of Conservators of the Peace, and the Original of Justices of Peace.

1. **A**FTER such Time as Queen Isabell (contending with her Husband King Edward the second) was returned over the Seas into England, accompanied with her Son Prince Edward (called afterward the third King of that Name) and with Sir Roger Mortimer, and such others of the English Nobility, as had, for the Indignation of the King, fled over the Seas unto her: She soon after got into her Hands the Person of the old King, partly by the Assistance of the Henalders that she brought with her, and partly by the Aid of such other her Friends as she found ready here: And she immediately caused him (by forced Patience) to surrender his Crown to the young Prince. And then also, for as much as it was (not without Cause) feared, that some Attempt would be made to rescue the imprisoned King, Order was taken, that he should be conveyed Secretly, and by Night Watches, from House to House, and from Castle to Castle, to the end that his favourers should be ignorant what was become of him; Yea, and then withal, it was ordained by Parliament, in the Life Time of that deposed King, and in the very first Entry of his Son's Reign (1 Ed. 3. cap. 15.) That in every Shire of the Realm, good Men and lawful (which were no Maintainers of Evil, nor Barretors in the Country) should be assigned to keep the Peace; which was as much as to say, that in every Shire the King himself should place special Eyes and Watches over the common People, that should be both willing and wise to foresee; and be also enabled with meet Authority to repress all Intention of Uproar and Force, even in the first Seed thereof, and before that it should grow up to any Offer of Danger. So that, for this Cause, (as he thinks) the Election of the Simple Conservators (or Wardens) of the Peace was first taken from the People, and translated to the Assignment of the King. Lamb. Eiren. 18, 19. cap. 4.

2. By 34 E. 3. 1. There shall be assigned in every County, for the keeping of the Peace, one Lord, and three or four of the most worthy of the County. And by 12 R. cap. 10. In every Commission there shall be but six Justices assigned. And by 14 R. 2: 11. there shall be Eight.

3. Holt Ch. J. said, he knew not whether, at first, Justices of Peace were more than High Constables. But the Statute, that made them complete Judges, is that of 34 E. 3. 1. Show. 528. in Case of Harcourt v. Fox.

4. It seems, that the Power of such Conservators of the Peace, whether by Tenure, Election, or Prescription, was *no greater than that of Constables at this Day, unless it were enlarged by some special Grant or Prescription.* 2 Hawk. Pl. C. 34. cap. 8. S. 11.

5. The extraordinary Conservators of the Peace were Persons specially commissioned in Times of imminent Danger either from Rebels or foreign Invaders, to take Care of and defend such a particular District committed to their Charge, and to preserve the Peace within the Limits of it; and these had Power to command the Sheriff with his whole Possé to aid and assist them. 2 Hawk. Pl. C. 34. cap. 8. S. 12.

(C) Their Power within the County.

See Orders of Justices of Peace (E)

1. **B**Y 4 E. 3. 2. There shall be assigned good and lawful Men in every County to keep the Peace, at the Time of such Assignment Mention shall be made that those who are indicted or taken by the said Keepers of the Peace, shall not be let to Mainprize by the Sheriff, if they are not mainpernable by Law, and that such as are indicted shall not be delivered but by Common Law; and the Justices of Gaol-Delivery are impowered to deliver the Gaols of those who are indicted before the Keepers of the Peace, to whom the said Keepers shall send their Indictments; and the said Justices of Gaol-Delivery shall enquire if the Sheriff's and Jailors have made Deliverance or let to Mainprize, any who are so indicted, and are not mainpernable, and punish the said Sheriff's &c. accordingly.

2. 18 E. 3. Stat. 2. S. 2. Enacts, that Two or three of the best Reputation in the Counties, shall be assigned Keepers of the Peace by the King's Commission: And at what Time Need shall be the same with other wise and learned in the Law, shall be assign'd by the King's Commission to hear and determine Felonies, and Trespasses done against the Peace in the same Counties, and to inflict Punishment reasonably according to the Law and Reason, and the Manner of the Deed.

3. 34 E. 3. cap. 1. Enacts, that In every County of England shall be assigned for the keeping of the Peace one Lord, and with him three or four of the most worthy in the County, with some learned in the Law, and they shall have Power to restrain the Offenders, Rioters, and all other Barretors, and to pursue, arrest, take and chastise them according to their Trespass or Offence; and to cause them to be imprisoned and duly punished according to the Law and Customs of the Realm, and according to that which to them shall seem best to do by their Discretion and good Advise-ment; and also to inform them, and to inquire of all those that have been Pillors and Robbers in the Parts beyond the Sea, and be now come again, and go wandering, and will not labour as they were wont in Times past, and to take and arrest all those that they may find by Indictment, or by Suspicion, and to put them in Prison, and to take of all them that be not of good Fame, where they shall be found, sufficient Surety, and Mainprize of their good Behaviour towards the King and his People, and the other duty to punish, to the Intent that the People be not by such Rioters or Rebels, troubled nor endamaged, nor the Peace blemished, nor Merchants nor other passing by the Highways of the Realm disturbed, nor put in the Peril which may happen of such Offenders; and also to hear and determine at the King's Suit, all Manner of Felonies and Trespasses done in the same County, according to the Laws and Customs aforesaid.

It has been questioned, whether Justices of Peace, as such, have not Power to enquire of Felonies &c. from the general Words of this Statute, which is express, That the Persons assign'd to keep the Peace, shall have Power among other Things to hear and determine Felonies &c. but the common Opinion of

Lawyers, and the Course of Precedents are in Favour of the contrary, which the Serjeant says, he takes to be at present settled Law, it having been solemnly adjudged, that the Caption of an Indictment

of Trespafs before Justices of Peace, without adding *Nec non ad Diversas Felonias &c.* Assignat. is naught. Also it seems certain, that even this Clause gives them no Jurisdiction over Offences specially appointed to be determined before Justices of Oyer &c. Yet inasmuch as all Felonies include in them a Breach of the Peace, it has been a generally approv'd Practice for Justices of Peace to take Examinations of Persons brought before them for Felony, as they are expressly directed to do by 2 & 3 Ph. & Ma. 10. And also to commit for Felony, and to take the Informations of Prosecutors upon Oath, and to bind them over to prosecute, and to commit those who shall refuse to be so bound, if it appear that they can give material Evidence; but inasmuch as the Statute of Ph. & Ma. directs Justices of Peace, in Case of Felony, to certify the Examinations and Informations to the Justices of Gaol Delivery; they seldom in Prudence proceed farther as to any Felonies, except petit Larcenies. 2 Hawk. Pl. C. Abr. 4., 41. cap. 8. S. 19.—But in the Folio Edit. it is Pag. 53. S. 53.

4. Indictment was certified *Capt. coram W. N. & Sociis suis Justiciariis Pacis Com. E.* but does not say *nec non ad diversas Felonias transgress. & alia Malefacta in Comitatu predicti. perpetrat. Audiend' & Terminand'*, and it was of Counterfeiting of Money, to which the Commission did not extend, and therefore it was dismissed. Br. Indictment, pl. 50. cites 2 R. 2. 9.

* But he ought to commit the Offender immediately. 8 Rep. 120. a. (a)—He may commit upon the View of the Force, but then he must [not only do it immediately, but also] make a Record of it. Ibid. (c) in Dr. Bonham's Case.—S P That it must be *Flagranti Crimine*; and if he does not commit them immediately upon the View, he cannot commit them afterwards; Per Coke Ch. J. Trin. 7 Jac. C. B. in S. C. by the Name of the College of Physician's Case.

5. By 15 R. 2. cap. 2. *When Forcible Entry is made into Lands or Church-Livings, one or more Justices of the Peace taking sufficient Power, and going to the Place so kept with Force, may * commit the Offender to the next Gaol, there to remain Convict by the Justices Record till he have made Fine and Ransom to the King. And herein the Sheriff and all others shall be Assistants in Pain of Imprisonment and making great Fines.*

Br. Corone, pl. 25. cites S. C. Justices of Peace cannot assign a Coroner to an Approver. 4 Inst. 165.—Staufd. Pl. C. 144. cap. 55. S. P. and therefore a Man cannot become an Approver before them. Cites Fitzh. tit. Corone, pl. 457. 9 H. 4.

6. A Man indicted before Justices of Peace in Bury confessed the Felony, and had a Coroner, and made Appellor in B. R. and the Appeal was held void, because Justices of Peace have no Authority to assign a Coroner, nor to enquire of Treason. Br. Peace, pl. 3. cites 9 H. 4. 1.

7. *False Imprisonment*; the Defendant justified, because the Plaintiff held a Manor with Force, and D. F. Justice of Peace took him, and recorded the Force, and sent him to the Defendant to be imprisoned in the Gaol of D. where the Defendant was Gaoler &c. Per Yelverton, the Statute gave this Authority to Justices of Peace, and not to one Justice. Per Newton Ch. J. the Statute gave it to one Justice, and also to more Justices; therefore Answer; Quod Nota. Br. Peace, pl. 4. cites 21 H. 6. 5.

8. By 1 E. 4. cap. 2. S. 4. *Sheriffs shall deliver all Manner of Indictments and Presentments taken at their Tourns or Law Days, to the Justices of Peace at their next Sessions; And S. 6. the Justices of Peace shall have Power to award Process upon such Indictments and Presentments, as if taken before them; and also to arraign and deliver all Persons so indicted.*

9. In no Case one Justice alone can make Inquisition, if it be not given by Statute. Br. Peace, pl. 14. cites 7 E. 4. 18.

10. A Justice of Peace by his Discretion may arrest a Man to find Surety of Peace. Br. Peace, pl. 8. cites 9 E. 4. 3. Per Littleton.—S. P. Br. Judges, pl. 10. cites S. C.

11. A Justice of Peace may examine Felony, and inform the Jury at Sessions; Per Catesby, Choke. and Pigot. Per Brian contra, but he may award and take Surety of Peace alone, but cannot hold Sessions alone; and of that which he does in Sessions he is excused; Contra of speaking out of Sessions. Br. Peace, pl. 19. cites 21 E. 4. 67.

12. No Recognizances were taken to the King by the ancient Conservators of the Peace; But now the Justices take Bail by Recognizance to the King. G. Hist. View of the Exchequer, 102, 103.—After the Justices of Peace were appointed, they issued their Warrants in order to apprehend Offenders, which they might do, by their being assigned to keep the Peace in each particular County; And if it were a bailable Offender, they bound

bound him over by Recognizance, either to appear at the Assises or Quarter Sessions, and likewise bound over the Evidence to prosecute; And if the Prosecuted or Prosecutor did not appear, such Recognizance was forfeited; and the Clerk of the Sessions, or the Peace, respectively, estreated such Recognizance into the Exchequer. G. Hist. View of the Exchequer. 137.

13. One Justice of Peace cannot commit another for Breach of the Peace. Jenk. 174. pl. 48. cites 3 H. 7. Fitz. Justice de Peace. 3. By all the Justices. For Par in Parem non habet Imperium.—But the Sessions of the Peace may commit one for Breach of the Peace. Ibid. cites Lamb Justice. 385.—And yet it seems to be agreed, that if a Justice of Peace gives just Cause to any Person to demand the Surety of the Peace against him, he may be compelled by any other Justice to find such Security; for the publick Peace requires an immediate Remedy in all such Cases. 2 Hawk. Pl. C. 41, 42. cap. 8. S. 46.

If any of them are absent, their Fellow Justices cannot amerce them, tho' no Sessions can be kept without them; For their Authority at the

Sessions is all equal, so that he which is not of the Quorum, hath like Power with him that is, except in special Cases set forth in the Commission and Statutes; and therefore it was held 3 H. 7. Fitz. tit. Justice del Peace. 3. that if one, who is not of the Quorum, will be so bold as to rebuke one that is of the Quorum, he and his Companions cannot commit him to Prison for it. Lamb. Eiren. 369, 370.

14. If a Justice of Peace be ill, and hears of a Riot, he may send his Servants to arrest them without Writing. Br. Peace, pl. 7. cites 14 H. 7. 8.

And if he hears that riotous Persons will come to Dale to make

a Riot, he may leave his Servants there, and command them, that if they come after, to arrest them, and yet the Justice does not see the Riot, and this for the hasty Remedy. Ibid. —But one Justice of Peace alone cannot punish the Riot when it is done, but two &c. But one only may prevent the Riot ut supra, and at the Time of the Riot one only may take Surety. Ibid.

15. In false Imprisonment; A Justice of Peace cannot make a Warrant to take a Felon, unless he be indicted of Felony; for he is a Justice of Record, and ought * to act by the Record. Per Fitzh. J. And per Brudnel Ch. J. he cannot make a Warrant to arrest a Felon, but may make a Warrant for keeping of the Peace, and he may make any one his Officer that he pleases, Quod fuit Concettum; And he cannot arrest a Man for Suspicion of Felony, unless he has the same Suspicion of him himself, and not for the Suspicion which others have of him. Br. Peace, pl. 6. cites 14 H. 8. 10.

*Orig. [Ovcr.]

16. And it is said elsewhere, that one Justice of Peace alone cannot grant Capias nor other Procefs, but two Justices at least shall do it; and this, fitting the Court in Sessions, and not out of Court. Ibid.

17. They have several and distinct Authorities and Commissions; one to hear and determine, which is kept at a Place certain, and is to be adjourned to a certain Time; And a Commission of the Peace, by Vertue whereof they are to keep their ordinary Sessions; And therefore an Indictment for forging a false Deed taken before them ad Sessionem Pacis was discharged. Cro. E. 87. Hill. 30 Eliz. B. R. Smith's Case.

18. By 21 Jac. 1. cap. 4. Actions popular, which may be presented before Justices of Assise, Nisi Prius, Gaol Delivery, Oyer and Terminer, or of Peace, shall be prosecuted only in the Counties where the Offences were committed, except for Recusancy, Maintenance, Champerty, buying of Titles, concealing of Customs, &c. or transporting of Gold, Silver, Munitiion, Wooll, Wooll-fells, or Leather. This Statute ordains many popular Actions upon penal Statutes, to be sued at this

Day before Justices of Peace in the Country, and not elsewhere; But it is expounded, not to extend to penal Statutes, where the Offence consists only in Non feassance, as Recusancy &c. Jenk. 228. pl. 94.

19. In Indictment against a Sheriff's Bailiff for Extortion, it was held, that Justices of Peace have no Power themselves to give and tax Damages to the Party. Jo. 380. Hill. 9 Car. B. R. the King v. Lamferne.

But the Jury ought to find the Damages, and then they might

treble them. But it is doubtful if the Act of 23 H. 6. cap. 10. (upon which the Indictment was founded,) extends to Extortions, unless taken upon Arrests; And Judgment was reversed. Jo. 438. 448. 449 Hill. 11 Car. B. R. Brunlden's Case.—als. Bumped's Case.

They cannot inquire, try, he is indicted. Jo. 379. Hill. 11 Car. B. R. the King v. Lamferne.

20. Justices of Peace cannot try one that is indicted, the same Day that he is indicted. Jo. 379. Hill. 11 Car. B. R. the King v. Lamferne. And determine civil Offences as Extortion, in one and the same Day; For the Party ought to have convenient Time to prepare for his Trial. Cro. C. 448. Hill. 11 Car. B. R. Bumpstead's Case. — So in Case of *Barretry*; And because they did, Judgment was reversed. But the Court said, that in Cases of Life, where the Offender is in Custody, they may try it the same Day. Sid. 334, 335. Pasch. 19 Car. 2. B. R. the King v. Browne — (But the Reporter adds, that this Opinion and Difference, as it seems to him, is founded more upon Authorities than upon Reason; which wills, that the Offender shall have so long time to advise in Case of Life, as in Case of less Offences. Ibid. 335.) — But Trin. 14 Jac. B. R. where one had been indicted at the Sessions of the Peace at W. for a common *Barretor*, and at the same Sessions arraigned thereupon, and traversed it, and a *Venire Facias* awarded immediately to try it, and he was convicted and fined 40 l. and forthwith committed to Prison till he should satisfy it, the Indictment and Proceedings were removed by *Certiorari*, and the Party removed by *Habeas Corpus*, who would have discharged himself by Exceptions to the Indictment, it was resolved, that he could not; because Judgment being given, he cannot discharge it without bringing a *Writ of Error*. Whereupon he brought Error, and assigned for Error as before, that the Trial and awarding the *Venire Facias* the same Sessions, he was indicted, could not be good; For that ought to be made returnable at the next Sessions, and not the next Day; and cited the 22 E. 4. Corone 44. sed non allocatur. For the Party being present may be tried the same Day, as well as at another Time, and so is the common Experience. And they conceived, that presently after the Conviction they may impose a Fine, and commit to Prison until it be paid, which is the Execution for the King. Cro. J. 404. Trin. 14 Jac. B. R. Rice v. the King.

21. It was said, that they cannot take *Inquisitions* of Riots, &c. but in their Sessions. Quære. Sid. 186. Pasch. 16 Car. 2. B. R. the King v. Cuffens & al.

22. They may inquire of *Libels*. Sid. 271. Trin. 17 Car. 2. B. R. the King v. Sumner and Hilliard.

*S. P. for selling Earthen Ware in London. 5 Mod. 149. Hill. 7 W. 3. the King v. Clough.

23. The Defendant was indicted before the Justices of Peace in their Sessions, upon the Statute of 2 & 3 Ph. & M. cap. 11. he being a *Clothworker*, and not living in a City, Borough, or Town Corporate, and yet keeping in his House more than one *Woollen Loom*, by Reason whereof he had forfeited forty Shillings per Week. An Exception was taken to this Indictment, for that the Justices had not Power to take it before them; for they cannot by Law hold Cognizance of Pleas upon *penal Statutes*, without an express Power given them by these Acts, and here being no such Authority allowed by this Act, the Indictment was for that Reason quashed. 4 Mod. 379. Hill. 6 W. & M. B. R. the Queen v. Buggs.

24. Though before the 13 & 14 Car. 2. the Justices of Peace could not make *Constables*, yet they could swear them; And though as to the Form of their Commission and Authority they are of late, yet they have the same Power as Conservators of the Peace at Common Law had: All the Conservators Power is vested in the Justices, and in that Quality they shall be intended to swear Constables. Per Holt Ch. J. Hill. 7 W. 3. 12 Mod. 88. Fletcher v. Ingram.

25. Where a special Authority is given to Justices of Peace out of Sessions, it ought to appear that that Authority was exactly pursued; Per Holt Ch. J. 2 Salk. 475. Mich. 8 W. 3. in the Case of the Inhabitants of Chittinston Parish v. Penhurst.

26. Conservators of the Peace did commit at Common Law, and it was incident to their Office, as it is to the Office of Justices of Peace, who are not authorized by any express Words in their Commission, but do it *ratione Officii*. 1 Salk. 347. Trin. 7 W. 3. B. R. in Case of the King v. Kendal and Roe.

27. It was said by Holt Ch. J. to have been held by Ld. Ch. J. Hale, that if a Justice of Peace direct his Warrant to any particular Person, he might execute it. 1 Salk. 347. in Case of the King v. Kendal and Roe.

28. 7 & 8 W. 3. cap. 6. s. 1. Enacts that for the more easy Recovery of small Tithes, where the same do not amount to above the yearly Value of 40 s. from any one Person, every Person shall truly set out, and pay all small Tithes, and Compositions for the same, with all Offerings, Oblations,

or Obventions, to the Rectors, Vicars, and other Persons to whom they shall be due, according to the Rights, Customs, and Prescriptions used within the Parishes; and if any Person shall subtract, or fail in the Payment of such small Tithes, Offerings &c. twenty Days after Demand, it shall be lawful for the Persons, to whom the same shall be due, to make their Complaint in Writing unto two Justices of Peace within the Place where the same shall grow due, neither of which Justices is to be Patron of the Church whence the Tithes arise, nor interited in such Tithes &c.

S. 2. If any Complaint shall be brought to two Justices of Peace, concerning small Tithes, Offerings, &c. the Justices are required to Summon in Writing, by reasonable Warning, every Person against whom Complaint shall be made; And after his Appearance, or upon Default of Appearance, the said Summons being proved upon Oath, the Justices shall proceed to hear and determine the Complaint; and upon the Proofs, shall in Writing adjudge the Case, and give such Compensation for such Tithes &c. as they shall judge reasonable, and also Costs, not exceeding ten Skillings.

S. 3. If any Person shall neglect, by ten Days after Notice, to pay any such Sum, as upon such Complaint shall, by two Justices, be adjudged, the Constables and Churchwardens of the Parish, or one of them, shall, by Warrant of the said Justices, distrein the Goods of the Party; and after detaining them three Days, in case the Sum adjudged together with reasonable Charges be not paid, shall make publick sale of the same.

S. 4. It shall be lawful for all Justices of Peace, in the Examination of all Matters offered to them by this Act, to administer an Oath to any Witnesses.

S. 5. This Act shall not extend to any Tithes &c. within London, nor to any other City or Town corporate, where the same are settled by Act of Parliament.

S. 6. No Complaint concerning any small Tithes &c. shall be determined by Justices of Peace, unless the Complaint be made within two Years after the same Tithes &c. become due.

S. 7. Any Person aggrieved by any Judgment given by two Justices, may appeal to the next Quarter Sessions; and if the Justices then present, find Cause to confirm the Judgment, they shall give Costs against the Appellant, to be levied by Distress and Sale of Goods; and no Proceedings by Virtue of this Act, shall be removed or superseded by Certiorari, or other Writ, unless the Title of such Tithes &c. be in question.

S. 8. Where any Person complained of for subtracting small Tithes &c. shall before the Justices insist upon any Prescription, Composition, or Modus, Agreement, or Title, and deliver the same in Writing to the Justices subscribed by him, and shall then give, to the Party complaining, Security to the Satisfaction of the Justices, to pay all such Costs and Damages, as upon a Trial at Law shall be given against him, in Case the said Prescription &c. shall not be allowed, the Justices shall forbear to give Judgment in the Matter, and the Persons complaining shall be at Liberty to prosecute such Persons, for their Subtraction, in any other Court.

S. 9. Every Person who shall, by Vertue of this Act, obtain any Judgment, or against whom any Judgment shall be obtained, before Justices of Peace for small Tithes &c. shall cause the Judgment to be inrolled at the next Quarter Sessions; and the Clerk of the Peace is required, on tender thereof, to inrol the same; and he shall not ask for the Inrolment, any Fee exceeding one Shilling.

S. 10. If any Person against whom such Judgment shall be had, shall remove out of the County &c. after Judgment, and before the levying the Sum; the Justices who made the Judgment, or one of them, shall certify the same to any Justice of Peace of such other County, wherein the Person shall be Inhabitant; which Justice is required, by Warrant directed to the Constables or Churchwardens of the Place, to levy the Sum adjudged, upon the Goods of such Person.

S. 12. *The Justices who shall bear and determine any of the Matters aforesaid, shall have Power to give Cofts, not exceeding ten Shillings, to the Party prosecuted, if they find the Complaint false and vexatious; which Cofts shall be levied in Manner aforesaid.*

S. 13. *If any Person shall be sued for any thing done in Execution of this Act, and the Plaintiff shall discontinue &c. such Person shall recover Double Cofts.*

S. 14. *Any Person who shall begin any Suit or Recovery of small Tithes &c. in his Majesty's Court of Exchequer, or in any Ecclesiastical Court, shall have no Benefit by this Act for the same Matter.*

S. 15. *This Act shall continue three Years, &c.*

This Act is made perpetual by 3 Annæ. cap. 18.

29. By the Statute of 1 E. 3. 16. the Justices of Peace have a Power to inquire of all publick Nuisances; Per Holt Ch. J. in an Indictment for not repairing a Common Bridge. 6 Mod. 255. Mich. 3 Annæ, B. R. in Case of the Queen v. Saintiff.

In Arrest of Judgment in an Indictment of Perjury, before Justices of Peace, Exception was taken, that Justices of Peace have no Power by their Commission, to take Indictments of Perjury and Battery, but the Court doubted, and seemed afterwards of Opinion, that they might. Mich. . 4 Annæ. B. R. 11 Mod. 67. the Queen v. Gunn.

30. Their Power is created by Act of Parliament within Time of Memory, and they have no other Authority than what is thereby given them; And the general Words of their Commission *De omnibus aliis Transgressionibus & Malefactis quibuscunque*, must be understood of such Crime, as they have Power over by the several Statutes which created or enlarged their Power. *So it is of Perjury at Common Law; But Perjury upon the Statute 5 Eliz. is indictable before the Justices of Sessions, because it is so appointed by the particular Provision of that Statute. Per Cur. 1 Salk. 406. Mich. 9 Annæ. in Case of the Queen v. Yarrington.

31. 2 Geo. 2. cap. 28. S. 11. *No License shall be granted to keep a Common Inn or Alehouse, or to retail Brandy, but at a general Meeting of the Justices acting in the Division where the Person dwells; and all Licences granted to the contrary shall be void.*

32. The Authority given to Justices of the Peace by the Statutes, and usually exercised by them, chiefly concern *Alehouses*, Apprentices, *Badgers*, Bail, Bakers, Bastards, Beer, and Ale; *Carriages*, and Prizes of Land Carriages; Church-wardens, Conitables, Cottages, Curling and Swearing; *Drunkenness*, *Excise*, *Felonies*, Forcible Entry and Detainer; *Fore-stallers*, *Games* not lawful; the Game, and Game-keepers; *Guns*, *Greyhounds*, *Setting Dogs*, *Ferrets*, *Snares*, *Nets*, *Hares*, *Partridges*, *Pheasants*, *Pidgeons*, *Hawks*, *Fish*, *Deer*, &c. *Goals*, *Hackney Coaches*, *Hedge Breakers*, *Highways*, and Surveyors of Highways; *Houses of Correction*, *Labourers*, *Leather*, *Lord's Day*; *Defaults* about *Money*, *Poor*, &c. as setting them to work, settling them in a Parish, or removing them from a Parish; And *Overseers of the Poor*, *Papists*, *Rates*, and *Parish Taxes*; *Regrators*, *Riots*, *Robbing Orchards*, &c. *Servants*, *Soldiers*, and providing *Carts* and *Carriages* for them upon their *March*; *Small Tithes*, *Treasurers of the County*; *Vagabonds* and *Vagrants*; *Wages*, *Waggoners*, and *Waggoners*, *Weights* and *Measures*, *Wood-stealers*, and *Destroyers of Timber*, or other *Trees*, &c. 4 Vol. R. S. L. III. 112.

33. 11 Geo. 2. cap. 19. S. 4. *Where Goods carried off the Premises, fraudulently or clandestinely, to prevent the Landlord from distraining, shall not exceed the Value of 50 l. it shall be lawful for the Landlord, his Bailiff, Servant or Agent, to exhibit a Complaint in Writing against such Offenders before two Justices of Peace, residing near the Place, not being interested in the Tenements; who may Summon the Parties, and examine the Facts, and all Witnesses upon Oath; or if Quakers, upon Affirmation; and in a summary Way determine whether such Persons be guilty of the Offence, and inquire of the Value of the Goods by them fraudulently carried off or concealed; and upon Proof of the Offence, by Order of the said Justices may adjudge the Offenders to pay double the Value of the Goods to such Landlord, his Bailiff,*

liff, Servant, or Agent, as the Justices shall appoint; And in Case the Offenders, having Notice of such Order, shall neglect so to do, shall by Warrant levy the same by Distress and Sale of Goods; and for want of Distress, may commit the Offenders to the House of Correction, to be kept to hard Labour for six Months, unless the Money be sooner satisfied.

S. 5. It shall be lawful for any Person aggrieved by such Order of the two Justices to appeal to the next Quarter Sessions, who shall hear and determine such Appeal, and give Costs to either Party.

S. 6. Where the Party appealing shall enter into a Recognizance with Surety in double the Sum ordered, with Condition to appear at such Quarter Sessions, the Order of the two Justices shall not be executed in the mean Time.

S. 16. If any Tenant, holding Tenements at a Rack-rent, or where the Rent reserved shall be full three fourths of the yearly Value of the Premises, who shall be in Arrear for one Year's Rent, shall desert the Premises, and leave the same uncultivated or unoccupied, so as no sufficient Distress can be had to countervail the Arrears; it shall be lawful for two Justices of Peace, (having no Interest in the Premises) at the Request of the Landlord, his Bailiff, or Receiver, to go upon and view the same, and to affix on the most notorious Part Notice in Writing, what Day (at the Distance of fourteen Days at least) they will return to take a second View; and if upon such second View, the Tenant, or some Person on his Behalf, shall not appear and pay the Rent in Arrear, or there shall not be sufficient Distress upon the Premises, the Justices may put the Landlord into Possession, and the Lease to such Tenant, as to any Demise therein contained only, shall become void.

S. 17. Provided, that such Proceedings of the Justices shall be examined into, in a summary Way, by the next Justices of Assize; and if they lie in London or Middlesex, by the Judges of the Courts of King's Bench or Common Pleas; and if in the Counties Palatine, then before the Judges thereof; and if in Wales, before the Courts of Grand Sessions; Who are empowered to order Restitution to be made to such Tenant, together with his Costs, to be paid by the Landlord, if they shall see Cause for the same; and in Case they shall affirm the Act of the Justices, to award Costs not exceeding 5 l. for the Appeal.

(D) Their Power out of the County, or within Corporations, where there are Particular Justices.

1. **W**HETHER the Grant is, that the Abbot of St. Albans shall make Justices of Peace there, and that the other Justices of the County shall not intermeddle, there the Justices of the County are restrained, so that they cannot intermeddle of things within the Franchise; and if they do, it is Coram non Judice. Br. Patents, pl. 111. cites 20 H. 7. 6. 8. Per Fineux Ch. J.

And the Grant was, that the Justices of the Franchise should have the like Authority, as the Justices of

the County of Hertford; And per Fineux, such general Grant, referring to a Certainty as above, is good in the Case of the King. Ibid — Quære, if the same Point as in the principal Case has not lately been determined accordingly, in a Case of the City of Salisbury.

2. If a Justice of Peace of one County pursues one into another County, for Felony done in the County of which he is Justice, and there takes him in the other County, it is held, that he is his Prisoner in the County where he takes him, and ought to imprison him in the other County, and cannot carry him to Gaol in the County where he did the Felony; For he is not his Prisoner there; Because his Pursuit in such Case is not material, and then he has nothing to do in the County where he took him, any more than any other Person. And this proves, that a Justice of Peace in one County, has no Authority in another County. Arg. Pl. C. 37. a. in Case of Platt v. the Sheriff of London.

S. C. cited Cro. C. 212. in the Case of Helier v. Benhurst (Hundred). — The Point, that the Imprisonment of him must be in the foreign County, is

3. One

by Brian, who said, that for his Deliverance he might be removed by Writ. But it was debated, whether he ought to carry him to the Gaol where he did the Felony; And it is there said, that some thought that he should, because he may be more readily there delivered. See the Year-Book of 13 E. 4. 9. a. in Case of the Lord Say v. the Town of Nottingham.

Cro. C. 211. S. C. and there, Page 212. it was held by Jones and Croke J. that there is a Difference where a Justice of Peace does an Act to compel another to perform [any thing] as to imprison any for Non-performance, or to command one for any Offence to be imprisoned, such Acts cannot be

3. One was robbed in Berks. and afterwards made Oath thereof in London before a Justice of Peace of Berks, and who dwelt within the said County, but at the Time of taking the Oath was at his Chambers in the Temple. The Oath was pursuant to the Statute, and no mention made where it was taken; But the Jury found it to be in London. The Justices were at first divided, upon the Question, whether the Oath was well taken or not? but after, upon putting the Case to the Justices at Serjeant's Inn in Fleetstreet, who were all of Opinion, that the Oath was well taken, the Justices of B. R. upon Conference among themselves, agreed to give Judgment for the Plaintiff, which was done accordingly. And Hyde, who delivered the Opinion of the Court, gave for Reason, that this was a particular Case, and this Oath is only taken by the Justice of Peace, not Virtute Officii, but as a Person designed by the Statute for this particular Purpose; and that it was not their Opinion, that in other Cases, where a Justice does a Thing by Virtue of his Office, that he may do it out of the County; But on the contrary, they were of Opinion, that such Acts would not be good, and so this is a singular Case, and stands upon a particular Reason different from the other Cases. Jo. 239. Pasch. 7 Car. B. R. Helier v. the Hundred of Benhurst.

done in any Place but where his Jurisdiction extends. But it is an usual Course for Justices of Peace to take Informations against Offenders in any Place out of the County to prove Offences in the County where they are committed. And sometimes they take Recognizance to prosecute; and such Recognizances taken out of the County by voluntary Assent of the Parties bind well enough, and are usual. But they cannot compel any out of the County to enter into a Recognizance; For they cannot use Coercive Power out of the County. And upon this the Court would advise; And afterwards the Judgment was given as in the Case itself above.

Holt's Rep. 407. S. C. verbatim, only leaves out the Word (Not) at the End of the Case.

4. The Magistrates of a Town had a Mind to turn the Clerk of the Market out of his Place, and procured a Forcible Entry to be made on the Market House, to get the Possession thereof from him; and the Justices of the Town being, as was suggested, in the Faction, would not inquire of the Force. And per Holt Ch. J. if all the Justices of a Corporation are concerned in a Force, and will not inquire of it, the next Justices of the County shall do it: For their denying to do it, is a Forfeiture of their Exemption from the County; And a Mandamus was granted, jointly and severally, to all the Justices of the Town, to inquire of the Force; For the Court would not suppose them all Guilty. 6 Mod. 164. Pasch. 3 Annæ. B. R. Caly v. Hardy, Golsen, & al. Justices of the Peace of the Town of Ipswich.

5. It seems to be a good General Rule, that no Process without Writ can be well awarded on any Indictment, or Appeal &c. from any Court, out of the County wherein it sits. 2 Hawk. Pl. C. 281, 282. cap. 27. S. 1.

6. It seems questionable, whether Justices of Peace, being assigned by their Commission to bear and determine Felonies, are as well within the Meaning as Letter of the 5 E. 3. 11? For, as on the one Side it may be argued, that this, being a remedial Law, ought to receive as favourable and large an Interpretation as the Words will admit; So on the other Side it may be said, that the Preamble of the Statute making mention as well of Persons appealed, as of those who are indicted, cannot be thought to have any Manner of Regard to Justices of the Peace before whom no Appeal lies; and nothing can be more reasonable, than to construe one Part of a Statute by another. 2 Hawk. Pl. C. 282. cap. 27. S. 3.

7. But by 22 H. 8. 5. Par. 5. Justices of Peace of the Shire &c. wherein any decayed Bridge shall be &c. shall make Process into every Shire within this Realm, against any Persons who ought to amend such Bridge, being presented before

before them to be decayed &c. — Also they have the like Power by other Statutes in many other Cafes. 2 Hawk. Pl. C. 282. cap. 27. S. 4.

8. 9 Geo. 1. cap. 7. S. 3. Enacts that, *Justices of Peace* dwelling in any City, or Precinct, that is a County of it self situate within the County at large, for which he shall be appointed a Justice, tho' not within the same County may grant Warrants &c. take Examinations, and make Orders for any Matters, which one Justice may Act in, at his own dwelling-house, tho' it be out of the County. Provided that nothing therein shall give Power to the Justices for the Counties at large, to hold their Quarter-Sessions in Cities, or Towns, that are Counties of themselves, nor impower Justices &c. of the Counties at large to Act in any Matters arising within Cities or Towns, which are Counties of themselves.

(E) * Power and Jurisdiction, What. By what Words.

1. **T**HE Justices of Peace, by the general Words of their Commission, have Power to punish any Offences, against any Statute made concerning the Peace of the Nation; per Holt Ch. J. 4 Mod. 51. in Case of the King v. Alfop.

* See the several other proper Titles, as forcible Entry, &c. for more Matters relating to this Head.

2. The [bare] naming them in an Act of Parliament doth not give them more Authority than they had before; per Holt Ch. J. 1. Show. 339. Mich. 3 W. & M. in Case of the King v. Alfop.

The principal Case was upon the Statute 2 & 3 E. 6 14.

against shooting of Hailshot (since Repealed) in which there was a Proviso, that it should not restrain those from shooting who had Authority so to do by the 33 H. 8. 6. and that all others who should presume to shoot should present their own Names to the next Justice of Peace who is to see them recorded at the Sessions, whence it was Argued, that it seemed to be an Offence inquirable there, to which it was answered, That the Names of such Persons were to be presented and recorded at the Sessions, that the King might know what Men were able to serve him in his Wars; and it was agreed that the Party might be Indicted for the Offence before Justices of Oyer and Terminer, but not before Justices of Peace for want of Jurisdiction. 4 Mod. 49. to 51. the King v. Alfop.

3. The general Words of the Commission of Justices of Peace, *De omnibus aliis Transgressionibus & Malefactis quibuscunque*, must be understood of such Crimes as they have Power over by the several Statutes which created or enlarged their Power. 1 Salk. 406. the Queen v. Yarrington.

(F) Of the Warrants, and the Form &c. of them. In General.

1. **A**NY Justice of Peace may by Word of Mouth authorise any one to arrest another, who shall be guilty of an Actual Breach of the Peace in his Presence, or of a Riot in his Absence. Also, he may grant his Warrant to arrest a Man for Treason, Felony, Præmunire, or any other Offence against the Peace; also, where-ever a Statute gives any one Justice of Peace Jurisdiction over an Offence, or Power to require a Person to do any certain Thing, it impliedly Impowers such Justice to bring the Party before him &c. but Anciently it was holden, that one Justice of Peace could not make out a Warrant for an Offence cognizable only by a Sessions of two or more Justices, but the contrary Opinion seems now to be Established by constant Experience. And by the like Experience, the Power of a Justice of Peace of granting Warrants for Felony, or other Misdemeanor, before any Indictment found, seems also at this Day to be Established; yet since the old Books are generally to the Contrary, it is adviseable for Justices of Peace to be very cautious in this Particular, especially

cially where the Crime for which the Warrant is made, cannot be heard and determined by the Justice who made it, without the Concurrence of others. 2 Hawk. Pl. C. Abr. 84. cap. 13. S. 10.

2. It ought to be *under the Hand and Seal* of the Justice who makes it out. 2 Hawk. Pl. C. 85. cap. 13. S. 21.

3. And to set forth the *Year and Day when made*, that in an Action brought upon an Arrest made by Virtue of it, it may appear to have been Prior to such Arrest. 2 Hawk. Pl. C. 85. cap. 13. S. 22.

4. It is safe, but perhaps not necessary, in the Body of the Warrant to shew the *Place* where it was made; yet it seems necessary to set forth the *County* in the Margin, at least, if it be not set forth in the Body. 2 Hawk. Pl. C. 85. cap. 13. S. 23.

5. It may be made either *in the Name of* the King, or of the Justice himself, as appears from the Precedents therein before referred to. 2 Hawk. Pl. C. 85. cap. 13. S. 24.

6. If it be for the Peace, or *good Behaviour*, it is adviseable to *set forth the special Cause* upon which it is granted; but if it be for *Treason or Felony*, or other Offence of an enormous Nature, it is said, that it is *not necessary* to set it forth; and it seems to be rather Discretionary, than Necessary to set it forth in any Case. 2 Hawk. Pl. C. 85. cap. 13. S. 25.

A Justice of Peace ought not to make a general Warrant, nor

can a Constable break a House in the Night, or at any Time unless in the Case of Felony and Treason. 1 Buls. 146. Foster v. Hill.—A Justice of Peace may make a Warrant to bring a Person before himself to find Sureties for the good Behaviour, and it will be good and sufficient in Law; For most Times he who makes the Warrant has the best Knowledge of the Matter, and therefore more apt to do Justice in the Case; Per Wray Ch. J. 5 Rep. 59. b. Hill. 32 Eliz. B. R. in Foster's Case.

7. Such a Warrant may be either *General*, to bring the Party before any Justice of the Peace of the County, or *Special*, to bring him before the Justice only who granted it. 2 Hawk. Pl. C. 85. cap. 13. S. 26.

8. It may be *directed to* the Sheriff, Bayliff, Constable, or to any *indifferent Person* by Name, who is no Officer; for that the Justice may authorize any one to be his Officer, whom he pleases to make such; yet it is most adviseable to direct it to the Constable of the Precinct wherein it is to be executed; For that no other Constable, and a fortiori no private Person is compellable to serve it. 2 Hawk. Pl. C. 85. cap. 13. S. 27.

(G) Warrants executed How.

1. A BAILIFF or a Constable, 'if they be sworn and commonly known to be Officers, and act within their own Precincts, need not shew their Warrants to the Party, notwithstanding he demand the sight of it; but these and all other Persons whatsoever making an Arrest, ought to acquaint the Party with the Substance of their Warrants, and that all private Persons to whom such Warrants shall be directed, and even Officers, if they be not sworn and commonly known, and even these, if they act out of their own Precincts, must shew their Warrants, if demanded. 2 Hawk. Pl. C. 85, 86. cap. 13. S. 28.

2. The Sheriff having such Warrant directed to him, may Authorise others to execute it; but every other Person to whom it is directed, must Personally execute it; yet it seems, that any one may lawfully assist him. 2 Hawk. Pl. C. 86. cap. 13. S. 29.

3. If a Warrant be generally directed to all Constables, no one can execute it out of his own Precinct; but if it be directed to a particular Constable by Name, he may execute it any where within the Jurisdiction of the Justice. 2 Hawk. Pl. C. 86. cap. 13. S. 30.

(H) Of

(H) Of their taking *Bail*.

1. **BY** 3 H. 7. 3. Two *Justices of Peace* Quor. Unus are impow'ered to bail Persons, who areailable by Law, until the next general Sessions or Gaol-delivery, where they shall certify the same on pain of 10l.
2. Where-ever a Man may be taken up by one Justice of Peace, one Justice of Peace may Bail him. 6 Mod. 179. per Holt Ch. J. Trin. 3 Annæ. Anon.
3. Where 2 *Justices of Peace* are ready [requir'd] to bail one, they ought to be both present to do it; and [it is] not enough that one of them should first Sign the Recognizance, and then send it to another, tho' the Contrary be sometimes irregularly practised; per Holt Ch. J. 6 Mod. 180. Trin. 3 Annæ. B. R. the Queen v. West.
4. A Justice that has Power to set a Fine has Power to Bail; For he is not obliged and bound to commit him; but after he is once committed in Execution it is too late to move for Bail; Per Holt Ch. J. 11 Mod. 52. pl. 25. Pasch. 4 Annæ. B. R. Anon.

(I) Of their *Proceedings*.

1. 3 H. 7. **EVERY** Justice of Peace, that shall take any Recognizance for cap. 1. **E** keeping the Peace, shall Certify the same to the next Sessions, that the Party may be called, and if he make Default, the same to be Recorded, and the Recognizance, with the Record of the Default, Certified into the Chancery, or before the King in his Bench, or into the Exchequer.
2. If Justices of Peace do not observe the Form prescribed by the Statute, there needs no Writ of Error, but what he does is void and *Coram non Judice*; but if the Justice Acts according to the Statute, then neither King's Bench nor Justices of Peace can redress it, nor set at Liberty the Party. Jo. 171. Hill. 3 Car. B. R. Cole's Case.

(K) Their *Qualification*.

1. **BY** 1 E. 3. cap. 16 The King, for the better keeping and maintaining the Peace, Willeth, that in every County good Men and lawtul, which are not Maintainers of Evil, or Barretors in the Country, shall be assigned to keep the Peace.—And by 18 E. 3. 2. Two or three of the best Reputation in the Counties, shall be assigned Keepers of the Peace by the King's Commission.—And by 34 E. 3. cap. 1. In every County shall be assigned for keeping the Peace, one Lord, and three or four of the moit worthy Men in the County, with some learned in the Law.—And by 2 H. 5. Stat. 2. cap. 1. They shall be made of the most sufficient Persons dwelling in the Counties; but Lords and Justices of Assise may be made Justices of the Peace tho' they dwell out of the Counties.
2. 13 R. 2. 7. Justices of Peace shall be made of the most sufficient Knights, Esquires, and Gentlemen of the Law of the County.
3. 2 H. 5. Stat. 1. cap. 4. The Justices of Peace who are of the Quorum, shall be resident in the same County, except Lords, Judges, Serjeants at Law, and the King's Attorney.

4. 18 H.

One was indicted for sitting as a Justice of Peace in Buckinghamshire not having 20l. a Year Contra Formam Statuti ;

but it was quashed, 1st Because no Indictment lies of it ; For the Statute limits it to be punishable by Debt, according to the Common Law. 2dly. A Man of Law and Corporations are excepted out of the Statute, and it is not shewn in the Indictment, that he was not a Man of Law, nor one of the Corporation 3dly. No Time of the Sitting is shewn ; For if he had 20l. at the Time, tho' afterwards he had not, he is not punishable ; and for this principally the Indictment was quashed. 2 Roll. R. 247. Mich. 20 Jac. B. R. Anon.

Saving for Towns Corporate.

5. 2 Mar. Seff. 2. cap. 8. Enacts, that no Person, having, or using the Office of a Sheriff of any County, shall use or exercise the Office of a Justice of Peace, by force of any Commission or otherwise, in any County where he shall be Sheriff, during the Time only that he shall exercise the said Office, or Sherifffwick ; and that all Acts done by such Sheriff by Authority of any Commission of the Peace, during the Time abovesaid shall be void.

6. 5 Geo. 2. cap. 18. S. 1. No Person shall be capable of being a Justice of Peace for any County in England or Wales, who shall not have an Estate of Freehold, or Copyhold in Possession, for Life, or some greater Estate, or for Years determinable upon Life, or for a certain Term originally created for 21 Years or more, in Lands or Hereditaments in England or Wales of the Yearly Value of 100l. above Incumbrances.

S. 2. No Attorney, Solicitor, or Proctor, shall be capable to be a Justice of Peace in England or Wales, during such Time as he shall continue in Practice.

S. 3. If any Person, who shall not be qualified according to this Act, shall take upon himself the Office of a Justice of Peace, or do any Act as such he shall for every Offence forfeit 100l. one Moiety to the King, and the other Moiety to such as will sue for the same.

S. 4. This Act shall not extend to any City, Town, or Liberty, having Justices of Peace within their Limits.

S. 5. Nothing in this Act shall incapacitate any Lord of Parliament, or the eldest Son, or Heir Apparent of any Lord of Parliament, or of any Person qualified to serve as Knight of a Shire by Stat. 9 Annæ. cap. 5. to be a Justice of Peace for any County.

S. 6. Nothing in this Act shall incapacitate the Officers of the Board of Green-Cloth from being Justices of Peace within the Verge of his Majesty's Palaces, or to incapacitate the Commissioners and principal Officers of the Navy, or the two under Secretaries in each of the Offices of principal Secretary of State, from being Justices of Peace for such Maritime Counties and Places where they usually have been Justices.

S. 7. This Act shall not extend to any of the Heads of Colleges or Halls in the Universities of Oxford and Cambridge, but that they may be Justices of Peace in the Counties of Oxford, Berks and Cambridge, and the Cities and Towns within the same.

7 Geo. 2. cap. 10. S. 3. The Act 5 Geo. 2. cap. 18. shall not extend to deprive the Vice-Chancellor of the University, or the Mayor of Cambridge, from being Justices of Peace in the County.

(L) Punish-

(L) Punishable. In what Cases.

1. A Justice of Peace by his Discretion may Arrest a Man to find Surety of Peace, and tho' he lets him go at large without Surety, yet the Party cannot punish him; because he is a Judge of Record. Br. Peace, pl. 8. cites 9 E. 4. 3.

S. P. per Littleton J. quod non negatur; quod nota, that Action

does not lie against a Judge of Record. Br. Judges, pl. 10. cites S. C.

2. The Statute of 3 H. 7. cap. 3. is that the Justice shall forfeit 10l. if he does not Certify the Recognizance at the next Sessions. Br. Peace, pl. 11. cites 2 H. 7. 11. — It should be (2 H. 7. 1. pl. 2.

An Information was exhibited against one put out of Recognizances

Commission of the Peace, for having, while in the Commission, compounded and not returned to the Sessions and taking 20 s. of every unlicensed Alehouse, and converting it to his private Use &c. Whereupon he was tryed at Bar and found Guilty, for which he was fined 1000 Marks and imprisoned at the King's Pleasure, and to be of good Behaviour for a Year, and to make publick Acknowledgement of his Offence at the next Assises to be held for the County of Surry. Sid. 192. Pasch. 16 Car. 2. B. R. the King v. Sir Purbeck Temple.

3. 4 H. 7. cap. 12. S. 1. Enacted that every Justice of Peace within the Shire where he is Justice, should cause to be Proclaimed yearly, in four principal Sessions, the Tenor of the Proclamation to the Bill annexed; and every Justice of Peace present at any Sessions, when it is not to be Proclaimed should forfeit unto the King 20s. — The which Proclamation was to the Effect following, viz. S. 2. *Henricus Dei gratia &c. the King* [after a Recital of the many Mischiefs arising for want of putting the Laws in Execution] “ commandeth “ the Justices of Peace of this Shire, to endeavour to execute the Tenor of their “ Commission, and that every Man that lets them to execute their Authority, “ that they shew it to his Grace, and if they do it not, and it comes to his “ Knowledge by other, they shall be taken as Men out of Credence, and be put “ out of Commission for ever. And over this he Commandeth all Men grieved “ in any Thing that the Justice of Peace may determine, that they make Com- “ plaint to the next Justice of Peace, or to any of his Fellowes; and having “ no remedy there, then to the Justices of Assises if they are soon after to come “ into that Shire, and if then they have no Remedy, they shall come to the King or “ to his Chancellor; and his Highness shall send for the said Justices, to know “ the Cause why his Subjects be not eased, and his Lawes executed: Where- “ upon if he find any of them in Default, he shall do him to be put out of the “ Commission, and punished according to his Demerits, and his Highness “ shall not let for any Cause, but that he shall see his Lawes to have true Exe- “ cution, and his Subjects to live in Surety.

4. A Justice of Peace was censured, because going to view Riotors, and remove the Force, and the Offenders being escaped before his coming, and he being requested to go to the House where they were, at a little Distance, he refused; and also, where the Peace was sworn and demanded of him against the Riotors, he awarded Superseas taking Bonds for keeping the Peace against certain others of his Servants who did not demand it, but released them again the next Day; and all this in partial Favour to his own Brother. Mo. 628. Carew's Case.

The Court was moved to grant an Attachment against a Justice of Peace for refusing upon Complaint to come and view a Force,

but they denied the same, and directed the Party to bring an Action of Debt for the 100l. Forfeiture given by the Statute in that Case. Vent. 41. Mich. 21 Car. 2. B. R. Anon.

5. W. exhibited his Bill against S. for a Misdemeanor in his Office of Justice of Peace, viz. for compounding of Matters between the Parties, being bound over to the Sessions, and now the Court observed this Difference; that for petty Quarrels between Party and Party, or for the Peace, or petty Trespasses, where the King is not to have a Fine, there a Justice of Peace

may make and persuade an Agreement between the Parties; but otherwise where a Fine shall accrue to the King. *Noy. 103. Whinnel v. Stroud.*

6. *Attachment* against Justice of Peace for *refusing to sign a Poor Rate.* Sid. 377. Mich. 20 Car. 2. B. R. Inhabitants of Peterborough's Case.

7. A Justice of Peace is not *indistable* for not binding over Offenders charged on Oath with a Riot. *Cumb. 317. Hill. 6 W. 3. B. R. Atton's Case.*

8. Holt declared, that if Complaint was made to him, that some Justice of Peace had issued a *Warrant to take Goods* out of a Man's Possession to which he pretended a Right, he would send for and bind the Justice over; For People must take the legal Remedy, as Detinue, Trover, or Replevin. *Farr. 99. Mich. 1 Annæ. B. R. Anon.*

9. A *Dissenting Teacher*, having qualified himself in one County, removed into another, and set up a *Conventicle* there, without further Qualification; whereupon a Justice of Peace convicted him; an Attachment was moved for against the Justice for a *Contempt of the Toleration Act*, alleging a Qualification in one County to be so all over England. But per Cur. the Act of Conventicles is still in Force, and the *Justices of Peace* have Power to execute it against such as do not qualify according to the Toleration Act, so that they being Judges of the Matter, if they do wrong, the Remedy is by *Certiorari* or *Appeal to the Sessions*, where the Whole may be re-examined, which shall be final by the very Words of the Statute; and if they err in a Matter of which the Law makes them Judges, it would be most unreasonable to grant an Attachment for such Error. *6 Mod. 228. Mich. 3 Annæ. B. R. Peat's Case.*

10. *Information* against a Justice of Peace for sending one to the House of Correction without sufficient Cause. *8 Mod. 45. Pasch. 7 Geo. the King v. Okey.*

11. A Justice of Peace must take care that he hath such an *Information* of the Fact as may be sufficient to support his *Warrant of Commitment*; but he need not set it forth in the Warrant it self; For so much certainty is not required in Warrants as in Writs and Pleadings, which are always on Record. *8 Mod. 5. Mich. 7 Geo. the King v. Walter.*

12. *Information* against Justices of Peace for *refusing his Warrant* for a Battery; but on shewing a reasonable Cause the Rule was discharged. *8 Mod. 337. Mich. 11 Geo. the King v. Nichols.*

(M) Punishable by Action.

Per Twifden J. if a Thing be enacted by Parliament to be done, the not doing whereof is a Damage to one or 2

1. IF Justice of Peace *refuses to take the Oath of the Party robbed*, the Question was, if the Party may have an Action on the *Case* against him? Windham J. doubted, because Justice of Peace is a Judge of Record, and no Action lies for what he does as Judge; but per Periam and Anderson, it lies; for in this Case he Acts not as a Judge but as a particular Minister appointed by the 27 *El. 13.* to take the Examination. *Le. 323. Trin. 31 Eliz. C. B. Green v. Hundred of Euccechurch.*

only, there no Indictment lies for the Non-feasance; and upon this Reason it is that the only Remedy, in Case a Justice of Peace refuses to take the Oath of the Party robbed, is for him to have an Action on the Case against him. *Sid. 209. pl. 3. Trin. 16 Car. 2. Anon.*

2. A Justice of Peace cannot detain a *Person* suspected in Prison, but during a convenient Time only, to examine him, which the Law intends to be three Days, and within that Time to take his Examination, and send him to Prison; and because here he detained him 18 Days in his own House, the Plaintiff brought an Action of *Falſe Imprisonment*, and had Judgment. *Cro. E. 829, 830. Pasch. 43 Eliz. C. B. Scavage v. Tateham.*

(N) Plead.

(N) *Pleadings* in Indictment, or Actions against them.

1. **W**HEN a *Justice of Peace* makes a *Justification*, he need not shew his Patent, any more than a Sheriff shall shew the Writ to him directed, or other Records; per Choke, Needham, and Littleton; For per Choke the Patent remains only with the Custos Rotul. Br. Monitans, pl. 69. cites 9 E. 4. 2.

2. 7 *Fac. 1. cap. 5.* Enacts, that an *Action* being brought against a *Justice of Peace, Mayor &c.* for any Thing done by Reason of their several Offices, both they and all their Assistants may plead the general Issue, and yet give the special Matter in Evidence.

(O) *Determination* of their Authority. What is, and the Effect thereof.

1. **W**HERE a new Commission of the Peace Issues, and is shewn to some of the old Justices, yet the other Justices, who did not see it, are not bound to take Notice, but may well sit by the ancient Commission; per Paston; but Portington Serjeant, Contra. Br. Commissions, pl. 2. cites 21 H. 6. 29.

If a new Commission of the Peace be proclaimed, or read in full County, the ancient Commission of the Peace is determined, and all the Justices ought to take Notice thereof; and if they sit after by the ancient Commission, all that they do is void. Br. Commissions, pl. 6. (bis) cites Marwood's Readings.

2. If one be *Justice of Peace of a Vill*, and after the King makes another *Justice of Peace of the same Vill*, yet the Power of the first remains; because all is in Affirmation; per Choke Justice, Quod fuit negatum; For the second Patent determines the Power of the first. Br. Commissions, pl. 20. cites 10 E. 4. 7.

A Commission of the Peace is made to four in the County of N. and after the

King makes *J. S. Justice of Peace there, for Term of his Life*, the first Commission is determined. Br. Commissions, pl. 10. cites Marwood's Readings.

3. Note for Law, that where Commission of the Peace issues to *J. N.* and others, and after *J. N. is made a Knight*, yet the Commission remains for him. Br. Commissions, pl. 22. cites 35 & 36 H. 8.

And where a Man learned in the Law is put in Commission, Ibid —

and after is made a Serjeant of the Law, yet he remains in Authority by the same Commission. And when a *Justice of the Bank is made a Knight*, yet he remains Justice, and his Commission shall serve him. Ibid.

4. 1 E. 6 cap. 7. S. 4. Enacts that where a *Justice of Peace is created a Duke, Archbishop, Marquess, Earl, Viscount, Baron, Bishop, Knight, Justice of the one Bench or the other, or Serjeant at Law, or Sheriff*, yet he shall remain Justice.

Br. Commissions, pl. 4. cites Marwood's Readings. — Serjeant Haw- created since

kins says, that it has been questioned, whether the Dignity of Baronet, which has been this Statute, be within the Equity of it. Hawk. Pl. C. 17. cap. 5. S. 5.

5. If the King grants to a * *Mayor and Commonalty and their Successors, to be Justices of Peace in their Vill, and after makes Commission of the Peace to others there*, yet the first Commission shall remain in force; because it is granted to them and their Successors, and so is not revocable at Will as Commission is. Br. Commission, pl. 5. cites Marwood's Readings.

2 Hawk. Pl. C. 17. cap. 5. S. 7. — * Such Commission is neither revocable by the King,

nor determinable by his Death, as the Common Commission for the Peace is, which is made of Course by the Lord Chancellor according to his Discretion. 2 Hawk. Pl. C. 57. cap. 8. S. 30.

6. If Commission be directed to A. and B. who are not in *rerum Natura*, or are dead at the Time of the Teste, &c. the ancient Commission remains in Force; For this new Commission is void. Br. Commissions. pl. 6. (bis) cites Marwood's Readings.

7. If a Commission be directed to N. *pro hac vice*, this shall determine the ancient Commission of those Matters, and yet N. the new Commissioner cannot sit but *unica vice*. Br. Commissions, pl. 6. (bis) cites Marwood's Readings.

* Serjeant Hawkins says, that this seems justly questionable, not

only as being contrary to common Practice, but also because Justices of Peace, as such, seem to have Authority by 34 E. 3. to hear and determine Felonies, without any special Clause in their Commission for that Purpose. 2 Hawk. Pl. C. 17. cap. 5. S. 7.

But if Commission of the Peace be in the County of N. and

B. R. comes there, this shall not determine the Commission of the Peace; contrary if they make Proclamation of the coming of B. R. Br. Commissions, pl. 9. cites Marwood's Readings.

10. 2 & 3 P. & M. 18. Enacts that a new Commission of the Peace or Gaol-Delivery for the Whole County, shall not be a Superjedeas to a former like Commission granted to a City or Town-Corporate, being no County.

11. If a new Patent is made to Justices of Peace, in which one of the old Justices is left out, yet the Acts of the old Justice are lawful 'till the next Sessions, in which the new Commission is published. And tho' the Patent be of Record, yet the Party shall not take Notice immediately, but at the Sessions. Mo. 186, 187. pl. 333. Mich. 26 Eliz. in an Anon. Case cites 5 E. 4.

See *More* as to Justices of Peace in general, under the Titles of Sessions, Door, and other proper Titles in this Abridgment.

Fol. 96.

* Concerning Commissions of Oyer and Terminer, 10 Conclusions are to be observed. 1

That Oyers and Terminers shall not be granted but before the Justices of the one Bench or the other, or the Justices *Er-rant*, and that for great or horrible Trespases; 2.

That Commissions are like to the *Kino's Writs*, such are to be allowed which have Warrant of Law, and continual Allowance in Courts of Justice. 3. That Justices of Oyer and Terminer cannot proceed upon any Indictment, but upon Indictments taken before *themselves*; For their Authority is, *ad inquirendum, audiendum,*

* Justices of Oyer and Terminer.

(A) Justices of Oyer and Terminer. [*Their Power and Authority, and of what they may inquire.*]

1. † If a Man be indicted of Barretry at an Assises before the Justices of Oyer and Terminer, and upon this Procefs issues against him, returnable at the next Assises, and the Defendant, at the next Assises, appears gratis, and pleads Not Guilty, so that he is not in Custody, so that he may be tried before the Justices, as Justices of Gaol-Delivery, & yet he may be tried immediately at the same Assises before them as Justices of Oyer and Terminer. Hill. 9 Car. B. R. *Chapman's Case*; in Writ of Error upon such Trial this was assign'd for Error, and per Curiam held good. (But it seems that it is very hard, and contrary to all the Presidents, and it is greatly Mischievous, if he shall not have Time for his Trial till the next Assises, when he has not his Witnesses ready.)

endum, & terminand'. 4. That Justices of Oyer and Terminer, may, upon an Indictment found, proceed the same Day against the Party indicted. 5. That if any Offence be prohibited by any Statute, and name not in what Court it shall be punished; or if the Statute appoint that it shall be punished in any Court of Record; in both these Cases it may be heard and determined before Justices of Oyer and Terminer. 6. That the King may make a Commission of Association; directed to others to join with the Justices of Oyer and Terminer, and a Writ of Admittance to the Justices of Oyer and Terminer, to admit the others into their Society. 7. If the Justices sit by force of their Commission, and do not adjourn the Commission, it is determined. 8. Justices of Oyer and Terminer, or Justices of Peace, cannot assign a Coroner to an Approver; For it is not within the Commission of either of them; but Justices of Gaol-Delivery may do it. 9. Justices of Oyer and Terminer shall send their Records and Processes determined, and put in Execution, to the Exchequer at Mich. every Year, to be delivered there to the Treasurer and Chamberlains, &c. to keep them in the Treasury. 10. None of these Commissioners are countermanded by any new Commission, unless the new Commission be shewed unto them, or that it be proclaimed in the County; or that a new Commission do sit and keep their Sessions by force of the New Commission. 2 Inst. 163, 164, 165.—|| S. P. But Contra if they have Commission of Gaol Delivery also; Quod Nota; For both those may be executed simul & semel. Br. Commissions, pl. 24. cites 3 M. 1.—Br. N. C. pl. 474. S. C.—S. C. cited 12 Rep. 32.—S. P. Sti. 29 Trin. 23 Car. in Case of the King v. Place.

It is generally said, that Justices of Oyer and Terminer have no Power by Virtue of a general Commission to proceed against any Persons, but those who are indicted before themselves; because the Words of it are, that they shall inquire, hear, and determine, by which it seems to be imply'd, that they must inquire of an Offence, before they proceed to hear and determine it. But this Reasoning depending wholly on the Wording of general Commissions, which are made in such Form, doth by no Means prove that a special Commission of Oyer and Terminer, reciting an Indictment of a particular Person, and authorising the Justices to send for and proceed upon it to try the Offender, is not good; and accordingly we find, that the Attainder of Dudley, afterwards Earl of Lutesstr, by Virtue of such a Commission was not objected against on this Account in the Arguments, concerning it, reported in Plowden's Commentaries. 2 Hawk. Pl. C. 21. cap. 5. S. 31.—† Cro. C. 340. S. C.—‡ It seems certain at this Day, that the same Persons being authorised by both the Commission of Oyer and Terminer, and also of Gaol-Delivery, may proceed by Virtue of the one in those Cases, wherein they have no Jurisdiction by the other, and execute both at the same Time, and make up their Records accordingly; but this doth not seem to have been clearly agreed in former Times. 2 Hawk. Pl. C. 20. cap. 5. S. 20.

2. Justices of Peace by force of their Commission of Oyer and Terminer cannot take an Indictment of Forgery upon the Statute of which gives Power to Justices of Oyer and Terminer to take it; For Justices of Oyer and Terminer, intended by the Statute, are Justices of Assize or other Justices who have a Special Commission of Oyer and Terminer, per Excellentiam, and not Justices of Peace who have a General Commission. B. 9 Car. B. R. Smith's Case, who was indicted before Justices of the Peace in London, and also at Newgate of Forgery, and the Indictments quash'd per Curiam.

3. If there be a Felo de se, and no Inquisition taken thereof by the Coroner upon view of the Body, because the Body cannot be seen, being * cast into the Sea, or otherwise absconded, an Indictment of it may be taken before the Justices of Peace and Oyer and Terminer, at their Session. B. 15 Car. B. R. Newman's Case, where such Indictment was found by Direction of the Court, and after a Plea pleaded for the Goods, and a Verdict given for the King. 5 Cooke 110. Forley's Case.

9 Rep. 118.
b. H. P. C.
165.

* Orig (Nal
ject)

4. If a Man is disseised sitting an Oyer, he may have Assize there, without Writ out of Chancery; and shall have Attaint there, upon false Verdict given there, in the same Manner without Writ of the Chancery, and needs no Patent of Assize there; For the Commission of Oyer shall serve for it; but see always that the Commission shall be special; For it seems that all Commissions in Oyer are not alike. Br. Oyer and Determiner, pl. 9. cites 6 E. 2.

5. If the Lord of a Leet offends of Hue and Cry within his own proper Precinct, or the like, which is punishable by Leet, this shall be presented in Oyer; For he cannot be punished in his own Leet; per Wilby. Br. Oyer and Determiner, pl. 3. cites 21 E. 3. 3.

Br. Leet, pl.
13. cites 21
E. 3. 3 & 4

6. Commission issued to Knivet, Thorp, and Ludlow, Knights, to hear and determine all Manner of Treasons, Felonies, Conspiracies, Champerties, Ambodextries and Damages, Grievances, Extortions and Descents done to the King and to the People, as well at the Suit of the King as of the Party, and also of Wards, Marriages, Escheats and other Things due to the King in the Counties of Essex, Hertford, Cambridge, Suffolke and Norfolk; by which they came to Chelmesford such a Day, and caused

Br. Com-
missions, pl.
15. cites S
C.—F. N. B.
112. (D)
that such
Commission
is good.

to read their Commission, and after *caused the Bailiffs of every Hundred to be called one by one*, as well in the Franchise as out, and commanded them to return their Pannels, and charge Inquests upon the Points above, according to the Manner of the said Sessions, and would not allow Charters of Exemption, because they had not this Clause, *licet tangat nos & Heredes nostros*, and those Matters touch'd the King, and when some were indicted they were compelled to answer it immediately, and some Bailiffs were indicted of Extortion and some of Felony, and they were compell'd to deliver over their Bailiffs Rods to their Under Bailiffs, and were commanded to Prison without Bail. Br. Oyer and Terminer, pl. 6. cites 42 Aff. 5.

At this Day the Common Form of a General Commission of Oyer and Terminer, is to authorise the Per-

7. The Writ of Oyer and Terminer should *not* be properly called a Writ, but it is a Commission directed unto certain Persons, when a great Assembly, Insurrection, or a *Heinous Misdemeanor* or Trespass is committed and done in any Place. Then the Manner and Usage is to make such a Commission of Oyer and Terminer, to hear and determine such Misbehaviour. F. N. B. 110. (B)

persons to whom it is directed, or three or four of them, of which Number either such or such particular Persons among them are specially appointed to be, to inquire by the Oaths of lawful Men, and by other Means, of all Treasons, Felonies and Misdemeanors, being specially mentioned, and of all others, in such and such Counties, and to hear and determine the same at certain Days and Places, to be appointed by them, &c. for which Purpose the King acquaints them, that he hath sent a Writ to the Sheriffs of such Counties, commanding them to return a Jury before them, at such Days and Places as shall be notified by them, in order to make Inquiries of such Offences, &c. 2 Hawk. Pl. C. 20 cap. 5. S. 21.—It is observable, that the abovementioned Commission makes no mention of the Suit of the Party; but it seems to have been anciently the most common Form of such Commission, to direct the Justices to hear and determine Offences, as well at the Suit of the Party as of the King. 2 Hawk. Pl. C. 20. cap. 5. S. 22.

8. Oyer and Terminer was granted for a Ward ravished, and Goods taken, and the Defendant found Guilty, and thereupon a Sci. fa. issued. F. N. B. 110. (C) in Notis (a) cites 29 E. 3. 37.

9. So upon a Rescous made upon the King's Bailiff, where he had distrained for Debts or Amercements to the King. F. N. B. 112. (A)

10. And if a Man have Goods, and Merchandise in any Ship upon the Seas, which Ship is broken by Tempest, and the Goods cast upon the Lands, which are *no Wrecks*, because certain Persons came alive to the Land, and the Merchandises, or Goods, are taken by Malefactors unknown, &c. The Party may have a Commission of Oyer and Terminer, directed unto certain Persons, to enquire of those who did the Trespass, and to hear and determine the same, and to make Restitution unto the Party, and a Writ unto the Sheriff, to return Probos & legales homines, &c. before the said Justices, &c. F. N. B. 112. (C)

11. If a Man sueth a Commission of Oyer and Terminer against divers Persons for taking of his Goods and Chattels, and wasting, spending, or eloining them, the Party shall have a Writ unto the Sheriff, reciting the Matter, commanding him to stay the Goods, and to put them into safe Custody, until it be otherwise provided and adjudged by the Justices of Oyer and Terminer, &c. If it be found for the Plaintiff, the Justices may return the Goods to the Party, and give him Damages. F. N. B. 112. (F)

And so of the Archbishoprick, if any Person hunt in the Parks, or cut down

12. In the Time of the Vacation of a Bishoprick, if any Person hunts in the Parks and Chases of the Bishop, the King may send his Commission of Oyer and Terminer to certain Persons, to hear and determine, and enquire thereof. F. N. B. 112. (G)

the Woods, or Fish in the Piscaries of the Bishop, &c. when the Archbishop is created, the King may send and grant the Commission of Oyer and Terminer, to enquire and determine the Trespass in the Time of the Vacancy. F. N. B. 112. (H)

13. If the *Sea Walls* be broken, or the *Sewers* or *Gutters* not scoured, so as the fresh Waters cannot have their Courses, the King ought to grant a Commission to enquire thereof, and to hear and determine the Defaults. F. N. B. 113. (A)

14. If certain Persons ought to *account unto a Corporation*, as if the King grant to the honest Men of the Town of N. a certain Sum, out of Things which come to the same Town to be sold, and there are Collectors to gather the same, who do so; the King may grant a *Commission* to certain Persons to *enquire what Persons have received such Sums*, and to hear and determine the Matter, and to hear their Accounts thereupon, and do in that Case as Auditors shall do; and he shall send a Writ unto the Sheriff to return a Jury before the same Justices at the Day &c. which they appoint &c. to enquire thereof. F. N. B. 114. (C)

15. *All Offences express'd in any Statute* may be inquired by the Justices of Oyer and Terminer, notwithstanding that the Statute does not give Power to any to enquire of them by express Words; per Justiciarios. Dal. 24. pl. 4. 4 & 5 Ph. & M.

16. *In Term Time*, no Commissioners of Oyer and Terminer, or Gaol-Delivery, by the Common Law, may sit in the same County where the K. B. sits; For *In Præsentia Majoris cessat potestas Minoris*. 9 Rep. 118. b. Trin. 10 Jac.

(B) *Constituted How; and Power determined.*

1. *Stat. Westm. 2.* **T**HE Writ of *Trespas* to bear and determine 13 Edw. 1. cap. 29. shall not be granted before any Justices, except the Justices of either Bench, and Justices in Eyre, unless for a great Trespas, where hasty Remedy is required; neither shall be granted a Writ to hear and determine Appeals before Justices assigned, but in special Case, and when the King shall command; and lest the Party should be kept too long in Prison, such Appellees and Indiltées may have a Writ of *Odio & Atia*, as in *Magna Charta*. Confirmed 2 Edw. 3. cap. 2.

2. 33 E. 1. the Statute of *Ragman*. By this Act it was ordained, that Justices should go through England, to hear and determine Trespas, and other Complaints of Things done within twenty five Years before. And see divers Matters in that Statute concerning those Things.

3. Upon the Death of Justices of Oyer and Terminer after an *Indictment* taken before them and Process awarded thereupon, the King may grant a new Commission to others Commanding them to proceed upon such Process, and to hear and determine the same, and the King shall send a Writ to the Executors of the Justices who are Dead to send the Records before the new Commissioners &c. 2 Hawk. Pl. C. cap. 5. S. 16.

4. 2 E. 3. 2. *Commissions of Oyer and Terminer* shall not be granted, but before one of the Justices of the one Bench, or the other, or the Justices Errant, and that for great Hurt and horrible Trespas, and of the King's special Grace, according to the Statute of *Westminster*. 2. 29.

5. Oyer and Terminer; Writ was sent forth at the Suit of *W. P.* and he disavowed it, and the Disavowment accepted. Br. Oyer and Terminer, pl. 4. cites 12 Aff. 21.

But in *Replevin Disavowment of the Suit was not received,*

and *Superfedeas* was issued out; quod nota. For it is not an enormous Trespas, therefore quod Superfedeant, and after a Writ * under the Targe of later Date was issued forth, commanding them that they proceed according to Law notwithstanding any Command, by which they proceeded by Advice of all the Justices, and yet their Commission of this before was in a Manner repealed. Br. Oyer and Terminer, pl. 4. cites Mich. 13 E. 3. — * Orig. (South le Targe.)

6. In Assise the Defendant pleaded Recovery in Oyer and Terminer of certain Damages in Trespass before certain Commissioners such a Day, by which he had Elegit, and this Land put in Execution as a Moiety &c. and that the Monies are not yet levied, Judgment in Assise; the Plaintiff said that after this Commission, and before the Judgment given, another Commission issued to restrain the first Commission, because it was too large, Judgment; and prayed the Assise; Fish said, and we pray Judgment, because he does not allege that the first Commissioners before Judgment had Notice of the second Commission; and he said, if Commission be granted to me, and I use it, if Commission be granted to you of later Date, and you do not use it, nor any Notice comes to me neither by User nor by Writ, there the first Commission has not lost its Force; but when the last Commission is used, it shall be of Force from the Date to some regard; but yet the Judgments, which are given by the first Commissioners, who had not Notice of the last Commission, which is not put in Ure by the holding of Sessions, shall be good, and shall be executed, notwithstanding such last Commission; and the Opinion of the Justices was with Fish in Omnibus; quod nota; Percy ad idem, if the first Commissioners had arraigned Felons, who were Indicted and found Guilty, and Judgment given that they should be hanged, this Judgment shall be executed, if the last Commission be not put in Ure nor Notice of it to the People before the Judgment; And so it appears there, that if Notice be after Judgment, yet the Judgment shall be executed; and the Opinion of the Court was clearly against the Plaintiff; quod nota. And per Fish the first Commission shall not cease till they have Notice, or that the Country may have Notice. Br. Commissions, pl. 13. cites 34 Ass. 8.

7. Stat. 33 Hen. 8. cap. 23. S. 1. *If any Persons, being examined by the King's Council, or three of them, be vehemently suspected of Treason, misprision of Treason or Murder. By the King's Command, his Majesty's Commission of Oyer and Terminer under his great Seal, shall be made to such Persons, and into such Shires, as shall be appointed by the King.*

* See F. N. B. 114. (A)

(C) *How to execute the Commission, and of * Proceeding before them.*

1. **N**OTE the Court adjourned all Indictments till in Craftino, notwithstanding that it was said, that they could not make Adjournment before they knew that they have Commission; For per Cur. it is not properly an Adjournment, but a Surcease, to be advised; and after the Defendant justified for Estovers, Judgment si actio; and the Issue was, that he came by Force, Absque hoc, that he had Estovers there &c. and so to try the Right, and so the Issue * [was taken all in the Realty.] Br. Oyer and Determiner, pl. 4. cites 12 Ass. 21.

* 12 Ass. 21. Orig. [et per tant.]

2. Where *Superfedeas* comes to the Justices of Oyer and Terminer, by which their Commission is in a Manner repealed, yet by *Procedendo* after, they may proceed, and this by Advise of all the Justices. Br. Commissions, pl. 12. cites 12 Ass. 21.

Br. Error, pl. 124. cites S. C.

3. Justices of Oyer and Terminer, where the Parties plead to the Country on Tuesday, shall take the Inquest the Wednesday next; quod nota. Br. Oyer and Determiner, pl. 5. cites 29 Ass. 33.

(D) Their

(D) Their Proceedings returned into other Courts.

1. **I**T was presented before the Justices of Oyer and Terminer in the County of S. that the Prior of S. ought to repair the Bridge of S. and the Commissioners came into B. R. and Process made there against the Prior; and so see that a Thing done in Oyer shall come into B. R. and Process shall be made there. Br. Oyer and Determiner; pl. 1. cites 44 E. 3. 31.

2. Oyer and Terminer in the County of L. was made to come into Chancery, Scilicet the Commission and the Presentments, and were sent into B. R. and Process made there. Br. Oyer and Determiner, pl. 2. cites 44 E. 3. 43. *And so it seems that Certiorari shall Issue to the Commissioners after the Oyer and Terminer determined, and then shall be sent into B. R. by Mittimus.* Br. Oyer and Determiner, pl. 2. cites 44 E. 3. 23. and H. 1. E. 6. accordingly.

3. Indictments and Records, which are taken before Justices of Oyer and Terminer and not determined before their Commission be ended, shall be sent into B. R. to Arraign the Parties there. Br. Corone, pl. 178. cites 1 E. 6. *S. P. Br. Oyer and Determiner, pl. 1. cites 38 H. 8. — 2 Inst. 419. S. P.*

Justices of Goal-delivery.

(A) Justices of Gaol-delivery: [And the Difference between them and Justices of Oyer and Terminer.]

1. **I**F an Indictment of Murder be taken before the Justices of Peace of Middlesex at Hixe's Hall against two Persons A. and B. and after the Indictment is delivered over by the Justices of the Peace according to the Statute of E. 3. to the Justices of Gaol-delivery at the Justice Hall, and there A. appears and is tried, but B. does not appear, upon this the Justices of the Gaol-delivery cannot award Process against B. returnable before the Justices of the Peace, and the Justices of the Peace after award Process of Utlawry against him; For the Indictment is before the Justices of Goal-delivery and not before the Justices of the Peace, and therefore the Justices of the Peace cannot award Process upon the Indictment which is not before them; for if he had appeared before them, they could not try him, and the Justices of the Gaol-delivery cannot grant Process returnable before other Justices. Trin. 11 Car. B. R. *Storie's Case*, who was Utlaw'd and reversed it for this Cause.

2. If an Indictment be taken as before was in *Storie's Case* against A. and B. and the Indictment delivered over according to the Statute to the Justices of Gaol-delivery at the Justice Hall, and there A. is tried; it seems that the Justices, by Force of the Statute, may award Process against B. upon the Indictment which is before them returnable before themselves at the next Gaol-delivery, tho' it be held by Force of a new Commission, and tho' the Statute gives to them Power only to try Prisoners, and not to proceed against any who is out of Prison; for otherwise there shall be a Failure of Justice, for it cannot be delivered again to the Justices of Peace, there being a Record made by the Trial of A. that it was delivered to the Justices of

Fol. 97.

Gaol-delivery. *Tr. 11 Car. B. R.* in the said Case of *Story*; this was doubted per *Curiam*; but they said that the clear way was to remove it into *B. R.* and there to proceed; and some of them thought that the Justices of Gaol-delivery might in this Case award Process, as before is said, as well as the next Gaol-delivery may award Execution of a Prisoner adjudged in the last Gaol-delivery, as the Use is.

3. Justices of Gaol-delivery may make *Writ of Restitution to the Plaintiff* in Appeal before them, when the Defendant is convicted before them, bearing *Teste at the Place of the Gaol-delivery*. *Br. Judges*, pl. 26. cites 4 E. 4. 11.

4. If Commission of Gaol-delivery be directed to *A. and B.* and after another Commission is directed to *C. and D.* and before Notice of the second Commission, as where it is not shewn to them, the first Justices sit, and take *Affise*, and deliver the Gaol, this is well done. *Br. Commissions*, pl. 2. cites 21 H. 6. 29. per *Newton Ch. J.*

5. If Commission be made to Justices of Gaol-delivery, to deliver the Gaol *hac Vice*, yet they may adjourn, and may deliver the Gaol at the Day of Adjournment, notwithstanding these Words (*hac Vice*.) *Br. Commissions*, pl. 18. cites *L. 5 E. 4. 32.*

6. Justices of Gaol-delivery have Power as Justice of Peace, and if they make their Record as Justices of Gaol-delivery, the other Power is void; per *Brudnel and Keble J.* *Br. Commissions*, pl. 17. cites 9 H. 7. 9.

And Justices of Gaol-delivery and of Oyer and Terminer may

Inquire in both Powers all at one Time, and make their Record as Justices, in the one Form, and the other, all at one Time and well; per *Butler, Hobert, Bead, Wood and Fisher.* *Ibid.*

7. If Justices sit by Commission, and do not adjourn it, the Commission is determined. *Br. Commissions*, pl. 11.

8. Indictments taken before Justices of Gaol-delivery, and not determined, shall be delivered to the Clerk of the Peace of the County where &c. and when other Justices of Gaol-delivery come there, they may proceed upon them; Contra of the Indictments of Oyer and Terminer, and see now the Statute thereof 1 E. 6. c. 7. *Br. Corone*, pl. 178. cites 1 E. 6.

Br. N. C. pl. 4-4. S. C.— S. C. cited 12 Rep. 52.

9. Note by coming of Commission of Oyer and Terminer, the Commission of Gaol-delivery is not determined; For the one stands with the other; contrary where the one Commission is contrary to the other; as of Commission of the Peace, where there is a former Commission thereof to others; this is Contrariant that each of them should be Commissioners of one and the same Thing, and both in Force; and the Commission of Gaol-delivery is only to deliver the Gaol. Commission of Oyer and Terminer has the Words *ad Inquirendum audiend. & determinand.* note the Diversity between them; but more commonly the Justices of Gaol-delivery are also in the Commission of the Peace, and by this they Indict, and after Deliver the Gaol as well of those as of the others. *Br. Commissions*, pl. 24. cites 3 M. 1.

10. Justices of Gaol-delivery have Power to assign a Coroner to an Approver. 4 Inst. 165. *Standf. Pl. C.* 143. b. cap. 55.

Note, Justices of Oyer and Terminer cannot by this Authority inquire but of such who are indicted before themselves; for their Commission is *ad inquirendum & terminandum*; but Justices of

11. Upon the Authority given them by their Commission and by Statutes, 13 Conclusions follow. 1. They may arraign any one in Prison in that Gaol, upon an Indictment of Felony, Trespass, &c. before Justices of Peace, tho' not found before * themselves, which Justices of Oyer and Terminer cannot do; and Justices of Peace shall deliver their Indictments to the Justices of Gaol-delivery.—2. They shall take a Panel of a Jury returned by the Sheriff without making any Precept to him as Justices of Oyer and Terminer must do; because a general Commandment is made to the Sheriff by the Justices of Gaol-delivery to return Juries against their coming; but if they have a special Commission it is otherwise; per *Hankford.*—3. They may deliver Suspects for Felony &c. by Proclamation, against whom sufficient Evidence is not produced to the Grand Inquest to indict them &c. which Justices of Oyer and Terminer, or Justices of Peace

Peace cannot do.—4. † They may inquire and take Indictments of Felony &c. of Prisoners before them and proceed upon them, and to may Justices of Oyer and Terminer; For both of them have Authority to inquire, hear, and determine of such as are Prisoners in the Gaol.—5. They may award Execution against a Prisoner who was indicted before Justices of Peace, and Outlawed thereupon, and afterwards taken and committed to Prison.—6. They may assign a Coroner to an Approver, and make Process against an Appellee in a foreign Country.—7. They may punish those that let Men to Bail, or Mainprise, not bailable by Law, or suffer them to escape.—8. By the Judgment of the whole Parliament in the Statute of 1 E. 6. 7. it follows that according to the Generality of the Words of their Commission they may deliver the Gaol of Prisoners committed for High Treason.—9. They shall send their Records and Process determined, and put in Execution to the Exchequer at Michaelmas, to be delivered there to the Treasurer and Chamberlains &c. to keep them in the Treasury.—10. They may receive Appeals of Robbery and Murder by Bill, but the Appellees must be in Prison before them.—11. Commissions of Association, and Writs of Admittance, & si non Omnes are directed as has been said of Justices of Oyer and Terminer.—12. They shall keep their Sessions in the principal and chief Towns of the Counties where the Shire-Courts of the same Counties are holden.—13. By Statute of 2 & 3 P. & M. cap. 18. it is Provided that all Commissions of the Peace or Gaol-delivery to any City or Town corporate, not being a County of it self, shall stand and remain, the granting of any like Commission of the Peace, or Gaol-delivery, in any Shire, Lathe, Rape, Riding, or Wapentake, being of a later Date, to the contrary notwithstanding. 4 Inst. 168, 169. cap. 30.

Gaol-delivery may arraign a Prisoner indicted before others; The Words of their Commission are ad Gaulas, Gaolam de B de Prisonariis in ea existentibus licet delinquant secundum leges &c. Brook, Title Commission, 3 Mar. 24. 4 Ed. 3. c. 2. That Justices of Gaol-delivery may deliver Prisoners indicted before the Guardians of the Peace. 12 Rep. 32. —S. P. Sti. 29. in Case of the King

v. Place.—Judgment was given against J. S. upon an Indictment of Barrettry in the County Palatine of Lancaster, taken before the Justices of Peace and removed before the Justices ad Placita tenend by Certiorari; and hereupon a Writ of Error brought, which recited a Conviction before A. and B. Justices of Oyer and Gaol-delivery, Nec non ad alia &c. which was held to be an ill Writ, and the Record not removed, because Justices of Gaol-delivery and Oyer and Terminer cannot hold Plea but of Indictments taken before themselves, and cannot send Mandatory Writs; but the Justices ad Placita tenend. infra Comit. Palat. Lancast. may; and so they did, so that the Record was before them in that Capacity, which the Writ of Error mentioned and not, therefore ill. Skin. 32. Hill. 33 & 34 Car. 2. B. R. the King v. Leaver.

† H. was indicted before the Justices of Assise, for inclosing Land &c. Exception was taken, that the Teste of the Indictment was at a Gaol-delivery before R. S. and F. G. and other Justices of Peace of the Queen &c. in the said County; and for this Cause it was alleged to be void; For that at a Gaol-delivery they have no Authority to take such Indictments, and this was held a material Exception; but the Justices said, they would advise &c. Cro. E. 90. Hill. 30. Eliz. B. R. Willoughby's Case.—So an Indictment of Felony which was taken and found before the Justices of Gaol-delivery in the County of Somerset, and upon which the Defendant was Outlawed, was discharged upon Exception taken, that they have no authority to take Indictments, unless they are Justices of Peace, and cited 3 Mar. Br. Commissions, pl. 24. Cro. E. 179. Pasch. 32 Eliz. B. R. Purfell's Case.—2 Hawk. Pl. C. 24 cap. 6. S. 3. cites S. C. But says, that the common Opinion, that they have such Power, seems much more agreeable to Reason; For surely it cannot but be implied in their Commission to deliver Prisons of their Prisoners, that they must have Authority to make such Deliverance by due Course of Law, which cannot be without a Proclamation, if there be no Prosecution, or a proper Trial, if there be one; in order to which there must be an Accusation of Record, without which the Prisoner cannot be arraigned or tried.

12. 1 E. 6. Cap. 7. S. 5. Where any Persons shall be found Guilty of Treason or Felony, for which Judgment of Death may ensue, and shall be Reprieved to Prison without Judgment at that Time, those Persons who shall, at any Time after, be assigned Justices to deliver the Gaol, where such Persons shall remain, shall have Authority to give Judgment of Death against such Persons, as the same Justices before whom they were found Guilty might have done, if their Commission of Gaol-delivery had continued.

When Commission of Oyer and Terminer is determined the * Records of it shall be sent into B. R. but Records

of the Justices of Gaol-delivery shall remain with the Custos Rotulorum of the County, and the next Justices of Gaol-delivery shall proceed upon them, upon Judgment of the Death by this Statute, Brooke makes a Quære, if they shall proceed by the Words of this Statute to allow Clergy or Sanctuary &c. and says it seems they shall by the Equity. Br. Commissions, pl. 11.—S. P. 12 Rep. 32. cites Brook tit. Commissions 12. and 38 H. 8.—* S. P. and therefore, and because Convictions before Justices of Gaol-delivery only are mentioned, this Statute extends not to Convictions before Justices of Oyer and Terminer. 2 Hawk. Pl. C. 27. chap. 6. S. 17.—A Person was condemned for Felony, and Ordered for Execution, which is respited by the Sheriff, and afterwards, before new Commissioners pleads, general Pardon of all Felonies and Executions; they cannot allow it, but the Record of his Arraign-

Arraignment and the Indictment shall be removed by Certiorari before the Justices of B. R. with the Body of the Prisoner by Corpus cum Cauſa, and it ſhall be allowed there, and not elſewhere; For the Power of the firſt Juſtices is determined, and the ſecond Juſtices are not to view the Record, or bring the Prisoner before them, Judgment having been given; *Otherwiſe if Judgment had not been given*; For in ſuch they might do as the firſt Juſtices might have done, and this by Statute 1 E. 6. 7. but not before. Dal. 20. pl. 9. 2 & 3 P. & M. Anon. — S. P. but left a Quære. D. 165. pl. 4. Mich. 1 Eliz. Anon. — But before this Act, if one had been indicted and Convicted by Verdict or Confeſſion before any Commiſſioners, and before Judgment the King had died, no Judgment could have been given; the King, for whom Judgment ſhould be given, being dead, and the Authority of the Juſtices determined, which ſpecial Caſes are remedied by this Act. 7. Rep. 51. b. Trin. 1 Jac. in the Caſe of Diſcontinuance of Proceſs &c. by Death of the Queen. — S. P. in Caſe of Treason or Felony. Cro. J. 14. Paſch. 1 Jac. pl. 18. — 2 Hawk. Pl. C. 27. cap. 6. S. 18.

S. 6. No Proceſs or Suit before Juſtices of Aſſiſe, Gaol-delivery, Oyer and Terminer, or Peace, or other of the King's Commiſſioners, ſhall be diſcontinued by a new Commiſſion, or by the Alterations of any of their Names.

13. If a Thief be condemned to be hang'd, and the Juſtices Command the Sheriff to reſpite the Execution for 6 Weeks, they may within the 6 Weeks, and after the Sessions adjourned, reſpite for a longer Time; Per all the Juſtices, and the Cuſtom of the Realm has always been ſo. D. 205. a. pl. 5. Mich. 3 & 4 Eliz. Anon.

But the Reporter makes a Quære of the Law in thoſe Caſes; becauſe ſome hold that Juſtices of Gaol-delivery may

14. It being doubted, whether *Persons in Newgate for Treason* might be indicted and tried before the Juſtices of Gaol-delivery without a Commiſſion of Oyer and Terminer, the Maſter of the Rolls, late Attorney General, affirmed that the ſame Queſtion was moved 11 Eliz. to all the Judges, who held that they could not proceed againſt ſuch Perſons without Commiſſion of Oyer and Terminer, whereupon it was thought the ſureſt Way to have a Commiſſion of Oyer and Terminer of all Treasons &c. And. 111. pl. 156.

inquire &c. of Treasons as well as Juſtices of Oyer &c. but their Authorities ſome how differ; For the later gives Power to inquire &c. of all Treasons in ſuch a County, but the former gives Authority to deliver the Gaol, as Newgate &c. of all Prisoners whatſoever in the ſaid Gaol being; ſo that by the one, the Juſtices may inquire of all Treasons &c. done in the County, but by the other, they cannot intermeddle with other Offences committed by the Prisoners in the Gaol [than ſuch as are] mentioned in the Commiſſion; and, as ſome ſay, of ſuch Prisoners as are in the Gaol at the Time of the Commiſſion awarded; but the Reporter thinks otherwiſe; becauſe the Practice in ſome Places has been otherwiſe. And it was ſaid that the Juſtices of Gaol-delivery have no Authority to inquire and take Indictments, for the want of ſuch Words in their Commiſſion; to which it was answered, that they may inquire, hear, and determine the Offences of the Prisoners in the Gaol; For otherwiſe their Commiſſion, by the Common Law, was vain, which gave Authority to deliver the Gaol, which Deliverance ought to be according to the Courſe of the Common Law, and therefore ought to be by Indictment and other Circumſtances neceſſary by the Law to make lawful Deliverance; ſo that the Indictment for the lawful Deliverance of the Offender is ſo incident, that it cannot be ſeversed, if the Deliverance be made upon the Trial; For without it he cannot be delivered; and likewiſe the Commiſſion gives Power as well to indict as to try and make Deliverance thereupon; For the Indictment is implied in the Words of Deliverance. And tho' the Practice now is to indict before Juſtices of Peace for Felonies and ſuch Offences as they may intermeddle with, and afterwards to try thoſe ſo indicted before the Juſtices of Gaol-delivery, yet this proves not the Neceſſity of doing ſo, as Br. tit. * Commiſſion ſeems to hint. For this is not allowed by the Common Law of the Land, there being no Juſtices of Peace by the Common Law who could take Indictments, but this is Warranted by the Statute of 4 E. 3. 2. which gives Authority to Juſtices of Gaol-delivery to deliver Gaols of thoſe who are indicted before the Keepers of the Peace; ſo that ſuch Proceeding does not prove that the Juſtices of Gaol-delivery cannot inquire. Now if they inquire, then the Queſtion is, if they ſhall inquire, hear, and determine Treasons committed by Prisoners in the Gaol, or not? and to this it was ſaid, that they may; For their Commiſſion is General, and the Generality of the Words contain under them, as well Matters of Treason as other Offences; and ſince the Words give Authority, there is no Reaſon to reduce them to a ſpecial Senſe, they having in themſelves a general One, eſpecially when it is for Execution of Juſtice, and they carry ſuch Meaning; which ſhews that Treason is not excepted; For the Words (of all Prisoners whatſoever in the ſaid Gaol being,) implies that they ſhall have Power to deliver all, whatever their Offence be, out of Priſon; and this differs from the Caſe of Juſtices of Peace, who have neither ſpecial nor general Words to Authoriſe them, but is to be compared to the Caſes of other Juſtices, who by general Words have Authority to meddle with Treason as thoſe of B. R. [who intermeddle with Treasons, and that] ſo ſhall the Commiſſioners of Gaol-Delivery; and this was held for Law by the Parliament in Time of E. 6. in the firſt Year of whoſe Reign cap. 7. It was Ordained among other Things, *that if any Perſon be found guilty of Treason &c.* Whence it plainly appears that they took the Law to be, that the Juſtices of Gaol-delivery might hear and determine the Treasons committed by the Prisoners, and if ſo, it follows of Conſequence, that they may take Indictments alſo before themſelves, of the ſame Offence, and do all other Things neceſſary to make lawful Delivery of the Prisoners of all Kinds out of the Gaol, whether by Execution of, or by diſcharging, them. And. 111, 112, 113. 26 Eliz. pl. 156. Anon. — * Quære if he means pl. 24 — † S. P. 2 Hawk. Pl. C. 24. cap. 6. S. 4. ſays, that this is not only warranted by very great Authorities, but alſo it ſeems more agreeable to Reaſon; For ſince the Words of the Commiſſion are general, and include

clude all Prisoners alike without any Exception, why should those who are accused of Treason be construed to be out of the Meaning of them more than others? especially considering, that the greater the Crime is for which a Man is imprisoned, the greater Hardship it is for him to lie under the Terror of a Prosecution for it, without being admitted to an Opportunity of clearing his Innocence.

15. By 33 H. 8. 20. They may punish such as keep unlawful *Gaming Houses*, or use unlawful Games. By 5 Eliz. 3. par. 9. they have Jurisdiction over *Perjury* and Subornation of Perjury against the Form of that Statute. By 8 Eliz. 3. they may punish those who transport Sheep alive. By 23 Eliz. 1. par. 9. they may inquire of, hear and determine Offences against that Statute in not coming to Church; and generally they have the like Power in other Statutes, creating new Offences, which it would be too tedious, particularly to set down in this Place. 2 Hawk. Pl. C. 27. cap. 6. S. 19.

* (A) † Justices Itinerants.

* There is no Letter in Roll.—

† They were Originally instituted for the good Rule of the Subjects and Ease of the Coun-

1. **J**ustices Itinerants were first Ordained ‡ by H. 2. who divided the Realm into 6 Circuits and appointed 3 Justices for every Circuit. Speed. 467. Janus Anglorum. 108.

tries, and that such as had Franchises might claim them; they were called Justiciarii in Itinere, or Itinerants, in respect of other Justices that were Residents. In the Black Book in the Exchequer, cap. 8. they are called Justiciarii Deambulantes and Perlustrantes; their Authority was by the King's Writ in Nature of a Commission, they had Jurisdiction of all Pleas of the Crown, and of Actions, real, personal and mixt; they rode from 7 Years to 7 Years; in what County soever they came, all other Courts, during the Eyre, ceased, and all those Pleas in that County, or arising there before any other, the Justices in Eyre might proceed upon as the others might have done. 4 Inst. 184. cap. 33. ——— But as the Power of Justices of Assises, by many Acts of Parliament, and other Commissions, increased, so these of Justices Itinerants by little and little vanished away. Co. Lit. 293. b.

‡ 22 H. 2. being Anno. 1176. and that it was done Communi Omnium Consilio. Prynne's Animadversiones on 4 Inst. 150. cap. 33. ——— And Sir Henry Spelman in his Glossary Verbo Iter, accordingly, and says that there were 2 Sorts of Justices Itinerant alii Comitatus itinerabant; alii Forestas Comitatus itinerantes Nova aucti Authoritate sub Edouardo 3. hoc exuerunt Nomen & Justiciarii Assisarum sunt exinde nuncupati. Qui Forestis designantur, Hodie priscam retinent Appellationem, alter Forestis Cistrentanis alter Ultra-trentanis constitutus.

2. Henry de Braibrock a Justice Itinerant being surprized in Time of H. 3. by Falcaus and imprisoned, because 30 Verdicts had passed against him; by Assent of Parliament the King went in Person with the Clergy and Laity to the Siege of the Place, and delivered him accordingly. Speed. 513.

3. They were to inquire of *Escheats, Lands, Churches and Women in the King's Gift*, and of *Castle-Guard*, Who? How much? And where? So as they had the Work of Escheators, and made their Circuits serve as well for the King's Profit as Justice to his Subjects; they used to take Fealty of the People to the King at one certain Time of the Year and to demand *Homage* also. Bac. of Government 1st. Part 199. cap. 62.

4. Before every Expedition they went about to the several Tenants in Ancient Demesne, and to the King's Borough-Holders in every County within their District, and there they demanded an *Aid*, which was in the Nature of a Gift, or Auxilium towards the King's Expedition, and if they could not then give, the King, at the End of the Expedition, might Tallage to a Tenth; and after Tallaging of the Metropolis the Justices in Eyre went thro' their proper Circuits and Tallaged all the King's Tenants in Ancient Demesne, and Burgage Tenants; and when any Aid was given, or the Justices assessed any Tallage, they returned the same out of their several Iters to the Justiciarii Residentes in the Exchequer. G. Hist. View of the Exchequer 28, 29.

* This in
Roll is Letter (A)

* (B) Justices Itinerants and others [*punished.*]

1. **I**N Time of H. 3. Sir Henry de Bath, in a Circuit, appropriated to him 200 *l.* Land, for which he was impeached. Speed 530.
2. E. 1. Deposed diverse Justices, and find them for Bribery. Speed 545.

A Justice of Record may be indicted of

taking of Money, and other such Falsity; but not of that which goes in falsifying a Record, as to say that he altered the Record from Trespas to Felony, and the like, which falsifies the Record. Br. Indictment, pl. 50. cites 2 R. 2. 9. — And where a Justice of Oyer and Terminer was arraigned of such Offence, he demurr'd upon the Indictment, and the Justices held the Indictment void; For it goes in Defeasance of the first Record; Quod Nota. Br. Indictment, pl. 14. cites 2^d Aff. 18.

Mr. Selden, in his Notes on Eadmer, gives us the Laws and Customs which William the King granted to all the People of England after his subduing the Land, and which are said to be the same as King Edward his Kinsman observed before him; the 15th whereof is, *Qui falsum tulerit Judicium veram suam perdat nisi Tactis sacro sanctis (Evangelius) probare poterit se melius Judicare non potuisse.* And there 86. No 41. De Judiciis, beginning about 14th Line, it is, *Sil e pot aleier, quod plus Recti facere nel font si perde la Franchises si al Rei nel pot racheter a son Plainir. Et si fit in Danorum Lege fit Forisfactura de Lahslite, sil alaier ne se pot quod melius scire non selt, & q od rectam Legem & rectum Judicium recusaverit, fit Forisfactura erga illum, cui jus hoc pertinuerit. si fit erga Regem vi Libra, si fit erga Comitum XL. solidi, si fit in Hundredo XXX. Solidi, et erga omnes i cons quilibetiam habent in Anglia coit ad solidos Anglicanos. In Danorum Lege qui rectum Judicium recusaverit, fit is in Misericordia de suo Lahslite, nec bene faciat Querelam Regi de hoc quod quis ei deceverit in Hundredo aut in Comitatu* — — — What is in the Roman Character is left by Mr Selden untranslating, which (as my Time is not so advantageously employ'd, as that Great Man's was, so much to the Benefit of the Learned Part of Mankind) I will essay the turning into English, and if the Reader likes it, he may content himself with it, but if not, he may amend it, and if a mistaken Guess should contribute to the making a Right One, it would give me some Satisfaction. I shall English the first Part of it thus, viz. If he cannot allege or make his Law, that he knew not to do more Right, so as he lose his Franchise to the King, he shall not redeem it at his Pleasure. And so in the Dane-Law it is a Forfeiture of *Lahslite*, if he cannot make his Law or swear that he knew not how to do better &c.

3. Sir William Thorpe, who had been Ch. J. of B. R. was indicted, for that he *Cepit Munera contra Furamentum suum*, viz. of R. S. 10 *l.* of H. 20 *l.* of D. 40 *l.* &c. And King E. 3. appointed three Earls and two Lords to examine this Matter; and he being charged with it could not deny it. The Judgment was, that he *Malitiose Falso & Rebelliter having broke his Oath* &c. be hanged; which Ld Coke calls a strange Judgment, and takes Notice that there was neither Felonice nor Proditorie in the said Judgment. See 3 Inst. 145. cap. 68. and 223. cap. 101. and page 224. he says it appears by Fleta. lib. 1. cap. 17. S. Cum igitur non fit &c. that the Punishment of a Corrupt Judge that received Gift or Reward was, * si inde convictus fuerit, quod imperpetuum a Concilio Regis excludatur, Terrasque, Res, Redditus, & Proventus Bonorum suorum amittat per unum Annum; qui, si Proventus non habuerit, puniatur per Discretionem, Decretum Regni & Consiliariorum Regis, and says that what Fleta calls Sacramentum Justiciariorum, in Vet. Magna Charta is called Juramentum Consiliariorum Regis; For the Judges of England are of the Kings Counsel for, in, and concerning the Laws of the Realm.

* Fleta. 19. cap. 17 S. 19.

(C) Their Original and Power.

1. **T**HE King's Bench is Eyre and more than Eyre; For if the King's Bench comes into the County, where any Commission in Eyre is, the Eyre shall cease, and the Justices at their coming shall send to all the Justices who have Power of Oyer and Terminer of Felony and Trespas, that they send before them all Indictments not determined, and shall send for the Records in their keeping; and all the Stewards of the County shall come and put in their Indictments; and also the Coroners their Rolls; Per Shard. Br. Judges, pl. 16. cites 27 Aff. 1. & 2.

2. The

2. The Justices in Eyre *after the Eyre is determined shall put their Records in Bank*, which is Banco Regis, and the same Execution, and the same Form of Execution (as before Justices in Eyre) shall be determined before the Justices of Bank. Quod Nota bene: Br. Judges, pl. 8. cites 14 H. 7. 20.

3. If Pleas are held in the County, and after the Justices in Eyre come into the same County, now the Judges in Eyre shall hold those Pleas which were held in the County before them in the same Manner as they were held before the others in the County, and they shall adjudge Execution upon any Recovery had in the County in the same Manner as the others should do by Fieri Facias or Elegit, and yet there are other Justices and another Court, and this Case was granted by the Justices. 15 H. 7. 5. b.

The C. B. shall cease by the coming of the Justices in Eyre. Br. Jurisdiction pl. 116. cites F. N. B.—4 Inst. 135. cap. 33. S. P. But that they yielded to B. R.

Justification.

(A) Who may justify the detaining of a Thing till Satisfaction.

See Inns &c. (B).—Trefpafs.

1. IF I send my Cloaths to a Taylor to make, he may keep them till Satisfaction for the making. Cr. 3 Ja. B. R. Per Williams.

Fol. 92. 8 Rep. 147. in the 6 Car.

genter's Case — Palm. 223. — Cro. C. 272. — Hob. 42. — Mo. 877. — Roll. R. 449. per Doderidge in Case of Robinfon v. Walker.

And he is not compellable to bring the Clothes Home, or deliver them, until he be paid for them, or be satisfied upon the Delivery, and that is to be proved upon Evidence. Cro. J. 626. Mich. 19 Jac. B. R. Waring v. Perkins. — But he cannot sell it; because the keeping the Apparel is no Charge, as a Horse is to an Inn-keeper. Yelv. 67. Trin 3 Jac. B. R. in the Hottler's Case.

2. But if I contract with a Taylor that he shall have so much for the making of my Apparel, he cannot keep them till Satisfaction for the making. Cr. 3 Ja. B. R. per Williams.

3. If the Lord, who has Estrayes by Prescription, takes an Estray and proclaims it according to the Law, and keeps it for diverse Months, and after, within the Year, the Owner claims it, the Lord may justify the detaining of it till amends made for the taking. Hatch. 5 Ja. B. between Taylor and James, Per Curiam. 44 C. 3. 12.

S. P. Br. Justification, pl. 17. cites 44 E. 3. 12 — See Estray (E).

4. But otherwise it is if the Lord works the Estray; For this makes him a Tortfeasor. Mich. 13 Ja. B. per Nichols.

See Estray (E).

5. If the Lord of a Fair hath used to have Toll for every Beast sold within it, and upon a Sale the Lord seizes the Beast sold for Non-Payment of the Toll, he may justify the detaining of it till Payment of the Charge which he has had in keeping it, as well as Payment of the Toll. Mich. 13 Ja. B. per Nichols.

* Orig. (Teigner.)

6. If A. possessed of Beasts delivers them to B. to pasture for 12 d. a Week, and after A. sells them to C. and C. comes to B. and demands of him to deliver them, and he refuses to deliver them till Satisfaction given for the Pasture; this is not lawful; For he ought to have his Remedy for the Pasture against A. who made the Contract. Mich. 8 Car. B. R. between Chapman and Allen, adjudged upon a special Verdict in a Crober and Conversion, where C. brought Crober

Cro. C. 271. S. C.

Trover and Conversion against B. and all this Matter found; and that B. after the Demand made by C. upon Payment for the Pasture by A. delivered them by Command of A. to a Stranger, and so a Conversion. And this Intratur. Hil. 7 Car. Rot. 419.

7. Carrier may detain for his Hire. Per Holt Ch. J. 2 Salk 654. Mich. 10 W. 3. in Case of Hartford v. Jones.

S. P. But if he once parts with the Possession of them, he cannot retake them. Per Holt Ch. J. 12 Mod. 511. Pasch. 13 W. 3. Anon.

8. Every Master of a Ship may detain Goods till he be paid for them, that is for their Freight; per Holt Ch. J. 12 Mod. 447. Pasch. 13 W. 3. Anon.

(B) Of what.

So if B. has a Heap of Corn, and A. will intermingle his Corn with B's. Corn. B. shall have all the Corn, because this was done by

1. IF A. flings his Corn into B's Boat, or A. loads his Corn in B's Cart, or A. puts a Saddle on B's Horse, and then puts him into his own Ground; In this Case, B. may very well take his Cart and Boat and Horse away, and keep and detain the Goods, without being any Trespassor, and may justify the detaining till A. brings his Action of Detinue to recover them; or his Replevin for them. 1 Bull. 96. Hill. 8 Jac. B. R. Anon.

A. of his own Wrong. Cited by Coke Ch. J. 2 Bull. 323. in Case of Ward v. Cypre, as adjudged in the Case of Shordish v. Moore.—So it is in the Case of Money, if two bring at Play, and the one of them will intermingles his Money in the other's Heap of Money, he shall now have all; For this is done by him of his own Wrong, Per Coke Ch. J. who said it was so adjudged in one Sir Richard Martin's Case; because his own proper Money or Corn cannot now be known, and therefore this intermingling being his own Act and of his own Wrong, by the Law he shall lose all; For this is done by him only as a Trick thinking thereby to deceive the other Ibid.

3. Deeds deposited for Security of Money borrowed will not be decreed to be deliver'd up without Payment of the Money. Fin. R. 10. Mich. 25 Car. 2. Fitzjames v. Fitzjames.—58. Hill. 25 Car. 2. Newman v. Jones and Trefilian.

4. Detainer of Goods cast away till they were paid for their Pains is good; and Salvage is allow'd by all Nations. 2 Salk. 654. Mich. 10 W. 3. B. R. Hartford v. Jones.

Land.

See Devise. (A) Where Land shall be taken as Money. Or Money as Land.

But where the Bond was to pay to the Husband his Executors &c. and the Wife died, leaving Issue, and the Issue died, and the Husband received a Part, and devised the Residue for Payment of Debts, as Part of his personal Estate, it was decreed to his Executor. Chan. Rep. 30. 4 Car. 1. Ferrers v. Ferrers.

1. Marriage Agreement to lay Money out in Land for a Jointure to Uses, Remainder to the Use of the Right Heirs of the Husband, after the Husband's and Wife's Death without Issue. The Money unlaidd out was decreed to the Heir. 2 Jac. 2. 2 Chan. Rep. 400 Knight v. Atkins.

2. A. marry'd M. the Daughter of J. S. with whom A. had 1500*l.* M. died leaving two Daughters, A. enter'd into Articles with J. S. that the 1500*l.* Portion, and 1500*l.* more, which he gave out of his own Estate, should be secured for a Purchase of Lands, or Leases of Lands, and paid to the Daughters at 21, or Marriage. Per Cur. If the Money had been invested in Land, and the Daughters died before the Day of Payment, the Lands would have gone to the Heir of them, but since it is in Money, if both die before the Time, it shall go to the Father, his Executors and Administrators. N. Ch. R. 36. 14 Car. 1. Wentworth v. Young.

3. J. S. before and in Consideration of Marriage with J. D. enter'd into Articles under Hand and Seal, to lodge 100*l.* in the Hands of J. N. to be laid out in Land for the Life of J. D. the Wife for a Jointure, with Remainder over. The 100*l.* was lodg'd accordingly; after J. S. dies, and a Creditor of J. S. sues the Wife his Administratrix. Upon a special Verdict finding as above, the 100*l.* was adjudged not to be Assets at Law; For the Intent being that the 100*l.* should be vested in Land, it was to be no longer look'd upon to be the personal Estate of J. S. 3 Chan. Rep. 217, 218. cited per Ld C. Jefferies, as a Case in Ld Hale's Time between Whitticke and

S. C. cited by the Master of the Rolls Pasch. 1688. as the Case of Whitwick v. Jermin.— S. C. cited Arg. Williams Rep. 174.

4. Bargainee dies, Part of the Purchase Money being paid, but the Title not being good, the Bargainor paid Interest, and the Bargainee paid Rent, and died before any Conveyance. Decreed the Money paid to be Part of Bargainee's personal Estate. 2 Chan. Rep. 139. 30 Car. 2. Cotton v. Cotton.

5. A. on Marriage with B. settles a Jointure, and covenants to lay out as much Money on Land as will purchase 120*l.* per Ann, to be settled on B. for Life, Remainder to the Heirs of A. A. dies intestate without having made any such Purchase. B. administers. The Heir brings his Bill to enforce B. to execute the Covenant in Specie, that so the Land might come to him after the Death of B. but the Court dismissed the Bill 2 Chan. Rep. 271. 35 Car. 2. Langton v. North.

6. Money by Marriage Articles was to be laid out on Land, to be settled To the Use of Husband and Wife for Life, Remainder to the Issue, Remainder to the Husband in Fee. Proviso, if the Husband die without Issue, the Wife might elect to have the Land or Money, and had six Months Time to make Election. The Husband died; No Purchase was made. The Wife was Enfeint of a Daughter born soon after the Husband's Death, but died at a Month old. The Wife was Administratrix both to Husband and Child, and elected within the six Months to have the Money, and gave Notice to the Plaintiff the Heir and Brother of the Husband. The Bill not being brought till after the Death of the Daughter. North K. dismissed the Bill; but without Costs; but in Mich. Term 1687. Jefferies C. decreed for the Heir. Vern. 298. Hill. 1684. Kettleby v. Atwood.

Ibid. 471. Mich. 1687. S. C.

7. Money of Infant invested in Land by Trustees of their own Heads, who afterwards dies in his Minority, is still to be considered as personal Estate; For an Infant cannot give Authority for, or consent to it, and he might have dissented to it at his full Age; and the Land is but in Nature of a Mortgage or additional Security for it. 2 Ch. Rep. 377. 1 Jac. 2. Winchelsea v. Norcliff.

So by Guardian. Arg. 2 Vern. 353. cites Dennis's Case.

8. 1500*l.* of the Husband's and 1500*l.* of the Wife's Money was agreed to be laid out in a Purchase of Land, and to be settled on the Husband for Life, Remainder to the Wife for Life, Remainder to the Issue of the Marriage, but no Mention where it should go afterwards in Default of Issue. The Husband and Wife died without Issue. The Question was, whether the Executor of the Husband, or Executor of the Wife, or the Heir of the Husband, or the Heir of the Wife, should have the Benefit of these Articles? And decreed, that the Articles making the Money as Land, it should be taken as Real Estate, and go to the Heirs of the Husband, and not to the Heirs of the Wife, in Regard, that in the common Usage and Way of Conveyances and Settlements, the Remainder in Fee was in

But the Reporter makes a Quere, if the Money was to be taken as Land, it had not been more reasonable to let the one half, (viz.) the Wife's 1500*l.* or the Land to be pur-

chafed there- fuch Cafe limited to the Heirs of the Husband. Wm's Rep. 175. with, to go cites it as in Ld C. Jefferies's Time. Sir Jonathan Atkins's Cafe. to the Heir of the Wife, or the other 1500*l.* or the Land to be purchafed therewith to go to the Heir of the Husband. Ibid.

9. Money, agreed to be laid out in a *Purchase for better securing a Jointure*, was not laid out during the Husband's Life, and the Husband died without Issue of the Marriage, was decreed by the Master of the Rolls to the Widow, in Satisfaction of what the Jointure fettled on her was short of the Agreement. 2 Vern. 5. Tr. 1686. Wharton v. Wharton.

10. Money by *Marriage Articles* was to be laid out in Land, and fettled *on the Husband and Wife and their Issue, Remainder to the Heirs of the Wife.* The Wife died, and after the Husband died. The Money shall go to the Heir of the Wife, and not to the Administrator of the Husband. 2 Vern. 101. Pasch. 1689. Lancy v. Fairchild.

S. C. cited 2 Vern. 355. Arg.

11. *Lunatick's Money invested in Land by Committee* was decreed to be still accounted as personal Estate, and to go to the next of Kin, and not to the Heir, and if the next of Kin will not take to the Land, the Committee must, and answer the Money. 2 Vern. 192. Mich. 1690. Audley v. Audley.

So if Part of the Money was paid, and the Bargainor pays it, and they agree to

12. A. under Hand and Seal *articles to sell Land to B.* but without any other Execution thereof, they *by mutual Consent go off the Bargain*, (by releasing each other, or cancelling the Articles &c.) and then the Bargainor dies indebted; This shall not be *Affets.* 3 Ch. R. 220. Hill. 1690. E. of Pembroke v. Baden.

go off as aforesaid, and then the Bargainor dies. Ibid.—But if the Bargainor dies, Part of the Money having been paid him, and no Conveyance made to the Bargainee. As the Bargainee had a Remedy in Equity to compell the Heir of the Bargainor to make the Conveyance on Payment of the Residue of the Money, so the Heir may be forc'd by Creditors to convey, and the Bargainee to pay the Money as the Testator's personal Estate, and it shall be *Affets* to them in Law and Equity when paid. 3 Ch. R. 220. E. of Pembroke v. Baden.—2 Vern. 215 S. C. & P. but cites it decreed by Jefferies C. with Assistance of Master of Rolls and 2 J. that the Purchasor, being willing to go off, should be repaid, and his Purchase discharged. But per Lords Commissioners decreed, that the Purchase go on and the Heir convey, and the Money be paid to the Executors.—It seems that after such Contract, the Bargainor dying, the Bargainee and the Heir of the Bargainor cannot, by Agreement to break off the Bargain, prevent the Executors of the Bargainor from having the Money, tho' no Debts are due; For that the Testator having done an Act, whereby he intends to deprive the Heir, and make it a personal Estate, cannot prevent it after. 3 Ch. R. 221. E. of Pembroke v. Baden.

* 3 Ch. Rep. 217.—Cited Vern. 471. —† Cited N. Ch. R. 165.—‡ 2 Chan. Cases 117. Trin. 54 Car. 2.—|| Vern. 298. 471—2 Ch. R. 404 S. C. by Name of *Kettleby v. Lamb* Says that Money agreed by Marriage Articles to be laid out upon Lands, and not being laid out, shall go as the Lands should have gone had a Purchase been made. —¶ Cha. Prec. 25. S. C.

13. It was agreed by Marriage Articles, that 500*l.* Part of the Wife's Portion, should be *placed in the Hands of A. and B. to be put out at Interest till it could be invested in a Purchase with the Consent of the Husband and Wife of Lands &c.* to be fettled on Husband and Wife for their Lives, and the Life of the Survivor of them, Remainder to the Heirs of their two Bodies, Remainder to the Heirs of the Body of the Wife, Remainder in Fee to the Wife's Brother the Plaintiff. Wife dies without Issue. Husband dies; The 500*l.* not laid out; but Husband received the Interest during his Life. Per two Commissioners, This is personal Estate, and to go to the Administrator of the Husband surviving; because there was *no positive Covenant that it should be laid out in Land.* 2dly. It was not to be laid out in Land, but *by the Consent of Husband and Wife*, and no Purchase was made or consented to; and if fettled, the Husband had been Tenant in Tail, and might have barred the Issue. Per Commissioner Hutchins Contra, that the Intention was plain, and that the Husband became only Tenant in Tail after Possibility of Issue extinct, and conceived this Cafe govern'd by the Cases of * *Whitwick v. Jermin*, † *Lawrence and Beverley*, ‡ *Ammon v. Honeywood*, and || *Kettleby v. Atwood.* 2 Vern. 227. Pasch. 1691. ¶ *Symonds v. Rutter.*

14. A. had Issue two Sons B. & C. and two Daughters M. & N. and by Will devised to *M. and N. 550*l.* a Piece*, and ordered that it should be *laid out in a Purchase of Lands* by his Executors within a Year after his Decease, *to the Use of M. and N. and the Heirs of their two Bodies*, and

if

if either of them die before Marriage, then 150 l. Part of the Portion of her so dying, Or if the 1100 l. should be laid out in Land, then so much Land as should be of the Value of 150 l. should go to the surviving Sister, and the remaining 400 l. or Land of that Value, if the Purchase be made, should go to his two Sons equally to be divided between them and their Heirs. M. died unmarried, N. survived and married J. S. The Sons died without Issue, and afterwards N. died without Issue. The Money was not laid out in Land, but the Heir at Law claimed the whole 1100 l. as Land; because had it been laid out, the Land would have descended to him. But decreed the 550 l. and 150 l. to the Husband, the Administrator of N. Hill. 1692. 2 Vern. 284. Abbot v. Lec and Cuthbert.

15. Money shall in many Cases be considered as Land, when bound by Articles in order to a Purchase; but whilst it remains *still Money*, and no Purchase made, it shall be deemed as part of the personal Estate of such Person, who *might have aliened the Land*, in Case a Purchase had been made. 2 Vern. 296. Trin. 1693. in Case of Chichester v. Bickerstaff.

16. Money by Marriage Articles is to be paid by the Woman's Father; The Husband, within three Years after the Marriage, is to advance the like Sum, and both to be invested in Land, and settled on the Baron and Feme, and their Issue, Remainder to the right Heirs of the Baron. Within a Year of the Marriage the Wife dies, and within a few Days after the Death of the Wife, the Husband dies, makes a Will, and A. Executor, and B. Residuary Legatee. The Heir of the Baron brought a Bill against A. the Executor, and who was likewise the Wife's Father, to pay him the 1500 l. as Land. Per Cur. this Money, though once bound by the Articles, yet when the Wife died without Issue, became free again, and was at the Dispose of the Baron, as the Land would likewise have been, had a Purchase been made pursuant to the Articles; and therefore would have been Assets to a Creditor, and must have gone to the Executor or Administrator of the Baron; and this Case is much stronger where there is a Residuary Legatee; and therefore dismissed the Bill. 2 Vern. 295. Trin. 1693. Chichester v. Bickerstaff.

S. C. cited Arg. Sel. Ch. Cases in Ld. Talbot's Time, 88. but Ibid. 90. Ld. C. Talbot said, that it is probable, the Court, in that Case, went upon some Reason which induced it to think, that Sir John Chichester looked upon the Money as personal

Estate; For otherwise the Authority of that Case is not to be maintained, being contrary to all former Resolutions, and also to a late one in the House of Lords, of the Countess of Warwick v. Edwards.

17. A. agrees for the Purchase of Land incumbered with Mortgages and Judgments; The Purchase Money was lodged in an indifferent Hand to discharge the Incumbrances, on settling the Quantum, and executing Assignments; but the Purchaser dies in the Interim, and left not Assets sufficient to pay his Debts on Bond. Lord Wright held, that the Money was bound by the Agreement, and must be applied to pay off the Incumbrances on the Land. Ch. Prec. 174. Mich. 1701. Farr v. Middleton.— The Lands and Money are mutually bound by the Agreement. Per Ld. Harcourt. Hill. 1711. Ch. Prec. 323. Greenhill v. Greenhill.

18. In Equity, Land agreed to be sold shall go as Money, and Money agreed to be laid out in Land as Land; But *Quære*, if Money be articulated to be laid out in Land in a Marriage Settlement, upon failure of Issue, and there is no Issue, but Debts by simple Contract, whether this Money shall be taken as Land, and thereby defeat Creditors? Mich. 4 Annæ. 1 Salk. 154. (seems to be the Author's own Memorandum, and Quære.)

19. A. before his Marriage with M. agreed by Articles to add 700 l. to M's 700 l. Portion, and the Securities for the Monies were assigned to Trustees, and agreed to be invested in Land, and settled on A. for Life, Remainder to M. for Life, Remainder to the first &c. Son in Tail Male, Remainder to Daughters, Remainder to the right Heirs of A. They intermarried; A. died without Issue, but made his Will, and devised some Lands to M. and devised the rest of his real Estate in the County, and City of York, and elsewhere in Great-Britain, to J. S. And gave his personal Estate, and all his Securities for Monies, to M. whom he made Executrix. Many of the Securities remained unaltered; But some of the Money had been put out upon

On an Appeal to the Ld. C. Cowper, this Decree was affirmed. Pasch 1-15 Wms's Rep. 176. in a Note there. —Ch Prec. 400. S C Pasch. 1-15 other

by Name of *other Securities*, and was mentioned to be in Trust for A. his Executors and Administrators. Lord Harcourt said, that the Articles had, in Equity, changed the Nature of this Money, and turned, it as it were, into Land; and therefore, as to so much of the 1400 l. as is subsisting upon the Securities, on which it was originally placed, or on any other Securities, where no new Trust has been declared, it ought to be considered as real Estate; But whereas 250 l. part of the 1400 l. had been called in by A. and placed out on other Securities, on a different Trust, that shall be taken to be personal Estate; Forasmuch as there being no Issue of the Marriage, it was in the Power of A. to alter and dispose of it, as against the Heir at Law, though not against M. and this placing out upon different Trusts, he took to be an *Alteration of the Nature of it*, since his declaring the Trust to his Executors seems tantamount with his having declared, that it should not go to his Heir. Wms's Rep. 172. 176. Mich. 1711. *Lingen v. Souray*.

the personal Estate devised to her being much more than the Provision intended by the Articles, it must be taken as a Satisfaction of what she would otherwise be intitled to by the Articles. Abr. Equ. Cases. 175; pl. 5. S. C. but is an Abridgment only of Ch. Prec. and has not the Point in Wms's Rep. — S. C. cited Arg. says, that it appears by the Decretal Order, that there was an Assignment of Securities to Trustees to be laid out in Land, and settled, but that, some Time after the Marriage, the Husband called in some of the Money himself, and settled it upon the same Persons as by the Marriage Settlement it was to be settled upon, and afterwards, by Will, devised his personal Estate to his Wife, against whom a Bill was brought by the Nephew as Heir at Law, and it appearing that 700 l. remained upon the same Securities at his Death, as at the Time of the Settlement it was decreed, that that 700 l. should be looked upon as Land, but the other which was actually taken out by him should not be bound, and that the like Distinction was 11 March. 1718. at the Rolls, in the Case of *Chaplin v. Forster*. See Ch. Cases, in Ld. Talbot's Time. 8^o, 88. Pasch. 1735. in Case of *Lechmere v. Lady Lechmere*. — But Lord C. Talbot disapproved the Distinction, and said, that none of the Cases did, nor was there any Thing in Reason, to warrant it; and that he was no ways satisfied, that that Case was resolved upon that Reason; For in that Case, the Husband had altered the Trusts and the Limitations of it: Besides, in that Case no-body had an Interest but himself and his Wife; and the Court, as appears by the Decree, laid great Stress upon the *Change of his Intent appearing by changing the Trust*; And in the Case of *Chaplin v. Forster*, the Husband alone was to have the Benefit of the Articles, and so neither of those Cases like the Case of *Lechmere v. Lechmere*. Ibid 91, 92.

20. A. on his Marriage with M. conveyed Lands in Trust for himself for Life, Remainder to Trustees to support &c. Remainder to M. for Life, Remainder to the first &c. Son in Tail Male, Remainder over; and assigned Banker's Assignments, (which are personal Estate, and go to the Executors) to the same Trustees in Trust to pay the Profits to such Persons as would be intitled to the Land so settled; And in Case the Principal should be paid in according to the Act of Parliament, then the Trustees should lay the Monies out in Land, to be settled to the same Uses. A. died without Issue; The Brother and Heir of A. brought a Bill against M. and A's Executor; and it was decreed, that these Annuities, or Banker's Assignments, being redeemable by Parliament, were as a Mortgage assigned to Trustees, and directed, when paid in, to be invested in a Purchase, and settled as the Fee Simple Lands were above settled; And therefore, though M. was to have an Estate for Life in the Annuities by the Jointure Deed, yet after her Death the Annuities should not be looked upon as personal Estate, so as to carry a Moiety, by the Custom of London, to her Representatives, but as Money directed to be laid out in Land, and to be as real Estate, to go to the Plaintiff after her Death, as Heir of A. Wms's Rep. 204. Trin. 1712. *Disher v Disher*.

21. A. died intestate, leaving a Widow and two Daughters; After his Decease 200 l. in Gold was found hid in a Hole in the Wall, and 200 l. in Silver in a Box, besides his Stock in Trade. The Widow invests the 400 l. in a Purchase of Lands of Inheritance, and settles the same to herself for Life, Remainder to her two Daughters in Tail, Remainder to her own right Heirs; Both the Daughters died without Issue intestate; The Defendant as Heir to the Mother entered upon the Lands; Plaintiff as next of Kin, and as Administrator to the Daughters, brought his Bill to subject the Land to the 400 l. viz. to
 refon?

refund two thirds thereof, as being personal Estate belonging to the Daughters; and it was proved, that the said several Sums were invested in this Purchase. The Master of the Rolls decreed for the Plaintiff; but upon Appeal to the Lord Keeper, the Decree was reversed, as being within the Reason of the Case of **Kirk and Webb**, lately affirmed upon an Appeal in Parliament, that Money had no Ear-Mark, and could not be followed when invested in a Purchase. 2 Vern. 440, 441. Mich. 1702. Kendar v. Milward.

22. A. on his Marriage with M. settled Lands, and also covenanted to lay out 2000 l. (then in Trustees Hands) in the Purchase of Lands, to be settled on himself and his Heirs. A. died intestate, living M. and leaving Issue one Daughter only; but in his Life-time he received 1350 l. part of the 2000 l. M. took out Administration, and the Daughter brought a Bill for a specifick Performance of the Covenant, and also for two thirds of the personal Estate, under the Statute of Distributions. It was held by the Master of the Rolls, that the remaining 650 l. ought to be taken as Land, and go to the Plaintiff as Heir, the Dispute here not being between the Father and the Party who was to pay the Money, but betwixt the Heir and Executor, who became intitled to the Money, subject to the Covenant, and that it was the rather to be deemed a real Estate, because it was part of the Marriage Agreement, and made in Consideration of a Marriage, and Marriage Portion; And decreed the 650 l. to be brought before the Master for the Benefit of the Plaintiff, (being an Infant) but would not decree it to be laid out in Land, because if the Plaintiff should die before such Disposition, it would go to the Heir of course. Wms's Rep. 483. Mich. 1718. Chaplin v. Horner.

23. A. being a Freeman of London, agrees on his Marriage with M. and covenants with Trustees, to add 1500 l. to the 1500 l. Portion of his Wife to purchase Lands within two Years after the Marriage to be settled on A. for Life, Remainder to M. for Life, in lieu and bar of Dower and Jointure; Remainder to the Issue; A. died, leaving M. and two Children. Lord Macclesfield held, that, from the Articles executed, the Money was a Debt, which A. was obliged to pay; that it was no part of the personal Estate from that time, but must be looked on as Land, and then it could be no Barr of the customary Part of the personal Estate; that the Custom did not operate at all till the Party's Death, and then whatever personal Estate was left, was to go according to it. Mich. 1718. Ch. Prec. 505. Babington v. Greenwood.

24. Money was articled to be laid out in Land to be settled on the first &c. Son in Tail; and because the Court, in order to preserve the Chance to the second Son, would not decree the Money to the eldest, but ordered it to be invested in a Purchase, pursuant to the Articles, the eldest Son got one to lend him a Purchase, and to settle it, with an Intention forthwith to suffer a Recovery, and to Re-convey the Estate to the Seller; And though all this appeared by the Master's Report, yet the Master of the Rolls (after some Hesitation) allowed it. Wms's Rep. 485. at the Bottom, in an Addition there, cites Pasch. 1723. v. Marth.—And the Reporter adds a Quare, whether the Money might not better have been paid to the eldest Son?

25. On the Marriage of A. with M. the Manor of K. was conveyed to the Use of himself for Life, Remainder to the first &c. Son in Tail, Remainder to himself in Fee. And it was agreed, that 10,000 l. part of M's Portion, should be vested in Land, and settled as the Manor of K. was, and in the Interim, to be placed out on Securities, and the Interest to go as the Rents and Profits of the Manor of K. should go. A. died, leaving B. his only Son; B. the Son levied a Fine of the Manor of K. to the Use of himself in Fee, and died without Issue intestate. The Manor of K. descended to E. as next Heir, though otherwise a remote Relation. Lord C. Macclesfield held, that B. had Election to have made this Money, or to have disposed of it as Money, but then he must have done something to determine such Election, which is not done in the present Case; that if

This Decree was affirmed on Appeal in the House of Lords. Ibid. 176.—S. C. cited by Ld. C. Talbot, who said, he was bound by it. Sel. Ch. Cases, in Ld. Talbot's Time 92.

Pafch 1735.
in Cafe of
Lechmere v.
Lechmere.

there had been fo much as a *parol Direction from B.* for the Payment of the 10,000 l. to his Adminitratix, he fhould have had a Regard to it; But that as to the Fine it was immaterial, B. having as good a Power to difpofe of the Manor of K. or of the 10,000 l. againft all but his Ifue before the Fine as after; and Ifue he never had; and ordered the Security for the 10,000 l. to be affigned; But decreed the Arrears of Interest, and a proportionable Part of the Interest of the broken Part of the laft half Year, to be paid to B's Adminitratix. 2 Wms's. Rep. 171. Trin. 1723. Edwards v. Lady Warwick.

26. *Lands were devised to Trustees and their Heirs in Trust to apply the Rents and Profits until Sale, for the Benefit of all his Children, A. B. C. and D. and the Survivors and Survivor of them equally, part and Share alike; and on further Trust, that as soon as the Trustees fhould fee neceffary for the Benefit of the Children, they fhould fell the Premiffes, and apply the Money for the Benefit of his Children, Part and Share alike; the Shares of the Sons to be paid at 21, and thofe of the Daughters at 21, or Marriage. B. the eldest Son, attained his Age of 21, died intefate, leaving a Widow, and no Child. The Master of the Rolls decreed the Lands, thus devised, to be personal Eftate, and the Widow to have a Moiety of her Husband's Share, both of the Rents and Profits received in her Husband's Life, and of the Money arifing by Sale; And upon Appeal to Lord C. King, tho' it was objected that the Lands were not abfolutely directed to be fold, but as soon as the Trustees fhould fee it neceffary for the Benefit of the Children, his Lordship held, that this was within the Rule of Lands, by being devised to be fold, becoming personal Eftate; that here the Lands are devised to be fold, and only the time of Sale left to the Direction of the Truitees, and affirmed the Decree. Hill. 1725. 2 Wms's. Rep. 321. Doughty v. Bull.*

27. *A. devised Land to be fold by his Executors, and with the Money to purchafe an Annuity of 100 l. a Year to J. S. for her Life, out of which the fhould maintain her Children; and gave 30 l. to each Child, to be raifed out of the faid Annuity and personal Eftate, and the Overplus of his personal Eftate he gave to J. S. who died foon after the faid A. Upon a Bill by the Adminitratior of A. for Sale of the Lands, which was oppofed by the Heir, Ld. C. King held, that the Intention of the Will, was to give all away from the Heir, and turn the Land into personal Eftate, which muft be taken as it was at the Death of A. and ought not to be altered by any fubfequent Accident, (as by the Death of J. S.) and that being made personal Eftate, the Heir ought not to have the Rents till Sale; and decreed the Land to be fold, and the Money, as personal Eftate, to be paid to the Plaintiff, he paying the Children's Legacies. But the Heir at Law was ordered his Cofts. Mich. 1725. 2 Wms's Rep. 308. Yates v. Compton.*

28. *Lands defcended to the Wife were charged with feveral Debts and Baron and Feme, for Payment thereof, vefted the fame in Truitees, to be fold, and the Surplus to be paid to Baron and Feme, as they by Writing fhould direct. They fold enough to pay the Debts; The Wife died; The Husband devised all his Lands lying in &c. to his Brother, and left a Daughter, who claimed the Lands; But decreed, that the Land muft be confidered in Equity, as if actually fold, and muft go as the Money would have gone; and whether confidered as Money or Land, it would have gone to the Husband, and the Devife good. Pafch. 1727. Abr. Equ. Cafes 396. Collingwood v. Wallis.*

29. *A. having five Nieces, his Co-heirs at Law, who had each of them feveral Children, devised a very confiderable Eftate to Trustees, and their Heirs, to be fold, and to put the Money arifing by fuch Sale into five equal Parts and Shares, and out of each fifth Part or Share, to pay 1000 l. a-piece to the feveral younger Children of each of his five Nieces, and the Refidue of the Money of each fifth Part, to be paid to fuch of his faid five Nieces as fhould be then living, and in Cafe of their Deaths, then their Shares to be equally*

equally divided amongst their younger Children, which should be alive at the Time the Dividends were, or ought to be, made; Great Part of this Estate was sold many Years since, and the 1000 l. a-piece to the several Children of the five Nieces had been paid; after which the Nieces themselves, being intitled to the Remainder of the Trust Estate, chose not to have it sold, but continued to receive the Rents and Profits thereof, in five equal Shares for several Years; And they being all now dead, the eldest Son of each of them claimed it as a resulting Trust for their respective Mothers, and that from them it descended to their eldest Sons as Heirs at Law; and the rather, for that all the Purposes for which the Trust was created, being satisfied, their Mothers might in their Life-times have compelled the Trustees to have executed Conveyances to them respectively, of the unsold Estate; and they, as their Heirs at Law, stood in their Place, and had the same Right; And that otherwise it would be in the Trustees Power, by delaying or hastening the Sale, to give the Surplus to whom they pleased; And that it was now Years ago since the Trust was created, and yet great Part of the Estate remained still unsold; But the Court directed the rest of the Estate to be sold, and the Money to be divided among the younger Children of each Niece, according to the Will, as it would have been if the Nieces had died before the 1000 l. a-piece to their younger Children had been paid, or before sufficient of the Estate could have been sold for the raising thereof, the Testator plainly intending, that the younger Children of each Niece, not their eldest Sons, or Heirs at Law, should stand in their Mother's Place; And greatly blamed the Trustees for having so long delayed the Sale. Patch. 1727. Abr. Equ. Cases, 396, 397. *Davers v. Folkes*.

30. A. in Consideration of 6000 l. Portion with M. by Marriage Articles, covenanted with Trustees, to lay out, within one Year after the Marriage, the said 6000 l. and to make it up 30,000 l. in the Purchase of Lands, to be settled on A. for Life, Remainder to Trustees to preserve &c. Remainder for so much as would amount to 800 l. a Year to M. for a Jointure, Remainder of the whole to the first &c. Son of the Marriage in Tail Male &c. Remainder to Trustees for 500 Years to raise Daughters Portions, Remainder to A. his Heirs and Assigns for ever. But if no Daughters, then the Term to cease for the Benefit of A. his Heirs and Assigns for ever.—— After the Marriage, A. purchased several Estates in Fee, but never settled them; and likewise purchased several Terms, and died intestate, and without Issue, leaving 1800 l. a Year Real Estate to descend upon the Plaintiff, his Nephew, and Heir at Law. And A. further covenanted, that until the 30,000 l. laid out as aforesaid, Interest should be paid for the same after the Rate of 5 l. per Cent. unto the Persons intitled to the Rents &c. of the Lands when purchased.—— M. took out Administration, and the Plaintiff by Bill prayed an Account of A's personal Estate, and to have the Covenant carried into Execution, his Remainder, by the Death of A. without Issue, now taking Effect; And also to have some Purchases compleated which were left incompleat at A's Death. It was intitled for Defendant, that Plaintiff was not privy to any of the Considerations in the Covenant, and so could not compel M. to lay the 30,000 l. out for his Benefit. But if he could, that the 1800 l. a Year Lands descended to him ought to be taken as a full Satisfaction. But both Points were decreed at the Rolls for the Plaintiff, the Heir at Law. And upon coming before Lord C. Talbot, his Lordship thought, that the Intent of A. was, that the 30000 l. should, at all Events, be laid out in Land, and that though the 30,000 l. was not deposited in Trustees Hands, (in which Case he observed it seemed to be admitted on both Sides, that it must have been looked upon as real Estate) yet upon the Case of the Countess of Warwick *v. Edwards*, where the Money was decreed to go as Land, tho' to a collateral Heir, who was not within the Considerations of the Settlement, by which he said he thought himself bound, he looked upon it as a settled Point, that where the Securities are appropriated, the Money shall

shall go as Land, even to a Collateral Heir or General Remainder-man, unless there appears some Variation in the Party's Intent ; And nothing appearing to the contrary, but that the Intent of A. remains as it was at the Time of the Covenant entered into, and so distinguished it from the Case of *Kingston [or Lingen] v. Sowry*, he thought this Case fell within the common known Rule, that Money articed to be laid out in Land, is to be looked upon as Land. Sel. Ch. Cafes, in Ld. Talbot's Time. 80 to 92. Pasch. 1735. *Lechmere v. Lady Lechmere*.

31. A. entered into Articles with J. S. for the building an House on A's Land, and agreed to give J. S. 1000 l. for the same, but before the House was built A. died intestate. The Son and Heir of A. and on whose Inheritance the House was to be built, brought his Bill against the Widow and Administratrix, to compel her specifically to perform this Agreement, and decreed accordingly. 2 Vern. 322. Mich. 1694. *Holt v. Holt*. — S. C. cited by Ld. C. Talbot, who said, that if a Man articles for a Purchase, and binds himself, his Heirs, Executors, and Administrators, the Heir is intitled to have the Purchase compleated, and may compel the Executors to do it, as appears from the said Case of *Holt v. Holt*. And said further, that where-ever a Man's Design appears to turn his personal Estate into Land, this gives his Heir an Advantage which this Court will never take from him. Sel. Ch. Cafes, in Ld. Talbot's Time. 91. Pasch. 1735: in Case of *Lechmere v. Lady Lechmere*.

(B) Where Money being ordered to be laid out in Land, and settled, Chancery will decree the Payment, or enforce the laying it out.

And if a Man covenant to purchase for him and Heirs of his Body by such a Woman, Remainder to his own right Heirs, and he dies without Issue, and without making any Purchase ; the Court will not compel the Executor to make a Purchase for the Heir, because that attached in himself, and is extinguished in him. 12 Mod. 522. ut sup.

1. IN Chancery it was agreed, to be the constant Practice of the Court, that if there be Covenants to purchase an Estate to such and such Uses, and Money lodged in Trustees, for that Purpose, the Court will compel a Purchase to be made to the Uses, tho' Covenantor died before ; but if the first Estate is an Entail, with Remainders over, and the Person to take it be living at the Time of the Death of him whose Money it is, there Chancery shall not compel a Purchase for the Sake of the Remainder ; because Tenant in Tail may destroy it as soon as it is created ; and the Court will not do a vain Thing. 12 Mod. 521, 522. Pasch. 13 W. 3. Anon.

2 A. by Will directed Money to be invested in Land, and to settle and intail the same on B. for Life, he paying 200 l. a-piece to L. and M. and after his Decease, to the Heirs Male of the Body of the said B. and the Heirs Male of the Body of every such Heir Male, severally and successively &c. and for want of such Issue, to C. for Life &c. B. had obtained a Decree about the Year 1690. for Payment of the Money to him, in Regard he was to be Tenant in Tail, and might bar the Remainders, and in 1703 died without Issue. Lord Cowper held, that tho' it should be admitted that B. was Tenant in Tail, yet the Money ought not to have been decreed to him, but in Equity the Trust ought to be strictly pursued. But he said, that forasmuch as B. lived ten Years after the first Decree and Payment of the Money to him, and probably, had it been settled in Land, would in his Life-time have barred the Intail, it was too late now to fetch the Money back from him, in Case he was Tenant in Tail ; And said, Quod fieri non debet factum valet. 2 Vern. 551. Pasch. 1706. *Leggatt v. Sewell and Weller*.

3. 2000 l. was agreed by Marriage Articles to be invested in Land, to be settled upon the Husband and Wife for their Lives, Remainder to the Heirs of the Body of the Wife by the Husband, Remainder to the Heirs of the Husband. The Wife died; then the Husband died intestate, and no Purchase made by him, but he had the whole Money in his Hands. They left Issue one Son and three Daughters. Administration was granted to the eldest Daughter. The Son brought a Bill against his Sister (the Administratrix) to have the Money paid him, he electing not to have it laid out in Land; And in Regard the Son would have the intire Interest in the Lands when purchased and settled, and the absolute Power over them, the Court decreed him the Money, and the Administratrix to be indemnified; And said, that under those Circumstances to decree a Settlement, would be to decree a vain Thing, which the Son the next Moment, by Fine only, might cut off. At the Rolls. Mich. 1710. Wms's Rep. 130. Benfon v. Benfon.

A. devised 1000 l. to be laid out in a Purchase of Lands in Fee, and the same to be settled upon B C and D. and their Heirs equally to be divided. B. dies, leaving his Heir an Infant; and C. and D. together with the Infant Heir, bring a Bill for the

1000 l. Lord C. Cowper directed the Shares of C. and D. to be paid to them in Money, according to their Election, the Words of the Limitation making a Tenancy in Common, and they having it in their Power the next Moment to turn it into Money. But the Infant Heir being incapable of making an Election, his Share was directed to be brought before the Master, and put out for the Infant's benefit. Besides, if he should die in his Infancy, such Election might be prejudicial to his Heir. Wms's Rep. 389. Mich. 1717. Seeley v. Jago.

4. So where Money was directed to be laid out in Land, and settled on M. for Life, Remainder to her first &c. Son in Tail, Remainder to such Son in Fee, and in the mean Time the Interest to go as the Profits of the Land &c. M. and B. (who was her only Son) agreed to divide the Money, viz. a third Part to M. and two thirds to B. In this Case Ld. C. Parker said, that since the Son might, by a Fine only, bar these Limitations, it would be in vain to decree a Settlement which might be cut off the same Moment it was made, and directed the Trustees to pay the Money to M. and B. pursuant to the Agreement, and to be indemnified; But said, that if there had been two Sons, or any Person in * Remainder, he would not have decreed the Payment. Wms's Rep. 470. Trin. 1718. Short v. Wood.

S. C. cited 2 Wms's Rep. 1-3. Trin. 1-23. Arg. and admitted by Lord C. Macclesfield in Case of Edwards v Lady Warwick ——— *It a Remainder man has but a Chance for the Estate, or the Money,

which cannot be barred without a Common Recovery; there, in Regard the Tenant in Tail may die before such Recovery suffered, or in the Vacation, when a Recovery cannot be suffered, Equity ought not, in Violation of the Intent of the Party, to decree Payment of the Money to the Tenant in Tail, but to decree a Settlement, that the Chance intended to the Remainder-man may be preserved. Wms's Rep. 471. says, it was cited by Ld. C. Parker as so determined in the Case of Colwall and Dr. Shadwell.

5. So it seems to be, if the Son had been an Infant, the Court would not have ordered Payment of the Money; For during the Infancy no Fine could have been levied. Wms's Rep. 471. at the End of the Case of Short v. Wood. ut sup.

S. P. by Ld. Cowper, who said, it was admitted that it ought to be so, be-

cause the Infant has no Capacity to bar the Intail until of Age, and may possibly die before. 2 Vern. 552. Pasch. 1706. in Case of Legatt v. Shewell.

6. A. on Marriage with M. settled the Manor of K. to the Use of himself for Life, Remainder to the first and every other Son of the Marriage in Tail, Remainder to himself in Fee. And it was agreed, that 10,000 l. Part of M's Portion, should be vested in Land, and settled as the Manor of K. was, and in the mean Time to be placed out upon Securities, and the Interest to go as the Rents and Profits of the Manor of K. should go. A. died leaving only one Son B. Upon Application to the Court by B. he being Tenant in Tail, Remainder to himself in Fee, the Money would have been ordered to him; B. died without Issue, and the Manor of K. descended to E. in Fee, who praying that the 10,000 l. being placed out on a Mortgage, the Mortgage might be assigned to her. Lord C. Macclesfield decreed the same accordingly, only his Lordship directed the Interest due at B's Death, to go to his Administratrix

This Decree was afterwards affirmed in the House of Lords. Ibid. 176.

stratrix ; And he dying in the Middle of the half Year, he ordered, (as the Reporter says he understood it) that the Interest should not be taken as a Rent, but should be apportioned, and paid to the Administratrix in Proportion. 2 Wins's Rep. 171. to 176. Trin. 1723. Edwards v. Lady Warwick.

See Fines
(E. a. 2) —
Grant (H. a. 4)
and other
proper Ti-
tles.

(C) Grant or Devise of Lands good, where they lie in several Places.

1. **T**HE King seised of the Rectory of A. which extended into the Counties of B. and C. by Letters Patents grants the Rectory of A. in the County of B. to J. S. in Fee, cum omnibus Terris Glebis &c. & aliis Hereditatibus cum suis Pertinen. dictæ Rectoriæ spectant'. The Question was, if those Things in the County of C. shall pass by his Letters Patents, by those Words, *Dictæ Rectoriæ spectant'*? And it was urged, that those Things in the County of C. cannot belong to the Rectory of M. in the County of B. And that it is not aided by the Statute of Misnomer or Non-nosmer &c. For the Patent is served by the Rectory in the County of B. and vouched a Case of a Prebend which extended into diverse Towns, which the Queen granted by Name of the Prebend of D. in one of the Towns that nothing passed in the other Town. But per Manwood Ch. B. the Tithes in the County of C. shall pass ; And per Shute J. tho' they are not belonging to the Rectory in the County of B. yet they are belonging to the Rectory of A. and the Words are (*dictæ Rectoriæ spectant'*) which is to be intended to the Rectory of A. generally, and not to the Rectory of A. in the County of B. Quære. Savil. 55. pl. 118.

2. If A. seised of a Manor extending into two Counties, viz. B. and C. and that in B. is Land, Rents, and Services, and that in C. only Services in Gros; and Grant is made of the Manor of B. cum omnibus terris &c. & servitiis dicto manerio spectant. the Services of the other shall pass as *Dicto Manerio spectant'*. Per Manwood Ch. B. Savil. 56. in pl. 118.

3. If I grant all my Manor of D. in Norfolk to B. and all my Land in England Parcel of the said Manor, all the Land shall pass which I have in any other County in England, which is Parcel of the said Manor. Per omnes J. But per Coke Ch. J. if I have a Manor which extends into two Counties, and I grant all my Manor in one County, nothing of what is in the other County shall pass; and so is 9 E. 4. But in the Case before, the subsequent Words add to the first Words. Roll. R. 407. pl. 43. Trin. 14 Jac. B. R. Anon.

4. A. seised of Land in the Village of R. and also of Lands in the Village of S. and both these Villages are in the Parish of R. A. bargains and sells all his Land in R. and covenants to levy a Fine accordingly. Adjudged, that nothing of the Land in S. passed; for R. shall be intended the Vill of R. and not the Parish; For a *Præcipe* of Lands of R. shall be intended of the Village, and not of the Parish. Noy. 17. Stock v. Dope. cites 39 H. 6. 14. Br. Trespass. 11.

5. A. grants all his Lands in Darfield, in the Tenure of J. S. and part of these Lands were in another Town, viz. in Wombell, but the whole Land lay within the Parish of Darfield; And in this Case the Judge ruled, that the whole Land did pass; and Darfield, in the first Clause, shall be intended the Parish of Darfield, and not the Vill only. Clayt. 61. Boswell's Case.

Ow. 61. Cro.
J. 120.
Stork v. Fox.
S. C. — S C
cited 2 Mod
236. ———
2 Roll. 54.
tit. Grants —
S. cited Cart.
81. ——— Mo.
710. Witley v. Fermor. S. P. ——— D. 261. b. pl. 27. Marg.

(D) Grant

(D) Grant of Lands Good, where the Grantor &c. has several Lands in the same Place.

1. **A** Made Feoffment in Fee of Bl. Acre, in the Parish of D. to his youngest Son, and his Heirs, by Deed, *Habendum after the Death of A.* and makes Livery Secundum Formam Chartæ, and so all void; And afterwards, having other Lands in the same Parish, conveys all his other Lands in the same Parish to his eldest Son, not demised to the youngest; And adjudged, that the Land intended to the youngest does not pass. D. 261. b. Marg. pl. 27. cites Pasch. 6 Jac. B. R. Lee v. Eyre.

* Landlord and Tenant.

* See Estate.

(A) What Things are removeable by the Tenant.

See Execution (Y) —
 Executor (U)
 — House —
 Waff.

1. **P**ER Dyer, there is a Difference when a *Furnace* is fixed to the *Middle of the House*, and when to the *Wall*; For the *Termor* may take it from the *Middle of the House*, but not from the *Wall*; For the *Wall* is worse for the taking it away, and therefore it is *waff*. And to this *Owen* agreed. Ow. 71. 37 Eliz. C. B. Day v. Austin.

Cited Cro E. 374. Day v. Bisbitch. —
 Where a *Termor* fixes such Thing, or fixes a *Post*

in the Land, and not to the Walls, he may take it within the Term; but if he permits it to stand till the Term be ended, the Lessor shall have it; And the taking of it by the Termor, within the Term, is not *waff*; For the House is not impaired by it; Per Kingmill J. and Grevil Serjeant; Quod nullus negavit. Br. Chattles, pl 7. cites 21 H. 7. 26.

2. Termor may pull down a *Wall made by him*, and it is not *waff*; per 2 Justices. Ow. 71. in Case of Day v. Austin.

3. *Fatts, Coppers, Tables, Partitions*, were set up by a Soap Boiler for the Convenience of his Trade, and who also paid the Backside, &c. and these were taken in Execution by the Sheriff on a Fi. Fa. and it was held good by Holt Ch. J. 1 Salk. 368. Mich. 2 Annæ. Poole's Case. — Dyer's *Fatt* is not to be taken on an Attachment, if fix'd to the Walls of the House. Cro E. 374. Day v. Bisbitch.

4. Things set up by Lessee for Years, for the Convenience of Trade, are removeable during the Term by the Common Law, and not by Virtue of any special Custom. But after the Term they are become a Gift in Law to him in Reversion, and are not removeable; per Holt Ch. J. 1 Salk. 368. Poole's Case.

5. Things set up to compleat the House, as *Hearths* and *Chimney-pieces*, are removeable; per Holt Ch. J. 1 Salk. 368. Poole's Case.

6. *Hangings* and *Looking Glasses* are not Furniture, but only Matter of Ornament, and not to be taken as part of the House or Freehold, but removeable by the Lessee of the House; per Ld. Keeper. Wms's Rep. 94, 95. Hill. 1706. Beck v. Rebow.

(A) Lateran

(A) Lateran Council.

Vaugh. 131. 1. **C**OUNCIL of Lateran was held, Anno Dom. 1215, under Pope accordingly.-
Mo. 436. in Innocent the third, and decreed against all *Pluralities of what-*
S. C. by ever *Value.* 4 Rep. 79. in Digby's Case.

Name of

Robins v. Gerard It is said to be held under Pope Alexander the third, in Anno 1170, and continued 'till Anno 1179. which was Anno 26 H. 2.

2. The Council of Lateran does *not bind the King*, being *Persona Mixta*, unless where he voluntarily submits to it. Jo. 387. Pasch. 12 Car. B. R. E. of Hertford v. Lecch.

3. The Council of Lateran was received in England *as a general Law*, and of as great Effect as an Act of Parliament, which concludes all Parties. Hard. 101. Pasch. 1657. in Case of Staveley v. Ullithorne.

(A) Latin.

Resolved 1. 36 E. 3. 15. **E**NACTS, that *all Pleas, which shall be pleaded in any*
that this Court *whatsoever within this Realm, shall be pleaded,*
Statute, as to *shew'd, defended, answered, debated and adjudged in the English Tongue,*
the first *but entered and inrolled in the Latin. Howbeit the Laws and Customs of*
Branch, was *this Realm, as also the Term and Processes, shall be holden and kept as before*
introductive *this Time hath been used.*
of a new
Law, but as

to the other Branches they are Declarative of the ancient; For of ancient Time, and before the Conquest, the original Writs, and all the Proces and Proceedings upon them, were entered in Latin; and infinite Records before this Time are extant entered in Latin, and yet for the better Illustration of the Truth, a Deed in English, Latin, or Dutch, &c. may be entered either in a Plea or special Verdict. 10 Rep. 132. b. Mich. 11 Jac. B. R. Osborne's Case.

Words which pass under the Name of Latin, are of four Sorts. 1. *Good Latin allowed by Gram-*
marians. 2. *Words significant, and known to the Sages of the Law, but not allowed by Grammarians, nor*
having any Countenance of Latin. And these two Sorts are within this Act. 3. *False or Incongruous*
Latin; This shall abate an Original Writ, but not vitiate any Judicial Writ, Count, Pleading, or Judgment, (For in all such Cases, false Latin shall be amended;) A multo fortiori, it shall not avoid a Grant or any Deed, &c. and therefore neither false Latin nor false English will avoid a Grant or other Deed, when the Intention of the Parties appears. 4thly. *Insensible Words.* 10 Rep. 133. the second Resolution in Osborne's Case.

S. C. cited 2. In *Præcipe quod reddat*, the *Writ was Filio & Heire*, where it should
10 Rep. 132. be (*Filio & Hæredi*) and therefore it was abated. Br. Brief, pl. 49. cites
b. in *OSBORNE'S* 41 E. 3. 21.
borne's
Case, and

there is also cited the 29 E. 3. 31. a. per Sharde J. That Latin is a Language formal to put in Writs, &c. and English is the Language of the Lay-gents. And yet when *English or French is Parcel of a Name*, there it shall be permitted in a Writ; and therefore if the Name of a Manor be *A. beside K.* he may demand it by a Præcipe by this Name in English; For it may be, that notwithstanding the Name, the said Manor lies in K. and therefore if in Præcipe he should say *A. justa K.* the Writ will abate, if any Part of the Manor extends into K. And it is there said, that this also agrees with 44 E. 3. 12. b. and 29 E. 3. 31. And so if the *Surname* of one be *Fitz-John*, he may be named so in a Writ; For if the Writ be Præcipe *W. Filio Johannis*, it will be a good Plea to say, that his Father has another Christian Name, as Richard, &c. and so abate the Writ, and so it is held 29 E. 3. 30. b. 44 E. 3. 12. b. and 13. a. 11 Aff. 29. 11 E. 3. Estoppel 228. 10 E. 4. 12. a. And the Reporter (as it seems)

seems) says, he has read, that one *Henry* had for his Surname, *In the Hall*, and brought a Writ by this Name, which consisted of three English Words, and well; For his Name is *not Henricus in Aula*, and cites 29 E. 3. 2. a. so that *Brevia tam Originalia quam Judicialia patiuntur Anglica Nomina*.

3. Where there is *no Latin Word obvious*, to signify the Thing for which the Action is brought, an *Anglice* will serve; as where it is for a Tester of a Bed, there *Fulcrum Lecti* with an *Anglice* well enough. *But where an obvious Word occurs*, there, because by the Statute of 36 E. 3. all Pleas ought to be inrolled in Latin, an *Anglice* will not serve, *least the Divine Science of the Law should be profan'd by Barbarisms*. Jenk. 270. pl. 88.

4. In an Information for seditious Words it was insisted by the Counsel, and agreed by the Court, that the ancient Precedents, and many later also, were used to express the Words in Latin, and this pursuant to the Statute of Ed. 3. which requires, that their legal Proceedings should be in Latin. Vent. 325. Hill. 29 and 30 Car. 2. Harrington's Case.

5. An Action upon the Case was upon a promissory Note, and a Demurrer for false Latin in the Original, which was *locarent ad Computum for locaret*, &c. for the Plaintiff it was said, that false Latin, if immaterial, shall not abate a Writ. Per Cur. in an Action upon the Case, the Original sets out the whole Matter so, as that the *Original is as the Bill*; and therefore false Latin shall not vitiate it. *But* if it had been in a Writ, for which there is an exact Form in the Register, then it would be bad. Judgment Respond' Ouster. 11 Mod. 237. Trin. 8 Annæ. B. R. Dillingham v. Gately.

6. 4 Geo. 2. 26. Enacts, that *all Writs, Procefs; Pleadings, Rules, Indictments, Records, &c. shall be in the English Tongue only, &c.*

Latitat.

(A) Latitat. *What it is.* and the Intent of it.

1. **T**HE Original of this Writ was, that in ancient Time, *while the King's Bench was moveable*, and following the King's Court, the Custom, was upon commencing a Suit, to send forth a Writ to the Sheriff of the County where the Court lay, for the calling him in, and if the Sheriff returned, *Non est inventus in Balliva mea*, &c. then was there a second Writ sued forth, that had these Words, *Cum testatum est quod Latitat*, &c. and thereby the Sheriff commanded to attach him in another Place where he may be found. Now *when* the Tribunal of the King's Bench come to be *settled at Westminster*, the former Course of Writ was held for a long Time, first sending to the Sheriff of Middlesex to summon the Party, and if he could not be found there, then to apprehend him wheresoever; but afterwards, upon pretence of eating the Subject, and expediting Justice, it was contrived to put both these Writs directed to the Sheriff of the County where he is suspected to be. And by this Writ, a Man being brought in, is committed to the Marshall of the King's Bench, in whose Custody, when he is, he may be sued upon an Action in that Court. Cowell's Interp. Verbo Latitat.

2. It was said by the Court, that a Latitat *cannot issue* out of this Court *into the County of Middlesex*; For if the Court removes out of Middlesex, then the Process must be a Latitat; and *in the County where the Court is, the Process must be by Bill*, as it was in Middlesex before the Court removed. 2 L. P. R. 147. cites Hill. 1656. B. S. Abbot v. Camby.

3. The Time when a Latitat issued forth is *traversable*, and may be averred otherwise than according to the Teste; per Keeling Ch. J. which was

N

agreed

agreed by the whole Court; For a Relation shall not work a Wrong. If a Man be taken in the Vacation by Warrant without Writ, and a Latitat be procured Tested in the Term, the Teste shall not discharge the Wrong done after the Teste, and before the actual taking out the Writ, but the Plaintiff may take Issue that he prosecuted truly. 2 Keb. 190. pl. 125. Pasch. 19 Car. 2. B. R. Bilton v. Long & al.

4. Latitat is only to bring the Defendant In Custodia, that the Plaintiff may declare against him by Bill, and after that the Proceedings upon the Latitat cease. Vent. 28. Pasch. 21 Car. 2. B. R. Hanway v. Merry.

Show. 354.
S. C.—A
Latitat may
be continued
7 Years; per
Herne Secondary. Sid. 53. in Case of Day v. Clinch.—S. P. Sid. 60. Welden v. Gregg.—It is in the Nature of an Original in the C. B. and so hath been always held to be; per Roll Ch. J. Sty. 156. Mich. 1649. Coles v. Sibbye.

5. Latitat is the Original of B. R. and may be continued on Record as an original Writ, and is sufficient to prevent the Statute of Limitations. Carth. 234. Pasch. 4 W. & M. B. R. in Case of Culliford v. Blandford.

Comb. 194.
Pasch. 4 W.
& M. B. R.
S. C.—
Carth. 133.
S. C. and P.

6. A Latitat was never construed to be a Commencement of a Suit on a Penal Law, and the Time must be reckoned from before the Filing of the Bill; per Holt Ch. J. but per 3 J. Contra. Vid. Show. 354. Culliford v. Blandford.

7. Note, It is a General Rule, that where a Defendant appears voluntarily, it shall be of no Force, unless the Plaintiff sue out his Latitat, or Bill of Middlesex, within a Fortnight. Comb. 244. Pasch. 6 W. 3. B. R. Anon.

8. In Assumpsit the Plaintiff produced a Note, Dated 18 Apr. 1724. for Payment of 60l. The Defendant produced a Receipt under the Plaintiff's Hand shewing that Defendant was to have 6 Weeks from the Date of the Note to pay this Money; and therefore insisted that the Plaintiff cannot maintain this Action, because the Process against the Defendant bore Teste 18 May, so that the 6 Weeks were not yet expired. But it was answered, that the Declaration was of Trinity-Term, which was above 6 Weeks after the Date of the Note, and that is the only Thing of which the Court ought to take Notice; For the Original Process is only to bring the Defendant in Custodia Marechalli, which may well be before the Cause of Action. And the Court held that to be the constant Difference; For the Plaintiff may sue out a Latitat before the Cause of the Action, but he can not declare till after the Cause of Action arises. 8 Mod. 343. Hill. 11 Geo. Perry v. Kirk.—Nor can he Arrest upon it before the Money is due. Vent. 28. Hanway v. Merry.

Law.

* See Maxims, sub tit. Law.—See Precedents.

(A) What is or may be said to be, or not to be * Law.

1. **C**ONSTANT Allowance in many Cases doth make Law. 2 Inst. 26. 399.—Jus venit, quod usus comprobavit. Ld. C. Ellesmere's Postnati. 35. cites it as said by Bracton.

2. What hath been always used and observed, is to be taken for Law. Cro. 732. Mich. 41 & 42 Eliz. in Case of Forth v. Harrison.

3. A Thing received in the Country as a Law, and without Precedent or Authority to the Contrary, it seems is to be taken for Law. See Nuisance (F.2) pl. 1.

4. We

4. We must not always conclude a Thing not to be Law, *because 'tis inconvenient*; but that for which there is *neither Practicall Custom, Judicial Precedent, or Act of Parliament* to warrant it, may well be judged to be so. 2 Vent. 7. Hill. 21 & 22 Car. 2. C. B. in Case of Crow v. Ramsey.

5. The *Laws of all Nations* are doubtless raised out of the Ruins of the *Civil Law*, as all Governments are sprung out of the Ruins of the Roman Empire; it must be own'd that the Principles of our Law are borrowed from the Civil Law, and therefore grounded on the same Reason in many Things; per Holt Ch. J. 12 Mod. 482. Pasch. 13 W. 3. cites Just. Inst. lib. 4. tit. 5. de Lege, in Case of Lane v. Sir Robert Cotton.

(B) *Division of Law.*

1. **T**HE Law consists of three Parts, viz. 1.* *Common Law*. 2. *Statute Law*. 3. *Custom*. Statute Law corrects, abridges, and explains the Common Law. Customs takes away the Common Law. But the Common Law corrects, allows, and disallows both Statute Law and Custom. For if there be Repugnancy in Statute, or unreasonableness in Custom, the Common Law disallows and rejects it; per Coke Ch. J. 2 Brownl. 198. Trin. 10 Jac. C. B. in Case of Rowles v. Maſon.—cites 8 Rep. Dr. Bonham's Case. Pl. C. 242. b. 243. a.— * Common Law expressed in our Books and Judicial Records. Co. Litt. 344. a. —S. P. Co. Litt. 115. b.

but the third Division into Custom, is expressed there by *particular Customs*, and gives for Reason of adding the Word (Particular) because if it be the *General Custom* of the Realm: it is *part of the Common Law*.——Particular Customs are to be proved. *Ibid.*——The Customs must be *founded on Reason, and used Time out of Mind*; and the Construction and Determination of them belongs to the Judges of the Realm. Co. Litt. 344. a.

2. There are *diverse Laws within the Realm of England*. As

1. *Lex Coronæ.*

See Prerogative.

2. *Lex & Consuetudo Parliamenti.*

Ista Lex est ab omnibus

quærenda, a Multis ignorata a Paucis cognita. Co. Litt. 11. b.

Lex Parliamenti is Lex terra, and if a Question concerning it doth arise in a Cause, of which the King's Bench has proper Conſuſance, the *King's Bench may adjudge of it*, as the Spiritual Courts do of Temporal Judgment, as Patents Deeds, &c. For the Conſuſance of the Principal draws to it the Conſuſance of the Accessories and Incidents. 12 Mod. 64. Trin. 6 W. & M. King and Queen v. Knowles. —cites Dy. 60

And this holds in Case of *Privilege of Parliament*, as in Sir *George Benſon's* Case. Trin. 14 Car. 2. C. B. where *filing an Original* against a ſitting Member, was adjudged no Breach of Privilege. 12 Mod. 64. King and Queen v. Knowles.

So a *Writ of Error in Parliament*, if a Term intervenes after the Teſte and before the Return hath been adjudged to be no *Superſedeas* of Execution. 12 Mod. 64. King and Queen v. Knowles.

So on a *Habeas Corpus*, the King's Bench hath determined *what Continuance a Commitment by Parliament* ſhall have. 12 Mod. 64. King and Queen v. Knowles.

That can be no Law or Custom of Parliament, which is not *grounded on Precedents*; and there is none that ever any Man's Inheritance was determined per *Legem & Conſuetudinem Parliamenti*. 12 Mod. 64. King and Queen v. Knowles.

3. *Lex Naturæ.*

The Law of Nature is

that, which God, at the Time of the Creation of the Nature of Man, infused into his Heart for his Preservation and Direction, and this is *Lex Æterna*, the Moral Law, called also the Law of Nature; and by this Law, written with the Finger of God in the Heart of Man, were the People of God a long Time governed before that Law was written by Moſes, who was the first Reporter or Writer of Law in the World. 7 Rep. 12. b. Trin. 6 Jac. Calvin's Case.

4. *Lex Communis Angliæ*, the Common Law of England, sometimes called *Lex Terræ*.

The Common Law has no Controller in any

Part of it but the *High Court of Parliament*, and if it be not abrogated or altered by Parliament it still remains. Co. Litt. 115. b.——The Common Law is *the absolute Perfection of Reason*. 2 Inst. 179 —

It is a *dangerous Thing to alter* or shake any of the fundamental Rules of the Common Law, which in Truth are *the main Pillars and Supporters of the Fabrick of the Common Wealth.* 2 Inst. 74 — S. P. 210. — The Common Laws are aptly and properly called the Laws of England; because they are appropriated to this Kingdom, as most apt and fit for the Government thereof, and have no Dependance upon any Foreign Law whatsoever, no not even upon the Civil or Common [Canon] Law, other than in Cases allowed by the Laws of England; so as the [Canon] Law of England is *Præsumptum Quarto Modo to the Kingdom of England.* 2 Inst. 98.

The Common Law of England, is grounded on the Law of God, and extends itself to the Original Law of Nature, and the Universal Law of Nations. When it respects *the Church*, it is called *Lex Ecclesiæ Anglicanæ*, as *Magna Charta*, cap. 1. *Ecclesiæ Anglicanæ habeat omnia sua Jura integra & illæsa.* When it respects *the Crown and the King*, it is sometimes called *Lex Coronæ*, as in Stat. 25 E. 3. cap. 1. *Lex Coronæ Angliæ est & semper fuit*, &c. and sometimes *Lex Regiæ*, as in *Registro*, fol 61. *Ad Jura Regiæ spectat*; And, *ad Conservationem Jurium Coronæ nostræ, and ad Jura Regiæ ne deperiant*, &c. When it respects *the Common Subjects*, it is called *Lex Terræ*; as in *Magna Charta*, cap. 29. *Nisi per legale Judicium Parium vel per Legem Terræ.* Yet in all these Cases it is comprehended under this general Term, the Common Laws of England. *Ld. C. Ellesmere's Postnati.* 32, 33.

It standeth upon two Main Pillars and Principal Parts, by which it is to be learned or known. 1. Certain known Principles and *Maxims and ancient Customs*, against which there never hath been, nor ought to be any Dispute. 2. Where no such Principles are, then, *former Judgments given in like Cases.* *Ld. C. Ellesmere's Postnati.* 35, 36.

And *Ld. Ch. J. Hale* says, the formal Constituent Parts, as he may call them, of the Common Law, seem to be principally these 3, viz. 1. The *common Usage* or Custom and Practice of this Kingdom. 2. The Authority of [*Acts of*] *Parliament*, introducing such Laws. And 3. The *Judicial Decisions* of Courts of Justice, *consonant to one another*, in the Series and Successions of Time. That it is this Usage which gives Power sometimes to the Canon Law, as in the Ecclesiastical Courts; sometimes to the Civil Law, as in the Admiralty Courts; and again controlls both when they cross other Customs generally received. That what we now take for Common Law were undoubtedly Acts of Parliament, tho' not now to be found of Record, they being perished and lost. That as to Judicial Decisions, it is true that tho' they bind the Parties as a Law as to the particular Case in Question till reversed by Error or Attaint, yet they have great Weight and Authority, especially when Consonant with those of former Times. *Hale's Hist. of Common Law.* 65, 66, 67.

Copyholds, and all other Parts of the Common Law, were at first established by Act of Parliament till the Records of them came to be lost; per *Ld. Macclesfield.* Trin. 1721. Ch. Prec. 574. in Case of *Sir H. Peachy v. D. of Somerset*

For more of this Division of the Law, called the Common Law, See *Hale's Hist. of the Common Law*, cap 1, 2, 3, 4

5. *Statute Law*, viz. Laws established by Acts of Parliament.

No Law or Custom of

6. *Consuetudines*, Customs reasonable.

England can be taken away, abrogated or annulled, but by Authority of Parliament only. 2 Inst. 97. 619.

7. *Jus Belli*, The Law of Arms, War and Chivalry. In Republica Maxime conservanda sunt Jura Belli.

Which is likewise

8. Law Ecclesiastical or Canon, in Courts in certain Cases.

called *Law Spiritual*, and such are allowed by the Laws of this Realm, as are not against the Common Law, (whereof the King's Prerogative is a Principal Part) nor the Statutes and Customs of the Realm; and regularly, according to such Ecclesiastical Laws, the Ordinary, and other Ecclesiastical Judges, do proceed in Causes within their Conuſance. And this Jurisdiction was so bounded by the ancient Common Laws of the Realm, and so declared by Act of Parliament. *Co. Litt.* 344. a — And see *Hale's Hist. of the Law*, 27, &c. and *Ibid.* 71.

25 H. 8. cap. 19. S. 2. Prohibits the executing any Canons repugnant to the King's Prerogative, or to the Customs, Laws, or Statutes of this Realm.

Provided that all Canons, Constitutions, Ordinances and Synodals Provincial, not repugnant to the King's Prerogative, nor to the Customs, Laws, or Statutes of this Kingdom, shall be still used and executed, notwithstanding this Act.

It appears by the Words (*ad lædendum Dignitatem Regis*), and (*In præjudicium Domini Regis & Coronæ suæ*), in the Statute W. 2. cap. 43. That *Inroachment of Jurisdiction* by Ecclesiastical Judges contrary to the King's Laws is *Crimen læsæ Majestatis.* 2 Inst. 466.

9. Law Civil in certain Cases, not only in Ecclesiastical Courts, but in the Courts of the Constable, Marſhal, and Admiralty; in which Court of Admiralty is observed the Law of Oleron in the 5 R. 1. and so called, because it was published in the Isle of Oleron.

The Laws of the Fo-

10. *Lex Forestæ.*

rest are general, because they respect all Forests alike; they are likewise particular, because they relate to Forests, and to no other Places. They consist principally in three Things, viz. In the Preservation and Continuance of the Place to be a Forest; in the Preservation of the Vert, which are the Green Woods and Coverts there; and in the Preservation of the Fenson, which is every Beast of the Forest and

and Chase, that being a general Word for all; and there can be no Trespass committed in the Forest, but it must be in one of these Particulars. Manw. Forest Law 205.

11. The Law of *Marque and Reprisal*.

Vid. Prerogative. (Na)

12. *Lex Mercatoria*.

A Merchant
Alien who is

here by safe Conduct, is not bound to sue according to the Law of the Land, to wait the Trial of Twelve Men, and other Solemnities of the Law of the Land, but ought to sue here, and shall be determined according to the Law of Nature in the Chancery, and ought to sue there *De Hora in Horam*, and *De Die in Diem*, for the Speed of Merchants, &c. per the Ld. Chancellor; and he said further, that Merchants &c. shall not be bound by our Statutes, which are *Introductive of a new Law*, but [where] they are Declarative of the Old Law, viz. the Law of Nature; and tho' by their coming here, the King can compel them to stand to the Right, yet it shall be *secundum Legem Naturæ*, which is by some called Law-Merchant, which is the Universal Law throughout the World. 13 E. 4. 9. b. 10. a. —Br. Denizen, pl. 5. is a very short Note of this.

The Law of Merchants is a Branch of the Law of Nations; and Merchants are favoured in our Law, as necessary for the Publick Weale, and as they employ all other Trades, and transport their Wares into other Countries. Arg. Palm. 4, 5. in Case of the King v. Cusack & al. —2 Roll R. 114. S. C. Arg. says, it is impossible that the Municipal Laws of any Kingdom should be sufficient for ordering the Affairs and Traffick of Merchants, and therefore the Generality of this Law has obtained the Name of Law-Merchant in our Books; and of this Law there are several positive and general Rules. 1. That Merchants ought not to be hindred or delay'd, but ought to have the speediest Dispatch that may be. 2. That * all Merchants coming to the Staple, shall be ordered by Law-Merchant, and not by the Law of the Land. 3. If the Goods and Merchandises of our Merchants are seized by any other Nation, and spoiled or wasted by them, we may seize all the Goods of their Merchants here, till Satisfaction made, and of this there is a notable Record in 3 E. 1. Memb. 19. which says, that it is *secundum Legem Mercatorum & Consuetudinem Regni*, to which Montague Ch. J. agreed, saying, it is true, and is like to the taking Goods in Withernam till Restitution of the Goods be made to be replevied. —* 27 E. 3. Stat. 2. cap. 2. Statute Staple.

If Alien Merchants sue for a Debt in Chancery, they are to be treated according to the Law of Merchants and of Nature. Jenk 164, 165. pl. 16.

The Judges ought take Notice of that which is used among Merchants, for the Maintenance of Traffick. Yelv. 136. Mich. 6 Jac. B. R. in Case of Pierion v. Pounteys. —Brownl. 102. S. C. —S. P. And it is part of the Common Law of this Kingdom, and if any Doubt arise to the Judges about their Customs, they may send for the Merchants to know their Custom; per Hobart Ch. J. Winch. 14 Mich. 19 Jac. in Case of Vanheath v. Turner.

The Law of Merchants, is *Jus Gentium*, and the Judges are bound to take Notice of it; per 3 J. Show. 318. Mich. 3 W. & M. B. R. in Case of Mogadara v. Holt. —Tho' the Court is to take Notice of the Law of Merchants; yet they cannot take Notice of the Custom of particular Places. Resolved 1 Salk. 125. Pasch. 3 W. & M. B. R. in Cases of Hodges v. Steward. —Ibid. 443. Mich. 4 W. & M. B. R. in Lethulier's Case, it was said by Holt Ch. J. That we take Notice of the Laws of Merchants that are General, but not of those that are particular Usages.

13. The Laws and Customs of the Isles of *Jersey, Guernsey, and Man*. See Prynne's

Atimadver-
sions 201 to 208. cap. 69, 70 —See 4 Inst. 283. cap. 69. Of the Isle of Man, and of the Law and Jurisdiction of the same and 286. cap. 70. of the Law and Jurisdiction of Jersey and Guernsey. And see Guernsey &c. supra.

14. The Law and Privilege of the *Stannaries*.

It is called
Stannaria

from *Stannum*, because the Lord Warden hath Jurisdiction of all the Tynne in Cornwall and Devon. Vid. 4 Inst. 229. &c. cap. 45. of the Courts of the Stannaries.

15. The Laws of the East, West, and Middle *Marches*, which are now abrogated. Co. Litt. 11. b.

3. Something might here be said of the *Feudal Law*. As to the Time of the Original Institution of Feuds, there seems to be great Uncertainty, Authors differing very much therein. Some ascribe it to the Time of Constantine the Great, and that he was the first Institutor of them; others, as Sir H. Spelman, in his Glossary Verbo Feodum 216. takes notice, that some ascribe it to the Gauls or Franks, others to the Lombards, and others to the Germans: However, the same Author says, that *Feodorum inventum peperit rei Militaris Necessitas*; and Ibid. 217. that it may be said of the Feudal Law, as of other unwritten Laws, *Temporis eam esse Filiam, sensimque sacrescentem, Edictis Principum auctam indies & exultam*. And says, that what our Lawyers call Copyholds, and which they speak of, as held at the Will of the Lord by Copy of Court Roll, explains to us the ancient Nature of Feuds. And again, as

to its being introduced hither, he says, page 218. That Feodorum servitutes in Britanniam nostram primus invexit Gulielmus Senior, Conquestor nuncupatus, qui Lege ea e Normannia traducta Angliam totam suis divisit Commilitibus. And afterwards, that *Mos in conferendis Feudis solennis fuit*, non repentinus, non temerarius — And Ibid. pag. 216. says, that Feodorum nostrorum origo & Antiqua Scientia e Jure Feodali (*Jurisconsultis nostris nimium incognito*) expetenda sunt. My Ld. Coke, in his otherwise very learned Commentaries on the Tenures of Littleton, has said so very little of it, (tho' the Subject Matter of the Book, led him directly to it, as the Source of what he so largely otherwise expatiated upon, and whence he might have cleared many Obscurities), that it seems even that Great Man had (as Sir H. Spelman above complains) consulted it very little. But the late Ld. Ch. B. Gilbert, who drew deep in that so much neglected Fountain, has manifested the great Use of that Law, in explaining those ancient Tenures, and the Manner of transferring Estates in those ancient Times, and thereby illustrated many of the Parts thereof, not throughly understood before, and so opened a Way for a clearer Apprehension of the very Reasons of those Tenures, and of the Manner of transferring them; and it would be high Injustice to the Memory of that Great Benefactor to the Law, not to acknowledge the Obligations the Students thereof are under to him. And the like may be said of another Reverend Person now living, the Author of the Introduction to the Laws of Tenures. To which I shall only add what My Ld. Coke in his Littleton 183. b. tells us, that Scire proprie est rem Ratione & per Causam cognoscere.

Br. Action sur le Statute. pl. 18. cites 37 H. 6. 20. — Br. Jurisdiction, pl. 103. cites 37 H. 6. 21. — The Martial Law is not a fix'd, but a transitory Law, variable by the General, as Occasion and Circumstances require, according to the Articles of War; Per Holt Ch. J. 6 Mod. 180. Trin. 3 Annæ B. R. Anon.

4. The Common Law takes Consufance of *the Law of the Constable and Marshal*; for in Appeal of Death it is a good Justification, that the Deceas'd appeal'd him of Treason before the Constable and Marshal, by which they combated there, and the Defendant vanquished the deceased to Death; and this is a good Justification at the Common Law; per Needham J. And Ahlton and Moyle agreed that the Common Law will take Notice of the Law of *Constable and Marshal*; Nevertheless Prisot contrary. But after they three had said as above, Prisot did not deny it. And the Common Law will take Consufance of *the Ecclesiastical Law*. Br. Trespass, pl. 197. cites 37 H. 6. 2. 3.

5. There is *no Law or Precedent obligatory to the Sovereign Court of one Country to put in Execution the Sentence of any Court in another Country*. For Par in Parem non habet Imperium. And such Proceedings in another Country shall not be called *Res Judicata*, nor prevent a new Inquiry against a Person and his Goods under the Direction and Protection of the Laws of the Country. MS. Tab. tit. Jurisdiction, cites 30 Aug. 1715. Goddard v. Swinton.

(C) Law Common, Canon, Civil, and Statute, and which shall be preferred.

1. **W**Here the *Common Law and Statute Law concur*, the Common Law shall be *prefer'd*. 4 Rep. 71. Trin. 33 Eliz. C. B. Hynde's Case. — Per Foster J. Raym. 7. — Co. Litt. 49. — Pl. C. 59.

2. Before the 21 H. 8. of *Pluralities*, the Common Law was guided in this Point by the Canon Law. Arg. Mo. 436. Hill. 38 Eliz.

3. Common

3. Common Law takes Notice of the Civil Law in the Court of Admiralty, Court of Conftable and Marthal; and of the Law between Merchants; and of the Canon Law in Courts Ecclefiaftical: And if any *Case happens at Common Law for which there is no Precedent*, Common Law fhall judge according to the Law of Nature and the Publick Good. Jenk: 117. pl. 33.—Ibid. 97. pl. 88. cites 8 E. 4. 12. 3 H. 6. 2. Hob. 11. Br. Cafes 481.

4. *Canon Law* is not admitted here, but as far as it has been received from Time immemorial; Per Holt Ch. J. Salk. 299. Mich. 10 W. 3. B. R. the King v. Raynes. 6 Mod. 190
—There is
but one Ca-
non Law
throughout

the whole Church; Per Whitlock J. And Doderidge J. faid, that the Law of the Englifh Church is not the Law of the Pope, but *is all extracted from the ancient Canons, as well General as National.* Lat. 234.—See Dav. 69. b. &c. in Cafe of the Commenda.

5. The Act of 17 Car. 2. 3. of Union of Churches, fhall be *conftrued* by the Canon Law. 8 Mod. 5. Mich. 7 Geo. the King v. Archbifhop of Armagh.

6. The Civil Law, and not the Canon Law is the Rule for conftruing the *Statute of Diftributions*, as to the computing the *Degrees of Proximity*; Per Mafter of the Rolls. Tr. 1722. Ch. Prec. 593. Mentney v. Petty.

7. The *Canon Law* is the Original Ground of the *Privilege of the Clergy*, and is *fo far in Force as receiv'd* in England. 2 Hawk. Pl. C. 337. cap. 33. S. 2.

(A) Lawful Prize.

1. **A** Merchant Ship was taken by a Spaniard *Enemy*, and a Month after an Englifh Merchant with another Ship *retakes* it from the Spaniard. The Ship being gain'd by Battle of an Enemy, neither the King nor the Admiral, nor the Parties to whom the Property was before, fhall have it, and a Prohibition granted. 2 Brownl. 11. *Weston's Cafe*. cites 7 Ed. 4. 14. 2 & 3 P. & M. D. 128. b.—Unless they claim it the Day in which it was retaken, Ante Occafum folis. Jenk. 201. pl. 22.

2. Where Goods of any Subject of a *Foreign Prince in Amity* with our King, are taken by an *Enemy of that Prince*, and thofe Goods *come to the Hands of the Englifh*, they cannot be regained from the Englifh; For they were taken Jure Belli. Jenk. 201. pl. 22.

3. If a Ship be taken by *Piracy*, or if by *Letter's of Mart*, and be not brought *Infra Præfidia* of that King, by whose Subject it was taken, it is no Lawful Prize; and the Property is not altered, and a Sale in fuch Cafe is void. Mar. 110. Trin. 17 Car. Anon.

4. Where the Question is Prize or Not Prize, no *Prohibition* fhall go. Sid. 320. Hill. 18 & 19 Car. 2. B. R. Thompson v. Smith.

5. A *Justification* of the taking a Prize as *Captain of a Man of War*, and *Condemnation* in the Admiralty Court, is not fufficient. Show. 6. Pafch. 1 W. & M. Beake v. Tyrrel.—But muft fhew fome fpecial *Caufe* for which ſhe became Prize, and what Judge gave Sentence, and to whom fuch Court of Admiralty did belong. Carth. 31 S. C.—3 Mod. 194. S. C.

Length

Length of Time.

(A) Length of Time. How it shall affect

- Annuities.* 1. Injunction was granted to stay Suit on an *old sleeping Deed* of Annuity which was newly started up after 40 Years. 12 Car. 1. 1 Chan. Rep. 108. Southcot v. Southcot. — Ibid. 144. 15 Car. 1. Bales v. Proctor S. P.
2. Annuity during the Life of A. and B. A. dies, B. makes *no Claim* in 40 Years, the Court conceived it as a Trust, and decreed the Estate to be discharged. 33 Car. 2. 2 Chan. Rep. 219. Bonington v. Walthall.
- Awards.* 3. Two *Joint Executors* submitted Disputes about the Testator's Estate to Arbitrators, who made an Award; about 12 Years after one of the Executors dies; the surviving Executor to whom an Account was awarded to be made by the other, having made *no Demand in all that Time*; yet the Award was decreed to be performed by the Executor of the Co-executor. Trin. 30 Car. 2. Fin. R. 384. Sweet v. Hole.
- Bankrupt.* 4. It was said by Mr. Fazakerley, that it never was determin'd, that an *Act of Bankruptcy* could be *war'd or purg'd*. See Sel. Chan. Cases in Ld Talbot's Time. 243. 244. Mich. 1734. De Gols v. Ward.
- Bonds.* 5. Bond to pay 30 l. at 9 Days End was never sued for till 22 Years after, tho' the Defendant was always *necessitous* and a Prisoner, and the Plaintiff a Man of Worth; the Court conceived the said Money to be satisfied, it not being demanded in 22 Years, and decreed the Bond to be delivered up to be cancelled. 10 Car. 1. Chan. Rep. 78. Coles v. Emerton. — And 10 Car. 1. Ibid. S. P. Carpenter v. Tucker.
6. A Bond of 300 l. Penalty without Condition entered into by the Plaintiff to the Defendant, to save the Defendant *harmless* against a Bond of 200 l. The said Bond being 23 Years old, and not sued in that Time, was decreed to be delivered up to be cancelled. 10 Car. 1. 1 Chan. Rep. 38. Geoffry v. Thorn.
7. Judgment on Bond of 40 Years standing being kept off by prior Incumbrances, and the Debt being *own'd by Answer* to a Bill for Discovery, was ordered to be paid. 26 Car. 2. 2 Chan. Rep. 102. Winchcomb. v. Winchcomb.
- Ch. Prec. 8. 49 Years is not Time sufficient to ground *Presumption of Payment* of a
310. Hill. Bond upon in Equity. Per Ld Cooper 3 Ch. R. 101. Crosby v. Middleton.
1710. S. C.
- N. B. In this Case there had been an Agreement within 10 Years before, to give fresh Security by the Surety who had sign'd and seal'd the Bond, but his Name was not inserted in it, but which he was ignorant of; and the principal Obligor and Obligee being Traders had Dealings all that Time, and then the principal Obligor broke. Ibid.
- S. P. 6 Mod. 9. Where a Bond for Payment of Money has lain *dormant 20 Years*, if
22. an Action brought thereon, the Defendant pleads *Solvit ad Diem*, Holt Ch. J. said, this will be a good Plea &c. For it is a strong Presumption, the Bond has been satisfied, where there has been no Demand made, nor Action brought thereon, in so long a Time. 11 Mod. 2. Pasch. 1702. B. R. Anon.
- Decree.* 10. Decree for settling Differences was deny'd to be reversed after 16 Years, tho' there might be Error to ground a Bill of Review. See Chan. Rep. 139. 15 Car. 1. Goddard v. Goddard.

11. A Cause was heard after 30 Years, the Inrolment of the Decree being lost. 3 Ch. R. 27. 20 Car. 2. Devering v. Cooper.

12. Bill of Review of a Decree upon an Agreement between Baron and Feme, whereby the Feme without any Fine settled an Annuity out of her own Lands on the Baron for his Life, and the Baron quitted some Advantage he had on Settlements made, and gave her Power to dispose by Will, was dismissed because the Decree was and is good, and because of the Length of Time since it was made, and that the Plaintiffs rested under it without any Complaint. 2 Ch. R. 46. 22 Car. 2. E. of Castlehaven v. Underhill.

13. An Executor brought a *Sci. Fa.* to revive a Decree obtained about 23 Years since. The Defendant pleaded in Bar, that after this Decree, the Plaintiff's Testator lived in the same Town with Defendant 15 Years, and never asked him for the Money, but had told him that he should never be troubled for it, and acquitted him thereof, but suggested no Deed or Writing for that Purpose. The Defendant likewise pleaded to the Plaintiff's not shewing a sufficient Probate of the Will to the intitling himself. Ld C. Macclesfield, ordered that the Plaintiff should not proceed without shewing the Defendant a sufficient Probate of the Will, and without farther Leave of the Court, in respect of the Staleness of the Demand. Mich. 1721. Wms's Rep. 766. Comber's Case.

14. Where a Devisee had admitted a Title in the Heir, and had paid Rent, and agreed so to do, and this for 20 Years, 'twas decreed against the Devisee, he not coming in Time. 3 Ch. R. 4. Mich. 13 Car. 2. Davie v. Beversham.

Devisees.
N. Ch. R.
76. S. C.
Vern. 196.
S. C.

15. A Copyhold was enjoy'd as under a Will made 40 Years ago, and upon a Writ of Aiel being brought by the Heir in the Court Baron, the Devisee brought his Bill and insisted on his long Possession. The Defendant pleaded *Infancy and Coverture*, viz. That she was but three Years old at her Father's Deah, whose Heir she is, and since a Feme Covert, and therefore Laches cannot be imputed to her, and did not discover her Title but lately, being Heir to her Grandfather the Testator; And it was insisted that a Writ of Aiel by the Stat. 31 H. 8. may be brought upon a *Seisin by the Ancestor within 50 Years*. The Defendant likewise denied the Will and suggested *Insanity* in the Testator, and that there was not any *Surrender to the Use of the Will*. The Surrender was not proved but decreed; and the Defendant might go to Law to try Will or no Will; Per North K. 2 Chan. Cases 150. Mich. 35 Car. 2. Lyford v. Coward.

16. Legacy was presumed to be paid after a great Length of Time, and decreed a perpetual Injunction against a Bond given relating to it, about 30 Years since, and discharged a former Decree, tho' inroll'd. 2 Vern. 21. Pasch. 1687. Fotherby v. Hartridge.

17. After a long Enjoyment by a Purchaser, a Descendent of the Vendor's pretends an *Entail*, but decreed that if such Descendent should not within a Year ensuing evict the Plaintiff on such pretended Entail, then all the Writings, which he is now Decreed to bring in upon Oath, shall be delivered up to the Plaintiff, and a perpetual Injunction to quiet the Possession against the Descendent and his Heirs, and all claiming by, from or under him or them &c. Fin. R. 320. Mich. 29 Car. 2. Fleming v. Page.

Entails.

18. Writ of Error returnable in Parliament, by Reason of the Distance of the Day of the Return, will be no *Superfedeas*. Vent. 31. Pasch. 21 Car. 2. B. R. Wortley v. Holt.

Error.

19. Suit was to avoid a Conveyance by Fine and Deed to lead the Uses of the Fine 23 Years since on Supplication of Fraud by purchasing the Fee of the Land for 11*l.* worth 60*l.* per Ann the Plaintiff being ignorant of the Value, but Defendant well apprised thereof, and the Plaintiff ignorant also of his Title, which he came to the Notice of after the Fine, Bill was dismissed. 2 Chan. Cases 159. Hill. 35 & 36 Car. 2. Hobert v. Hobert.

Frauds.

20. The Court refused to set aside an Account, stated in a fraudulent Manner, after the Death of the Parties to the Account, and near 20 Years at-

ter the stating it. Sel. Chan. Cafes in Lord King's-time 34. Western v. Cartwright.

21. *No Length of Time will bar a Fraud.* Per Lord Chancellor. Hill. 1734. Sel. Chan. Cafes in Lord Talbot's-time 63. in Case of Cotterell v. Purchase.

Heirs.

22. It seems that the continued Possession of the Bastard Issue shall prevail in Conscience against the Right of the Mulier puifne. Cary's Rep. 6. cites Doctor and Stud. 154.

Judgments.

23. After a Judgment had been of a long Standing a Sci. fa. was brought upon it against the Heir of the Heir; it was assigned for *Error that there was no Bill upon the File*; but it being an ancient Judgment, and it being mentioned by a Note in the Attorney's Book, that such a Judgment was paid for to be put upon the File; it was ordered that a new Bill be put upon the File. Cro. J. 186. Mich. 5 Jac. B. R. Maynay v. Collins.

24. No Relief on a Judgment entred into 60 Years since, especially since *no Consideration* is proved. 2 Chan. Rep. 49. 22 Car. 2. White v. Ewens.

25. On a Bill to Redeem an Estate actually extended on a Judgment so long since as 6 Eliz. and gone thro' 5 or 6 Hands, The Question was, if Defendant shall Account otherwise than at the extended Value? the Cause went off on a Proposition that Defendant should be allowed what he paid, and account only for what he received during his own Time; Jeffries C. Vern. 468. Tr. 1687. Poole v. Guife.

26. Conufee of a Judgment extends the Lands of the Conufor on an *Elegit*; Conufor grants over the Reversion to C.—C. may Redeem tho' the Conufor had brought a Bill, and was difmiffed 20 Years before for the fame Purpose; For per Jeffries C. the Conufee has at Law an Interest only Quoufque; and the Difmiffion here would not give him a greater Estate, and it would be abfur'd to deny a Redemption; For the Interest under the Extent was but a Chattle Interest, and the Confequence of denying a Redemption would be, that Lands of Inheritance should not defcend, but to the Worlds end go in a Courfe of Adminitration. Vern. 397. Pafch. 1689. Clobery v. Simonds.

Mean Profits.

27. Mean Profits were decreed notwithstanding the Length of Time and decreed from such Time as the Right accrued. 2 Chan. Rep. 261. 34 Car. 2. Coventry v. Hall. (Thinne's Case.) 2 Chan. Cafes 71. Mich. 33 Car. 2. Coventry v. Thinne. The Length of Time was answered by the many Suits and Abatements.

Mortgages

28. Chancery will not relieve Mortgages after a long Lapse of Time, but it being proved by one Witness, that the Mortgagee, about 24 Years since, told him that he was fully satisfied, and paid all his Debts due from the Mortgagor, the Court, in respect of the Badges of Equity which this Cause beareth, proposed to do something for the Plaintiff which the Defendant consented to do. Chan. Rep. 127. 15 Car. 1. Itham v. Cole.

So after 4 Descents in Case of Infancy and Coverture

29. Redemption of a Mortgage was decreed to the Heir after Forfeiture and Sale for a long Time past by Reason of the Impediment during the Coverture of the Mother. Chan. Rep. 193. 12 Car. 2. Cornel. v. Sykes.

2 Vern. 377. Proctor v. Cowper.—In this Case Mortgagee entred in 1650. but made up an Account in 1686. when a Bill was brought, and the Decree was Trin. 1700.

S. P. unless there are such particular Circumstances as may vary the ordinary Case; as Infants, Feme Covert &c.

30. Lord Keeper Bridgman said he would have a Rule to limit to what Time a Mortgage should be redeemable, and conceived 20 Years a fit Time in Imitation of the Statute of Limitations in real Actions; but gave no Rule in it then, only he directed that when a Bill came to redeem an old Mortgage, the Defendant should plead or demur to it that so the Judgment of the Court might be had upon it. Chan. Cafes 102. 20 Car. 2 Pearson v. Pully.

are Provided for by the very Statute, tho' those Matters in Equity are to be governed by the Course of the Court. 2 Vent 340. Tr. 22 Car 2 White v. Ewer.—Chan. Rep. 105 12 Car 1. Hales v. Hales.

S. P.—Ibid. 206. 13 Car. 2. Clapham v. Bowyer—Chan. Rep. 184. 12 Car. 2. Sanders v. Hord, acc.—S. P. per Lord King, and tho' the Plaintiff was an *Infant part of the Time*, yet the Right to redeem not beginning in his Time, and 12 Years being lapsed since his full Age before he brought his Bill, it was dismissed. G. Equ. R. 185. Hill. 12 Geo. 1. Floyd v. Mansell.—S. P. Decreed, and tho' the Plaintiff was an Infant at his Father's Death, yet the Computation of Time began 33 Years before, even in his Grandfather's Time and run on in his Father's Time who was of full Age, and therefore will run on *against Infants after*. Mich. 1729. Abr. Equ. Cases 315. Knowles v. Spence.—It was admitted Arg. that the general Rule is not to exceed 20 Years, unless it be upon extraordinary Circumstances. Sel. Chan. Cases in Lord Talbot's time 62.—If a Person *takes a Conveyance of an Estate as a Mortgage without any Defeasance*, he is guilty of a *Fraud* and no Length of Time will bar a Fraud; per Ld Chancellor. Sel. Chan. Cases in Ld Talbot's time 63. Hill. 1734. in Case of Cotterel v. Purchase.—Where a *Bill to redeem* was brought in about 16 Years after Entry of the Mortgagee but the Cause lay Dormant till after 20 Years, this is not like making an Entry and then lying still; For the Defendant might have dismissed the Bill for want of Prosecution, or they themselves might set down the Plea to be argued; per Lord Chancellor. Sel. Chan. Cases in Lord Talbot's time 63. Ibid.

31. After a long Time and a *Release of the Mortgagor's Interest* long since the Court would not admit a *Redemption* of a Mortgage, tho' the Premises were Mortgaged for about a *5th. Part of their now Value*. 2 Chan. Rep. 131. 29 Car. 2. Nance v. Coke.

32. A *Redemption of a Mortgage at the Suit of other Creditors* was denied, because of the Length of Time. 2 Chan. Cases 62. Trin. 33 Car. 2. Arg. cites Sir Woollaston's Case.

S. P. 1 Chan. Cases 220. Hill. 23 & 24 Car. 2. Roscarick

v. Barton.—So at the Suit of an *Executor*. per Ld. K. Coventry. 13 Jac. 1. N. Ch. R. 34. Gird v. Teogood.

33. If Mortgagor agrees that Mortgagee shall *enter and hold till satisfied* (which is in the Nature of a *Welch Mortgage*) the Length of Time is no Objection. Vern. 418. Mich. 1686. Orde v. Heming.

34. After a *Mortgage* had been made 24 Years, the Heir brought a Bill to Redeem; but he dying the Suit was Revived by his Co-heirs, who about 9 Years afterwards got a *Decree but did not Prosecute it*, but sold the Equity of Redemption to J. S. who brought his Bill to Redeem, and to have the Benefit of the former Decree; Lord Wrioth dismissed the Bill because of the Difficulty of the Account after such Length of Time and because the Mortgagor acquiesced so long, and neither paid the Debt nor fought a Redemption; and tho' there were *Infants*, yet *the Time having begun upon the Ancestor*, it shall run upon Infants as it is at Law in the Case of a Fine, and tho' they had a Decree, yet they did not Prosecute it. 2 Vern. 418. Hill. 1700. St. John v. Turner.

35. The Court declared that after 20 Years and two Purchases, it was not proper to *examine a Non Compos* mentis, and dismissed the Bill. Chan. Rep. 40. 5 Car. 1. Winchcomb v. Hall.

Non Compos

36. In regard the Plaintiff had 40 Years Possession of a *Pischary*, the Court decreed Defendants to surrender and released their Title to the same tho' the *Surrender* made by the Defendant's Ancestor was *defective*, and that the Plaintiff's should hold and enjoy against the Defendants. Vern. 196. Mich. 1683. in Case of Lyford v. Coward.—Cites 35 Car. 2. Penelope v. Trelawny.

Pischary

37. Possession for *more than 70 Years under a legal Title* shall never be disturbed in Equity. MS. Tab. tit. Injunction cites 28. Jan. 1722. Stone v. Burn.

Possession

38. *Payment of Purchase* will be Money presumed after 40 Years. Chan. Rep. 94. 11 Car. 1. Bidlake v. Arundell.

Purchaser

39. *Purchaser* for a valuable Consideration was not relieved against an *old dormant Entail*, it being found by Verdict not to be Fraudulent, but no Costs to the Defendant. Clarendon C. N. Ch. R. 57. 13 Car. 2. Needler v. Wright.

40. Bill was for *Remainder of purchase Money* after 33 Years, and no Suit for it before but the Land was enjoyed, and former Parties concerned Dead. No Relief was granted. 2 Chan. Rep. 44. 22 Car. 2. Hunton v. Davis.

Fin. R. 344. Pasch. 30 Car. 2. Heupert v. Heupert v. Benn.

Benn.—So Purchaser for a valuable Consideration of Lands charged with an Annuity could not be relieved as to *Arrears due 30 Years before*, and tho' the same had not been demanded in all that Time Fin. R. 252. Trin. 28 Car. 2. Duke of Albemarle v. Viscountess of Purbeck.

Qualifications by taking Oaths &c.
41. In Cases of *not taking the Sacrament*, or the *Oaths of Allegiance* and Supremacy, the Court will *intend* that they were *duly taken* after a long Acquiescence, but a Right shall never be intended when the Merits of it are controverted, and no collateral Part disputed. 8 Mod. 166. Arg. Trin. 9 Geo. in Case of the King v. Powell.

Quo Warranto.
42. In an Information in Nature of a Quo Warranto, to shew Cause why he claimed to be Capital Burgefs; per Cur. Length of Time will never *establish* a Right, which was gained by *Usurpation*. 8 Mod. 165. Trin. 9 Geo. the King v. Powell.

Recognizances, Statutes &c.
43. A Statute entred into long since, and the Conufee having held Lands of the Conufor divers Years, the Court thought the Debt satisfied and decreed it to be *vacated*. Chan. Rep. 106. 12 Car. 1. **Dennis v. Nurse**.—So where the Defendant insisted on a Demand, and a Promise of Payment. Chan. R. 117. 13 Car. 1. **Dutton v. Jay**.—So after 46 Years, and several Descents and Purchases of the Lands appointed for payment of Debts. Chan. R. 135. 15 Car. 1. Popham v. Desmond.—And tho' it was not extendable because of *Infancy*, yet he should have sued in Equity for Relief. Lev. 198. Mich. 18 Car. 2. B.R. Middleton v. Shelly.

44. An Ancient Recognizance *was deny'd to be set aside to let in a Mortgage*. 2 Chan. Rep. 106. 27 Car. 2. Plummer v. Stamford.

45. A. seised of Land confessed a Statute to B. and afterwards another Statute to C. and then made a Lease in Trust to D. to pay 40*l.* a Year to his Wife for a *Jointure*. The Heir got an Assignment of C's Statute which he set up against the Jointure, whereupon the Wife, to Protect herself against the Statute of C. procured an Assignment of B's Statute after a Bill exhibited against her and Pendente Lite, and then set it forth in her Answer. It appeared that this Statute to B. was entred into in the 26 Eliz. which was 94 *Years ago* (about the Year 1583.) and the Lease for Jointure and *Payment of Interest till 1644.* was proved, and that then there was an *Agreement to forbear an Extent till 1658.* and that *then there was a Minority*; and it was held by the Lord Chancellor that the Antiquity of this Statute was answered by the proving thereof and Payment of Interest. Chan. Cases 304. Mich. 29 Car. 2. Willoughby v. Perne.

Trusts.
46. Bill was for Relief against a *Statute 58 Years Old*; Defendant to answer the Length of Time says, he found a Writing containing an *Agreement not to execute it in the Life of the Cognisor*, and that Defendant did not dare to demand it, the Plaintiff being a Surety for Money borrowed by Defendant; but the Statute was decreed to be *vacated*, and a perpetual Injunction. Fin. R. 331. Mich. 29 Car. 2. Corey v. Corey.

47. Bill was to *discover a Trust of Lands*, after the same had been in Possession of the Detendant and his Ancestors for 20 Years, or more, without any Claim, and suggesting that tho' several Sums were paid to Plaintiff's Father as a Consideration, yet it was only in Trust to pay the same and other Debts, and after to stand seised to his Ancestor and his Heirs. Decreed an Account, and that on Payment of what was due to Defendant he should reconvey to Plaintiff and his Heirs. Fin. R. 262. Trin. 28 Car. 2. Berrington v. Mason.

Vicaridges.
48. Lands were *devised in Trust* to pay Debts and Legacies, and then to the Trustees and their Heirs, on Condition, that *if any of the Testator's Name would buy them, he should have them for 200*l.* less than the Value*; 25 Years after Testator's Death, one of the Name brings a Bill for *præemption*, but Jeffries C. dismiss'd the Bill as unreasonable after so long Time. Vern. 362. Hill. 1685. Hucksteep v. Matthewes and Court.

Water-Courses.
49. Length of Time, as 160 Years, *is not a sufficient re-uniting a Vicaridge to a Parsonage*, but that a new Vicar may take Wood, &c. of which the Vicaridge was endowed. Cro. E. 873. Hill. 44 Eliz. C. B. Robinson v. Bedel.

50. A *Water-Course* running to a House and Garden, through another's Land was enjoy'd near 40 Years. But it was objected by Defendant to the Length of Enjoyment, that in 1662. A. took a Lease of the Lands, and during his Lease made the Water-course, and that after the Lease expired, he was often denied Liberty to scour or amend the Water-course, and this was fully proved, and Defendant insisted, it was only upon Sufferance, and not on any Agreement or Consideration. Somers C. directed an Issue, if any Agreement between any Owners of the respective Estate, for the making or continuing it. On a Rehearing Wright K. decreed for Plaintiff, declaring a *quiet Enjoyment* was the best Evidence of Right, and would presume an Agreement, and the Proof ought to come on the other Side to shew the special Licence, or that it was to be restrained or limited in Point of Time. 2 Vern. 390. Mich. 1700. Finch v. Resbridger.

51. A. had been in Possession of a *Water-Course* upwards of 60 Years. B. claimed the Land through which the Water-Course ran, by Virtue of a forfeited Mortgage for 100 Years, and which he had foreclosed. A's Title was fully proved, and his Bill was for quiet Possession; and to have a perpetual Injunction, B. having *interrupted* him by *cutting a Channel through his own Lands*, and setting up a Sluice in the Mouth of it, whereby A's Water-Course was totally diverted and prevented. It was objected, that it was a Matter purely *at Law*, and therefore he should have *established his Title* there before he came here, and that the Remainder-man should be made a Party; but decreed for A. the Plaintiff, and if the Defendant would have had the *Remainder-man a Party*, he should have shewn in his Answer who he was, and set forth that himself had only a Term for Years, and prayed that Remainder-man might be made a Party. Ch. Prec. 530. Trin 1720. Bush v. Western.

52. A. seized of Land in Fee, made a *Lease to B. for 90 Years upon Trust for such Uses as A. should by his last Will direct*. Afterwards A. made his Will, (having then no Issue, but his Wife grossly enfeint) and thereby *devised the same Land to the Heirs of his Body*, on the Body of his Wife begotten, and for default of such Issue to the said B and his Heirs. A. died, and a Month after a Son was born, who enjoyed the Land 'till 21, and then suffered a *Common Recovery*, and afterwards *devised the Land to J. S.* and died. J. S. exhibited a Bill against B. to have the Lease of 99 Years assigned to him; and whether he should have it or not was the Question? And notwithstanding the long Admittance of A's Will; and the Acquiescence under it for 20 Years and upwards, B. was decreed to assign the Residue of the said Term, to whom J. S. should appoint, clear of all Incumbrances, and the Plaintiff his Executors and Administrators, to hold and enjoy the same. Fin. R. 160. Mich. 26 Car. 2. Nourse v. Yarworth.

Affirmed by
Ld. Cowper
Hill 6 Ann.
G. Equ R. 3.
Ld. Guernsey v. Rod-
bridges.

Wills.
Vid. Heir
(1. 2.)

(A) Levant and Couchant.

1. **L**evant and Couchant shall be *intended* such Beasts as are nourished and fed upon the Land, and may there lie in Summer and Winter. 2 Brownl. 101. Mich. 9 Jac. C. B. Patrick v. Lowre.—*So many as the Land will maintain*. Vent. 54. Hill. 21 & 22 Car. 2. B. R. in Case of Leech v. Widley.

2. So many of the Cattle as the Land, to which the *Common is Appurtenant*, may maintain in the Winter, so many shall be said Levant and Couchant; per Coke Ch. J. in Norfolk Circuit, and agreed to by 2 Justices; cited Noy. 30. in the Case of Cole v. Foxman.—Goldsb. 117. S. P. in Case of Smith v. Bonfall.

Q

3. *Prescription*

- Per Twisden.
Vent. 165. 3. Prescription for Common sans Nombre, without saying Levant and Couchant, being after a Verdict was held good, but if it had been upon a Demurrer, it would have been otherwise. 1 Mod. 7. Mich. 21 Car. 2. B. R. in the Case of the Corporation of Darby.—cited per Twisden J. as the Case of Maffelden v. Stoneby
- Vent. 165.
S. C. and P. 4. Levancy and Couchancy need not be averred, where the Copyholders have *Solam & separalem Pasturam*, which is different from their having Common; For in this last Case Levancy and Couchancy on their Tenements is the Measure of their Common. 2 Lev. 2. Pasch. 23 Car. 2. B. R. Hopkins v. Robinson.
5. If a Man has Common for a certain Number of Cattle, belonging to a Yard-Land, &c. he need not say Levant upon the Yard-Land, &c. but otherwise if it was a Common sans Nombre. 2 Mod. 185. Hill. 28 & 29 Car. 2. B. R. Stevens v. Austin.
- 6 Mod. 115.
S. P. Anon. 6. Foddering of Cattle in the Yard was held by Hale Ch. J. to be Evidence of Levancy and Couchancy; per Holt Ch. J. 1 Salk. 169. Hill. 2 Annæ. B. R. Emerton v. Selby.



Fol. 106.

* Ley Gager, *Vadiave Legem*, and there is also *facere Legem*, by making of his Law, that is, to take Oath, (for Example) that he oweth not the Debt dem-

* Ley Gager.

(A) Ley Gager. *In what Cases a Man shall be Ousted of the Law. By Matter of Record.*

1. **I**F Debt be brought upon Recovery in Court † Baron or Franchise, which is not a Court of Record, the Law lies because it is not of Record. 49 E. 3. 3. Contra 6 D. 4. pl. 3. adjudged.

And it is called Wager of Law, because of ancient Time he put in Surety to make his Law at such a Day, and it is called making of his Law, because the Law doth give such a special Benefit to the Defendant to bar the Plaintiff for ever in that Case. Co. Litt. 294. b. 295. a.—S. P. 2 Inst. 45.—Every Wager of Law doth *counter-vail a Jury*, for the Defendant shall make his Law, de Duodecima manu, viz. an Eleven and himself. And it should seem, that this making of Law was very ancient; For one, writing of the ancient Law of England, saith, *Hujus purgationis non omnis evanuit celsitate Memoria; nam per hac tempora de pecunia postulatus Debitum nonnunquam Duodecima, quod aiunt, manu dissolvit.* 2 Inst. 45.

† S. P. Co Litt. 195. a.—S. P. Le. 203. Pasch. 31 Eliz. Castle v. Oldman.—And Waller one of the Secondaries shewed the Court a Precedent, 6 Eliz. in Debt, by *Lyndal v. Cylter*, upon a Pain forfeited for breaking a By-Law in a Court Baron, and the Party was received to wage his Law.—Quere if it lies upon *Amerciament* in a Court Baron. Mo. 276. pl. 430. Pasch. 31 Eliz. Anon.—cited 2 Vent. 171.—In Debt upon *Amerciement* in a Court Baron, tho' the imposing of it was grounded upon a Prescription, yet Wager of Law was admitted. Arg. cites Co. Ent. 118. But the Court overruled it. Vent. 261. in Case of the Mayor of London v. Dupester.—And Holt Ch. J. denied this Case of Co. Ent. 118. 2 Salk. 684. 2 March 1701. at Guild-Hall. Mood als. Wood v. Mayor, &c. of London.—Holt Ch. J. cited the same Point, as adjudged 29 Car. 2. Rot. 92. in B. R. which he said, was the only Case or Authority that he met with in the Books, except the Opinion of 49 E. 3. 3. which he said, he valued very little, as to what is said there of a Court Baron. But that what was said of a Franchise might be so; For Franchise commonly means a Court of Record. And he takes Notice that was not said by the Court, but by the Counsel. 12 Mod. 632. Hill. 13 W. 3. in Case of the City of London v. Wood.

If a Man recovers Damages in Ancient Demesne, and the Plaintiff brings Debt, it shall be tried Per Pais, and the Defendant shall not wage his Law. Quere inde. Br. Ley Gager, pl. 11. cites 34 H. 6. 64.

2. But otherwise it is, if the Recovery be in a Court of Record. 19 D. 6. 80.

3. In Debt Defendant says, that he bought to the Use of the King, and the other says, that he bought to his own use; and after Defendant may wage his Law, tho' he has confessed the buying of Record. 7 H. 4. 7.

4. In Debt for Arrearages upon Judgment before Auditors assigned of Record, the Law does not lie. 11 H. 4. 64. 92. 11 H. 4. 56. 4 H. 6. 17 b. 8 H. 6. 5 b. 29 b. 20 H. 6. 16 b. *M.* 41 & 42 *El. B. R.* adjudged Franklin's Case.

Br. Ley Gager, pl. 31. cites 11 H. 4. 54.—S. P. Br. Ley Gager, pl.

35. cites 9 H. 5. 3. But that it is otherwise of an Account before the Plaintiff himself.

5. But in Debt upon Arrearages of Account before Auditors assigned of Record, the Law lay at Common Law; For before the Statute, the Auditors had no Power to commit to Prison. 4 H. 6. 18. Contra 20 H. 6. 17. 14 H. 6. 24 b.

Br. Ley Gager, pl. 24 S. P. cites 49 E. 3. 3. but Brook says, that it is

is Contrary at this Day.—* *W.* 2. 11.—The Defendant shall not wage his Law, and this by Construction of this Statute, which gives them great Authority. Co. Litt. 295. a.

6. So, after the Statute, in Debt for Arrearages of Account before one Auditor assigned of Record, the Law lies; For this is at the Common Law, and not within the Statute; For he cannot imprison by the Statute. 20 H. 6. 16 b. adjudged. Dubitatur 4 H. 6. 25 b.

* S. P. For the Statute (*W.* 2. c. 11) says, *Coram Auditoribus*, and there-

fore of an Account before one Auditor the Law lies. Co. Litt. 295. a.—S. P. 10 Mich. 10 Jac. in Denbawd's Case.—Br. Ley Gager, pl. 7. S. P. cites 20 H. 6. 16.

7. So in Debt for Arrearages of Account, found before Auditors, not within the Statute; as where Defendant is found in Surplus, there Law lies; For it is at Common Law. 14 H. 6. 24 b. *Curia.* Contra 20 H. 6. 16 b. 17.

But it was agreed, and said expressly, that in the Exchequer before

Auditors, the Lord was found in Surplusage, and the Bailiff brought Debt upon the Account, and the Lord was ousted of his Law by Judgment; For that which is before Auditors is of Record, and shall bind the Lord as well as the Bailiff; and yet they may commit the Bailiff to Gaol if he be in Arrears; but not the Lord for his Surplusage; For the Statute does not extend to that. Br. Ley Gager, pl. 7. cites 20 H. 6. 16.—S. P. Co. Litt. 295. a.

8. In Debt for Amercement in a Lect, Defendant shall not wage his Law; Because it is assessed in a Court of Record. 10 H. 6. 7.

Br. Ley Gager, pl. 99. cites S. C.—S. P.

Co. Litt. 195. a.—S. C. cited Le. 203. Pasch. 31 Eliz. C. B. in Case of Castle v. Oldman.

9. If a Man recovers by Verdict in Action upon the Case upon a Promise under 40s. in the Borough Court of Dunster in Somerset, which is not any Court of Record, but a Court Baron, and after brings Action of Debt in B. R. upon this Judgment, yet the Defendant may wage his Law; Because it is not any Court of Record. Mich. 2 Car. between *Tewens* and *Pound* adjudged, and the Law made accordingly.

This Case was denied by Holt Ch. J. 2 Salk. 684. in Case of Mood v. the Mayor, &c. of London.

10. In Debt upon a Contract of 40s. if Defendant confesses that he owes 20s. to the Plaintiff and is ready to pay it, he cannot wage his Law of the Remnant; Because he has acknowledged the Contract of Record; For it shall be intended, that the 20 s. is Parcel of the 40 s. Contra 29 E. 3. 25 b.

In an Action of Debt brought upon a Contract the Defendant cannot wage his

Law for Part, and confess the Action for the other Part; per Hobart Ch. J. said to have been adjudged, Mich. 15 Jac. in C. B. And it was said to have been so adjudged upon a Shop Book in *Part's* Case, and cites 38 H. 6. 14. and adjudged accordingly. Godb. 327. pl. 420. Pasch. 21. Jac. C. B.

For tho' the Parliament transferred the Debt, yet it is not any Debt of Record, and as he might have wag'd his Law against the bankrupt, so he may against the Plaintiff
 11. Where a Debt is assigned by Commissioners of Bankrupts, yet Ley Gager lies against the Assignee, tho' it was alleged, that it is a Debt on Record, and the Plaintiff enabled to the Suit by Act of Parliament. Cro. C. 187. Pasch. 6 Car. B. R. Morgan v. Green. Cro. J. 105. Mich. 5 Jac. B. R. Bradshaw v. -----

And the Court took a Distinction, that in the Cafes cited of the Amercement by By-Laws, the Debts are not immediately founded upon Customs, but upon the Amercement by the By-Laws, which are warranted by Custom; but in the Principal Case, the Debt is founded immediately upon the Custom confirmed by Act of Parliament.
 12. In Debt for Scavage, being a Duty accruing to the City for Timber imported. The Count was, that they were and had been a Corporation, Time out of Mind, and their Customs confirmed by Act of Parliament. The Defendant tender'd his Law; But the Count over-ruled it; For here the Duty it self is by Prescription, and that confirmed by Act of Parliament. Vent. 261. Trin. 26 Car. 2. Mayor &c. of London v. Dupetter. 2 Lev. 106. S. C. by name of the Mayor &c. of London v. Deputee.

But the Reporter says, Quære; For he doubted how that would differ from the Case at Bar, only that
 13. Debt was brought for Damages and Cofts recovered in a Court Baron in an Action brought there for Words. The Defendant was not allowed to make her Law. And it seemed clear, that tho' Wager of Law doth lie of a Debt recovered in a Court Baron, yet that shall be intended of a Debt originally sued for there. Raym. 386. Trin. 32 Car. 2. B. R. Woodroffe v. Wilgrefs.

Wager of Law would not have been in the Original Action, because there is an Injury supposed in the Defendant, in which Cafes Wager of Law lies not, cites Co. Litt. 295. and therefore tho' it be in a Recovery in a Court Baron, yet because the Original Cause of the Action would not permit Ley Gager, he thought they did well in refusing her waging of Law. Ibid. 386, 387.—So where A. demanded a Quit Rent of 18d a Year of B. and B. promised payment, if A. would swear his Title, and satisfy him, that he had a Right to demand it, and in an Action upon this Promise brought in a Court Baron A. recovered, tho' it was urged at the Time of the Verdict, that the Freehold would come in Quæsti upon that Promise, and so the Court Baron could have no Jurisdiction. Upon Debt brought in C. B. upon this Judgment B. came to wage his Law, and was ready to swear that he owed A. nothing; But the Court held, that by the Recovery it became a Debt and was owing; and being asked, if he had paid the Money, he answered that he ow'd nothing; whereupon the Court concluded, that he had not paid it, and therefore would not admit his waging his Law, without bringing sufficient Compurgators, to swear, that they believed he swore Truth, but such not appearing Defendant defect de Lege, and Judgment was given against him. 2 Mod. 140. Mich. 38 Car. 2. Beaumont v. -----

And it is ridiculous to say, that Wager of Law will lie in Debt upon a Judgment in a Court Baron, because the Money might be paid in private, for that would be a Reason to wage Law in all the Cafes before put; but it is to be considered, that it is not the Privacy of the Payment, or the Possibility thereof, that is the Occasion of a Wager of Law, but that the Ground of the Action is secret; per Holt Ch. J. 12 Mod. 682. in Case of City of London v. Wood.
 14. Debt was brought in C. B. for a Sum of Money recovered in the Hundred Court, and the Defendant was admitted to wage his Law, tho' at first the Court doubted. 2 Vent. 171. Pasch. 2 W. & M. C. B. Anon.

vid. (K)
 pl. 4.

(B) In what Cafes the Law shall be Ousted by Specialty.

1. **I**n Debt upon Arrearages of Rent, reserv'd upon Lease for Years by Deed, the Law does not lie against the Deed. 49 E. 3. 3. (It does not lie for the Rent without the Deed.)

2. If my Bailiff receives of me 20l. by Deed, to buy Things for the Manor, and if it be found upon Account, that he has bought nothing but retains the Money in his hands; In Debt upon the Account the Deed of the Resciet shall oust him of the Law. 49 E. 3. 3.

3. In

3. In Writ of Account, if Defendant be adjudged to Account, and before Auditors he sets forth two Tallies, testifying that the Plaintiff had received certain Monies, the Plaintiff may wage his Law, that those are not his Tallies. 21 E. 3. 49.

Fol. 107.
See (K) pl. 4

4. By 38 E. 3. cap. 5. Any Man may wage his Law (by sufficient People of his Condition) against Londoner's Papers, and the Creditor shall take Surety otherwise, if he please; but shall not put the Party to plead to the Inquest, unless he will do so of his own Accord.

But at this Day, if the Debtor subscribes his Hand to the Creditor's

Book, he cannot wage his Law; For their Customs are approved by Statute 14 E. 3. and other Statutes; and this is not properly Paper. Br. Ley Gager, pl. 98. — Debt upon a Contract was brought before the Mayor and Recorder of London; the Defendant tendered his Law. The Plaintiff replied, that there is a Custom, that if a Man has put a Seal to a Paper, testifying the Contract, that he shall be ousted of the Ley Gager. The Defendant demurred; For that the Plaintiff by this Plea had abated his own Action. But adjudged before Prison; that this Matter will well maintain his Count, and does not alter the Nature of the Contract; because it was an Evidence only of the Contract. D. 21. b. pl. 132. per Luke J. cites 30 H. 6.

5. A Man retained an Attorney for his Master for 10 l. by the Year by Deed; the Master, in Debt by the Attorney, may wage his Law. Br. Ley Gager, pl. 95. cites 46 E. 3. 10.

But if the Master makes the Servant, who retained by Deed, his

Executor, and dies; there, in Debt by the Attorney against the Executor, he cannot wage his Law, by Reason of his own Deed. Ibid.

6. Where a Bailment is made by Deed sealed, yet the Defendant may wage his Law in Action of Detinue; For Detinue, which is Matter in Fact, is the Cause of Action, which may be answered by Matter in Fact. Br. Ley Gager, pl. 3. cites 27 H. 8. 22.

7. If one brings Debt on Bond, and does not say Sigillo suo sigillat. the Defendant may wage his Law: Arg. Mo. 333. lays this Case was cited by the Ld Chief Baron.

8. It lies not where there is a Specialty or Deed to charge the Defendant, but only where there is a bare Parol Transaction, which may be discharged as it was contracted; Per Hatfield J. 12 Mod. 669. in Case of London City v: Wood.

Co. Lit. 29.

S. P.

(C) For what Things.

See (D).

1. In Debt upon Arrearages of Account before Auditors En Pais the Law lies. 49 E. 3. 2. b. Curia. Contra 11 D. 4. 79. b. 13 D. 4. 1. 14 D. 4. 19. and the Statute of 5 D. 4. cap. 8.

Cro. E. 600. contra.—Br. Ley Gager, 51. cites 22 H. 6. 35.—

Debt upon Arrearages of Account before Auditors &c. the Defendant pleaded that Nothing was owing to him, and that he was ready to aver by his Law, and prayed that the Plaintiff be thereof examined, and shewed to the Court an Indenture, by which it appeared, that the Parties put themselves in Award of 1200. of all Debates, who awarded that the Defendant should pay to the Plaintiff the Sum aforesaid, which he shewed for his Matter; Per tot Cur. Such Arbitrators are not his Judges upon his Account; For they cannot upon this Matter award him to Prison; but are Arbitrators only, and not otherwise; and if he ought to have this Action; yet after, he shall have a new Action upon the same Award, by which he was admitted to his Law. Br. Ley Gager; pl. 52. cites 22 H. 6. 14.

2. [But] In Debt upon Arrearages of Account had before himself, the Defendant shall have his Law. 8 D. 6. 29. b. 20 D. 6. 41. b.

Br. Ley Gager, pl. 51. cites 22 H. 6. 35.

3. In Debt upon Arbitrement upon Submission without Deed the Law lies. 49 E. 3. 3. 11 D. 4. 56. b. adjudged. 1 D. 6. 1. b. 4 D. 6. 17. b. 8 D. 6. 5. h. 10. b. Curia. 19 D. 6. 10. 20 D. 6. 17.

Cro. E. 600. Bowyer v. Garland — Br. Ley Gager, pl. 31.

cites 11 H. 4. 54. and 21 H. 6. 30. and pl. 34 cites 5 H. 5. 13. and 21 H. 6. 30. — In Debt on Arbitrement, Defendant was ousted of his Law by the Court. Lat. 213. Anderson v. Symonds.

The Reason why Wager of Law lies on Award, if Submission be by Parol, is, that the Submission is the Ground of the Action; per Holt Ch. J. 12 Mod. 680. in Case of City of London v. Wood. — And because the Defendant has Notice of the Submission and Award. Br. Ley Gager, pl. 105. cites 1 H. 7. 25. per Brian.

Br. Ley Gager, pl. 47. 6. 10. **4. In Debt upon a Contract for his Table the Law lies. 19 D.** cites S. C. —

S. P. per Moyle and Danby, but contra by Prifot and Needham. Ibid. pl. 70. cites 39 H. 6. 18. — 9 Rep. 87. b. — Contra per Gawdy J. being only in Court. Cro. E. 818. Pasch. 43 Eliz. B. R. Bishe v. Walford. — S. P. per rot. Cur. Quod nota; the Reason seems to be inasmuch as it is at the Election of the Plaintiff, whether he would take them to Table or not; but it is said elsewhere, that it is contrary where the * Keeper of a Prison brings such Action; for he cannot refuse the Prisoner. Br. Ley Gager, pl. 50. cites 22 H. 6. 13. — S. P. Co. Litt. 295. a.

* S. P. Br. Ley Gager, pl. 44. cites 19 H. 6. 10. For he cannot live without Eating and Drinking. — Debt by the Keeper of the Tower against J. N. who was in his Ward for Treason, for his Eating and Drinking from such a Day to such a Day, and the Defendant tender'd his Law, and was ousted per Cur. Contra the Salary of a Priest. Brook says, the Reason seems to be because the Keeper cannot refuse the Prisoner, and it is not Charity that he should die for Want of Sustenance; contra for the Eating and Drinking of a Man who is at large. Br. Ley Gager, pl. 3. cites 28 H. 6. 4. — † S. P. Br. Ley Gager, pl. 44. cites 19 H. 6. 10. — pl. 50. cites 22 H. 6. 13. pl. 55. cites 15 E. 4. 16. Contra of a Victualler. — S. P. Because it is a Work of Charity; per Ld Chancellor and Doderidge J. in the Star Chamber. Roll. R. 338. Hill. 13 Jac. Adkinson v Hobs. — The Reason why in Debt by Gaoler against the Prisoner for Meat and Drink, he cannot wage his Law, is not, because the Gaoler is obliged to find him Victuals; For that is not true, as appears by Pl. C. 68. a. But because the Defendant is in Durance, and the Plaintiff cannot take Security from him for Re-payment; For a Bond will be void, so that he must be content with a Promise; per Holt Ch. J. 2 Salk. 684. 2d. of March 1701. Mood v. the Mayor of London.

See (C) pl. 4. in Notis — (D) Ley Gager. [Not where a Man is compellible to do the Thing.]
See Gaoler (B).

Mo 698 — 1. **If a Labourer within the Statute brings Debt for his Wages Defendant shall not have his Law; because he was compellable to serve by the Statute. 3 D. 6. 42. h. 34. 11 D. 6. 48. b.**

S. P. Otherwife it is, if he be not retained according to the Statute. Co. Litt. 295. a. — Debt upon a Retainer in Husbandry for his Salary Arrear, the Defendant said, that he did not retain him in Husbandry, and a good Plea, by Reason that he cannot wage his Law in this Case, and therefore he may traverse the Contract; quod Nota bene. Br. Contract &c. pl. 20. cites 38 H. 6. 22.

S. C. cited per Holt Ch. J. who said, that the Reason of being compellible to serve is no Reason; For tho' he be bound to serve, yet the other is not bound to take him. But the Reason is, because it is hard that the Master should be put to wage this Law, but rather that the Plaintiff should be put to prove his Retainer by the Statute. 12 Mod. 683.

* Orig. Carve — † Orig. Chare. **2. If a Man covenants to serve me at my * Plough, and to find what is necessary for this Business as the Plough itself, † Wagons, Carts, &c. for so much a Year &c. In Debt for this, I may wage my Law; For this is not within the Statute to be compell'd to serve so. 3 D. 6. 42. h.**

S. P. Br. Ley Gager, pl. 5. cites S. C. For he who may compel a **3. If a Man be retained to scald Hogs by the Year for so much, in Debt for this he shall have his Law; For it is not within the Statute to be compelled to serve. See 3. D. 6. 42. h.**

Stranger to serve by the Statute, and is retained accordingly, his Labour and his Salary is contained in the Statute; therefore such shall not be barred by Ley Gager; contra of others.

9 Rep. 88. **4. If a Man retain'd to sing Masse by the Year for so much brings Debt for it, the Defendant may wage his Law; Because he was not compellible to serve by the Statute. 11 D. 6. 48. h.**

5. If

5. If a Man be retain'd to be of his Counsel for so much by the Year &c. In Debt for this he shall have his Law; (For he is not compellible in this Manner) 3 H. 6. 34. b. 42. b. adjudged.

S. P. Br.
Ley Gager,
pl. 4. cites 3
H. 6. 34 and
Brook says,

the Reason seems to be, because none shall be ousted of his Law in such Case, but *against Servants of Husbandry, and Labourers who are retained by the Statute, and take Wages expressed in the Statute.*

6. If an Attorney of B. sues an Action of Debt against his Client, for Fees and Charges disburs'd in the Court, the Defendant cannot wage his Law. M. 37 El. B. Curia Nich. 37 & 38 El. B. R. between *Germayn and Rowles, adjudged by Admittance. Cr. 40 El. B. per Curiam. Cs. 1 Inst. fol. 295. Sect. 514. Because an Attorney is compellible to be his Attorney. 21 H. 6. 4.

*Cro. E. 425.
459. S. C.—
Br. Ley Gager,
pl. 45.
cites 21 H. 6.
4. S. P.

7. If a Solicitor, retain'd to solicit a Suit, sues an Action of Debt for Fees and Charges which he had expended in the Suit, the Defendant may wage his Law. Nich. 37 & 38 El. B. R. adjudged by Admittance.

8. If an Attorney of B. R. brings Action of Debt for his Fees, and other Expences of Suit in B. the Defendant may wage his Law. Cr. 40 El. B. between Fenkinson and Sharpe, adjudged; because he is not compellible to be his Attorney there.

9. If an Attorney of B. brings Action of Debt, because he was his Attorney in an inferior Court, the Defendant shall have his Law; Because he was not compellible to be his Attorney there. 21 H. 6. 4.

Br. Ley Gager,
pl. 45.
cites S. C. ac-
cordingly.

10. If a Serjeant at Law brings Writ of Debt, and declares how he was retain'd to be of Counsel with the Defendant for two Years, taking by the Year 10l. the Defendant may wage his Law, tho' the Plaintiff be * compellible to be of Counsel of any. (But this is by Contract by the Year) 21 H. 6. 4. By all the Justices.

* Fo. 108.

S. P. Br. Ley
Gager, pl.
45. cites S.

C. For Brook says, it seems, that he is not compellible to be of Counsel for a whole Year, nor for two Years, nor for any Fee certain for the whole Year.

11. Debt because the Plaintiff retained the Defendant for eight Years for 20s. per Ann. to serve in all Occupations, and for 8l. Arrear, for his Service of eight Years, Action accrued &c. The Defendant tender'd his Law; and per Cur. a Taylor, Carpenter, &c. who are Artificers shall not be compelled to serve by the Statute. But a Ploughman, Shepherd, &c. shall be compelled to serve, and therefore as to them Ley Gager lies not of their Salary. But here, because the Retainer was in all Occupations, and does not say in Husbandry, therefore the Law was admitted. But by the Reporter, because Husbandry is Parcel, and of this the Law lies not, therefore it lies not in any Part. But Judgment was ut supra. Br. Ley Gager, pl. 66. cites 38 H. 6. 14.

Br. Labour-
ers, pl. 36.
cites S. C.

12. If an Hostler will not lodge me, I shall have Action upon the Case, and so of a Victualler who will not sell me Victuals; and yet in Debt for these Victuals, the Defendant * may wage his Law; Per Moile and Prifot. Br. Action sur le Cafe, pl. 76. cites 39 H. 6. 18.

Br. Ley Ga-
ger, pl. 70.
Per Moile
and Prifot.
cites S. C.—
* S. P. 9 Rep.

87. b. For a Victualler or Hostler is not compellible to deliver Victuals till he is paid for them in Hand.

13. Where a Man retains another for 10l. to go to Rome to obtain a Bull &c. in Debt for this the Defendant may wage his Law; quod nota, per all the Justices; For this is not a Retainer according to the Statute of Husbandry, where they shall be compelled to serve; therefore in that Case the Law will not lie. Br. Ley Gager, pl. 70. cites 39 H. 6. 18

(E) Of what *Thing* it lies *touching Realty*.

S. P. Co. Lit. 1. **I**n Detinue of Charters concerning his Franktenement, the Law does not lie; For it is real. 20 D. 6. 38. Dubitatur 38 E. 3. 7. So of a Lease for Years; For it concerns the Land, and is a Chattel Real; and so it was lately adjudged in B. R. Quod nota bene inde. Br. Ley Gager, pl. 97. cites 34 H. 8.—Co. Litt. 195. a. S. P.

2. So in Detinue for a Release of all Right in his Franktenement, the Law does not lie; Because it is Real. 20 D. 6. 38.

In Detinue of Charters, if the Plaintiff does n^t tintitle himself to the Land, the Defendant may wage his Law; For if a Man gives me a Deed of Feoffment, it is only a Chattel in me, contra if I have the Land; per Pigot. Br. Ley Gager, pl. 75. cites 8 E. 4 3.

3. But if a Man has Charters in his Custody concerning the Land of another Man, and he Bails them to Re-bail, if he brings Detinue against Bailee, he may wage his Law; because they are Chattels between them. 20 D. 6. 38.

* S. P. Co. Lit. 295. a. —It will not lie, tho' it was upon a Parel Lease; per Holt Ch. J. Because it is in the Realty, and arises from the taking the Profits of the Land, and Occupation of it in the Country; and so the Notoriety of the Thing excludes the Defendant from waging his Law; per Holt Ch. J. 12 Mod. 681.

4. In Debt for Rent upon Lease for Years, the Law does * not lie; For it is in the Realty. 1 D. 6. 1. 9 E. 4. 1. 4 D. 6. 17. b. 8 D. 6. 5. b. 29. b. 20 D. 6. 16. a. b. Contra 44 E. 3. 42. Contra 50 E. 3. 10. b. adjudged.

Br. Ley Gager, pl. 641 cites S. C. and that Cot. Serjeant took the Reason of the Difference between Ley Gager not lying in Debt upon a Lease for Years, and lying upon a Lease of Beasts to be, that of a Lease of Land, Ejectment or Quare ejectionis infra Terminum lies, but not of Beasts; For Lease of Land is notorious to the Conuifance of the Country. But Brook makes a Quære of the principal Cafe.

5. But if a Man lease Sheep, rendring Rent; in Debt for the Rent Ley Gager lies; For it is not Real. 1 D. 6. 1. b. Curia. (For this is not a Rent).

Orig. (Gallins.) 6. In Detinue for an Obligation the Law lies; Because it is not Real. 38 E. 3. 7.

7. Debt, in the Detinet without the Debet, of certain Corn, and Rent Fowl, and counted upon a Lease for Years of certain Land, reserving the Corn and Fowl; and because the Writ was in the Detinet, he waged his Law, and was admitted to it; and yet it was granted, that Debt shall not be in the Debet, but of Money only, and therefore Error as it seems. Br. Ley Gager, pl. 26. cites 50 E. 3. 16.

S. P. per Holt Ch. J. 12 Mod. 681. 8. In an Action of Account against a Bailiff of a Manor, the Defendant cannot wage his Law, because it foundeth in the Realty. Co. Litt. 295. a.

9. In Account for Profits of 14 Acres of Land for six Years, Defendant cannot wage his Law. Mo. 468. Mich. 39 & 40 Eliz. Popworth v. Arche.

(F) Part Real, Part Personal.

Br. Ley Gager, pl. 86. cites S. C. 1. **I**n Detinue of a Box with Charters and Muniments, if the Plaintiff counts not of any Charters in Particular, the Defendant may wage his Law of the whole. 19 D. 6. Because before the bringing of it, the Box and all in it is but a Chattel. 19 D. 6. 9. b.

2. If

2. If Detinue be brought for a Chest sealed, with Money and Charters of Land in it, the Law lies. 44 E. 3. 41. b. (of the whole.)

3. But otherwise it is if he declares of certain Charters in Particular, and if the Writ be not that the Chest was sealed. 44 E. 3. 41. b.

4. But in Detinue of Charters inclosed in a Chest, if he declares of one Charter in Particular, the Defendant cannot wage his Law of it. Br. Ley Gager, pl. 43. cites 19 H. 6. 9 and pl. 86. cites 20 H. 6. 38.

S. C. — Defendant said it was a Box, and justified &c. *Absque hoc* that it was a Chest &c. and held a good Plea; and yet Defendant might have waged his Law. Br. Ley Gager, pl. 79. cites 22 E. 4. 7.

5. In Detinue of certain Charters and Miniments contained in a Chest, and declares of one Charter in Particular, the Defendant may wage his Law of the Residue. 10 H. 6. 20. b. adjudged 11 H. 6. 9. b. 14 H. 6. 1. 19 H. 6. 9. b. 20 H. 6. 38.

Br. Ley Gager, pl. 43. cites 19 H. 6. and pl. 86. cites S. C. — pl. 79. cites 22 E. 4. 7. — In such Case the Defendant waged his Law as to all but this Charter, and did it immediately; and the Reason seems to be that when it is in a Chest inclosed the Charters are of the Nature of the Chest which is only a Chattel; Contra of Charter special; For of this he cannot wage his Law, because it concerns *Franktenement*. Br. Ley Gager, pl. 61. cites 14 H. 6. 1.

6. But he can not wage his Law of the Chest; for it is of the Nature of the Charter. Dubitatur 11 H. 6. 9. b. 14 H. 6. 1. Br. Ley Gager, pl. 86. cites S. C.

— So where the Count was of Box with Charters concerning his Inheritance, and counts of 4 in special shewing how &c. The Defendant as to 3 pleaded *re-delivery in another County*, and as to the 4th. the Writ abated, and to the Box and the other Charters he waged his Law, and the Law was received without Challenge. Br. Ley Gager, pl. 68. cites 38 H. 6. 25.

7. In Sale of Land for 40 l. the Defendant may wage his Law in Debt of Gawdy held, it; For tho' the Land be Real, yet the Bargain and Contract is Personal; per Newton; quod nullus Negavit. Br. Ley Gager, pl. 87. cites 22 H. 6. 43.

that he should not be admitted thereto; For it is a real Contract; but all the other Justices e contra; whereupon it was ruled, that he should make his Law, &c. Cro. E. 750. Pasch. 42 Eliz. B. R. Miller v. Eastcrowe. — Cites 22 H. 6. 44. 34 E. 1. 18 E. 2. 31 E. 3. 34 H. 6. tit. Ley. 28. 45. 72. 73.

8. In Debt, if a Man leases a Chamber to another, or his Friend, and takes him or his Feme and Son to Table, rendering for the said Chamber and Tabling 6s. a Week, the Defendant cannot wage his Law. Br. Ley Gager, pl. 58. cites 9 E. 4. 1.

9. So of Lessor of a Manor stored with Beasts. Ibid. *Contra* of a Lease of

Beasts rendering Rent, without Land, the Defendant may wage his Law in Debt for the Rent. Ibid.

(G) In what Action it lies.

1. In Action upon the Case against a Surgeon, because he undertook to cure him of his Hurt, and did it so negligently that he is maimed, the Defendant may wage his Law. 48 E. 3. 6. Curia. Because it is not supposed *Vi & Armis* nor *contra Pacem*.

S. P. Br. Ley Gager, pl. 22. cites S. C. but the Plaintiff offer'd to defend at this Day a

hur in Law, and therefore the Defendant put himself upon the Country; but note that a Man cannot wage his Law in Action upon the Case.

2. In an Attachment upon a Prohibition the Defendant cannot wage his Law, that he has not sued against the Prohibition, because the Writ supposes him to do it *Contra Pacem*. 18 E. 3. 4. 2 E. 3. 35. b. adjudged. *Contra* in Time of E. 1. 69. adjudged.

Br. Ley Gager, pl. 88. cites 24 E. 3. 39. *Contra*. — And by the Re-

Reporter, because he comes by Capias, he ought not to have his Law; For *Rex est Pars for the Contempt* &c. Br. Ley Gager, pl. 56. cites 24 E. 3. 39. and 18 E. 3. 4. — And it is a Contempt of the King. Ibid. pl. 17. cites 44 E. 3. 32.

3. In Writ of *Detinue of Charters*, a Man shall not Wage his Law. Br. Arbitrement, pl. 2. cites 9 H. 6. 60.

4. In Action of *Debt in London upon a Concessit Solvere to pay*, the Defendant may wage his Law, tho' it be a *customary Action*. Br. Ley Gager, pl. 69. cites 38 H. 6. 32.

Br. Ley
Gager, pl.
107. cites 13
H. 7. 2. 3.
Contra per
all the Jus-
tices except

5. *Debt against an Abbot, of a Contract between him and the Predecessor of the Abbot*, and averred that the Stuff came to the Profit of the House; the Abbot tendered his Law, but could not have it; For, per Brian, he had not *Notice, nor was Party to the Contract*. Br. Ley Gager, pl. 105. cites 1 H. 7. 25.

Brian; For the *Writ is in the Debet, and not in the Detinet*, as against Executors.

6. *But in Debt upon a Recovery in Ancient Demesne* the Defendant may wage his Law. Ibid.

7. *So of Baron and Feme of the Debt of the Feme*, they may wage their Law, for there is *Notice* of it in them. Ibid.

8. If a Man *recovers Damages in Writ of Right, or other Action in Ancient Demesne, and brings Debt of the Damages recovered*, the Defendant may plead *Nul tiel record*, and it shall be try'd per Pais, and the Defendant shall not wage his Law. Br. Court Baron, pl. 1. (bis) per Littleton; but Brooke says *Quære inde*.

9. In *Debt for Money won at Play*, the Defendant was allowed to wage his Law. Buls. 186. Pasch. 10 Jac. Harrison v. James.

Fol. 109.

(H) By other Hands. Bailment, Contract.

S. P. Br. Ley 1. **I**f Detinue be brought against Successor Dean upon Bailment to his Gager, pl. 19. cites S. C. Predecessor, the Law lies. 44 E. 3. 41. h. Curia.

Brook says, and so see that he shall not be in a worse Case than his Predecessor; and after the Plaintiff counted of certain Charters special, and no mention was in the Writ of any * special Charter, but in the Count, and upon this the Defendant tender'd his Law again, and was Outted; and so see a Difference. where he Counts of a Charter special, and where of a Chest sealed with Charters.—* Orig. (Servic.)

Br. Ley 2. **The Abbot may wage his Law of a Contract made by his Com-** moign. 46 E. 3. 10.
Gager, pl. 54. cites 15
E. 4. 16. accordingly, per Brian; but per Choke it is all one 10 E. 4. 5.

* For the Baron and Feme are one Person in Law, and therefore it is the immediate Receipt of the Plaintiff himself. Br. Ley Gager, pl. 54. cites 15 E. 4. 16

—S. P. Co. Litt. 295. a.

3. **The Abbot shall wage his Law in Debt upon Contract made by the Covent in the Vacation.** 13 D. 7. 3. * Upon a Receipt by the Hands of the Feme of Plaintiff, Ley Gager lies.

4. **If a Monk makes Contract as Officer of the Abbot, and after is made Abbot, he may wage his Law of it.** 46 E. 3. 10. h.
5. **If my Attorney General to retain Servants retains a Servant for certain Wages, and he brings Debt against me for the Wages I may wage Law; yet Contrary by the Hands of the Attorney.** 46 E. 3. 10. admitted.

6. **In Account by Abbot upon Resceit by Hands of a Conmoigne the Law lies.** 13 D. 4. 8. 2 D. 5. 2. h. Curia.

For both are of one and the same Corporation, viz. the Abbot and the Monk; per Brian. Br. Ley Gager, pl. 92. cites 5 E. 4. 5. — Co. Litt. 195. a.

7. **In Account by Baron upon Receipt by Hands of the Feme Plaintiff the Law lies.** 13 D. 4. 8. 2 D. 5. 3. **Curia.** Br. Ley Gager, pl. 92. cites 15. E. 4. 16.—Co. Litt. 295. a.—S. P. adjudged ; because a Receipt by the Hands of the Wife of the Plaintiff, or Defendant, is all one [as a] Receipt by their own Hands. Cro. E. 919. Hill. 45. Eliz. C. B Goodrich's Case.
8. **In Detinue upon Delivery by other Hands, the Law lies, because he shall not have answer to the Bailment, but to the Detinue.** 18 D. 8. 3. 8 D. 6. 10. b. Br. Ley Gager, pl. 1. cites 18 H. 8. 3. pl. 47. cites 21 H. 6. 30.—S. P. because the Detinet is the Ground of the Action, and the Bailment, tho' it be by another Hand, is but the Conveyance, and not traverfable. Co. Litt. 295. a.
9. **So in Detinue against Executor upon Bailment to the Testator, the Law lies, because he is charged partly of his own Detinue.** 3 D. 6. 38. For they are not charged for the Bailment but by their own Possession ; For where they shall be charged as Executors, they cannot wage their Law ; because of another's Act a Man cannot wage his Law. Br. Ley Gager, pl. 89. cites S. C.
10. **But otherwise it is in Account upon Bailment by other Hands, For there the Resceit is traverfable.** 8 D. 6. 10. b. 18 D. 8. 3. Br. Ley Gager, pl. 1. cites 18 H. 8. between the Plaintiff and Defendant, but in the Notice of a third Person. Co. Litt. 295. a.
11. **In Debt upon Arbitrement by Executor upon submission and award in Life of Testator, the Law does not lie, because by other Hands. Contra 8 D. 6. 5. b. admitted.** Co Litt. 195. a. Contra, that in an Action of Debt upon an Arbitrement by the Bailment of another's Hands, the Defendant shall wage his Law ; because the Debt is the Ground of the Action, and the Contract, tho' it be by another Hand, is but the Conveyance, and not traverfable.
12. **In Detinue against Executor upon Bailment to the Testator the Law lies, because he is charged of his Detinue.** 11 D. 6. 40. b. admitted.
13. **In Debt against Executor upon a Borrowing by the Testator, the Law does not lie, because the Contract [was] made by other Hands. Contra 17 E. 3. 1. b.** Wherefo-ever a Man is charged as Executor or Administrator, he shall not Wage his Law ; For no Man shall wage his Law of another Man's Deed, but in Case of a Successor of an Abbot ; because the House never dies. Co. Litt. 295. a.
14. **In Debt by Executor upon a Contract made to the Testator, the Law lies tho' it is made by other Hands.** 29 E. 3. 36 b. adjudged.
15. **If an Executor brings Detinue of Chattels of the Bailment of his Testator, the Defendant may wage his Law, tho' it be by other Hands. Because in a Detinue upon Bailment by other Hands, the Defendant shall wage his Law ; For the Bailment is not traverfable. Contra 2 E. 2. Fitz. Ley. 56.**
16. **Debt against an Abbot, and counted of a Sale of 10 Oxen to his Predecessor, which came to the Use of the House, and the Defendant tender'd his Law ; and Newton, Patton, and Mscue J. doubted, inasmuch as it was of another's Contract, whether he shall be permitted to make his Law? Quere ; For the Contract is not properly the Matter, but the Sale to the Use of the House, which lies in Notice of Pais.** Br. Ley Gager, pl. 46. cites 21 H. 6. 23.
17. **By the 4 & 5 Anne 16. it is enacted, That Actions of Account may be brought against a Bailiff or Receiver, for receiving more than his Just Share, and an Action of Account was brought upon this Statute, against Defendant, as Bailiff ad Merchandizandum, who waged his Law ; and upon Demurrer, it was objected that Wager of Law would not lie against a Bailiff ad Merchandizandum ; But if Action had been brought against**

against a Receiver; and Plaintiff did not shew by whose Hands, the Wager of Law would lie, and so it was adjudged in this Case for the Plaintiff. 8 Mod. 203. Trin. 10 Geo. 1725. Page v. Barnes.

(I) By other Hands.

S.P. but in Account by the Baron of Receipt by the Defendant, by the Hands of the Feme of the Plaintiff, the Defendant may wage his Law; For the Baron and Feme are one Person in Law, and therefore 'tis an immediate Receipt of the Plaintiff himself. Br. Ley Gager, pl. 54. cites 15 E. 4. 16. — 2 Saund 65. — 2 Mod. 681. per Holt Ch. J. — In account brought against Receiver, as having received by the Hands of the Plaintiff, Wager of Law will lie. But if by the Hands of a third Person, it lies not; because it appears from the Nature of the Action, that a third Person can prove the Receipt; per Holt Ch. J. 12 Mod. 679.

1. **I**n Account upon Receipt by other Hands, the Law does not lie: Dy. 10 El. 265. 2. 29 E. 3. 26. b. 36. 30 E. 3. 19. 22 D. 6. 39. 13 D. 7. 3. 33 D. 6. 8. b. 21 E. 4. 55. b. 18 D. 8. 3. Because the Receipt is traversable in this Action. 10 E. 4. 8. 34 E. 3. Fitz. Ley. 61.

2. In Account, if Defendant before Auditors pleads Payment by other Hands, the Plaintiff shall not wage his Law of it. 29 E. 3. 36.

3. In Debt, if the Plaintiff supposes that the Defendant owed to him 10l. which he delivered him by the Hands of such a one, to repay at such a Day, at which Day he did not pay it, the Defendant may wage his Law. 29 E. 3. 26. b. adjudged.

4. So if a Man sells Goods for a certain Sum, and delivers them by the Hands of his Servant, and after brings Debt for the Sum upon the Contract, the Defendant may wage his Law; Because the Contract was not made by * other Hands; For the Delivery of the Goods after the Contract is not any Cause of Action. 29 E. 3. 36. adjudged.

5. In a Debt if Plaintiff counts upon a Contract, Scilicet, that Defendant owes him 10l. for certain Goods sold to him by J. S. his Servant, the Defendant may wage his Law; For he has counted (as he ought) that he himself sold the Goods by his Servant, so that the Contract was made to the Plaintiff himself. 30 E. 3. 19. adjudged 24 E. 3. Ley. 63.

6. In a Detinue, if the Plaintiff counts of a Bailment of certain Goods by other Hands. The Defendant shall have his Law; For he shall not have any Answer to the Bailment, but he shall answer to the Detinue. 18 D. 8. 3. 32 D. 6. 12. 13 D. 7. 3. 33 D. 6. 8. b. 34 E. 3. Fitz. Ley. 61.

Br. Ley Gager, pl. 41. cites 8 H. 6. 10. — The Reason of the Diversity is,

that in a Declaration in detinue, the Bailment is no necessary Inredient, and the Plaintiff, by alleging an unnecessary Thing, shall not bar the Defendant from waging his Law; For if in Detinue the Defendant should plead *Nihil Detinet*, and put himself upon the Country, and upon Trial it appears, that the Defendant found the Goods, instead of having them by the Bailment of a third Person, yet the Plaintiff shall recover; so the Gift of the Action is not the Delivery of the Goods, but the Detainer is the only material Part of the Action, and the whole Point is, whether he detained the Goods; and that is a Matter of Secrecy; per Holt Ch. J. 12 Mod. 680. In Case of City of London v. Wood.

7. In Action of Debt upon a Contract by other Hands, the Defendant may wage his Law; Because he ought only to answer the Debt. 18 D. 8. 3. 34 E. 3. Fitz. Ley. 61

8. If an Executor brings an Account against another, as Receiver by the Hands of Testator, the Defendant cannot wage his Law, that he never was Receiver of the Money by the Hands of the Testator. For this is a Receipt by other Hands, tho' the Executor represents the Person of the Testator. Dy. 2 El. 183. 60. Per Cur. see the Precedent of this pleaded New Entries Account 48. and there cites this

Book,

Book, that he was ousted of his Law, when he came to make it.
7 E. 3. 47. Vide 2 E. 2. Ley. 56.

(K) What *Person* may wage the Law.

1. **A** *Infant* shall not wage his Law, because he cannot make *Oath*. 11 H. 6. 40. b. 38 E. 3. 8. b. Co. Litt. 295. a.—
S. P. and
therefore
by the best Opinion; where *Detinue* is brought against two as *Executors*, and One is an *Infant*, and they offer their Law, they shall be compelled to the General Issue ad *Patriam*. *Quære inde*. Br. Ley Gager, pl. 101. cites 11 H. 6. 40.
2. So where two ought to have their Law, and one is under Age, both shall be ousted, because the *Infant* cannot, and both ought to join in *Plea*. 11 H. 6. 40. b.
3. A *Man* who is Dumb and not Deaf, may wage his Law of *Non-summons*, and make it and shew his Assent by *Signis*. 18 E. 3. 53. adjudged.
4. In an Account if the Defendant before *Auditors* pleads *Payment*, or other Thing given in Satisfaction, the Plaintiff may wage his Law of it, tho' he be Plaintiff. 29 E. 3. 36. 30 E. 3. 4. b. See (B) pl. 3.
5. *Tenant* who is summoned by one *Summoner* where there ought to be two, may wage his Law of *Non Summons*, according to the Law of the Land; but the *Vouchee* shall not wage his Law of *Non Summons* upon the *Writ* of *Summons*: Br. *Disceit*, pl. 11. cites 50 E. 3. 16.
6. In *Formedon* against a *Feme* who made *Default*, and *Grand Cape* issued returnable 15 Mich. before which Day she took *Baron*, and at the Day appeared and waged her Law of *Non Summons*; and the *Feme* made her Law alone without her *Baron*, and the *Writ* abated. Br. Ley Gager, pl. 32. cites 12 H. 4. 24.
7. He who is *attainted* of any *Falsity*, or is *perjured*, shall not wage his Law. *Quod Nota Bene*. Br. Ley Gager, pl. 81. cites 33 H. 6. 32. per Litt. ^a. Co Litt. 295.
8. Debt was brought against *J. R. de W. in Com. L. Chapman*; the Defendant appeared by his *Attorney*, and offered to wage his Law, and *Essoign'd*; and at that Day the Plaintiff appeared, and the Defendant being solemnly required, one *J. R.* came to answer the Plaintiff as Defendant in that Action, in his proper Person, and offered to wage his Law; the Plaintiff said, that *J. R.* now appearing to wage his Law, ought not to be admitted, because the said *J. R.* is not that Person which the Plaintiff prosecutes; For this *J. R.* who appears is *J. R. de W. in Com. L. Junior, Chapman*, and he whom the Plaintiff prosecutes, is *J. R. de W. in Com. L. Senior, Chapman*, both of them, at the purchasing the Plaintiff's *Writ*, living at *W.* and that he agreed with the Defendant so to do, therefore because *J. R. de, &c.* hath not appeared to wage his Law, prays Judgment: The Defendant confesses such Matter, and says, that he believing that the *Writ* was prosecuted against him, appeared by his *Attorney*, and offered to wage his Law, and prays to be discharged of the Debt; and the other *J. R.* being exacted, appeared not; and the Court would advise; but no Judgment for the Plaintiff. *Brownl.* 55. cites Mich. 4 Ed. 4. Rot. 144.
9. *Executors* cannot wage their Law; per *Brian* and *Littleton*. Br. Examination, pl. 22. cites 20 E. 4. 3.
10. In Account; the Defendant upon his Account alleged *Tallies* of the Plaintiff, by which he had received certain of the Money, and the Plaintiff waged his Law, that they were not his *Tallies*; and it was admitted; and to see that the Plaintiff may wage his Law, and by it shall charge the Defendant. Br. Ley Gager, pl. 40. cites 21 E. 4. 49.

S. C. cited 11. A * *Bailiff* may not wage his Law, but a *Receiver* may. Cro. El. 2 Salk 684. 790. Mich. 42 & 43 Eliz. C. B. *Shyfield v. Barnfield*.

For it is a

Matter triable Per Pais. Cro. E. 579. *Archer's Case* ——— S. P. per Holt Ch. J. and says, the Reason the Book gives, is, because it is *in the Realty*, and he said, that is as much as to say, as because it is *notorious to the Country*; Because the Country takes Notice of his looking after the Manor, and they have thereby an Opportunity of knowing that he received his Rents &c. 12 Mod. 631.

Brownl. 53. 12. A. brought *Debt upon Joint Contract, against B. C. D. and E.*—E. S. C. by Name of *Gastington v. Boucher* & al. and that the appearing by a Joint Super-sedeas will not hinder, but that they may vary in Plea.—*Hurt. 26. Mich. 16.* *Boucher*.
 12. A. brought *Debt upon Joint Contract, against B. C. D. and E.*—E. was outlawed, B. C. and D. appeared by a *Joint Super-sedeas*. B. tendered his Law, that he with the Rest did not owe.—C. and D. plead *Nil Debent per Patriam*. It was insisted that B. should not be admitted to his Law alone, because they were all charged as one Defendant, being for a Joint Debt, and so that they must all answer together. But this was held to be unreasonable; For if so, then by joining [others] with me, as Joint Defendants, I must be subject to their Plea, tho' they would confess the Action; and tho' Defendants may not sever in Dilatories, yet in Bars they may. And after divers Motions and Precedents produced, B. was received to his Law, and the Plaintiff nonsuited. Hob. 244. *Essington v. Bourcher*.

Jac. S. C. by Name of *Gastington v. Boucher*, and there mentions several Precedents, one whereof was Hill. 15 Jac. Rot. 841. *Fleet v. Harruon and Brook*. Where F. brought Debt against H. and B. upon an *Emittent*, and H. wag'd his Law, and Judgment against Brook by *Nihil Dicit*. *Et quia Conventiens est quod Judicium de loquela predicta unicum sit versus predictos Isaac, & Jacobum si contingat ipsum Jacob de perficiend. legem suam predictam deficere, Ideo parcat in Judicium inde versus presatum Isaac reddendum quousque predictus Jacobus legem predictam perficeret, sive inde deficeret; & postea predictus Jacobus perficit legem suam. Ideo consideratum est per Curiam quod predictus querens nihil capiat per breve suum predictum sed sit in Misericordia pro falso clamore suo inde, & quod predictus Jacobus eat inde sine die.* And according to this Precedent it was agreed per Cur. that so it ought to be.

(K. 2) *By Attorney.* In what Cases.

But in *Præcipe* quod reddat; the *Tenant made Default after Appearance*, by which *Petit Cape* issued, at which Day he appeared by *Attorney*, and the *Attorney waged the Law*; Quod Nota. Br. Ley Gager, pl. 28. *7 H. 4. 3.*

be by the Tenant in Person, and not by *Attorney*; therefore the *Attorney* shall not be *essoigned* at the Day, but the *Tenant* himself in pain of losing *Seisin* of the Land by his *Default*. Br. Ley Gager, pl. 29. cites *7 H. 4. 6.*

(L) *Against whom* it lies.

1. **I**n an Action brought by the Prince of Wales the Defendant shall wage his Law. 34 E. 3. Ley. 82.

2. In Debt brought by *Merchant-Stranger* it lies not. Palm. 14. Arg. cites 5 E. 2.

3. Where one is *indebted by Specialty to a Man attainted* the King shall have it, & e contra if it be without *Specialty*; For there the Debtor may wage his Law against the Person *Attainted*, Contra *against the King*, tho' it was *upon Contract only*; and therefore he shall not be in a worse Case than he was before, and so the King shall not have the Debt; per Hamm and Holt, Quod non Negatur. Br. Ley Gager, pl. 25. cites 49 E. 3. 5.

A Man cannot wage his Law against the King. Quod Nota Bene, that where the King is Party there the Defendant cannot wage his Law Br. Ley Gager, pl. 22. cites 50 E. 3. 1 ——— 4 Rep. 95 b. in a Nota

Nora of the Reporter it is said, that in every Quo Minus in the Exchequer, brought by the King's Debtor against one who is indebted to him upon Simple Contract, the Defendant shall not have his Law, for the Benefit of the King, as appears in 8 H. 5. Ley 66. 20 E. 3. Ley 52. 10 H. 7. 6. and yet there the King is not Party; a Fortiori where such Debt or Duty is forfeited to the King, and he is the Sole and immediate Party.—For Debt forfeited to the King by common Law no Ley Gager lies. Cro. C. 187. *Morgan v. Green.*

4. Quo Minus in Scaccario against him who usurped upon the Possession of the King which was leased to the Plaintiff, so that he could not pay his Farm to the King, the Defendant may wage his Law, as appears in a short Note there, where it is said, that in 4 E. 4. it was adjudged, that a Man may wage his Law in a Quo Minus; but contra Anno 8 H. 5. tit. Ley. p. 66. in Fitz. which was agreed for Law 35 H. 8. Br. Ley Gager, pl. 102. cites 32 H. 6. 24.

5. In Debt by Assignee of Commissioners of Bankrupts the Defendant pleaded Nil debet, and waged his Law. And the Court held that he might, tho' the Interest and Power to sue in his own Name be good to the Plaintiff by the Statute of Bankrupts. But otherwise if the Duty itself had been originally due by the Statute. Noy. 112. *Osborne v. Bradshaw.* cites 10 H. 7. 18.

6. If an Infant be Plaintiff, the Defendant shall not wage his Law. Co. Litt. 165. a.

7. An Action doth not lie against an Executor upon a Concessit solvere of the Testator upon a special Custom; Per Roll Ch. J. For this would be to charge an Executor in an Action of Debt, where he may by the Law wage his Law, and an Action of Debt lies not against an Executor upon a simple Contract made by the Testator. Adjournatur. Sti. 199. Hill. 1649. B. R. *Hodges v. Jane.*

(M) *In what Cases it lies for a Collateral Respect.*

See Gaoler (B)

1. **I**F Detinue, if Defendant acknowledges the Detinue in Pleading, he cannot wage his Law. 39 E. 3. 9.

2. If A. delivers Money to B. to deliver over to C. and after A. brings Account against B. and he pleads Never his Receiver to render Account, he shall not wage his Law; because his Receipt was Conditional whether to account or not. 9. 13 Ja. B. between *Bedle and Pilgrim* adjudged. (It seems it is intended that he shall not wage his Law, that he had delivered it over; Because upon this Issue he cannot give it in Evidence, but ought to plead it specially).

3. In Action of Debt against Baron for Wares bought by his Feme without the Assent of the Baron for her Apparel, the Baron shall not wage his Law; Because * it may be, that this was necessary Apparel, and it may be e contra, and so a Matter in Law which the Baron by his wager of Law shall himself determine. Dubitatur. 9. 13 Ja. B. *Sir Thomas Gardiner's Case.*

* Fol. III.

S. P. For when the Matter of the Charge is pregnant with

Matter of Law, there ought to be no Wager of Law; For that were to swear to the Law; per Hatfield J. 12 Mod. 671. in *Case of the City of London v. Wood.*

4. A Man retained an Attorney for his Master for 10l. per Ann. by Deed; in Debt by the Attorney, the Master may wage his Law. Br. Ley Gager, pl. 95. cites 46 E. 3. 10.

5. But if the Master makes the Servant who retained his Executor by Deed, and dies; there in Debt by Attorney against the Executor, he cannot wage his Law by Reason of his proper Deed. Ibid.

6. And

*Orig (Celerer).—But if the same Officer be after made Abbot, he may wage his Law. Ibid.—But Finch denied it, and said that the Abbot may wage his Law of the Contract of his Monk; and the same Law of the Baron of the Contract of his Feme. And Brook says, the Law seems to be with Finch. Ibid.

6. And per Persey, if the * Butler, or other Monk, who is an Officer in an Abby, makes a Contract for Stuff which comes to the Use of the House, the Abbot cannot wage his Law. Ibid.

7. In Debt upon a Buying, the Defendant tender'd his Law; the Plaintiff said, that the Defendant in the same Action confessed the buying, and that it was to the Use of the King; and the Plaintiff said, that it was to his own proper Use, and the Defendant had Aid of the King, and so the Buying confessed, Judgment if the Law &c. and yet the Defendant had his Law; the Reason seems to be because it may be that he had paid. Br. Ley Gager, pl. 30. cites 7 H. 4. 7.

Br Examination, pl. 15. cites 14 H. 4. 19.—

Debt upon Ar-

rears of Account, the Defendant tendered his Law, and prayed that the Plaintiff be examined, and so he was, and found that it was for Debt upon Contract, and therefore it lies not in Account; for it was always certain; by which the Plaintiff was moved to amend his Entry, and would not, wherefore the Defendant made his Law immediately with 12, of which one was challenged for Nonage, and adjudged of full Age by Inspection, and so the Law admitted. Br. Ley Gager, pl. 42. cites 8 H. 6. 15.

* This in all the Editions of Brook is Defendant, but it seems it should be Plaintiff according to Br. Examination. pl. 9. which cites S. C.—

So where the Defendant said, that he owed him nothing, and that he was ready to make his Law, and prayed that the Plaintiff be examined, and upon the Examination said, that it was before one Auditor only, and therefore the Defendant was admitted to his Law, per Cur. For the Statute mentions (before Auditors.) Br. Ley Gager, pl. 7. cites 20 H. 6. 16.—S. C. cited, and Judgment accordingly. Goldsb. 75. pl. 4. in Bostock's Case.

And per Newton, if a Contract be made in Middlesex, and Action is brought in Essex, the Defendant may wage his Law. Br. Ley Gager, pl. 48. cites 21 H. 6. 35.

S. P. Mo 49. pl. 148.—

So where the Plaintiff supposes the Contract between him and Defendant, and Defendant says it was between them and another; in these Cases Defendant may wage his Law, and ought not to traverse the Contract. Ibid.

So in Detinue of a white Horse which in Fact is Red or Black Ibid.—

So in Detinue of a Piece of Cloth of 20 Yards, where is only 15 Yards Ibid. — Contra

9. Debt upon Arrears of Account before Auditors assigned, the Defendant tender'd his Law, that he owed him nothing, and prayed that the * Plaintiff be examined whether it lies in Account; and upon the Examination, it appeared that the Defendant leased to the Plaintiff an Hostery and Stuff, and at the End of the Term they accounted, and was Arrear of Part of the Rent, and Part of the Stuff was wasted; and therefore, because he might have had Debt upon the Lease for the Rent, and Detinue for the Stuff, tho' it be worn or wasted, the Defendant was admitted to his Law. Br. Ley Gager, pl. 6. cites 20 H. 6. 16.

10. Detinue of two Writings obligatory. Per Newton, where the Plaintiff declares upon Bailment in one County, where the Bailment was in another County, the Defendant may wage his Law, and if he will not, he may be twice charged; But per Markham contra. Br. Ley Gager, pl. 48. cites 21 H. 6. 35.

11. In Debt for One Horse sold for 10 l. where Two were sold for this Sum, or eontra; or if he counts of a Cow sold, where it was a Robe, Defendant may plead that Nihil debet Modo & Forma per Patriam, and the Jury upon Evidence thereof ought to find for the Defendant, in Pain of Attaint; per Cur. and hence it appears that he may wage his Law by Conscience; For 'tis another Contract. Br. Ley Gager, pl. 93. cites 21 E. 4. 22.

12. So in Detinue of a Chain of four Ounces, which is only two Ounces, the Defendant may wage his Law; For he did not detain such Chain. Br. Ley Gager, pl. 78. cites 22 E. 4. 2.

of alleging of the Value; For where he brings Detinue of a Horse of 20*l.* Price, which is not worth 10*l.* or of Cloth or a Chain of 20*l.* Value, which is not worth 7*l.* he cannot wage his Law by Conscience. Note a *Diversity* by Award of the Court. *Ibid.*—S. C. cited C. 219. b. pl. 11.

13. In *Detinue of Charters* gaged for Money lent, the Defendant may wage his Law, if the Plaintiff does *not count of a Charter Special*. Br. Charters de Terre, pl. 62. cites 22 E. 4. 7.

14. In *Debt*, Plaintiff counts on a *Contract*; Defendant says he made a *Contract for a less Sum*, absque hoc, that he made any *Contract* for the Sum compriz'd in the Writ, as the Plaintiff has suppos'd; Per Cur. he shall not have his Plea, because he may wage his Law. Mo. 49. pl. 148 Pasch. 5 Eliz. Anon. See D. 219. b. pl. 11. Bladwell v. Steggein.

15. *A. was indebted to B. on a Contract*; after *C. gives B. Bond* for the Money, and *A. gives C. Counter Bond*. *A.* cannot wage his Law; For the *Contract* continues; but had *C.* given the *Bond* at the *Time* of the *Contract*, it had been otherwise. 2 Le. 110. Trin. 29 Eliz. Hooper's Case.

16. *A. sold Wood to B. on Condition that if A. did not prove it good and sufficient, B. should pay nothing for it*; Per Windham J. If the Case be so, *B.* may wage his Law; and it was said, that *A.* must have *Detinue* for the *Wood*. Goldsb. 65. pl. 5. Mich. 29 & 30 Eliz. Millington v. Burges.

17. *A. and B. made a joint Contract with C. and A. alone brought the Action*. This was argued not to be the same *Contract*, and that so the Defendant might wage his Law. And of this Opinion was the Court, Absente Anderfon. Goldsb. 75. pl. 4. Hill. 30 Eliz. Boitock's Case.

18. Upon *Account* between two, it was agreed that *Each of them should be quit of the other*; Defendant cannot wage his Law; For it is but an *Agreement*, which cannot be executed but by *Release* or *Acquittance*. 3 Le. 212. 258. Mich. 32 Eliz. C. B. Sanderfon v. Ekins. So where upon Examination it was found, that the Defendant was indebted.

to the Plaintiff 10*l.* to be paid at *Christmas*, and that upon *Communication* between them, it was agreed, that the Defendant should then pay to the Plaintiff 5*l.* in *Satisfaction* of all the *Debt*, and as to the other 5*l.* that he should be acquitted of it; the *Justices* were clear of *Opinion*, that the Defendant ought not to be admitted to wage his Law, For notwithstanding that bare *Communication*, the whole *Debt* remained due, not extinguished by the *Communication*; for 5*l.* cannot be a *Satisfaction* for 10*l.* but contrary of a *Collateral Thing* in *Recompence* of it &c. * and *Satisfaction*. But *Agreement to pay 5*l.* before the said Christmas* in *Satisfaction* of the whole 10*l.* [there] upon such *Matter* shewed, the Court was of *Opinion*, that the Defendant might be admitted to wage his Law. 4 Le. 81. Mich. 03 Eliz. C. B. Anon.—* *Orig. is (and Satisfaction and Agreement to pay &c.)*

19. *Wager of Law* was deny'd in *Debt for Scavage* arising by *Prescription*, and that confirmed by *Act of Parliament*. Vent. 261. Trin. 26 Car. 2. B. R. Mayor &c. of London v. Dupester.—2 Lev. 106. S. C. 684. S. C. cited per Holt Ch. J. 12 Mod.

20. *Debt for a Duty* growing by a *By-law*; if the *By-law* be authorized by *Letters Patents*, no *Wager of Law* lies. Vent. 261. in Case of Mayor &c. of London v. Dupester.

21. So in Case for *Toll* granted by *Letters Patents*. Vent. 261. cites 20 H. 7. In Action of Debt for Toll by Pre-

scription, you cannot wage your Law; Per Hale Ch. J. who ask'd if they could shew a *Precedent* where a Man can wage his Law in an *Action* brought upon a *Prescription* for a *Duty*. Mod. 121. pl. 26. Trin. 26 Czar. B. R. Anon.

(M. 2) In what Cases it lies, and the Reason thereof. See Gift.

1. **W**ager of Law is allowable in five Cases. 1st. In *Debt* upon *Simple Contract*, which is the *Common Case*. 2d. In *Debt* upon an *Award* upon a *Parcel Submission*. 3d. In an *Account* against a *Receiver* for *Receipts* by his own *Hands*. 4th. In *Detinue*, tho' the *Bailment* were by the *Hands* of another. 5th. In an *Amerciament* in a *Court-Baron* or other

other inferior Courts not of Record; and in every of these Instances, the Action is grounded upon a feeble Foundation, and of small Consideration in Law; Per Hatfield J. 12 Mod. 670. in Case of the City of London v. Wood.

* S. P. Raym 286. — Where there is a Contempt in the Defendant, he ought not to be allowed to swear it off; Per Hatfield J. 12 Mod 671.

2. In no Case where a * Contempt, Trespass, Deceit or † Injury is supposed in the Defendant, he shall wage his Law; because the Law will not trust him with an Oath to discharge himself in those Cases; But in some Cases, as Debt, Detinue, Account, the Defendant is allowed by Law to wage his Law. Co. Litt. 295. a.

* S. P. Sti. 199 per Roll Ch. J. Hill. 1649. B. R. Hodges v. Jaue.

3. The Reason wherefore in an Action of Debt upon a simple Contract, the Defendant may wage his Law, is, for that the Defendant may satisfy the Party in * Secret, or before Witnesses, and all the Witnesses may die, so the Law doth allow him to wage his Law for his Discharge; and this, for ought I could ever read, is peculiar to the Law of England, and no Mischief issueth hereupon; for the Plaintiff may take a Bill or Bond for his Money; or if it be a simple Contract, he may being his Action upon his Case upon his Agreement or Promise, which every Contract executory implieth, and then the Defendant cannot wage his Law. 2 Inst. 45.

4. The only true Reason of Wager of Law, is the Inconsiderableness of the Ground of the Plaintiff's Demand, and it suffices that the Nature of the Defendant's Discharge be of equal Validity with the Ground of the Plaintiff's Charge; Per Hatfield J. 12 Mod. 670. in Case of the City of London v. Wood.

5. Originally it was not only a Privilege of the Defendant to discharge himself, but one which the Plaintiff had when he had no Witness of his Debt, to put the Defendant under a Necessity of giving him his Oath to discharge him; so it was a Kind of an Equity in Law, that the Plaintiff might put him to take his Oath that he owed Nothing to him, or confess the Debt, rather than the Plaintiff should lose his Debt, in Cases where he had no Witnesses of it all, or had some who were then dead; Per Holt Ch. J. 12 Mod. 678. in Case of City of London v. Wood. — Cites Magna Charta. c. 28.

6. If Summons in Praecipe quod reddat be not served 15 Days before the first Day of the Return of the Writ, the Tenant may wage his Law of Non Summons; For 15 Days before the fourth Day of the Return will not serve. Br. Ley Gager, pl. 57. cites 24 E. 3. 46.

7. Debt against a Bailiff upon Arrears of Account, and the Defendant pleaded that he owed him Nothing, and that he was ready to make by his Law, and had the Law; For he was not to account before Auditors; quod nota. Br. Ley Gager, pl. 15. cites 43 E. 3. 1.

And per Beik. the Vouchee in Praecipe quod reddat shall not wage his Law, that he was summoned upon the Summons; for he need not save his Default at the Grand Cape ad Valentiam; But if he be returned summoned, where he was not summoned, and after Grand Cape ad Valentiam issues, he shall have Disceit of the Return &c. Ibid.

8. It is said in Writ of Disceit, that if the Sheriff returns in Praecipe quod reddat that the Tenant is summoned by J. N. and T. C. where he was not summoned but by one of them, the Tenant may wage his Law, that he was not summoned according to the Law of the Land. Per Fulthorp. Br. Ley Gager, pl. 27. cites 50 E. 3. 16.

So where a Man, who is able to live of his Land, and not compellable to serve, be retained in Husbandry, in Debt for his Salary,

9. In Debt upon a Retainer in Husbandry for 8 Years, taking 20 s. per ann. &c. the Defendant said Protestando, that none is bound to serve if he be not able in Body, and pro placito, that at the time &c. the Plaintiff was not but 5 Years of Age, and tendered his Law, and was ousted of the Law by Award; For though the Plaintiff was not compellable to serve, yet when he was retained and served in Fact, he shall have his Wages; And there the Law does not lie; and this because the Retainer was in Husbandry. Br. Ley Gager, pl. 67. cites 38 H. 6. 22.

the Defendant shall not wage his Law ; And it was agreed, that if a * *Priest, Gentleman, Yeoman, Cook, Butler,* and the like, who are not compellable to serve, *are retained in their Degrees or Offices,* and bring Debt for their Salary, the Defendant may wage his Law, and *contra* if they are retained in *Husbandry* ; Note the Diversity ; By which the Defendant said, that he did not retain him in Husbandry ; and a good Plea ; and the other said, that he did retain him *Modo & Forma,* and a good Replication, though he did not say in Husbandry ; For it shall have Respect to the Declaration, and so good Issue. *Ibid.* — Br. Laborers, pl. 46. cites S. C. — * S. P. Br. Ley Gager, pl. 70. cites 39 H. 6. 18.

10. In *Detinue* ; if a Man delivers to me Goods in Satisfaction of a Debt, and after brings *Detinue* thereof, the Defendant may wage his Law ; For the Property is changed. Br. Ley Gager, pl. 78. cites 22 E. 4. 2.

11. A Man may wage his Law of *Non-summions in Re-summions*, as well as he may in the Original ; per Brian and Chock ; But per Catesby *contra*. Quære ; And the Writ was returnable 15 Trin. and the *Summoners summoned him about the 15th of Corpus Christi* ; and therefore, per Chocke, he may wage his Law of *Non-summions*, that he was not summoned according to the Law of the Land ; For the Law is, that he shall be *resummoned by the Day in the Writ* ; But Catesby said, that he cannot wage his Law here by Conscience, nor can he wage his Law in *Re-summions*. Br. Ley Gager, pl. 103. cites 1 E. 5. 2.

12. Debt of 40s. upon the Statute of Cappers ; The Defendant tendered his Law ; and per Cur. he shall not have his Law, in as much as the *Action is founded upon the Statute*. Br. Ley Gager, pl. 106. cites 10 H. 7. 18. So in Debt against W. C. for Scavage taken against the Statute of 19 H. 7.

which wills that none shall take Scavage against the Form of the Statute, upon Pain of 20l. the Defendant pleaded *Nihil debet per Patriam*, but did not tender his Law. Br. Ley Gager, pl. 65. cites 21 H. 7. 14. — In Debt upon a Penalty given by Statute, the Defendant shall not wage his Law. Co Litt. 295. a.

13. If the *Tenant, at the Day of the Return of the Grand Cape,* appears and tenders his Law of *Non-summions*, and the *Sheriff* does not return the *Writ*, yet he may make his Law ; For he has a Day by the Roll. Quod Nota. Br. Ley Gager, pl. 2. cites 27 H. 8. 14.

14. In *Detinue of twenty Quarters of Wheat* ; The Plaintiff counts simply of a Contract for the Wheat &c. The Defendant pleads, that the Plaintiff bought of him eighty Quarters, upon Condition to pay for it as he came for it, and otherwise to be void ; And said, that the Plaintiff had received thirty Quarters, and paid for it, but at another Day he received ten Quarters, which he had not paid for, and so the Contract void. Judgment in Action. It was agreed, that Defendant might wage his Law, or say if he will, *Non detinet per Patriam*. D. 29. b. 30. pl. 201, Hill. 28 H. 8. Anon.

15. In Debt the Plaintiff declared upon a Sale of some Wood for 20 l. The Defendant pleaded *Nil debet &c.* and upon the Evidence it appeared, that the Bargain was for twenty Marks ; The Court directed the Jury to find for the Defendant, because it cannot be intended one and the same Contract ; And that in this Case the Defendant might have waged his Law, though he had pleaded *Non debet* the 20l. *nec aliquem inde Denarium*. 3 Nels. Abr. 516. pl. 2. cites Mich. 5 Eliz. Dyer. 219. The Case is in D. 219. b. pl. 11. Mich. 4 & 5 Eliz. and stated as here ; And by the Opinion of Catelyn Ch. J. and Browne

J. the Verdict shall be for the Defendant in this Case, as in Case of a Variance of the Contract of the Things sold, according to the 21 E. 4. in as much as it cannot be intended one and the same Contract. But then the Book says, Quære if there be not some Diversity, in as much as the *Plea is Non debet the sum nec aliquem Denarium inde in forma qua &c. Unde in Detinue* 22 E. 4. of a Chain containing three Ounces, and in Truth it contained but two, yet the Defendant might safely wage his Law ; Otherwise it is if the Variance be only in the Price or Value.

16. There is no Act of Parliament in express Words, which takes away Wager of Law in Action of Debt upon Arrearages of Account ; But at the Common Law the Defendant shall have his Law in Action of Debt, brought upon Arrearages of Account, be the Account before one or several Auditors, as appears in 38 H. 6. f. 6. a. But the Reason why the Defendant shall not wage his Law when the Account is made before Auditors, is up-
c7

on the Statute W. 2. cap 11. For now this Statute has made the Auditors Judges of Record, because they are impowered thereby to commit the Defendant to Prison, which none can do but Judges of Record, and for that Reason, viz. that they are Judges of Record. 10 Rep. 103. a. in a Nota of the Reporter, in Denbawd's Cafe.

17. Two Men were Partners in Goods ; the one of the Partners sold unto J. S. at several Times, Goods to the Value of 100 l. and for the Goods at one time bought he paid the Money according to the Time ; Afterwards an Action was brought by one of the Partners, for the rest of the Money, and the Plaintiff declared upon one Contract for the whole Goods, whereas in Truth they were sold upon several Contracts made, and the Defendant in that Cafe would have waged his Law ; But the Court advised the Plaintiff to be nonsuited, and to bring a new Action, because that Action was not well brought; for it ought to be a several Action upon the several Contracts. Brownl. 244. Hill. 11 Jac. C. B. Lambert's Cafe.

18. In Action against B. Plaintiff declared upon the Custom of Merchants for a Bill of Exchange drawn by a Factor of the Company's Agent beyond Sea for Money paid, and indorsed here by one of the Company. Hobart Ch. J. thought the Defendant ought to be admitted to wage his Law ; For the Delivery of the Money made a Contract in Law, and as he may have an Action of Debt, so without Question he may have an Action upon the Cafe, and so count upon a Promise, and then the Defendant may not wage his Law. Winch. 24. Mich. 19 Jac. Vanheath v. Turner.

19. An Action of Debt was brought against one for 50 l. due for divers Pieces of linnen Cloth sold to the Defendant. The Defendant was ready at the Bar to wage his Law ; But the Court being informed that the Defendant's Wife kept a Shop, and used to buy and sell by her Husband's Privity and Allowance, and that these Parcels of Cloth were bought by her to furnish her Shop, and that the Defendant her Husband, although he was a Seaman, and meddled not in buying and selling of any of the Wares in the Shop, yet his Wife did it by his Allowance, Roll Ch. J. advised the Defendant to take heed he waged not his Law ; For that he could not do it with a good Conscience, because his Allowance of his Wife's buying the Wares was all one, as if he bought them himself, and counselled him to plead, to which the Defendant consented, and the Ley Gager was waived by Consent of the Parties, and an Impar lance given till the next Term. Sti. 322. Pasch. 1652. B. R. Anon.

* It is a Note of the Reporter. 4 Rep. 95. b. 20. Wager of Law lies not in *Quo Minus*, because the King's Revenue is remotely concerned, upon Suggestion, that the Plaintiff is indebted to the King, and less able to pay him by the Defendant's Detainer of his Debt. Per Hatfell J. said, it was given as a * Reason. 4 Rep. in Slade's Cafe. 12 Mod. 671. in Cafe of City of London v. Wood.

The Secrecy of the Contract, which raises the Debt, is the Reason of the Wager of Law ; But if the Debt arise from a Contract that is notorious, there shall be no Wager of Law. Per Holt Ch. J. 12 Mod. 679. in Cafe of City of London v. Wood.—In Debt upon a Contract for a Sum in Gross, Wager of Law will lie ; But if Debt be brought for Rent due upon a parcel Lease, it will not lie; and the Reason is, because it is in the Realty, and arises from the taking the Profits of the Land, and Occupation of it in the Country, and so the Notoriety of the Thing excludes the Defendant from waging his Law. Per Holt Ch. J. 12 Mod. 681. in Cafe of City of London v. Wood.

21. Where the Matters charged are Facts notoriously known, in such Cafe there are no Precedents of Wagers of Law. Per Hatfell J. 12 Mod. 671.—Per Holt Ch. J. Ibid. 682.

22. The very Custom of London excludes Wager of Law in some Actions, as in *Debt for Diet*, 1 Ed. 4. 6. Bro. Examination, 18. the Statute of 38 Ed. 3. 5. before which no Wager of Law could be against a Londoner. Per Hatfell J. 12 Mod. 671. cites Br. Ley Gager, 94.

23. A Prescription prevents Wager of Law, and no Man can deny it upon Oath. Per Holt Ch. J. 12 Mod. 683. in Cafe of City of London v. Wood.

(M. 3) In what Cafes Defendant may be *compelled* to wage his Law.

1. **I**N 33 H. 6. 8. In a *Præcipe quod reddat*, the *Tenant made Default*, but appeared on the Return of the Great Capias, and *pleaded Non-summmons*, and would conclude to the Country, where the proper Trial was, by Wager of Law of Non-summmons; And the Question there was, if he could waive his Plea of Wager of Law, and betake himself to Plea concluding to the Country? And the better Opinion there is, that he could not put himself upon his Country; and decline his Wager of Law; and that Case is plainly out of the Statute of Magna Charta, because it is not Debt, nor simplex loquela, but a Process of Non-summmons, from which he was to save himself. Per Holt Ch. J. 12 Mod. 679. in Case of City of London v. Wood.

2. In London there is a Custom, that if the Defendant thinks that the Plaintiff has made a false Declaration in Debt, he may pray that the Plaintiff may be sworn, whether his Declaration be true, and he shall have it; and if he swears, the Defendant shall be by this condemned, and if he refuses it the Plaintiff shall be barr'd, for it is peremptory. Br. Ley Gager, pl. 77. cites 21 E. 4. 44.

3. Plaintiff, on bringing convenient Proof, and averring Magna Charta, may compel the Defendant to wage his Law. Per Holt Ch. J. 12 Mod. 679. in Case of City of London v. Wood.

(M. 4) In what Cafes, and the Effect, where there are two Defendants, and one does, or tenders his Law, and the other makes Default at the Day.

1. **D**EBT against two who waged their Law, and at the Day the one came and made his Law, and the other made Default, by which it was awarded, that the Plaintiff take nothing by his Writ; for the Contract is now destroyed; But per Thorp, the Plaintiff, before the Law made by the Defendant, might have condemned both by Default of the other at the Day of the Law; Quære inde. And per Candish and Finch, it is no Mischief to the Plaintiff, for he may have Debt against the other alone, and it is taken there that the Writ shall abate only; Quod mirum! for it seems that the Ley Gager is a Bar. But it was agreed, that in Debt upon Obligation against two, who plead Non est Factum, and it is found the Deed of the one, and not the Deed of the other, the Plaintiff shall recover against him who is convict; Quod Nota. Br. Ley Gager, pl. 12. cites 40 E. 3. 35.

and the other made Default. He that appeared prayed to do his Law, and it was denied; For the Declaration and Plea, and Wager of Law, were all Joint, and the Default of one now is the Default of both Noy. III. Stacey v. Slane.

2. Cessavit against three, who at the Grand Cape waged their Law of Non-summmons, and at the Day two made Default, and the third appeared and tendered the Arrears by Statute before Judgment, and could not but for the third Part; Wherefore he prayed to be received of two Parts, and so fee where they failed their Law, viz. where some do not come, the other shall not make his Law for this Part, as it seems, Quære inde; And if the 3d. could not have performed his Law, for his Part, in an Action Real, and save his Part, the Demandant should recover two Parts by Default of the two; it seems that he shall, but his Intent was to save the intire Land. Br. Ley Gager, pl. 13. cites 40 E. 3. 40.

S. P. Br. Ley Gager; pl. 38. cites 38 E. 3. 27. But where in Debt against two, they pleaded Nihil debent, and upon that they wage their Law, and a Day given &c. One came at the Day.

Cessavit against three, who waged their Law of Non-summmons at the Grand Cape, and at the Day two appeared ready &c. and the 3d. made Default.

fault, and upon Argument &c. the two waged their Law, and the Writ abated for two Parts, * and was refused for the third Part, in Default of the third, and so the Writ stood for the third Part. Br. Ley Gager, pl. 23. cites 43 E. 3. 13.—* Orig. is (et un fuit receive pur le tierce part &c.)

3. *Præcipe quod reddat against two, who made Default, by which Grand Cape issued, and the one made Default, and the other appeared and took the intire Tenancy, absque hoc that the other had any Thing, and tendered his Law of Non-summions, and the Plaintiff maintained his Writ, that they hold as the Writ supposed; Priit; Quod Nota. Br. Ley Gager. pl. 21. cites 47 E. 3. 14.*

(M. 5) In what Cafes, and the Effect. *Abatement of Writ.*

See (K)

1. **P***ræcipe quod reddat against Baron and Feme, and the Baron came in proper Person and proffered his Law, and the Feme by Attorney, and the Law was accepted, and the Writ abated, and ill per Thorp and Cur. Quod Nota; and so see, that by Ley Gager of Non-summions, the Writ shall abate; and yet upon Return of Tarde, or that the Demandant Non invenit plegios de prosequendo, the Court shall award Summons sicut alias. Note a Diversity. Br. Ley Gager, pl. 18. cites 44 E. 3. 38.*

2. *Debt against Executors of the Debt of the Testator for eating and drinking; and because the Testator might have waged his Law, the Writ was abated. Br. Ley Gager, pl. 55. cites 15 E. 4. 16.*

(M. 6) In what Cafes, and the Effect; *tho' he might traverse &c.*

So in Debt upon Arbitrement, the Defendant may traverse the Arbitrement, and yet may wage his Law. Ibid.—

1. **I***N Debt of a Loan to the Predecessor, which came to the Use of the House, the Abbot may traverse the mesne Conveyance that he did not * borrow, and yet he may wage his Law. Br. Ley Gager, pl. 76. cites 13 E. 4. 4.*

Ibid.— Br. Ley Gager, pl. 94. cites 21 E. 4. 45. contra; that the Defendant in *Detinue, Debt &c.* shall not be permitted to traverse the mesne Conveyance where he may wage his Law, unless in special Cafes.—* Orig. (Apprompta.)

(M. 7) *How, of Part.*

1. **J***N Debt the Plaintiff counted part upon Arbitrement, and part upon Arrearages of Account, and as to the Arbitrement the Defendant made his Law immediately, and to the Residue tendered his Law, and prayed that the Plaintiff be examined, and the Attorney would not be examined; wherefore it was awarded that the Defendant have his Law, and upon this he was ready to make his Law immediately; and because he, upon the first Tender of his Law, did not pray to make it immediately, therefore he was ousted of making of it now; Per Cur. and was put to a Day; Quod Nota. Per tot. Cur. Br. Ley Gager, pl. 10. cites 33 H. 6. 24.*

2. *In Debt upon buying of a Horse, the Defendant shall not be received to wage his Law of Parcel, and of Parcel plead to the Country, because a Trial*

a Trial may make an End of all. *But* if it be upon such buying for 20 s. the Defendant may say that he bought it for 10 s. absque hoc, that he bought it for 20 s. and as to the 10 s. he may wage his Law; because the Contract, for the Manner of it, is not confessed; Per Frowike. But if he says, that as to 10 s. he tendered the Money, and as to the other 10 s. wages his Law, he said, that it is a Doubt to him, because the Contract is in a Manner confessed. Vavisor agreed; Ideo quære. But it is commonly used to wage the Law for Parcel, and to make Tender for Parcel by Attorney; tamen dubito of the Law &c. Kelw. 40. b. pl. 5. Mich 17 H. 7.

3. In Account against one as Receiver, he counted of a Receipt of diverse Sums, some by his own Hands, and some by other Hands; The Defendant, as to the Sums, [charged to be received] by the proper Hands of the Plaintiff said, that *Ne unques Receiver* &c. *Prist*, to make his Law; and of the Residue pleaded to the Country, and Day given till another Term; at which Day the Defendant, for part of the Sums of which he had pleaded his Law, would have waived his Law, and confessed the Action of it, and of the Residue he would have performed his Law; And whether he might do it without the Assent of the Plaintiff, the Court much doubted; But by the Advice of the Court, he waived all his Plea of the Law, with the Consent of the Plaintiff, and pleaded to the Country *Ne unques son Receiver to render Account*, *Prist*; and had it, therefore quære legem: But after, in this Term, by the Opinion of the Court, except Harper, he could not have the Confession allowed. D. 265. a. pl. 2. Mich. 9 & 10 Eliz. Anon.

4. In Debt brought upon a Contract, the Defendant cannot wage his Law for part, and confess Judgment for the other part; Per Hobart Ch. J. who said, it had been so adjudged Mich. 15 Jac. in C. B. And it was said to have been so adjudged upon a Shop-Book, in *Carr's Case*, and cited 38 H. 6. 14. If the Law lies not for Parcel, then it suspended for the whole, where the Debt is an entire Debt; And so it was adjudged in the principal Case here. Godb. 327. pl. 420 Pasch. 21 Jac. C. B. Anon.

5. In an Action of Debt where the Defendant may wage his Law, If he confesses part of the Debt, and wages his Law of the Residue, and a Judgment is given and entered for the Plaintiff for that which is confessed; After this Judgment the Plaintiff cannot be nonsuited as to the Residue; But he ought to appear when the Defendant comes to wage his Law for this part of the Debt. Buls. 194. Pasch. 10 Jac. Anon.

(N) Examination of the Plaintiff. In what Cases the Defendant may pray that Plaintiff, or his Attorney, be examined.

1. 5 H. 4. c. 8. **T**O eschew Mischiefs which be as well within London as other Places, of that diverse fained Suits of Debt have been taken by the People of the said Places against diverse People, surmising that they have accounted before their Apprentices, and sometimes other their Servants, Auditors assigned, of diverse Receipts, Duties, and Contracts, had betwixt them, and that they were found in Arrearages upon the Account in diverse great Sums, where there was never Receipt nor Duty betwixt such Parties, to the Intent to make them against whom such Suits were taken, to put them in Inquest, and to put them from the wagging of their Law; the Judges before whom such Actions shall be sued in Cities and Boroughs, shall have Power to examine the Attornies, and others, and thereupon to receive the Defendants to their Law, or to try the same by Inquest after the Discretion of the Judges.

If before this Statute a Man had entered into an Account before two Auditors for a Thing which lay not in Account, and they found him indebted, upon which the other brought in Account; For

Writ of Debt against him, it was no Plea for the Defendant, that the Matter lay not

For

For it was his Folly to enter into the Account ; And so at the Common Law the Defendant was without Remedy , But now, by this Statute he may tender his Law, and pray that the Party be examined, whether it lies in Account or not, and if it be found that it does not, the Defendant shall make his Law and go his Way ; But by the Common Law, the Defendant ought to answer to the Debt, which is the End of the Account, and the Judgment of the Auditors, and the Matter of Account, is only Conveyance. Per Frowike. Kelw. 82. b. pl. 3. Pasch. 21 H. 7. —It seems, by the Meaning of this Statute of the Examination of the Attorney of the Plaintiff in Debt upon Arrearages of Account before Auditors, that *Wager of Law does not lie, but that Nihil debet per Patriam* shall be received in Debt upon Arrearages of Account before Auditors. E contra, 50 E. 3. against Gaoler, for Escape of one condemned before Auditors assigned. D. 145. pl. 63. Pasch. 3 & 4 P. & M. Wife's Case.

If the Attorney refuses to be examined the Defendant shall be admitted to his Law. Br. Examination, pl. 33. cites 33 H. 6. 26.

2. *Debt upon Arrears of Account* ; Defendant prayed that the Plaintiff's Attorney be examined if the Matter lies in Account, and so he was, notwithstanding that no Issue was tendered ; and upon the Examination of the Attorney, it appeared that it was for Stuff bought by the Defendant of the Plaintiff, by which he tendered his Law and was admitted ; quod nota. *Mirum of the Examination before Law tendered.* Br. Examination, pl. 15. cites 14 H. 4. 19.

S. P. Br. Examination, pl. 6. cites 9 H. 6. 8. — S. P. ibid. pl. 7. cites 9 H. 6. 58. — Where Executors bring Action, or where Action is brought against them, Examination does not lie ; For this is to have the Ley Gager, and Executors cannot wage their Law. Br. Examination, pl. 22. cites 20 E. 4. 3. per Brian and Littleton. — *Debt by an Executor upon Arrears of Account before Auditors in the Time of the Testator*, the Defendant tendered his Law and prayed that the Plaintiff be examined, and the Executor was examined, tho' it was of another's Deed, but not precisely, whether he saw or heard the Account, or was present at it ; but whether any Matter which proves that it lay in Account came to his Hands, and of other Points at the Discretion of the Justices, but not of the Truth of the Deed precisely, and upon the Examination it was awarded, that the Defendant answer without his Law ; quod nota. Br. Examination, pl. 19. cites 21 H. 6. 54, 55. — But if such Action was brought against an Executor the Plaintiff shall be Examined. Ibid.

3. *Debt by two Executors and counted of Arrears of Account made in the Time of their Testator*, and the Defendant tendered his Law, that he owed them nothing, and prayed that they be examined, and the Opinion of the Court was that they shall not be Examined of another's Deed ; Contra of Attorney ; For he may have Information of his Master &c. And the Cause of this Examination given by the Statute is, that if it be found upon Examination of the Party upon a Book that the Matter does not lie in Account, then the Law lies ; and so this Case is out of the Case of the Statute of Examinations, by the Opinion of the Court. Br. Examination, pl. 5. cites 3 H. 6. 46.

6 Rep. 53. cites S. C. and that as to what Rolfe Serjeant said, Cockein who gave the Rule said, that the Law will have a Diversity between a Lord or Lady &c. and other Common Persons.

4. If a Dame or Peer of the Realm brings Debt upon Arrears of Account, they shall be Examined ; per Rolfe, for the Statute is General ; but Cockine contra. Br. Examination, pl. 25. cites 3 H. 6. 48.

5. In *Debt by Executors of Arrears of Account before Auditors assigned by their Testator* the Defendant said, that he owed him nothing *Modo & forma*, Prit by his Law ; and prayed that the Plaintiffs be Examined ; and because they shall not be Examined of another's Deed, they demanded of the Attorney without Oath of the Truth, who said that it is the Truth as he is informed, [therefore] Newton [ruled the Defendant to] answer without the Law ; nota. Br. Examination, pl. 17. cites 19 H. 6. 35.

6. In *Debt upon Arrears of Account*, the Defendant may Wage his Law, quod nichil debet &c. and pray that the Plaintiff be Examined if the Matter lies in Account or not ; and if it appears by the Examination that it does not lie in Account he shall have his Law, and otherwise not ; and the Party or his Attorney shall be sworn to say the Truth, and every Examination is upon Oath as here. Br. Examination, pl. 32. cites 35 H. 6. 5.

7. In *Debt upon Arrears of Account* the Defendant tendered his Law, and prayed that the Plaintiff be Examined if it lies in Account, and so it was ; and the Matter was, that the Defendant was in Debt to a Stranger for farming of Tenth, and E. was indebted to the Plaintiff in such a Sum, and the

Br. Ley Gager, pl. 84. cites S. C. — Br. Examination, pl. 11. cites S. C.

the said E. assigned the Defendant to pay the Plaintiff, and the Defendant said that he had made certain Payments of Tenths, and prayed to reckon of them, and then he would pay to the Plaintiff that which remained, by which the Plaintiff assigned to him two Persons to hear his Account, and upon this the Defendant was found in Arrears of the Sum in demand, and by the best Opinion this Matter lies not in Account, for the Defendant was not accountable to the Plaintiff. Br. Ley Gager, pl. 73. cites 5 E. 4. 140.

8. Debt upon an Obligation, the Defendant said that it was made Beyond Sea, and prayed that the Plaintiff may be examined, and it was denied, per Cur. for it was said that because it bore Date at large without Place certain it is sufficient, tho' it was made at Rome or other Place, and may be alleged to be made here. Br. Examination, pl. 31. cites 21 E. 4. 74.

(N. 2) Ousted in what Cases by Examination of the Plaintiff.

1. DEBT upon Arrears of Account, the Defendant tender'd his Law and prayed that the Plaintiff be examined, and so he was, and said upon Oath that it is as he has counted, by which the Defendant was compelled to Answer without his Law. And so see that where the Defendant prays that the Plaintiff be examined or sworn, this is Peremptory to the Plaintiff in this Point, and so is the Ley Gager of the Part of the Defendant, and so is the Oath of the Plaintiff in London by the Custom, where [if] the Defendant prays that the Plaintiff shew his Declaration and he does so, there the Defendant by this shall be Condemned. Br. Examination, pl. 18. cites 19 H. 6. 43.

Br. Peremptory, pl. 16. cites S. C.

(O) The Manner of doing it.

1. Magna Charta, NO Bailiff shall put any Man to his open Law, or to an Oath upon his own bare saying, without faithful Witnesses brought in for the same.

Ley Gager shall be made by 12 viz. 11 and himself shall be sworn.

Br. Ley Gager, pl. 9. cites 33 H. 6. 3. — 2 Inst. 45. — He ought to bring with him his Neighbours that will avow upon their Oath, that in their Consciences he saith Truth; so as he himself must be sworn de fidelitate, and the 11 de * credulitate. Co. Litt. 295. a. — * S. P. But they may be dispenced with by the Plaintiff's Assent. Vent 4 Hill. 20 & 21 Car. 2. B. R. Anon. — They may be less than 11. 2 Vent. 171. Pasch. 2 W. & M. C. B. Anon.

2. Præcipe quod reddat against Baron and Feme and a third, who waged their Law of Non-summons, and the third appeared to be within Age; wherefore upon Oath of the Baron and Feme, that he was the same Person they two waged their Law only without more Hands, and the Writ abated; quod nota. Br. Ley Gager, pl. 37. cites 38 E. 3. 8. — But refers to lib. Int. 42. of Wager of Law by 12 Hands, and New Book of Entries fo. 389.

3. When a Lombard &c. wages his Law, and cannot speak English nor Latin, the Record shall be read to him in his own Language, and so he shall perform the Law; quod nota. Br. Ley Gager, pl. 49. cites 21 H. 6. 42.

Co. Litt. 295. a S. P.

4. Debt against Baron and Feme of the Debt of the Feme; before the Court they waged their Law, and the Feme was not permitted to make her Law alone, but she and the Baron together. Br. Ley Gager, pl. 53. cites 15 E. 4. 2.

Co. Litt. 159. a. S. P. — S. P. Br. Ley Gager, pl. 59. cites 9 E. 4.

24. for the Baron is Debtor by the Marriage.

5. The Defendant was set at the right Corner of the Bar, without the Bar, and the Secondary asked him, if he was ready to wage his Law? he answered, yes; then he laid his Hand upon the Book, and * then the Plaintiff was called; and a Question thereupon arose, whether the Plaintiff was demandable? and a Diversity taken where he perfects his Law Instantly, and where a Day is given in the Same Term, and when in Another Term; as to the last, they held he was demandable, whether the Day given was in the same Term or another; then the Court admonished him, and also his Compurgators, which they regarded not so much as to desist from it;

* When the Defendant has his Hand on the Book before he is sworn the Plaintiff is to be called and he may be Non-suited. 2 Vent. 171. Anon. —

† S. P. 2 Inst. accordingly the † Defendant was sworn, that he owed not the Money *Modo*
45. *Et forma*, as the Plaintiff had declared, nor any Penny thereof; then his
Compurgators standing behind him, were called over, and each held up his
right Hand, and then laid their Hands upon the Book, and swore, that they
believed what the Defendant swore was true. 2 Salk. 682. Trin. 11 W. 3.
B. R. Anon.

(P) At what Time.

1. **P** *Præcipe quod reddat*; the Tenant came at the Grand Cape and waged
his Law of *Non-summons*, and at the Day &c. came to make his
Law, and the Demandant offered to wave the Default, and prayed that the
Tenant may plead in Chief; per Finch, you can't do so unless the Tenant
will consent to it; and the Tenant was thereof demanded, and would not
Consent, wherefore he waged his Law, and the Demandant took nothing
by his Writ; but at the first Day when the Tenant offered his Law, the De-
mandant might have released the Default as it seems. Br. Ley Gager, pl.
82. cites 42 E. 3. 7.

Br. Nonfuit,
pl. 10. cites
S. C. and that
the * Plai-
ntiff absented
himself and
was not suf-
fered to be-
come Non-
fuit. But

Brook says, that if he had imparled to the Law, and so to have been Nonfuit, it seems to him that
such Imparlance ought to be to another Term.——* This is (Defendant) in all the Editions of Brook,
both at Ley Gager, pl. 85 and at Nonfuit, pl. 10. but it should be Plaintiff as here.

2. In Debt the Defendant tendered to make his Law immediately that he
owed nothing &c. and the * Plaintiff went his way to be Nonfuit; and be-
cause the Plaintiff appeared in Court, is was awarded that the Defendant
should make his Law, and this is the Folly of the Plaintiff; For he might
have imparled to the Law, and then at the Day he might have been Non-
fuit; but quære, if he may be Nonfuit at another Day in the same
Term; quære if it be used at this Day. Br. Ley Gager, pl. 85. cites 3 H. 4. 2.

3. In Debt, the Defendant tendered his Law and had a Day &c. and
at the Day the Plaintiff was *essoigned*, and at the Day the Defendant was
essoigned &c. and at the Day the Plaintiff was *essoigned* again, and there-
fore the Defendant went quit by Judgment without making his Law. Br.
Ley Gager, pl. 36. cites 9 H. 5. 5.

4. In Debt the Defendant tendered his Law, and the Plaintiff imparled
to a Day in the same Term; there the Plaintiff shall not be demanded nor
be Nonfuit; for his Appearance was of Record the same Term, and if
he refuses the Law he shall be barred. Br. Ley Gager, pl. 96. cites 3 H. 6. 49.

Br. Jours.
pl. 23. cites
S. C.

5. Debt upon Arbitrement the Defendant imparled, and came back the
same Term, and tendered his Law; and per Cur. he shall have his Law.
Br. Ley Gager, pl. 41. cites 8 H. 6. 10.

6. In *Præcipe quod reddat*; *Essoign* is cast for the Tenant at the Summons
returned, and by his Default Grand Cape issued; there he cannot wage his
Law of *Non-summons* at the Day, unless he surmises that the *Essoign* was
not cast by Him; quod nota. Br. Ley Gager, pl. 90. cites 36 H. 6. 23.—
And see 10 H. 6. 9. that if he had so surmised he might wage his Law. Ibid.

7. In *Detinue*, the Defendant pleaded in Bar, and after relinquished it
and waged his Law, and well; for a Man may relinquish his Plea and
plead the general Issue, and this shall be before the Plea entred. Br.
Pleadings, pl. 119. cites 2 E. 4. 13.

8. In Debt the Defendant waged his Law, and when he came to per-
form it the Plaintiff said, that he who now came is another of the same Name,
for his Action is against *J. S. the Elder*, and he who now appears is *J. S.
the Younger*, and prayed his Judgment; quære, For the Averment was not
granted nor denied. Br. Ley Gager, pl. 91. cites 5 E. 4. 5.

Roll. R. 430.
S. C. by
Name of
Spink v.
Baker.

9. In Debt, the Defendant had Day given to wage his Law, and at the
Day Defendant was sick of a burning Fever, whereupon the Court was
moved for another Day for the Defendant to come and wage his Law,
and offered to make all this good by an Affidavit; but the Court refused,
and advised him to plead to the Country, and so he did. 3 Buls. 263.
Mich. 14 Jac. Smink v. Barker.

10. D. 17

10. *Day given for waging of Law is peremptory ; per three Justices against one.* 3 Buls. 316. And the Defendant cannot afterwards *wave it* without the Plaintiff's Consent, and betake himself to the Country, and upon his Non-appearance a *Defecit de Lege* was entered. Buls. 186. Pasch. 10 Jac. Harrison v. James. After the Roll was marked with a *Defecit de Lege*, and *Costs assessed*, it was moved and prayed, *Sedente Curia*, that he might be demanded again, and it was granted, and then Defendant made his Law. Noy. 42. Anon.

11. In Debt by Assignees of Commissioners of Bankrupts; Defendant came in and *waged his Law Instanter*, and it was debated if the Plaintiff might be *Nonsuited*; and at length it was agreed in as much as the Defendant came *Instanter*, that the Plaintiff cannot be *Nonsuited*; for which Reason the Plaintiff was not called, but the Defendant *waged his Law*; and after he had sworn they demanded his *Compurgators*, and then the Officers, viz. Criers, and Book-keepers &c. and they came and said, ready [or Here] but they were not sworn but accepted, and so the Plaintiff barred. Sid. 366. Trin. 20 Car. 2. B. R. Buckeridge v. Brown.

Plaintiff has imparled, the Plaintiff shall not be demanded nor can be *Nonsuited*. Ibid. 19. b. 3 H. 6. 50. a. The Reporter says, Vide that when Defendant comes *Instanter* to wage his Law, or at another Day in the same Term, to which the cites 14 H. 4.

(Q) *In one Action, where a Bar in another.*

1. **A**ccount against A. of Goods delivered to him to Merchandise, the Defendant said, that the Plaintiff at another Time brought Writ of *Detinue* against the Defendant of the same Goods, and counted upon a Bailment to re-bail, in which the Defendant *waged his Law*, and made the Law, Judgment; and a good Plea in Bar, per Brian Ch. J. but Catesby J. contra, and that it is only an *Estoppel*. Br. Barre, pl. 92. cites * 2 R. 3. 14.

101. cites 2 R. 3. 19. per Brian, but Catesby contra.—S. P. *ibid* pl. 108. cites 12 E. 4 that it is a good Bar. by 2 Justices

2. If a Man brings Debt of 10l. and the Defendant wages his Law, and after the Plaintiff brings Action upon the Case against the same Defendant that he Promised to pay the 10l. &c. The Defendant may plead that of the same Sum the Plaintiff at another Time brought Action of Debt in which the Defendant *waged his Law*, Judgment in Action; and a good Plea, for he was once barred of the same Sum. Br. Action sur le Cafe, pl. 105. cites 33 H. 8. S. P. Br. Action, Sur le Cafe, pl. 110. cites 2 R. 3.

(R) *Failure*. What.

1. **I**N Debt it was adjudged a Failure of the Law, where the Defendant came at the *Capias* in ward of the Sheriff and *waged his Law*, and it was by *Mainprise*, and at the Day was *Essoigned*; For *Essoign* does not lie for him who is by *Mainprise*. Br. Ley Gager, pl. 16. cites 44 E. 3. 12. Br. Judgment, pl. 8. cites S. C.

(S) *Estoppel*. What Plea Defendant may plead after he had done his Law; or after what Plea he may wage his Law.

1. **W**HERE three tender their Law in *Cessavit* of Non-*summons*, and at the Day two make Default, and the third appears, he cannot say that he is *sole Tenant* * [and tender the Law again] for the Whole, by Reason of the *Ley Gager* in Common which affirms the others to be Tenants with him. Br. *Estoppel*, pl. 28 cites 41 E. 3. 2. 3. S. P. Br. Several Tenancy, pl. 3. cites 4 E. 3. 47.—and yet by † 42 E. 3. 16 after such (terd lat.)—

Ley Gager he pleaded *several Tenancy*, quare diversity. Br. *Estoppel*, pl. 28.—* Orig (terd lat.)—† S. C. cited Br. Several Tenancy, pl. 3. 2. *Præcipe*

So he may plead Non-tenure and shall not be Estopped, for this comes upon the View; per Pank, quod conceditur. Br. Estoppel, pl. 54 cites 7 H. 4. 8.

2. *Præcipe quod reddat against one who waged his Law of Non-summons*, he shall not be by this estopped in another Action to plead Jointenancy with another; For he shall have the View in another Writ, and by Consequence shall plead Jointenancy. Br. Estoppel, pl. 32. cites 42 E. 3. 11.

Wherefore he said that the first Writ was brought against those 2 and others, and those 2 took the whole Tenancy, Absque hoc that the other 2

3. *Præcipe quod reddat against two, the one took several Tenancy of five Acres*, Absque hoc, that the other had any Thing, and Vouched; and the other took the Tenancy of the rest in Severalty, and Vouched another; Belk. said, to this you shall not be received; for at another Time in such a Writ against you, you waged your Law of Non-summons; & non Allocatur per Cur. For after Ley Gager of Non-summons, the Tenant shall have the View, and plead Jointenancy or several Tenancy, by which he was awarded to Answer. Br. Estoppel, pl. 35 cites 42 E. 3. 16.

had any thing, and waged their Law of Non-summons by which his Writ abated, and he brought this Writ fresh against those 2, Judgment if they shall be received to take the Tenancy in Severalty, and by the Opinion of the Court this is a good Estoppel. Br. Ibid.—By which they took the whole Tenancy in Common, and the one Vouched one, of that which belonged to him, and the other Vouched another, of that which belonged to him, and the Demandant demurred; Quære, because it is not adjudged there. Br. Ibid.—S. P. Br. Several Tenancy, pl. 6. cites S. C.

4. In *Cessavit*, a Man is Summoned in other Land than is in Demand, there if he makes Default, and Grand Cape issues, he may wage his Law of Non-summons, but he shall not say for Plea that he was Summoned in other Land, note a Difference; For in whatsoever Land he be Summoned if he appears it suffices. Br. Ley Gager, pl. 60. cites 37 H. 6. 26.

Br. Brief, pl. 217. cites S. C.—Br. Estoppel, pl. 97. cites S. C.

5. *Debt against B.* The Writ is abated, because the Contract was by him and one C. who is alive not named, and after C. died, and in a new Action against B. he waged his Law, notwithstanding the Confession of the Contract before; For it may be, that he had paid after &c. Br. Ley Gager, pl. 59. cites 9 E. 4. 24.

But where Baron and Feme, and the third waged their

6. *General Ley Gager by the one of Non-summons in Præcipe against, two* shall be Estoppel in a new Action to say, that he is Tenant with a Stranger, and that the other had nothing. Br. Estoppel, pl. 167. cites 12 E. 4. 1.

Law of Non-summons, in Præcipe quod Reddat, by this the Feme was received after in another Action, nor was estopped to say, that she and her Baron are Tenants, and the Third had nothing. Br. Estoppel, pl. 131. cites 21 E. 3. 13.

For More of Ley Gager in General, see *Consult*, and other proper Titles.

Libel.

(A) What is a Libel.

* Serjeant Hawkins says, that the reasonableness of this Opinion may justly be questioned; For that

1. **J.** S. was libelled against, for Incontinency, and A. B. C. and D. maliciously repeated a great Part of it in the Presence of several. They were censur'd for this in the Star-Chamber, tho' there was no Proof that C. and D. made the Libel, or that they assented or were Privies to the making of it. But saying that the Libel is made of [such a] one, tho' he speaks it with Malice, without repeating any Part of it, is not punishable; nor to * repeat Part of it in Merriment, without Malice, or any purpof

purpose of Defamation; and the Court held, that a Libeller was punishable, tho' the Matter of the Libel is true. Mo. 627. Mich. 43 & 44 Eliz. in the Star-Chamber. Want's Case.

Jells of this Kind are not to be endured, and the Injury to the

Reputation of the Party grieved, is no way lessened by the Merriment of him that makes it. Hawk. Pl. C. 196. cap. 73 S. 14.

2. Every Infamous Libel either is *in writing*, or *without writing*. That *in writing is*, when an *Epigram, Rhyme &c.* is composed or published to the Contumely of another, by which his Fame or Dignity may be prejudiced. This may be *by Words or Ballads*. 1. As where it is maliciously sung in the Presence of others. 2. By giving it over to another to scandalize the Party. *Without writing*, may be *by Pictures*, as painting him in an Ignominious Manner. 2. By *Signs*, as fixing a Gallows &c. at his Door or elsewhere. 5 Rep. 125. b. Pasch. 3 Jac. The Case De Libellis Famosis.

3. A. being very old; and having a good Estate, which he intended to settle on B. who was his Heir General, J. S. who had married a Niece of A. wrote a Letter to A. that B. was not the Son of one of the Name of A. and was a Haunter of Taverns, and that divers Women followed him from London to his House, and desired to hear of A's Death, and that all his Estate would not pay his Debts &c. And sign'd it, and sent it sealed and directed to A. This was held to be a Libel, and J. S. was fin'd 200l. and B. left at Liberty to bring his Action at Law. 2 Brownl 151. Pasch. 10 Jac. C. B. Peacock v. Sir Geo. Reynell.

But had the Letter been directed to the Plaintiff himself, and not to A. it should not have been a Libel. Ibid. 152

Or if it had been directed

ed to a Father for Reformation of any Acts of his Children, it should be no Libel; For it is only for Reformation and not for Defamation; For if a Letter contain scandalous Matter, and be directed to a third Person, if it be Reformatory, and for no Respect to himself, it shall not be intended a Libel; For the Mind with which it was made is to be respected; As if one write to a Father scandalous Matter concerning his Children, giving Notice thereof to the Father, and advising him to have better Regard to them, This is only Reformatory, without any Respect of Profit to him that wrote it; But in the Principal Case, the Defendant intended his Profit and his own Benefit; and this was the Difference. 2 Brownl. 152 in S. C.

4. A. wrote an infamous, scandalous &c. Letter to B. and subscribed his Name, and sealed and directed it, To his Loving Friend Mr. B. and added, Speed this. And after dispersed great Numbers of Copies. Resolved by Ld. C. Egerton, and the 2 Ch. J. and per tot. Cur. that the said Letter, which in Law is a Libel, shall be punished (tho' it was solely writ to the Plaintiff himself without any Publication) in the Star-Chamber; For it is a great Offence to the King, and tends to breaking the Peace, and therefore necessary to be punished by Indictment, or in the Star-Chamber; But the dispersing Copies, or publishing the Effect of it aggravates the Offence; for which the Party may have an Action on the Case. 12 Rep. 35. Edwards v. Wootton.—In this Case Ld. Cook said, that a Person libelling himself, is punishable by the Civil Law, and it seemed to him, that he should be so in the Star-Chamber. Ibid.

So where A. sent a Letter sealed up and deliver'd into B's Hands, containing many Ironical Scandals, as saying, You will not play the Jew nor the Hypocrite, and so taunting him for an Alms-House, and

other good Works done by him, all which he charged him to have done for Vain Glory, but never published it; yet the Court fined the Defendant, and sentenced him to wear Papers, and to make his Submission to B. in Cheapside. But an Action of the Case will not lie in this Case, for want of Publication. However, the King and Common Wealth are interested in it, because it is a Provocation to a Challenge and Breach of the Peace. Hob 215 Pasch. 10 Jac. in the Star-Chamber. Sir Baptist Hicks's Case.—S. C. Poph 139. and the Ld. C. Bacon said, that such private Letter shall be punished, because that in a Manner it infers the Party, to whom such Letter is sent, to publish it to his friends for their Advice, and for fear the other Party should, so that this Compulsory Publication shall be deem'd a Publication in the Delinquent.—And in an Information for writing &c. the Country-Parson's Advice to the Ld. Keeper, it was held, that it lay for speaking ironically. And the Attorney General said, it was laid to be wrote ironically, and the Defendant ought to have shew'd at the Trial, that he did not intend to scandalize them; And the Jury or Judges say that this was done, and they have found the Ill Intent. And Judgment was given of the Pillory, and a Fine of 40 Marks. 11 Mod. 86 Trin. 5 Annæ B. R. The Queen v. Dr. Brown.

Lev. 139.
S. C.

5. A. made Addresſes to M. whom he afterwards married; one J. S. during the Courtſhip, wrote a Letter to M. adviſing her not to marry A. For that he is a Debauchee, and has the Pox, and is not worth a Groat, but has declared, that if he marries her, he will allow 50l. a Year to a Whore. This Letter was not ſubſcribed, but conveyed to M. but it appeared upon Evidence, that all this was by J. S. But notwithstanding, it was held a Matter indictable. Sid. 270. Trin. 17 Car. 2. B. R. The King v. Summer and Hilliard.

The Matter being again at the Bar, Keeling and Moreton inclined, that the Printing was not juſtifiable, and that the

6. The Printing a Charge of Extortion in his Office, againſt the Vicar-General of the Biſhop of L. and delivering it to ſeveral Members of the Committee of Parliament for Examination of Grievances is juſtifiable; but if he had delivered it to others it had been otherwiſe; and the Printing them, which is a Publiſhing of them to the Printers and Compoſers, is not ſo great a Publication, as to have ſo many Copies tranſcribed by ſeveral Clerks. Lev. 240. Trin. 20 Car. 2. B. R. Lake v. King.

Committee ought not to be informed by Printing, or Copies, but Viva voce. Ibid. 241. Trin. 22 Car. 2. S. C. — But after in Mich. Term following, Judgment was given for the Defendant. Ibid. 241. S. C. — Mod. 58. S. C. Trin. 22 Car. 2. but no Judgment. — Sid. 414. Paſch 21 Car. 2. S. C. but Adjournatur. — Saurd. 131. Hill. 19 & 20 Car. 2. S. C. and there 133. Reports, that after this Caſe had depended 12 Terms, Judgment was given for the Defendant by Hale Ch. J. Twiſden and Rainsford upon this Point, viz. That it was the Order and Courſe of Proceedings in Parliament to print and deliver Copies &c. of which they ought to take Judicial Notice. — S. C. cited Hawk. Pl. C. 194. cap. 73. S. 8. And ſays it ſeems to be holden by ſome, That no want of Jurisdiction in the Court, to which ſuch a Complaint ſhall be exhibited, will make it a Libel; becauſe the Miſtake of the Court is not imputable to the Party, but to his Counſel. But if it ſhall manifeſtly appear, that a Proſecution is intirely falſe, malicious and groundleſs, and commenced, not with a Deſign to go through with it, but only to expoſe the Defendant's Character, under the ſhew of a legal Proceeding, Serjeant Hawkins ſays, he cannot ſee any Reaſon why ſuch a Mockery of Publick Juſtice ſhould not rather aggravate the Offence, than make it ceaſe to be one, and make ſuch Scandal a good Ground of an Indictment at the Suit of the King, as it makes the Malice of their Proceeding a good Foundation of an Action on the Caſe at the Suit of the Party, whether the Court had a Jurisdiction of the Cauſe or not. Hawk. Pl. C. 194. 195. cap. 73. S. 8. — But it ſeems that no Preſentment by a Grand Jury can amount to a Libel; becauſe it would be of the utmoſt ill Conſequence any way to diſcourage them from making their Inquiries with that Freedom, which is neceſſary for the Publick Good, by making them liable to Proſecutions on Account of ſuch Inquiries. Hawk. Pl. C. Abr. 224. cap. 73. S. 7. but in the Book at large, it is S. 8.

2 Show. 313.
S. C.

7. C. forged an Order of Chancery, in which were ſeveral deſamatory Expreſſions againſt the Plaintiff, and at the End draws a Pillory, and ſubſcribes it for Sir J. H. and his forſworn Witneſſes by him ſuborned; this is but one complicated Act, and an Action will lie. Skin. 123. Sir John Auſtin v. Col. Culpepper.

8. A. being choſe Church-warden, was tendered an Oath Ex Officio, viz. to preſent every Pariſhioner &c. ſome of which Articles concerned A. himſelf, and was Excommunicated for Refuſal; and thereupon had a Prohibition, of which he cauſed 2000 to be printed in Engliſh, and diſperſed them all over the Kingdom, intituling them, A true tranſlated Copy of a Writ of Prohibition, granted by the Ld. Ch. J. and other, the Juſtices of the Court of C. B. in Eaſter-Term 1676, againſt the Biſhop of C. who had proceeded againſt, and Excommunicated, one T. W. a Church-warden for refuſing to take the Oath uſually tendered to Perſons in ſuch Office, by which Writ the Illegality of ſuch Oaths is declared, and the ſaid Biſhop commanded to take off his Excommunication. The Court declared this to be a moſt ſeditious Libel, and gave Order to enquire after the Printer, that he might be proſecuted. 2 Mod. 118, 119. Mich. 28 Car. 2. C. B. Waterfield v. the Biſhop of Chicheſter.

An Action was brought by the Husband for riding Skimmington; and adjudged it lay; becauſe it made him ridiculous, and ex-

9. In a Special Action on the Caſe the Plaintiff declares, that he is an Hackney Coachman, and the Defendant, with Intent to diſgrace him, did ride Skimmington, and deſcribes how, thereby furniſhing, that his Wife had beat him, and by Reaſon thereof Perſons, who formerly uſed him, refuſed to come into his Coach, ad Damnum. Upon Not Guilty, it was found for the Plaintiff, and upon Motion in Arreſt of Judgment, Judgment was Quod Querens Nil capiat per Billam. Raym. 401. Trin. 32 Car. 2. B. R. Maſon v. Jennings.

posed him; per Holt, 3 Salk. 226. Mich. 5 W. & M. B. R. in Case of Tilney v. Crop.—So carrying a Fellow about *with Horns, and bowing at B's Door*. 2 Show. 314. cites Sir Wm. Bolton v. Dean.—For scandalous Matter is not necessary to make a Libel, it is enough if the Defendant induces an ill Opinion of the Plaintiff, or to make him Contemptible or *Ridiculous*. 3 Salk. 226 in Case of Tilney v. Crop.—2 Show. 314. cites Mingay v. Moody.

10. A Libel consists not in Words and scandalous Matter only; for that is not of itself sufficient, tho' spoken with never so much Malice; but it is the *putting in writing, or procuring to be put in Writing*; for if the Words are not written, he is not guilty of the Libel. 12 Mod. 219. Mich. 10 W. 3. the King v. Beere. 2 Salk. 417.
Hill. 10 W.
3 B. R. S.C

11. The *taking the Copy of a Libel* is a Libel, because it comprehends all that is necessary to the making of a Libel; it hath the same scandalous Matter in it, and the same mischievous Consequences attending it at first; For it is by this Means perpetuated, and it may come into the Hands of other Men, and be published after the Death of the Copyer; and if Men might take Copies with Impunity, by the same Reason, printing of them would be no Offence; and then farewell to all Government. 12 Mod. 220. the King v. Beere. 2 Salk. 417.
S. C.

12. In Action on the Case upon a Libel it is sufficient if the *Matter is reflecting*; as *To paint a Man playing at Cudgels with his Wife*; per Holt Ch. J. 11 Mod. 99. Mich. 5 Annæ. Anon.

13. A Defamatory Writing, *expressing only one or two Letters of a Name, in such a Manner, that from what goes before, and follows after, it must needs be understood to signify such a particular Person* in the plain, obvious and natural Construction of the Whole, and would be perfect Nonsense if strained to any other meaning, is as properly a Libel, as if it had expressed the whole Name at large; for it brings the utmost Contempt unto the Law, to suffer its Justice to be eluded by such trifling Evasions: And it is a ridiculous Absurdity to say, that a Writing, which is understood by every the meanest Capacity, cannot possibly be understood by a Judge and Jury. 2 Hawk. Pl. C. 194. cap. 73. S. 5.

14. It seems clear, That no writing whatsoever is to be esteemed a Libel, unless it *reflect upon some particular Person*; and it seems, that a Writing full of *obscene Ribaldry*, without any kind of Reflection upon any one, is not punishable at all by any Prosecution at Common Law, as I have heard it agreed in the Court of King's Bench; yet it seems, that the Author may be bound to his Good Behaviour, as a scandalous Person of evil Fame. 2 Hawk. Pl. C. 195. cap. 73. S. 9.

(B) *Who shall be said to be Maker, Contriver, or Publisher. Or be punished as such.*

1. **H**E who *disperſes Libels*, tho' he does not know the Effect of them nor ever heard them read, is punishable. Mo. 627. Mich. 43 & 44 Eliz. in the Star-Chamber. In Want's Case.

2. *Jurors at a Wardmote Inquest presented J. S. for Incontinency*, for which J. S. complained of them in the Star-Chamber. But the Court would not examine the Cause against them; because the Precedent would be dangerous, to draw into the Star-Chamber Jurors for their Inquests. Mo. 627. Want's Case.

3. Resolved in a Case of Libels. 1. The *Procurer*, and also the *Writer* are both Contrivers. 2. The *Procurer of another to publish* the Libel, and the *Publisher himself*, are both of them Publishers. 3. The *Reading a Libel, not knowing it to be a Libel*, is not publishing. 4. He that *writes the Copy of the Libel by the Commandment of his Master or his Father*, is not a Publisher. 5. He that *Laughs when he hears another read a Libel*, is not a Publisher if he does no more. 6. He that *lends a Libel to be copied,* 9 Rep. 59 b.
Lamb's
Case must
be expound-
ed by Mo.
813. S. C.
where it is
or

Reported as or he that *repeats* the Libel, or any Part of it, or *shows the Contents* of it, or any Part of it, knowing it to be a Libel, is a Publisher. So if *that the Writer of a Libel is, in* one *writes the Copy* by Commandment of his Master or Father, *and then carries it to another*, he is a Publisher. Mo. 813. Mich. 8 Jac. Lamb's Case. Judgment of Law, *the Contriver*; and then *Cock's Case*, that he that is Convict of a Libel must be Contriver, Procurer, or Publisher, is good Law, but not otherwise; per Holt Ch. J. 12 Mod. 219. the King v. Beare. — S. P. in S. C. 2 Salk. 418. that if it be not expounded by Mo. 813. it may be doubtful; For if that Case be look'd into, the Question there was about the Publication of a Libel, and it was held, that the Writing the Copy of a Libel was not a Publication, but only Evidence of a Publication. But there was no Question made, how far he was guilty of Libelling. And as for the Matter of Publication, the *bare having* a Libel is not a Publication; per Holt Ch. J. — But when a Libel appears *under a Man's own Handwriting*, and no other Author is known, it is *a taking in the Manner*, and it turns the Proof upon him; per Holt, *Ibid.* 419. — * Mo. 822 Goodrick's Case.

2 Salk. 418. 4. If a Libel be made in Writing, and afterwards *burnt*, and one *re-members* the Contents, and dictates to another who writes it, the *Writer* is the 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. Cumb. 359. Hill. 8 W. 3. B. R. the King v. Pain. — For he who dictated cannot be indicted for making this Libel. Because he did not write it; and if the Writer cannot be punished, this Crime is unpunishable; per Cur. Carth. 406. S. C. — * It is highly Criminal. 2 Salk. 417. per Holt Ch. J. — 5 Mod. 167. S. C. — * Carth. 409. per Holt Ch. J. in Case of the King v. Beare.

5. If a Libel be publickly known, *having a written Copy* of it is *Evidence of a Publication*; but otherwise where it is not known to be published. per Holt Ch. J. Hill. 10 W. 3. B. R. 2 Salk. 418. the King v. Beare.

See (A). (C) *Punished How.* And *what ought to be done* with Libels when met with.

1. **A.** R. was indicted in the King's Bench, for the making of a Libel in Writing *in the French Tongue* against R. of S. *calling him* therein, *Roy de Ravens* &c. Whereupon he, being arraigned, pleaded thereupon Not Guilty, and was found Guilty, as by the Records appeareth. So as a Libeller, or a Publisher of a Libel, committeth a publick Offence, and may be indicted therefore at the Common Law. 3 Intt. 174. cites Mich. 10 E. 3.

S. C. cited per Holt Ch. J. 1 Salk. 419 in Case of the King v. Beare. — and calls it a strong Case. 2. J. N. an Attorney of the King's Bench, wrote a *Letter to J. F. one of the King's Council*, that neither *Sir W. S. Chief Justice*, nor his *Fellows the King's Justices*, nor their Clerks, any great Thing would do by the Commandment of our Lord the King, nor of Queen Philip in that Place, more than of any other of the Realm; which said John, being called, confessed the said Letter by him to be written with his own proper Hand; *Judicium Curiae, et quia praedictus Johannes cognovit dictam literam per se scriptam Roberto de Ferrers, qui est de Concilio Regis, quae litera continet in se nullam veritatem, Praetextu ejus Dominus Rex erga Curiam & Justiciarios suos hoc in casu habere posset Indignationem, quod esset in scandalum Justitiae & Curiae; Ideo dictus Johannes committitur Maresc. & postea invenit 6 Manuatores pro bono gestu.* 3 Intt. 174. cap. 76. cites Mich. 18 E. 3.

3. If one finds a Libel *against a private Man*, he may either *burn it*, or *deliver it to a Magistrate* immediately; But if it concerns a Magistrate, or other *Publick Person*, he ought immediately to *deliver it to a Magistrate*, that the Author may be found out. 5 Rep. 125. b. cites it as resolved Mich. 43 & 44 Eliz. in the Star-Chamber, in *Halliwood's Case*. A Libel, tho' the Contents are true, is not to be justify'd. But the Right Way is to discover it legally to some Magistrate or other that may have Cognizance of the Cause; but it may be justify'd in an *Alton Sur Case*. Hob. 253. Lake v. Hatton.

4. One was prosecuted in the Star-Chamber for composing and publishing an Intamous Libel in Meter, scandalizing a deceased and present Archbishop of Canterbury. It was resolved, 1. That every Libel, (called Famofus Libellus, or Infamatoria Scriptura) made *against a private Person* deserves a severe Punishment; Because it provokes all the Family of that Person to Revenge &c. If it be against a *Magistrate*, it concerns not only the Peace, but scandalizes the Government. 2. It is punishable, notwithstanding the *Person scandalized be dead at the Time*. 3. A Libeller called (Famofus Defamator) shall be punished, either by *Indictment at Common Law* or by *Bill if he deny it, or Ore tenus upon Confession*, in the Star-Chamber, and that according to the Greatness of his Offence, it may be by *Fine and Imprisonment*, and if the Case be exorbitant, by *Pillory and Loss of Ears*. 4. It is not material, whether it be true or not, or of what Fame the Party libelled is. 5 Rep. 125. Pasch. 3 Jac. The Case De Libellis Famofis.

5. One was indicted for exhibiting an Infamous Libel directed to the King against Coke the Ch. J. of B. R. and the Court for a Judgment given in the said Court in **Magdalen Colledge Case**, affirming the said Judgment to be Treason, and calling the *Chief Justice Traytor, perjured Judge*, and scandalizing all the Protectors of the Law: And this Libel, he fixed upon the great Gate entering Westminster-Hall, and divers other Places. And being arraigned, he put in a scandalous Plea, affirming he would not plead otherwise. It was adjudged, that he should be committed to the Marthal, stand upon the Pillory with Paper mentioning the Offence, and be imprisoned till he submit himself to every Court, be bound to his Good Behaviour with Sureties during Life, and pay 1000*l.* Fine to the King. Cro. C. 175. Mich. 5 Car. B. R. Jeif's Case.

6. An Information was exhibited against A. B. for causing to be framed, printed, and published, a scandalous Libel intitled &c. thereby scandalizing of one C. D. Upon Not Guilty pleaded it appeared upon the Evidence, that *two of these Libels printed were found at the Lodgings of the Defendant* upon Warrants from the Principal Secretary of State to search there, he being suspected to be the Contriver of it. The Opinion of the Court was, That this was no Crime within the Information, though he gave no Account how they came there; and the having of a Libel, and not delivering of it to a Magistrate, was only punishable in the Star-Chamber, unless the Party maliciously * published it. Vent. 31. Pasch. 21 Car. 2. B. R. Anon.

* Tho' he never publishes it, yet his having it in readiness for that Purpose if any Occasion should happen, is highly Criminal, and tho' he might design to keep it private, yet

after his Death they might fall into such Hands as might be injurious to the Government, and therefore Men ought not to be allowed to have such evil Instruments in their Keeping &c. Per Cur. Carth. 409. Trin. 9 W. 3. B. R. The King v. Bear.

(D) What is the *Distinct Power* of the Court, and of the Jury, as to Libels.

1. **I**N an Information for a Libel, it was urged, that the only Thing to be examined by the Court is, whether the Paper published contain any Libellous Matter; For then the *Application must be left to the Jury*. But per Cur. This Rule is not to be taken so extensively, For where the Application is merely indifferent, we will not grant an *Information*, but there must be a seeming and apparent Application to be made. Gibb. 57. Pasch. 2 Geo. 2. B. R. the King v. Butcheler.

A a

(E) Pleadings

(E) Pleadings &c.

S. P. Resolved. 2 Salk. 66c. Mich. 5 Annæ. B. R. The Queen v. Dr. Drake. which was an Information for writing a Libel, setting forth, that it contained several scandalous Matters secundum Tenorem sequentem, and in reciting a Sentence of the Libel it was (nor) instead of (not). Upon Not Guilty pleaded, this appeared in Evidence,

1. **A**N Indictment was for composing, writing, making, and collecting several Libels in uno quorum continetur inter alia juxta Tenorem & ad Effectum sequentem, and then sets forth the Words. Upon Not Guilty, the Jury found the Defendant Guilty as to the Writing and Collecting prout in Indictamento supponitur, & quoad omnia alia præter Descriptionem & Collectionem Not Guilty. Exception was taken, that (Inter alia) shew'd there was somewhat else, which perhaps might, if it appeared, qualify the Rest. But per Cur. non allocatur; For then he could not be found Guilty; and if any thing qualifies that which is set forth, it must be given in Evidence. 2. It was agreed, that ad Effectum sequentem of itself had been naught; For the Court must judge of the Words themselves, and not of the Construction which the Prosecutor puts upon them; But the Words (ad Effectum) were corrected by the Words (Juxta * Tenorem) which imports the very Words themselves. 3. It was held, that the finding him Guilty of the bare Writing and Collecting is Criminal; not but that Collecting had better been out of the Case; And it being objected, that Defendant being found Guilty of Collecting and Writing, and not of making and composing, the Verdict is Repugnant, or an Acquittal, Non allocatur; For Making is the Genus, and Composing and Contriving is one Species, and Writing a second Species, and procuring to be written a third Species; so that not finding him guilty of all, but Writing only, is finding him not guilty of any Species of making but writing. 2 Salk. 417. Hill. 10 W. 3. B. R. The King v. Bear.

and a special Verdict was found. The Court held, that this was not a Tenor by Reason of the Variance of (Nor) for (Not) which are different both in Grammar and Sense.—And there it was held by Holt Ch. J. That in pleading, there are 2 Ways of describing a Libel or other Writing, viz by the Words, or by the Sense. By the Words, as if you declare of a Libel Cujus Tenor sequitur &c. or Qui sequitur in his Anglicanis Verbis sequentibus, there you describe it by its particular Words, of which each is such a Mark, that if you vary, you fail in making good their Description. 2. You may describe it by its Sense and Meaning; thus it is a good Information to shew, That the Defendant made a Writing, and therein said so and so, translating it into Latin; in which Case exactness of Words is not so material; because it is described by the Sense and Substance of it.—S. C. 11 Mod. 78. Pasch. 5 Annæ. Adjournatur.—Ibid. 84. Trin. 5 Annæ. Adjournatur.—Ibid. 95. Mich. 5 Annæ. Adjudged for the Defendant. But says, that a Writ of Error was intended.

2. A Man may justify in an Action on the Case for a Libel; but otherwise in an Indictment; per Holt Ch. J. 11 Mod. 99. Mich. 5 Annæ. Anon.

3. Upon a Motion for an Attachment against the Defendant for publishing a Libel on the Court of B. R. and a Rule made upon him to shew Cause why it should not be granted, it was moved to discharge that Rule upon an Affidavit that his Fault was not wilful, but merely thro' ignorance; that he had the Libel from one C. a Printer in C. that it was in Latin, which he did not understand, and that he did not know who was the Author, otherwise than by a Letter which he received from the Printer, and which was now annexed to his Affidavit; by which Letter it appeared, that one Dr. Middleton was the Author; so that having shewed how he came by this Libel, and having told all that he knew of the Author, for that Reason it was insisted in his Behalf, that the Rule should be discharged, and that the Printer should be prosecuted; but the Rule was continued on the Defendant until he made out his Allegation against the Printer, who was therefore joined in the Rule, that both of them might be before the Court. In the next Term Dr. Middleton appeared and confessed in Court, that he was the Author of the Book; and thereupon the Rule was discharged against the Defendant and the Printer, and the Doctor was committed till further Consideration of the Matter; and afterwards he was fined 50*l.* and bound to his Good Behaviour for a Year, and so was Dr. Colebatch the same

same Term, for the like Offence. 8 Mod. 123. Pasch. 9 Geo. the King v. Wiatt.

4. Information for a Libel was in the *Disjunctive*, viz. Scriptit seu scribi caufavit, and held not good. 8 Mod. 328. Mich. 11 Geo. the King v. Brereton.

(F) Publication. What.

1. **W**Riting the Copy of a Libel is not a Publication thereof, but only an Evidence of a Publication; per Holt Ch. J. 12 Mod. 220. cites Mo. 813. and 9 Rep. 59. b. Dr. Lamb's Case; and says the writing the original Libel it self is the same; and if a Publication of it has been proved, it is Evidence that the Publication was by him that had it in his Custody.

(A) Libraries.

1. 7 Ann. **W**Hereas several charitable Persons have of late Years erected cap. 14. S. 1. **W**ed Libraries within several Parishes and Distincts in England and Wales, it is hereby enacted, that in every Parish or Place where such Library is, or shall be erected, the same shall be preserved for the Use appointed by the Founder.

S. 2. And every Incumbent, Minister, or Curate of a Parish, before he shall be permitted to use such Library, shall give such Security for the Preservation thereof, and Observation of the Rules and Orders appointed by the Founder &c. as the proper Ordinary shall think fit.

And if any Book shall be taken away and detained, it shall be lawful for the said Incumbent &c. to bring an Action of Trover in the Name of the proper Ordinary, and recover treble Damages, to be applied to the Use of the said Library.

S. 3. And it shall be lawful for the Ordinary, his Commissary or Official, or for the Archdeacon, his Official or Surrogate by his Direction, if such Archdeacon be not Incumbent of the Place, to inquire, at his or their Visitation, into the Condition of such Libraries, and to redress the Grievances and Defects concerning the same.

And it shall be lawful for the Ordinary from Time to Time to appoint such Persons to view the Condition of the said Libraries, as they shall think fit.

S. 4. And where any Library is appropriated to the Use of the Minister of any Parish, such Minister, or Curate, within 6 Months after his Institution, Induction, or Admission, shall make a Catalogue of all Books remaining in such Library, and sign the same, thereby acknowledging them to be in his Custody, which shall be delivered to the proper Ordinary within the Time aforesaid, to be registred Gratis.

S. 5. And where a Library shall hereafter be given to the Use of any Parish, or Place where there is an Incumbent, Minister, or Curate in Possession, such Incumbent &c. shall make a Catalogue as aforesaid, and deliver the same within 6 Months after he shall receive such Library.

S. 6. And upon the Death of any Incumbent &c. the Library belonging to any Parish or Place shall be Locked up by the Church Wardens, or such other Persons as shall be appointed by the Ordinary till a new Incumbent &c. shall be inducted or admitted.

S. 7. *Provided that if the Place where such Library is kept shall be used for the Meeting of the Vestry, or any other Parish Business &c. it shall be used as formerly, but after such Business dispatched shall be again locked up and secured.*

S. 8. *A Book shall be kept in the said Library wherein the Minister shall enter all Benefactions, and an Account of all such Books as shall be given, and by whom.*

S. 9. *And it shall be lawful for the Ordinary and the Donor, if living, and after his Death for the Ordinary alone, to make such Rules and Orders concerning the same, as he shall think fit, not being contrary to such as the Donor shall have made; which said Orders shall be entred in the said Book, and kept in the Library.*

S. 10. *And no Book shall be alienable without the Consent of the Ordinary, and then only where there is a Duplicate of such Book; and if any Book be taken away or lost, a Justice of Peace may grant his Warrant to search for the same, and if found, order it to be restored to the Library.*

S. 11. *Provided that this Act do not extend to the publick Library at Rye-gate in Surrey.*

Licence.

See Grant.

(A) Licence. How it differs from, or is a Grant.

1. **I**F a Man Licences me to enter into his Land and to Occupy it for a Year, half a Year, or such like, *this is a Lease*, and so shall be pleaded. Br. Licence &c. pl. 19. cites 5 H. 7. 1.

2. A Licence to hunt, and carry away the Deer killed to his own Use, or to cut down a Tree in a Man's Ground, and to carry it away the next Day to his own Use, are Licences as to the Acts of hunting and cutting down the Tree; but as to the carrying away the Deer killed, or the Tree cut down, they are Grants. Vaugh. 351. Thomas v. Sorrell.

See Corporation.
Grant.

(B) Good.

1. **I**F a Man is bound in an Obligation of 40l. upon Condition, or Deafeance, that if *J. S. be Servant to the Obligee for 7 Years*, that the Obligation shall be void; per Cur. it is a good Plea that the Obligee licenced the Servant to go &c. tho' the Licence be only by Parol. Br. Licences, pl. 18. cites 6 E. 4. 2.

2. A Condition to a Licence is void; As a Lease for Years on Condition that he pay 20l the second Year, this is void; For the Licence does not give a Right, but only executes it, as a Livery or Attornment. Owen. 73. Hill. 38 Eliz. Haddon v. Arrowsmith.

(B. 2) Granted by whom good. Servant, Bailiff &c.

1. **N**OTE, that Licence of a Parker to Hunt and Chase in the Park of his Master is not good; Contrary of the Licence of a Bailiff to take a Cow, or to Milk her, or to Ride a Horse to such a Place; for he has.

has Authority to fell * them ; quære. Br. Licences, pl. 20. cites 2 E. 4. 4. * Orig. (Vender le Stuf)

2. *Trespais de Parco fracto upon the Statute 3 E. 1. 20. for killing 2 Deer*; the Defendant said, that the Parker prayed him to kill the Deer, and he did it, and the best Opinion was that it is no Plea; For the Parker himself cannot do it by his Office, but only to keep the Game. Br. Trespais, pl. 295. cites 2 E. 4. 4.

3. Parkers and Shepherds are only Keepers of the Game, and Sheep. Br. Trespais, pl. 295. cites 2 E. 4. 4.

4. It was found upon a special Verdict, that the Parson of the Parish made A. Collector of Tithes, and that A. had licenced a Parishioner to carry away his Corn without setting forth of Tithes; per Cur. clearly, the Licence is void, and a Consultation was awarded. Noy. 134. Brickendine v. Denwood.

(C) How it must be Pursued.

1. Licence or Authority must be pursued *strictly*, as well in Form as in Substance; As Licence to impark 300 Acres, he cannot impark but 100 Acres only. Arg. Owen. 73. cites 10 H. 7.

So if I have Licence to impark 200 Acres and do it accord-

ingly, and after increase it by another 100 Acres, there this is no Park; quære, of this. Br. Patents, pl. 76. cites 23 H. 8.—2 Rep 80. b.

2. If the King licences his Tenant to alien his Minor of D. and he aliens it except an Acre; the Licence shall not serve it; for there the King is not ascertained of his Tenant of the Whole. Br. Patents, pl. 76. cites 23 H. 8.

S. P. Bridgm 114. cites 30 E. 3. 17.— So where the King licences one to

alien the third Part of his Land, and he aliens all; the Alienation is void in all. Fin. Law. 8. b.

3. In *Trespais* for immoderately riding his Mare; the Defendant pleaded, that the Plaintiff lent him his said Mare and *Licentiam dedit eidem* (Defendenti) *equitare upon the said Mare*, and that by Virtue of this Licence the Defendant and his Servant did ride alternatim upon her. The Court upon Demurrer held the Licence annexed to the Person, and not to be communicated to another. Mod. 210. Hill. 27 & 28 Car. 2. C. B. Bringloe v. Morris.

In this Case North took a Difference where certain Time is limited for the Loan of the Horse and where not; in the first

Case, the Party to whom the Horse is lent hath an Interest in the Horse during that Time, and in that Case his Servant may ride, but in the other Case not; and a Difference was taken between *Hiring an Horse to go to York*, and *Borrowing an Horse*; in the first Case the Party may set his Servant up, but not in the second. Ibid.

(D) Extent thereof.

See Grant (F)

1. Whether a Licence to Hunt gives a Power to kill and carry away is left a Quære per Brook. Br. Licence, pl. 6.

In Trespais it was held by 4 that

where a Man gives me Licence to hunt and kill a Buck in his Park * and to dispose of it, my Servant cannot justify to do it by my Command; for a Licence goes strictly to him to whom it is given, and to no other; Contrary of a Gift by which a Man gains a Property; and by this Licence, he that has the Licence cannot bring his Servant with him; for this is out of the Licence; and if a Man gives Licence to kill a Buck, he cannot take it away with him; per Chocke. Nevertheless three others were of a contrary Opinion, and that a Man may kill the Buck by his Servant; quære inde. Br. Licence, pl. 12. cites 18 E. 4. 14.

* Orig. (& ceo dispense.)—† S. P. Bridgm. 115. cites 12 H. 7. 25.—‡ S. P. Br. Contract, pl. 4. cites S. C.—S. P. Godb. 359. Trin. 21 Jac. B. R. per Haughton. J.

B b

2. Where

2. Where Command is given to W. N. to enter the Park of the Commander and deliver Beasts to J. S. there J. S. cannot justify to enter with W. N. to receive the Beasts, but shall stay without and receive them there; by the best Opinion. Br. Licence, pl. 14. cites 18 E. 4. 25.

If a Man gives Licence to J. S. to take and kill a Deer in his Park, he may take with him his Servants to Chase and kill the Deer; per all the Justices. Br. Trespafs, pl. 431. cites 13 H. 7. 10.—So if it be to chase, kill, and take Deer at his Pleasure; per Cur. Ibid. pl. 434. cites 13 H. 7. 13.—But if a Man Licence H. N. to chase in his Park, he cannot take others with him to chase; per Cur. for this Licence is for Pleasure only, and not for Profit. Ibid.—S. P. Fin. Law. 8. b. cites S. C.—S. P. per Mountague Palm. 73. Hill. 17 Jac. B. R. in Case of Webb v. Paternoster.

* S. P. Fin. Law. 8. b. cites S. C. 4. If J. Licence W. N. to eat with me, or * walk in my Orchard, he shall not take others with him; per Cur. Br. Trespafs, pl. 434. cites 13 H. 7. 13

5. Contrary, if he Licence me to carry over his Land, or to take Trees, I may take others with me to do it; for this is Profit; quod nota, per Cur. Br. Trespafs, pl. 434. cites 13 H. 7. 13.

6. A Way granted to go to Church over my Land does not extend to any other, but only to himself; For it is only an Easement. Fin. Law. 8. b.

7. A Licence, as to put in his Beasts, is indefinite, till it be determined by him that gave the Licence; per Vaughan Ch. J. Cart. 218. Pasch. 23 Car. 2. C. B. Whately v. Conquest.

(E) Countermandable.

See Interest.

As if I Licence one to dig Clay in my Land, this is revocable, and may be Countermanded, tho' it be in Point of Profit, which is a stronger Case than a Licence of Pleasure. Poph. 151. Hill. 17 Jac. Webb v. Paternoster.—Cites 13 H. 7. the Dutcheffs of Suffolks Case.

1. IT was agreed that a Licence is Countermandable, tho' it concerns Profit or Pleasure, unless there be a certain Time in the Licence. Poph. 151. Hill. 17 Jac. Webb v. Paternoster.—Cites 13 H. 7. the Dutcheffs of Suffolks Case.

There is a great diversity between a Licence in fact, which giveth an Interest, and a Licence in fact which giveth only an Authority or Dispensation; For the one is not to be Countermanded, but the other is. Arg. Lane. 46. cites 5 H. 7. and 1 Ma. Dyer 92.

See D. 177. pl. 31. where it is said that by the best Opinion a Licence granted for a Time certain is not countermandable. The Queen v. Bartue and Dutcheffs of Suffolks. 2. If a Man Licence another to occupy his Horse for four Days in his Land &c. the Licenser may countermand the Licence within the four Days; nevertheless contrary, if he gives or grants for four Days, he cannot countermand; note the Difference; per Cur. Br. Licence, pl. 9. cites 39 H. 6. 7.

3. Trespafs in his Land; the Defendant justified for Common for 20 Beasts, the Plaintiff said that the Defendant put in 40 Beasts over and above the 20 Beasts, of which he has brought this Action; upon which the Defendant pleaded Licence of the Plaintiff; and the Plaintiff pleaded Countermand of the Licence, and that the Defendant did the Trespafs after, and well; quod nota, that he may Countermand. Br. Trespafs, pl. 229. cites 39 H. 6. 7.

S. P. Fin. Law. 8. b. 4. A Man may discharge his Licence after, and where he gives to me Licence to enter into his House, by which I enter, if he discharge me after, there

there I shall be compelled to go out of the House, unless it were *tempore tempestatis*, for then I may remain; per Wood Justice. Br. Licence, pl. 15. cites 20 E. 4. 4.

5. The King licences *A. to go beyond Sea, and to stay there for a certain Time*; Provided, that if he conspires or converses with Fugitives, or the King's Enemies, that then his Licence shall be void; after the Time of this Licence, the King commands him upon his Allegiance, by a Privy Seal, to return; his Licence is revocable during the Time allowed; For it concerns his Loyalty, and does not give him an Interest; his conversing with Fugitives does not make it void ab initio, but only from the Time of such his conversing. Jenk. 220. pl. 69.

(F) Determined.

1. **T**respas by Baron and Feme for Chasing in their Warren, and taking and carrying away 20 Hares &c. *dum uxor sola fuit*, the Defendant pleaded Licence of the Feme, *dum sola fuit*, for him and his Servant to chase at their Pleasure, by which he chased, and killed, and carry'd away Prout &c. and a good Plea without shewing the Deed of the Licence; per Cur. Nevertheless quære, if by the *Marriage* the Licence is determined, so that he cannot chase after. Br. Licence, pl. 6. cites 22 H. 6. 52.

2. Licence to *erect a Stack of Hay* till he may conveniently sell it; it stood two Years and then a Lease was granted to a Stranger of the Land, who gave Notice to remove it, and half a Year after turned his Beasts into the Field, who eat of the Hay; yet because of the *convenient Time to remove*, Judgment was for the Defendant. Palm. 71. Hill. 17 Jac. B. R. Webb v. Paternoster.

Noy. 98. *Blummer v. Webb*, S. P. and S. C. Reports it as a general Licence, and adjudged for Defendant, because not removed in convenient Time, and that the Licence determined by the Lease, and so the Damage was by the Plaintiffs own Default.

Godb. 282.
S. C.—2
Roll. R. 143.
152. S. C.—
He should
have fenced
it in. Poph.
151. S. C.—

(G) Actions and Pleadings.

1. **T**respas for *chasing in his Warren*; the Defendant pleaded Licence of the Plaintiff; and good, without shewing the Deed. Br. Monfrans, pl. 130. cites 42 E. 3. 2.

2. If a Licence is pleaded, he ought to shew the Place where &c. Br. Pleadings, pl. 96. cites 6 E. 4. 2.

3. In *Trespas*, if a Man pleads that the Baron gave Licence to the Defendant by his Feme, or an Abbot by his Commoigne, this shall be pleaded by the Baron himself, and by the Abbot himself, and the Feme and Commoigne shall be *ouited of the Book; Per Cur. Br. Pleadings, pl. 126. cites 10 E. 4. 4.

* Orig.
(Ouster del
liver.)

4. In *Trespas*, if the Defendant pleads Licence of a Corporation, it is not good without Deed; and where a Man pleads Licence to enter into his House, and the Plaintiff says, that the Defendant broke the Door and the Windows, and claimed to his own Use, which is the same *Trespas* of which he brings his Action; per Cur. it is no good *Replication*, where he justifies by Licence in Fact, without traversing the Licence, contrary of a Licence in Law. Br. Licences, pl. 17. cites 21 E. 4. 75.

5. If a Man licence me to enter into his Land, and occupy it for a Year, half a Year or such like, *this is a Lease*, and so shall be pleaded, and not

a Licence; and it is said elsewhere for Law, that Licence *cannot be given in Evidence upon another Issue*, but ought to be pleaded. Br. Licences, pl. 19. cites 5 H. 7. 1.

S. C. Sid 428. Mich. 21 Car. 2. B. R. takes Notice that the Scil. was of a Day which was the Day after the Trespass, and thereupon the Plaintiff demurred generally; and it was said at Bar, that the Scilicet is void, and does not vitiate the Bar upon general Demurrer. But the Court held that it made the Plea ill in Substance, and so Judgment was given for the Plaintiff, and the rather, because there was *no Traverse*.—2 Keb. 561 S. C. adjudged, and that it was held per Cur. that this was a Lease, and should have been so pleaded, and cannot be at the Will of one; but this is but general Issue, and aided by general Demurrer.

6. In *Trespass*, the Plaintiff declared that the Defendant, on the 24th of January, enter'd, and took Possession of his House, and kept him out of Possession to the Day of exhibiting the Bill; the Defendant pleads, that *Ante præd. Tempus quo, Scil. &c. the Plaintiff licenc'd the Defendant to enjoy the House till such a Day*. It was insisted, that the Plea is naught in Substance; For a Licence to enjoy from such a Time to such a Time is a Lease, and ought to be pleaded as a Lease, and not as a Licence, and that it is a certain present Interest. Twilden J. said, that if one doth licence another to enjoy his House till such a Time, it is a Lease, but whether it might not be pleaded as a Licence, he had known it doubted. Judgment nisi &c. Mod. 14. Trin. 21 Car. 2. B. R. Hall v. Sebright.

7. In *Replevin*, the Defendant avows as a Commoner for taking Goods Damage feasant in Loco in quo &c. The Plaintiff pleads in Bar of the said Avowry, that the Parson of Dale is seised of such Glebe Land, and that he had Common in Loco, in quo &c. for 200 Sheep Levant and Couchant upon the same Glebe Land. And that the Plaintiff, by the Licence of the said Parson, put in his Cattle, and Issue is taken upon the Levant and Couchant, and found for the Plaintiff. And it was moved in Arrest of Judgment for the Avowant, because Licence cannot be given by a Commoner to put in the Cattle of a Stranger; and here the Plaintiff was only a Trespasser upon the Parson; and such Licence cannot be without Deed. 2 Cro. 574. Monk v. Butler. And stay until &c. Raym. 171. Mich. 20 Car. 2. B. R. Rumsley v. Rawson.

Beasts which the Parson had procured to compester his Land, and the Right of the Case is tried, and so aided by the Statute of Oxford; but Time being given to shew Cause, it was insisted at another Day that the Licence ought to have been shewn to be by Deed, being to take a Profit in alieno solo; but it was answered, that a Parol Licence was sufficient in this Case, being only to take the Profit Unica Vice, and there passing no Estate by it, and the Plaintiff had Judgment Ibid 25.

they were

Lien.

(A) Lien. What is a Lien on the Lands.

1. **A.** Was bound in a Statute to B. and one C lent 100l. to A. with which A. bought Lands, and assured the same to C. for his 100l. A. failed in Payment, B. extended that Land. C. was denied Help in Chancery, altho' the Land was bought with his Money; For B. hath Priority of Right in Law without Covin. Cary's Rep. 11, 12. cites Crompton 63. a.

2. *Recognizance* before Execution is no Charge upon the Land, nor has the Recognizee any Right or Demand in the Land; For the Land is not the Debtor but the Person; and the Land is charged only in Respect of the Person. Cro. E. 552. Pasch. 39 Eliz. B. R. Barrow v. Grey. ———
 Parl. Cases 74. in Case of the King v. Baden. S. P.

Baron Turner said, that Recognizances were only Charges on the Land, but could have

no Interest where there was a Prior Mortgage in Fee taken in by an Incumbrancer subsequent to the Recognizances. Hard. 173. Mich. 12 Car. 2. Hacket and Bedell v. Wakefield.

3. *Fine by Tenant for Life to Reversioner in Fee*, and declared the Uses to Reversioner and his Heirs, on Condition to pay 40*l.* per Ann. to him for his Life, and for Default to the Use of the Conufors.—This Annuity is a Lien on the Land into whatsoever Hands it comes, and for Non Payment he may enter. Cro. E. 688. Trin. 41 Eliz. B. R. Smith v. Warren.

4. A *Judgment after a Mortgage* cannot affect the Land in Mortgage in Law. Arg. Mich. 1682. Vern: 64. in Case of Girling v. Lee.
 A Judgment is only a General Security, and not a specifick Lien on the Land. Wms's Rep. 279. Trin 1715. in Case of Finch & al. v. Lord Wincheifca.

5. A. a *Purchasor mortgaged back* the Land for Part of the Purchase Money, and gave a Note for other Part. A. devised his Land for Payment for his Debts. Tho' the Note, was for Part of the Consideration Money, and tho' the same Person that mortgaged had the real Estate in him, yet per Cur. he can have no Preference, but must accept Satisfaction in Proportion only with the other Creditors. 2 Vern. 281. Mich. 1692. Bond v. Kent.
 A Bond was given for part of the Purchase Money, and the Bond was left, and the Purchasor being dead, the Ld Chancellor

was of Opinion, to charge the Widow and Son with Payment of the Money due on the Bond, in Regard of the Land being in their Possession. Hill. 1 Jac. Carey's Rep. 35. Hearte's Case.

6. The *Elegit* it self (when sued out) doth not immediately touch the Lands; For if the Chattels are sufficient, and it appears so to the Sheriff, he ought not to extend the Land. Arg. Parl. Cases 74. in Case of the King v. Baden.

7. A. Cesty que Trust of a Farm, whereof eight Acres were Copyhold, and which were agreed to be settled on A. and a Covenant to surrender them accordingly, mortgaged the Farm to B. by the Name of such a Farm, with the General Words, *All and singular the Lands and Tenements Parcel thereof, or usually occupied therewith &c. but says nothing of the eight Acres being Copyhold, nor does he covenant to surrender them.* A. died, the Surrender of the Copyhold eight Acres not being made to him. B. got a Decree of Foreclosure against C. the Sister and Heir of A. And afterwards, the Covenantor (the Father of A.) being indebted by Judgment to J. S. at the Request of C. surrendered the eight Acres to J. S. J. S. brought an Ejectment, and got Judgment, whereupon B. brought his Bill for Relief. And the Question was, between B. the Mortgagee and J. S. whether the Mortgage was a Lien on the Copyhold; And the Ld Chancellor held, that the Copyhold was never by the Mortgage under any specifical Lien, and that it would be the same, were there no Creditor in the Case. And he took a *Difference* where a Man originally lends Money upon a Security, and having Money due on a Bond, tells the Debtor he will trust him no longer upon personal Security, and thereupon he mortgages Land to him; and where a Man already trusted with Money, seems insolvent, and thereupon his Creditors to bolster up their Security as well as they can, find out Copyhold Lands, and get a Surrender of them. For in the first Case, he trusts his Money on the real Security; but in the later he does not. And so dismissed the Mortgagee's Bill, and affirm'd a Decree made by the Master of the Rolls. G. Equ. Rep. 13. Hill. 7 Annæ Oxwith v. Plummer.

8. The Creditors of J. S. brought a Bill for Debts, viz. Mortgages, Judgments and Bonds; upon one of the Bonds the Defendant was out-
 C c law'd,

law'd, and upon one of the Judgments the Recoverer had brought an Action of Debt; and the Question being concerning the Priority of Payment, it was objected, that the Judgments were by Confession, and it was not equitable that it should be in the Power of the Party to prefer one Creditor to another, but that seem'd to be over-rul'd: And as to the Outlawry, the Court rul'd, that being only upon *Mesne Procefs before Judgment*, it did not alter the Nature of the Debt, nor create a Lien upon the Land in this Case: But that where there is an Outlawry, and a Seizure thereupon, the Debt attaches upon the Land, and shall be preferred to a Judgment, tho' prior to the Outlawry; but that it is the Seizure that gives the Preference. 1 Salk. 80. Trin. 1714 in Canc. Erby v. Erby.

9. A Decree for a Debt does not bind the Real Estate, it acting only in Personam, not in Rem, and the Remedy upon a Decree to affect the Land, is only for a Contempt, whereupon the Party proceeds to a Sequestration. 2 Wms's Rep. (621.) Trin. 1731. by the Master of the Rolls. Bligh v. Lord Darnley.

(B) What Agreement is a Lien on Lands.

1. **A.** Was *Jointress for Life, Remainder to B. in Tail, Remainder over. B. agreed with A. that if A. would make a conditional Surrender of her Estate for Life, to enable B. to suffer a Recovery, and mortgage Part of the Premises, then B. would settle the Residue, together with the Equity of Redemption upon himself for Life, Remainder to his first &c. Son, Remainder over. A. surrendered. B. suffered a Recovery, and made a Mortgage, but never made the Settlement after the Agreement. B. became indebted by Bond and Judgment. The Agreement was not in Writing, but acknowledged by Debtors under B's Hand. The Agreement was decoyed by Ld Ch. Harcourt, at the Suit of the Remaindermen in the intended Settlement, to be carried into Execution and affirmed in the House of Lords. But afterwards, a Point came before Ld Ch. Cowper, whether the Creditors by Judgment subsequent to the Agreement should be paid their Judgments; it was argued, that from the Time of this Agreement, B. was but as a Trustee for the Uses in the Settlement, and as such could not bind the Estate; to which it was answer'd, that this Case was not like that of a Trustee out of Possession; For B. was in Possession, and as he was seised of the legal Estate in Fee, so he was also the visible Owner of it, and might be supposed to be truted upon the Credit of this Estate. Ld Cowper laid, that *Articles for a valuable Consideration, and the Money paid, will in Equity bind the Estate, and prevail against any Judgment Creditor, mesne betwixt the Articles and the Conveyance*; but this must be where the Consideration is somewhat adequate to the Thing purchased; otherwise, if the Money paid is but a small Sum, in Respect of the Value of the land, this shall not prevail over a Judgment Creditor; That in this Case, the Consideration was not adequate; For A. parted with no Money, but only made a conditional Surrender. Wms's Rep. 277. to 283. Trin. 1715. Finch & al. v. Ld Winchelsea.*

See Jointresses.

(C) Waived by what Acts.

1. **T**HE Creditors of J. S. brought a Bill for Debts, which Debts were Mortgages, Judgments and Bonds; upon one of the Bonds the Defendant was outlaw'd, and upon one of the Judgments the Recoverer had brought an Action of Debt, and the Question was upon the Priority

Priority of Payment. It was objected, that the *bringing Debt upon the Judgment* was a Waiver of the *Dien* created by that Judgment; For it can only extend to the Land that the Party had at the Time of the later Judgment; but the Court held, that the bringing Debt upon the Judgment not postpone this to other Judgments, and that it was the Act of the Attorney, and that it would be no Waiver, because there was no other Remedy after the Year and Day at Common Law. 1 Salk. 80. Trin. 1714. in Canc. Erby v. Erby.

(D) *Descends* on whom.

1. **I**T was demanded in Bank, of what Effect Judgment in Warrantia Chartæ *pro Loco et Tempore* is, and it was moved, that *Warranty is only a Covenant*, and by this Covenant a Man *shall not bind the Land to be delivered in Value to whosoever Hands it comes after by Purchase*, or otherwise; For this is a Mischiefe, *Quod Verum est*; he shall not be so bound by the Warranty or Covenant Real; but *otherwise* it seems, *by the Special Judgment* above. Br. Warrantia Chartæ, pl. 8. cites 2 H. 4. 14.

2. Lien Real descends only on the Heir at the Common Law; but Lien Personal binds all, as Heirs in Gavelkind &c. As if A. binds himself and his Heirs in a Bond &c. Per Coke Ch. J. Cro. J. 217. Hill. 6 Jac. B. R. in Case of Game v. Simms.

[See Doucher, and other proper Titles.]

(A) Life.

1. **L**ife shall not be twice in Jeopardy, viz. once at the Suit of the King, and once at the Suit of the Party. Br. Appeal, pl. 9. cites 44 E.

3. 38.

2. If a Man be once acquitted, he shall not put his Life in Jeopardy again for the same Offence; *Quod nota bene*. Br. Appeal, pl. 12. cites 45 E. 3. 25. and 21 E. 3. 24. acc.

3. *The Law favours Life*. See Maxims.

* Limitation.

(A) Time of Limitation.

1. **I**N 11 H. 3. a Man could not claim in a Writ of Right any Land, ante Annum & Diem quo Avus Avi de H. 3. (qui fuit H. 1.) fuit Vivus & Mortuus. 11 H. 3. Rot. 7. between Richard de Hoff, and John de Rengny, adjudged, and † put positively. (Note that this was before the Statute of Merton.)

* Limitation, as it is taken in Law, is a certain Time prescribed by Statute, within which the Demou-
dant in the Action must prove himself or some of his Ancestors to be seized. Co. Litt. 114. b.
2. But † Orig. (misc)

2. But a Man ought then to claim Land of a Seisin, the Year and Day in which H. 1. fuit Vivus & Mortuus. 11 D. 3. Rot. 7, aforesaid, admitted.

* By 20 H.

3. cap. 8.

Touching Conveyance of Descent in a Writ of Right from any Ancestor, from the Time of King Henry the Elder, the Year and Day: It is provided, that from henceforth there be no Mention of so long Time, but from the Time of King Henry our Grandfather. And this Act shall take Effect at Pentecost, the 21st. Year of our Reign, and not afore. And the Writs before purchased shall proceed; Writs of Mortdancestor of Nativis; and Entry, shall not pass the last Return of King John from Ireland into England. And this Act shall take Effect as before is declared; Writs of Novel Disseisin, shall not pass the 11t. Voyage of our Sovereign Lord the King that now is into Gascoine. And this Provision shall take his Effect from the Time aforesaid, and all Writs purchased before shall proceed.

* Merton cap. 8.

3. Rot. Parliamenti 43 E. 3. Numero 16. The Commons pray because all the Time of King Richard is held for Time of Memory, of which Time no Man can have true Cognizance that it please to limit in certain the Time of Memory, so that it doth not pass the Coronation of the King Edward Grandfather of our Lord the King who now is. And like Petition for diverse Opinions and Michiefs, which happened 46 E. 3. N^o. 28. But no Assent to them. But the Answer to the first is, Let the Law stand which hath been used hitherto till it be otherwise ordained.

4. Westm. 1. 3 E. 1. 39. *Seisin of One's Ancestor in a Writ of Right shall be from the Time of R. 1, in an Assise of Novel Disseisin, & Nuper obiit from H. 3. his Voyage in Gascoign, and in a Mortdancestor, Cofnage, Ayel and Neise from the Coronation of H. 3.*

5. The ancient Limitation in Writs of Novel Disseisin & Nuper obiit, was post primam Transfretationem of King Henry; and the Limitation in Writs of Ayel, Cofnage, Mortdancestor, and in Writs of Entry, was after the Coronation of King Henry, and such a Limitation was in Avowry as in Assise, and the Limitation in Writ of Right was from the Time of King Richard the first, and the Limitation of Common was before the Coronation of King Henry, which see amongst the Statutes. Nevertheless note now, that all these Limitation are void, and a new Limitation made by the Statute of 32 H. 8. 20. Br. Limitation pl. 4. cites 5 Ass. 2.

* Ld Coke calls this a most profitable and necessary Statute. Co Lit. 115. a.— This Act does not re-

frain the King.

Pl. C. 244. Per Weston J.—

A Sci. Fa. to execute a Judgment, and a Quid Juris

clamat are not remedied by this Statute; because no Lands are demanded by them. Bendl. 194. in Case

of Whitton v. Compton.

All the ancient Statutes of Limitations are repealed by this Statute Br. Limitation pl. 1.—

It seems clear,

that the new Limitation extends to Copyhold as well as to Freehold; For the Statute is, that he shall not make

Prescription, Title, nor Claim &c. and those who claim by Copy make Prescription, Title and Claim

&c. and also the Plaints are in Nature and Form of Writ Domini Regis ad communem Legem &c. and

those Writs, which are now brought at the Common Law, are ruled by the new Limitation, and there-

fore the Plaints of Copyhold shall be of the same Nature and Form. Br. Limitation, pl. 2. cites 6 E. 6.

6. * 32 H. 8. cap. 2. S. 1. Enacts that, No Person or Persons shall sue, have, or maintain any Prescription, Title, or Claim, to or for the Possession of his Ancestor, or Predecessor, and declare and allege any farther Seisin or Possession of his or their Ancestor or Predecessor, but only of the Seisin or Possession of his Ancestor or Predecessor, which hath been, or now is, or shall be seised within 60 Years next before the Teste of the same Writ, or next before the said Prescription, Title, or Claim so to be sued, commenced, brought, made or had.

S. 2. In a Mortdancestor, Cofnage, Ayel, Writ of Entry, Sur-disseisin, or any other possessory Action upon the Possession of his Ancestor or Predecessor, it shall be within 50 Years before the Teste of the Original of any such Writ.

* See (N).

S. 3. In a Writ upon the Parties * own Seisin or Possession, it shall be within 30 Years before the Teste of the Original of the same Writ.

* Avowry.—

This Act as

to Avowries,

S. 4. In an * Avowry or Cognizance for † Rent, Suit, or Services † of the Seisin of his Ancestor, Predecessor, or his own, or of any other, whose Estate

Estate he pretends to have, it shall be within 40 Years before the making of such Avowry or Cognizances. extends only to Rent, Suit, or Service, so as

Relief is not within the Purview of the Law; For it is no Service but a Duty, by Reason of the Tenure and Service; and albeit *Homage, Fealty, and Escuage, and other accidental Services* (being Services) are within the Letter of the Law, yet they and all other accidental Services, as *Heriot Service*, or to cover the Lords Hall, and the like (for that they may not happen within the Times limited by that Act) are by Construction out of the Meaning of this Statute; but albeit Relief be not within this Statute, yet in Avowry for Relief, the Avowant must allege a Seisin of the Services within the ancient Statute, viz. *Post primam transfretat. Regis Henrici in Gaiconiam*, and the Seisin of the Services is traversable. And so it is of Homage, and Fealty, and Escuage; albeit they be out of the Statute of 32 H. 3. yet are they within the ancient Statute. 2 Inst. 95, 96.——So of a Rent-Charge. *Bendl. 194. in Case of Whittton v. Compton.*

In Replevin, the Defendant avowed upon a Tenure by *Fealty, Rent, and Suit of Court*; the Plaintiff in his Replication confessed the Tenure, but that the Avowant, nor none of his Ancestors were seised of the said Services, or any of them within 50 Years; the Defendant demurr'd, and had Judgment; For Fealty, Homage, and such casual Services, as perhaps may not happen within 50 Years, are not within this Statute. 3 Lev. 21. Trin. 33 Car. 2. in *C. B. Bennet v. King.*——S. P. resolv'd 10 Rep. 10. b Mich. 17 & 18 Eliz. *Bevil's Case.*——S. P. is left a Quare by the Reporter. D. 350. b. pl. 19. Mich. 15 & 16 Eliz.

‡ See (M).——† This Statute extends not to a *Cessavit, Rescous &c.* Arg. Litt. R. 342.——The Writ of *Cessavit* had gone no further, this Word should be constr'd according to the Subject Matter, sometimes for actual Seisin, sometimes for Seisin in Law; And therefore, as to the Writ of *Right, Mortdancestor, Aiel, &c. Assise, &c.* it shall be intended of an actual Seisin, and not of a Seisin in Law; so that the three first Branches are to be intended only of an actual Seisin; and the fourth Branch concerning * *Avowries* extend to Seisin in Law, as well as actual Seisins. 4 Rep. 10. in *Beril's Case.*——

* See Avowry.

S. 5. * *Formedons in Reverter or Remainder, and Scire Facias upon Fines,* * See pl. 8
shall be sued within 50 Years after the Title or Cause of Action accrued, and S. 1. and See
not after. (L) pl. 2, 3

S. 6. *The Party, Demandant, Plaintiff, or Avowant, that (upon Traverse or Denier by the other Party) cannot prove actual Possession or Seisin within the Times above limited, shall be for ever after barred in all such Writs, Actions, Avowries, Cognizance, Prescription &c.*

S. 11. *Provided, that in any of the said Actions, Avowries, Prescriptions &c. the Parties grieved may have an Attaint upon a false Verdict given.*

7. 1 Ma. 1 Parl. 2. Sess. 4. S. 4. Enacts, that *The Statute of 32 H. 8.* Before this
2. *shall not extend to a Writ of Right of Advowson, Quare Impedit, Assise of Darrein Presentment, Jure Patronatus, Writ of Right of Ward, Incumbent of an Advowson had lived 60 Years, and died, and a Stranger had presented, or if one had a Seigniorship by Knight-Service, and had not been seised of it by 60 Years, by Reason of his Tenant living so long, or otherwise, and the Tenant had died, his Heir within Age, and another had seised him, and enter'd into the Land; in the one Case, he could not have Quare impedit, or Darreine Presentment, nor in the other, Right of Ward or Ravishment of Ward. And such Mischiefs, from Persons living so long, was not remedied either by Exposition of the Words, or by the Equity of the Act, till the same was remedied by this Statute; that Act being made to restrain it to a Time for the Tranquility and Repose of the People, in which Case, no Time shall be gain'd by Exposition or Equity, beyond the strict Words of the Act. Per Catlin. Pl. C. 371. b. in Case of Stowell v. Zouch.*

8. 21 Jac. 1. cap. 16. S. 1. *For quieting of Men's Estates, and avoiding of Suits. Be it enacted &c. That all Writs of * Formedon in Descender, Formedon in Remainder, and Formedon in Reverter, at any Time hereafter to be sued or brought, of or for any Manors, Lands, Tenements, or Hereditaments, whereunto any Person or Persons now hath, or have any Title, or cause to have or pursue any such Writ, shall be sued and taken within 20 Years, next after the End of this present Sessions of Parliament; and after the said 20 Years expired, no Person &c. or any of their Heirs, shall have or maintain any such Writ, of or for any of the said Manors &c. and that all Writs of Formedon in Descender, Formedon in Remainder, Formedon in*

* See (L) pl. 1. — Plaintiff in Ejectment may make Title by a Collateral Warranty, and give it in Evidence as his Title, according to 10 Rep. 97. S. 1. if a Di-

Reverter, of any Manors &c. whatsoever, at any Time hereafter to be sued or brought by Occasion or Means of any Title or Cause hereafter happening, shall be sued and taken within 20 Years, next after the Title and Cause of Action first descended or fallen, and at no Time after the said 20 Years.

feifordies after five Years quiet Possession, and the Disseisor enters, the Heir may maintain Ejectment; For the Right of Possession belongs to the Heir, tho' the mere Right be in the Disseisor. 2 Salk. 685. held per Cur. in Case of Smith v. Tyndall.

So if a Man enters by Wrong, and disseises another, and continues 20 Years in quiet Possession, yet in this and the former Case, if a Writ of Right be brought, and the Mife join'd upon the meer Right, the Verdict must be for the Plaintiff, notwithstanding the Statute of Limitations in the one Case, or the Collateral Warranty in the other. 2 Salk 685. Smith v. Tyndall. — Touching the Warranty, if a Disseisor continues Possession 20 Years, and the Disseisor enters or brings an Ejectment, the Disseisor shall maintain his Possession by the Statute of Limitations; For he has acquir'd a Jus Possessionis, tho' not a Right to the Inheritance; Per Holt Ch. J. 11 Mod. 104. S. C.

At this Day peaceable Possession for 20 Years tolls an Entry, and after such Possession a Release of Actions gives a Right, and there is no Remedy for the Fee Simple by Writ of Right after such Possession, and a Release of Actions. Jenk. 16. pl. 23. — * A seised in Fee having Issue two Daughters, L. and M. devised his Land to B. Son of L. in Fee, L. being dead at the Time of the Devise. B. died without Issue, and the Heir on the Part of the Father of B. and W. R. the Heir of M. enter'd, and took the Profits by Moieties for 20 Years together, thinking the Devise void for a Moiety. Now the Mistake being discover'd, C. brought an Ejectment against W. R. and upon a special Verdict found, it was objected, that the Devise was void as to a Moiety; but that was over-rul'd; and then it was objected, that the bringing this Ejectment against W. R. admitted the Plaintiff to be out of Possession for 20 Years, and that then he was barred by the Statute. But per Cur. The Statute of Limitations never runs against a Man but where he is actually ousted or disseised; and tho' one Tenant in Common may disseise another, it must be by actual Disseisin, and not by bare Perception of the Profits only; but here B. had the whole by Devise, and W. R. is a mere Stranger; and where two are in Possession, the Law will adjudge it in him that has the Right; and the bringing the Ejectment admits nothing. 2 Salk. 423. Hill. 1 Annæ B. R. Reading v. Roylton. — If a Disseisor dies after five Years quiet Possession, and the Disseisor enter, the Heir may maintain Ejectment: For the Right of Possession belongs to the Heir, tho' the meer Right be in the Disseisor. So if a Man enters by Wrong, and disseises another, and continues 20 Years in quiet Possession: yet in these Cases, if a Writ of Right were brought, and the Mife joined upon the meer Right, the Verdict must be for the Plaintiff, notwithstanding the Statute of Limitations. 2 Salk. 685. Pasch 4 Annæ B. R. Smith v. Tyndall.

And that no Person &c. that now hath any * Right or Title of any Entry into any Manors &c. now held from him or them, shall thereinto enter, but within 20 Years next after the End of this present Sessions of Parliament, or within 20 Years next after any other Title of Entry accrued; and that no Person &c. shall at any Time hereafter, make any Entry into any Lands &c. but within 20 Years next after his or their Right or Title, which shall hereafter first descend or accrue to the same; and in Default thereof, such Persons so not entering, and their Heirs, shall be utterly excluded and disabled from such Entry after to be made; any former Law or Statute to the contrary notwithstanding.

* See (H). S. 2. Provided nevertheless, That if any Person &c. that is or shall be intituled to such Writ or Writs, or that hath or shall have such Right or Title of Entry, be or shall be at the Time of the said Right or Title first descended, accrued, come, or fallen * within the Age of 21 Years, Feme Covert, Non Compos Mentis, Imprisoned or Beyond the Seas, that then such Person &c. and his and their Heir and Heirs, shall or may, notwithstanding the said 20 Years be expired, bring his Action, or make his Entry as he might have done before this Act: So as such Person &c. or his or their Heir and Heirs, shall within 10 Years next after his and their full Age, Discoverture, coming of sound Mind, Enlargement out of Prison, or coming into this Realm, or Death, take Benefit of, and sue for the same, and at no Time after the said ten Years.

* See (I. 2). S. 3. And be it further enacted, That all Actions of Trespafs — † See (O). Quare Clausum fregit, all Actions of Trespafs, * Detinue, Action — † See (F) sur † Trover, and Replevin, for taking away of Goods and Chattels, all Actions of † Account, and upon the || Case, other than such Accounts as concern the Trade of ¶ Merchandise between Merchant and Merchant, their Factors or Servants, all Actions of ** Debt grounded upon any Lending or Contract without Specialty: All Actions of †† Debt for Arrearages of Rent, and all Actions of Assault, Menace, Battery, Wounding, and Imprisonment,

prisonment, or any of them which shall be su'd or brought at any Time after the End of this present Sessions of Parliament, shall be commenced and su'd within the Time and Limitation hereafter expressed, and not after (that is to say) the said Action upon the Case, (other than for Slander) and the said Actions for Account, and the said Actions for Trespass, Debt, Detinue, and Replevin, for Goods or Chattles, and the said Action of Trespass, Quare Clausum tregit, within three Years next after the End of this present Sessions of Parliament, or within six Years next after the Cause of such Actions or Suit, and not after; and the said Actions of *††* Trespass, of Assault, Battery, Wounding, Imprisonment, or any of them within one Year, next after the End of this present Sessions of Parliament, or within four Years next after the Cause of such Actions or Suit, and not after: And the said Actions upon the *||||* Case for Words, within one Year after the End of this present Sessions of Parliament, or within two Years next after the Words spoken, and not after.

Defendant pleaded the Statute of Limitations, the Plaintiff reply'd, that the Intestate in his Life Time filed an Original in Trespass &c. against the Testator within six Years after the Cause of Action did accrue, and that he did not appear,

but soon after died, whereupon the Intestate *recenter*, (viz.) on such a Day, filed another Original against his Executor, the now Defendant, who appeared, and the Intestate declared against him, and that he prosecuted the said first Original against the Testator, with an Intention to declare against him, if he had appeared, and averred that the Cause of Action did accrue within six Years next after the first filing the said first Original; and upon a Demurrer to this Replication, it was objected, that it was ill, because it did not appear, that the Original was returned, or made a Record in Court; for the Plaintiff should have set forth, that the Original was delivered to the Sheriff to execute, and that the Defendant not appearing, the Sheriff had returned, that the Plaintiff had found Pledges to prosecute the Writ, (viz. John Doe and Richard Doe) and that the Defendant nihil habuit in Balliva sua, by which he might be attached; all which was omitted in this Replication; and there being no Appearances or Continuances alleged, the Plaintiff ought not to have Judgment; but it was otherwise adjudged; For the filing an Original had put the Case out of the Statute, and that it was not necessary for the Plaintiff to aver, that the Writ was returned, for it shall be so intended, unless the Contrary appear on the other Side. Nels. Abr. 1127. Limitation (A) pl. 26. cites 1 Lutw. Rep. 256 Kinsley v. Heyward— This Judgment was afterwards reversed upon a Writ of Error, and the Reversal was afterwards affirmed in Parliament. Ibid.

J. S. gave a promissory Note to A. payable on Demand; A. died leaving B. his Executor, B. within the six Years sued out a *Latitat* returnable tres Mich. which was continued to Hill Term following, and died in the mean Time; C. as Executor of B. brought Action on the Note, but not till four Years after B's Death, which was 10 Years after the Note given, the 6 Years being run out at B's Death; the Defendant pleaded the Statute of Limitations; the whole Court inclined against the Plaintiff that the Plea was good, but it having been urged by Serjant Chappel, that the Case of *Rundsey v. Hayward*, was denied to be Law in the Case of *Lethbridge v. Chapman*, Mich. 3 Geo. 2. in C. B. the Principal Case was adjourned to confer with the Judges of C. B. about the Resolution in *Lethbridge's* Case. Gibb. 170. Mich. 4. Geo. 2. B. R. Willcox v Heggins— Ibid. 289. Trin. 5 Geo. 2. B. R. the Case was argued again, when it was insisted that the Note being payable on Demand makes it an executory Contract and therefore no Debt due till a Demand; but it was answered, that it is a present Duty without a Demand, and the Difference is, where the Debt is to arise upon a Collateral Act to be done according to the Case of *Cap v. Lancaster*, Cro. E. 548. and so held the whole Court, and Raymond Ch. J. said, the Case of *Lethbridge* did not come up to the Point; For there the Action was brought within 14 Months after Testator's Death, whereas in the principal Case 4 Years were run out; that in Case of Abatement by Plaintiff's Death after the 6 Years elapsed the Executor, to bring his Case within the Equity of the Statute, must make a recent Prosecution; as to which the Clause in the Statute which provides a Year after the Reversal of a Judgment &c. may be a good Direction; and of the same Opinion were the other Justices; and by Page and Probyn I. if any thing had happened to have hindered the bringing a New Action sooner, as a Contest about the Will or Right of Administration, it should have been disclosed in the Pleadings; and Judgment was for the Defendant by the whole Court.— For more of this See (G)

¶ See (F. 2).— ** See (I).— †† See (M) pl. 4.— †† See (P) Aldrich v. Duke— ||| This Statute extends not to Words which slander a Title; Per Hyde Ch. J. Cro. Car. 141. Low v. Harwood— *Scandalum Magnatum*, said to have been adjudged in the *Id* *Earl's* Case, not to be within this Statute. 21 Jac. 16. Cro. Car. 535.— Litt. R. 342. S. C. cited Arg. as agreed

Six Years are limited for Action per quod *Crimen Felonie intestat*, but if the Action for Words be founded on an Indictment, or other Matter of Record, this is not within the Statute of Limitations, but the Action may be brought at any Time. Sid 95. in a Note there.

S. 4. And notwithstanding be it enacted, That if in any the said Actions or Suits, Judgment be given for the Plaintiff, and the same be reversed for Error, or a *verdict* pass for the Plaintiff, and upon Matter alleged in Arrest of Judgment, the Judgment be given against the Plaintiff, that he take nothing by his Plea, Writ or Bill; or if any the said Actions shall be brought by Original, and the Defendant therein be Outlawed, and shall after reverse the Outlawery, that in all such Cases, the Party, Plaintiff, his Heirs, Executors, or Administrators as the Case shall require, may commence a new Action or Suits,

A filed an Original in a Plea of Trespass upon the Case against B. for Monies lent, and died. The Executor brought In-

deb. Ass. a- Suit, from Time to Time within a Year after such Judgment reversed, or such Judgment given against the Plaintiff, or Outlawry reversed, and not after.

her Testator did, Defendant pleaded the Statute of Limitations, to which Plaintiff reply'd as before, that her Testator died Pendente Brevi suo Originali, and averr'd, that Defendant had promised &c. within six Years of the said Original. Defendant demurr'd, It was insisted for the Plaintiff, that this Case was within the Equity of this Proviso. That if in any of the said Suits a Judgment given for the Plaintiff be arrested after Verdict, or if the Action be by Original, and the Defendant be outlawed, and after shall reverse the Outlawry, that in all such Cases, the Plaintiff his Heirs, Executors, &c. may commence a new Action within a Year after &c. But per Cur. tho' this is a hard Case, yet the Statute has not provided for it, and Judgment was given for the Defendant. Lutw. 261. to 264. Hill 5 & 6 W. & M. Gargrave v. Every.

S. 5. And be it further Enacted, That in all Actions of Trespass, Quare Clausum Inegit, hereafter be brought, wherein the Defendant or Defendants shall disclaim in his or their Plea, to make any Title or Claim to the Land in which the Trespass is by the Declaration supposed to be done, and the Trespass be by Negligence, or Involuntary, the Defendant or Defendants shall be admitted to plead a Disclaimer, and that the Trespass was by Negligence or Involuntary, and a tender or offer of sufficient amends for such Trespass before the Action brought, whereupon, or upon some of them, the Plaintiff or Plaintiffs shall be enforced to join Issue; and if the said Issue be found for the Defendant or Defendants, or the Plaintiff or Plaintiffs shall be Nonsuited, the Plaintiff or Plaintiffs shall be clearly barred from the said Action or Actions, and all other Suit concerning the same.

S. 6. And be it further enacted, by the Authority aforesaid, That in all Actions upon the Case for slanderous Words, to be sued or prosecuted by any Person or Persons in any the Courts of Record at Westminster, or in any Court whatsoever, that hath Power to hold Plea of the same, after the End of this present Session of Parliament; if the Jury upon the Trial of the Issue in such Action, or the Jury that shall enquire of the Damages, do find or assess the Damages under 40 Shillings, then the Plaintiff or Plaintiffs in such Action shall have and recover only so much Costs as the Damages so given or assessed amount unto; without any further Increase of the same, any Law, Statute, Custom, or Usage to the contrary in any wise notwithstanding.

*S. 7. Provided nevertkeless, and be it further enacted, That if any Person or Persons, that is or shall be entitled to any such Action of Trespass, Detinue, Action sur Trover, Replevin, Actions of Account, Actions of Debts, Actions of Trespass for Assault, Menace, Battery, Wounding or Imprisonment, Actions upon the Case for Words, be or shall be at the Time of any such Cause of Action given or accrued, fallen, or come within the Age of 21 Years, Feme Covert, Non Compos Mentis, Imprisoned, or * Beyond the Seas, that then such Person or Persons shall be at Liberty to bring the same Actions, so as they take the same within such Times as are before limited, after their coming to, or being of full Age, discoverd, of sane Memory, at large, and returned from beyond the Seas, as other Persons having no such Impediment should have done.*

Infant by his Guardian brought Action upon the Case upon Assumpsit; the Defendant pleaded the Statute of Limitations, and Plaintiff demurred; and the Question was upon this Proviso, which saves to Infants Actions of Trespass &c. and it was urged that Trespass upon the Case is not mentioned in this Saving. But the Court were of Opinion (Ch. J. absente) that this Saving, extends to all Actions upon the Case, (as without Doubt it was intended :) For there is a Saving of Trespass generally, and all Actions upon the Case are Trespasses, (Scilicet) Trespass upon the Case, and it shall be mischievous, if other Construction shall be made. Sid. 453. Pasch. 22 Car. 2. B. R. Chandler v. Violet.—S. P. Lutw. 242 Trin. 4 W. & M. Gery v. Coke.—It was argued, that this Clause excepts, by Reason of Infancy, Actions on the Case for Words only, and extends to nothing more. But the Court held it within the Equity of the saving Clause, tho' not express'd; For the Intention was not to preserve a petty Action for Words, and not to save an Action for a real Duty as in this Case, and so the Plaintiff had Judgment. 2 Saund. 120. S. C.—Note, That it was said, that the Infant here ought to wait till his full Age, 6 Years being laps'd during his Infancy, and that therefore he could not pursue his Action, but agreeably to the Words of the saving Clause of the Act, which is (in 6 Years after his full Age;) But this was not regarded by the Court. And the Reporter says, it seems to him that he might well pursue his Action at any Time within Age, tho' the 6 Years are elaps'd. Ibid. 121.

An Infant after full Age, brought an *Indeb. Ass.* against an Executor, on a Promise of Testator made to the Plaintiff in the Plaintiff's Infancy (and as it is there said Arg. when he was but a Day old). The Defendant

ferdant demurred, because Actions on the Case are omitted in this Proviso; and said, it would be hard after so many Years to charge the Executor. But the Ch. Justice and 2 J. held, that upon the whole Frame of the Act, it was strong against Defendant, and it would be strange that Plaintiff might in this Case bring Debt, and not an Indeb. Ass. and were of Opinion, that *Actions of Trespass* mentioned in this Statute comprehend *this Action*; because it is a *Trespass upon the Case*, and the Words of the Proviso saves the Infant's Right in Actions of Trespass. And therefore tho' there are not particular Words in the Enacting Clause which relate to this Action, yet this Proviso restrains the Severity of that Clause, and restores the Common Law, and so to be taken favourably, and it being within the Reason with other Actions therein mentioned ought also to be within the same Remedy. But Ellis J. doubted. But the Plaintiff had Judgment. 2 Mod. 71. Pasch. 28 Car. 2. C. B. Croser v. Thomlinson.

* In *Assumpsit* Defendant pleaded *Non-assumpsit infra sex Annos*; the Plaintiff replied, that he was *beyond Sea* till such a Time, after which he brought the present Action such a Day; Defendant demurred. It was argued that tho' *Assumpsit* be not within the Letter, yet it is *within the Equity* of it; And *quando Verba sunt Specialia, Ratio autem generalis, Statutum generaliter est intelligendum*. And the Court being of this Opinion, Judgment was given for the Plaintiff. Gibb. 51 Trin. 2 & 3 Geo. 2. B. R. Anon.

9. Stat 10 W. 3. cap. 14. S. 1. *No Fine or Common Recovery, nor any Judgment in any real or personal Action, shall be reversed or avoided for Error, unless the Writ of Error, or Suit for the reversing such Fine, Recovery, or Judgment, be brought and prosecuted with Effect within twenty Years after such Fine levied, or such Recovery suffered, or Judgment signed or entered of Record.*

S. 2. *If any Person intitled to such Writ of Error shall, at the Time of such Title accrued, be within the Age of 21 Years, or Covert, non Compos Mentis, imprisoned or beyond the Seas, such Person, his or her Heirs, Executors, or Administrators, may bring their Writ of Error within five Years after full Age, Discoverture, coming of sound Mind, Enlargement out of Prison, or returning from beyond the Seas, or Death.*

10. By 12 & 13 W. 3. cap. 3. *No Statute of Limitation shall bar, where the Plaintiff is staid by Privilege of Parliament.*

11. Stat. 4 Ann. cap. 16. S. 16. *No Claim or Entry to be made upon any Lands shall be of Force to avoid any Fine levied with Proclamations, or shall be a sufficient Entry or Claim within the Statute 21 Jac. 1. cap. 16. for Limitation of Actions, unless an Action shall be commenced within one Year after the making of such Entry or Claim, and prosecuted with Effect.*

S. 17. *All Suits in the Admiralty for Seamen's Wages shall be commenced within 6 Years after the Cause of such Suits shall accrue.*

S. 18. *If any Person, intitled to such Suits for Seamen's Wages, be within the Age of twenty one Years, Feme Covert, non Compos Mentis, imprisoned, or beyond the Seas, such Persons shall be at Liberty to bring the same Actions, so as they take the same within six Years after their being of full Age, discover, of sane Memory, at large, and returned from beyond the Seas.*

S. 19. *If any Person, against whom there shall be any such Cause of Action for Seamen's Wages, or against whom there shall be any Cause of Action of Trespass, Detinue, Action sur Trover, or Replevin, or of Action of Account, or upon the Case, or of Debt grounded upon any Lending or Contract without Specialty, Debt for Arrearages of Rent, or Assault, Menace, Battery, Wounding and Imprisonment, be at the Time of any such Cause of Action accrued, beyond the Seas, such Person, who is intitled to such Action, shall be at Liberty to bring the said Actions against such Persons after their Return from beyond the Seas, so as they take the same, after their Return from beyond the Seas, within such Times as are limited for the bringing of the said Actions by this Act, and by the Act 21 Jac. 1. cap. 16.*

(B) *Prevented, as to Real Actions. By what Acts.*

The same Point was ruled by Holt Ch. J. at Lent Assizes for Bucks. 12 W. 3. because a Possession for 20 Years is like a Descent, which tolls Entry, and gives a Right of Possession, which is sufficient to maintain an Ejectment. Ibid. — S. P. per Holt Ch. J. M. S. W. 3. B. R. Pulliston v. Warberton.

1. IF A. has had *Possession of Lands for twenty Years* without Interruption, and then B. gets Possession, upon which A. is put to his Ejectment, tho' A. is Plaintiff, yet the Possession of twenty Years shall be a good Title in him, as if he had still been in Possession; Ruled per Holt Ch. J. 2 Salk. 421. 1699. Stokes v. Berry.

2. The *Possession of one Jointenant* is the Possession of the other so as to prevent the Statute of Limitations. 1 Salk. 285. Hill. 2 Annæ. B. R. Ford v. Grey.

3. A *Claim or Entry* to prevent the Statute of Limitations, must be on the Land, unless there are some special Reasons to the contrary. Ibid.

(C) *Prevented; As to Personal Actions. By what Acts.*

12. Mod. 557. cites 1 Sid. 238. S. P. but it should be 228.

1. IF *Action* be commenced in an inferior Court, and then it is removed here by *Habeas Corpus*, and here they proceed de Novo; This Commencement there serves to prevent the Statute of Limitations; Per Cur. 1 Sid. 228. Mich. 16 Car. 2. B. R. in Case of Bevin v. Chapman.

2. An *Attachment of Privilege* is but as a Latitat, and not as an Original. Per Holt Ch. J. Show. 367. Rudd v. Berkenhead.

3. *Infant Executor*; Plaintiff cannot take Advantage of a *Suit commenced before by Administrator Durante Minoritate*, to avoid the Statute of Limitations. Cumb. 428. Eltob v. Thorowgood. — But per Powell J. *Executor Durante Minoritate*, and *Infant Executor*, make but one Executor successively, and such Executorship continues till 21, and then he may well have the Advantage of the *Prosecution of the Executor*, during his Minority, and so out of the Statute; ut ante, in C. B.

But Note, the Party, who sues out a Latitat, must have a

4. It hath been adjudged, that the suing out a *Latitat* within the time is sufficient to prevent the incurring of the Statute of Limitation. Carth. 233. in Case of Culliford v. Blandford

Non est inventus returned by the Sheriff, and then he must enter the *Writ upon the Roll*, and afterwards file it; otherwise the suing it out will avail him nothing. L. P. R. 19. — But the *Continuances* must be entered, which may be done by an Attorney at his Chamber. Arg. 12 Mod. 572. — To prevent the Statute, it is not enough to take out a Writ, even a proper one, but all the *Continuances*, though for six or seven Years, must be entered, and so shewn to the Court; For, if there be but an *Omission of one Continuance*, it spoils all. 12 Mod. 578.

5. Whether an *Original in Clausum fregit*, sued out in Dorsetshire above 6 Years, and *Case* brought thereon within 6 Years in London, will prevent the Statute of Limitations? 12 Mod. 568. Hayward v. Kinley.

6. In an Action on the Case the Plaintiff laid his Damages at 400 l. Defendant pleaded the Statute; Plaintiff replied, that he sued out a *Latitat* for 150 l. two Years before. On Demurrer it was insisted for Defendant, that these were different Actions, for no Man would take out a *Latitat* for 150 l. and declare ad Damnum 400 l. It is true, if the Plaintiff had averred, it had been ne and the same Cause of Action, it might have been otherwise; and so it was ruled by the Court. 8 Mod. 109. Holloway v. Thurston. — Jo. 213. Lamb v. Finch.

(D)

(D) Extends ; to what Things or Actions, touching the Realty.

1. **A**N Annuity is not within the 32 H. 8. of Limitations ; Per Coke ; And Popham thought the same, if it be by *original Grant of Annuity* ; But if it be by *Grant of a Rent-charge &c.* it is within the Statute ; to which Opinion of Popham, Fenner and Gawdy agreed. Noy. 37.

2. *Quare Impedit*, Affise of *Darrein Presentment*, and Writs of *Ward* are not within the 32 H. 8. of Limitations, and the Reason is, that some Persons live to 100, and others to 120 Years old. Jenk. 205. pl. 34.

3. A Demand of *Money wrongfully received out of Lands* is not barred by the Statute of Limitations, where the *Estate in Law is in Trustees*. 9 Mod. 33. Trin. 9 Geo. 1. Lawly v. Lawly.

As where Lands on Marriage were settled on Trustees,

with a *Proviso*, that if the *Wife should survive*, the *Trustees should permit her to receive the Rents and Profits* during her Life, as the same were at that Timelet. Her Husband let the Lands at an advanced Rent, and died ; and the Wife received such advanced Rent for several Years, and died Upon a Bill by the Heir of the Husband against the Wife's Executor, he answered, That if the Wife received more than she ought, it was above 14 Years since, and so pleaded the Statute of Limitations. But the Plea was disallowed. Ibid.

4. *Thirty Years Possession of a Cotage* is a good Title against the Lord of a *Manor*, by Virtue of the Statute of Limitations, if he should bring an *Ejectment* to recover the Possession. Per Cur. 8 Mod. 287. Trin. 10 Geo. 1. in Case of the King v. Wilby Parishioners.

5. The Court of Exchequer would not allow a Plea of the Statute of Limitations to be a good Bar to a Bill for *Tithes*. Arg. said to have been in Hil. 12 Geo. 1. G. Equ. R. 228.

Admitted by the other Side, that that Statute could not be extended to a Demand for Tithes. Ibid. 229.—And per Gilbert Ch. B. the Reason is, that not of the Nature of those Demands intended to be barr'd by the Statute. Ibid.

(E) Extends to what Things or Actions in general, touching the Personalty.

1. **P**urchase Money is barrable by the Statute of Limitations. Chan. R. 76. 9 Car. 1. Kennedy v. Vanlore.

2. *Debt upon the Statute 2 E. 6.* for carrying away his Corn, the *Tythes* not being set out, from 20 Jac. until 11 Car. The Defendant pleaded for the last three Years *Non debet*, and for the Residue the Statute of 21 Jac. 16. Plaintiff demurred. Per tot. Cur. the Statute does not extend to this Action. Cro. C. 513. Mich. 14 Car. B. R. Talory v. Jackson.

S P. Lev. 101. in Case of Jones v. Pope.—Sid. 355. S. P. in S. C.

3. Bill was to have an Account of *Monies received* by the Defendants, being *Prothonotaries of the King's Bench*, which was alleged to belong to the Ch. J. and which Monies they by their Office ought to receive for the Ch. J. by an *implied Trust Virtute Officii*. The Defendant pleaded the Statute of Limitations, 21 Jac. 16. Upon the arguing this Plea, it was insisted by the Plaintiff's Counsel, that this Trust was not within the said Statute. 1 Chan. Cases, 20. Heath v. Henly and Whitwick.

N. Ch. R. 75. S. C. — 3 Ch. R. 8. S. C. — S. where Bill was to have an Account of Money delivered by A.

(whose Executor the Plaintiff was) to the Defendant, to compound for *A's Estate*, (sequestered for Delinquency.) And in Trin. Vacation, 16 Car. 2. the Case being heard by the Lord Chancellor, Justice Twifden, and Wyndham, they declared, and were of Opinion, that the Statute of Limitations did not bar this Suit, because it was on a Trust that the Defendant had the Money for which the Account was sought. But for another Reason the Bill was dismissed. 1 Chan. Cases, 26 Sheldon v. Weidman.

Sid 357. S. C. and it was argued and agreed, that *Actio non fundatur in Statute*, as that of Debt for Tithes &c. are not within the Statute of Limitations; and

4. In *Debt for an Escape*, the Defendant pleaded the Statute of Limitations; Plaintiff demurred, because it is not pleadable in this Case, it not being *Delt upon a Lending or Contract*, as the Statute speaks, but is founded upon a *Tort*, as *Action of Debt for Tithes*, in which it was said, that the Statute has oftentimes been adjudged not to be pleadable: But then an incurable Fault was found in the Declaration, which counted only upon the Writ and Escape, and omitted the Judgment; upon which the Plaintiff prayed Leave to discontinue, which was granted, though after Argument; For the Sheriff shall not go unpunished for the Escape, by Default of the Declaration. Lev. 191. Mich. 18 Car. 2. B. R. Jones v. Pope.

For that Reason this of Debt for Escape is not; For such Action was not at Common Law, but was given by the Statute of R. 2. But *Alition on the Case for Escape lay at Common Law*, and therefore is within the Statute of Limitations, but not Debt for Escape. Nor can it be within the Clause of the Statute above, because the Action arises *ex Maleficio*, and not *ex Contractu*. — S. C. tho' it was insisted, that if the Action was not founded upon Lending, or Contract properly, yet the Law had made it a Contract, and the Statute intended to limit all Actions of Debt founded on Contract without Specialty, and has not distinguished between *Contracts in Law*, and *Contracts in Deed*, but includes all; And though it was further insisted, that this Action is not founded only upon the Statute 1 R. 2. cap. 12. but upon the Escape, which is a naked Matter of Fact; For though the Statute, and also the *Judgment and Writ of Execution, are of Record, and so Specialties*, yet the Escape, upon which the Action is founded, is mere Matter of Fact; For if the Action be founded upon Record, then the Defendant cannot plead Nil debet; Because that is no Plea to a Specialty, and that without Doubt he might plead Nil debet; And that therefore the Plea seemed good. But notwithstanding, the Court held the Plea ill, and that the Action was not within the Statute of Limitations. Saund. 37, 38. S. C.

5. The Statute intends to limit only those Actions, which arise upon a *naked Contract*, without any Writing under Seal. 2 Sand. 65. Hill. 21 & 22. Car. 2. in Case of Hodfden v. Harridge.

In Case by Assignee, it was insisted for the Plaintiff, that the Assignment and Promise, which give a new Cause of Action, are within the 6 Years, and the Assignees shall have a new 6 Years. But Curia Contra, and that the 6 Years shall be accounted from the original Cause of Action, and the *new Promise is but a Fiction in Law*. The Court inclined to give Judgment for the Defendant, but a Discontinuance was granted &c. Comb. 70. Mich. 3 Jac. 2. B. R. Ashbrooke v. Manby.

6. *Assumpsit as Assignee of Commissioners of Bankrupts*, for a Debt due by Contract to the Bankrupt; The Defendant pleaded Non Assumpsit infra sex Annos; Plaintiff demurred. It was argued, that the Statute of Limitations extends not to this Case, it being a *Debt assigned by Virtue of an Act of Parliament*; and said, that it was so adjudged in 1653. Upon which *Day was given to produce the Record*. But after, for a Fault in the Declaration, the Plaintiff, by Licence of the Court, discontinued. 2 Lev. 166. Hill. 27 & 28 Car. 2. B. R. Copley v. Dockminique.

7. The Statute of Limitations of personal Actions extends to *Indebitatus Assumpsit*. 2 Mod. 71. Pasch. 28 Car. 2. C. B.

But such Plea was allowed, and the Plaintiff moved to discontinue, which was granted Carth. 144 Trin. 2 W. & M. B. R. Rudd v. Berkenhead — In Assumpsit by Attorney for *his Fees, and Money disbursed, and Labour and Pains in prosecuting diverse Suits*, the Defendant pleaded the Statute; Plaintiff demurred. It was argued for the Plaintiff, that this Action being by several Declarations, the one for Fees only, and the other for Money expended, and Labour and Pains in the Prosecution, the Statute is not pleadable to that which is for Fees only; Because it arises by Matter of Record. But per tot. Cur. the Statute is pleadable as to the Declaration for the Fees; For the Fees are not of Record, and a Case cited, where it had been so adjudged in this Court, within two Years before. And thereupon Judgment was given generally in the principal Case 3 Lev. 367. Trin. 5 W. & M. C. B. Oliver v. Thomas.

8. Ld. Ch. J. North said, he had known it resolved, that the Statute of Limitations is not a good Plea to an Action brought by an *Attorney for his Fees*; Because they depend upon a Record here, and are certain. Pasch. 29 Car. 2. C. B. Mod. 246. in pl. 5.

9. *Damage Cleer* is within the Statute 21 Jac. because it arises out of the Action, and is not grounded on the Record. Raym. 243. Mich. 29 Car. 2. C. B. Barbe v. Burton.

10. Statute of Limitations enumerates the Actions it limits, and they are all Suits at Common Law. It is no Bar to a *Suit in Equity upon a * Trust*, nor for a † *Legacy*, nor for a ‡ *Rationabile Parte Bonorum*. 6 Mod. 25. Mich. 2 Annæ. B. R.

3 Salk. 228.
* Ch. Cases 26.
Mich. 15
Car. 2. —
† Vern. 256.

Mich. 1684. Parker v. Ash. — The Reason why a Legacy is out of the Statute is, because it may be stopped till Debts are paid. Per Holt Ch. J. 11 Mod. 44 — ‡ Litt. R. 343. — Hut. 109.

11. In the Case of *Seamen*, the Duty does not arise from the *Contract*, See (A) pl. but from the *Service done*; And therefore, tho' the *Contract were above six* S. S. 3: *Years, and any Part of the Service within that Time*, it is out of the Statute of Limitations. 6 Mod. 26. Mich. 2 Annæ, in a Note there.

(F) *Accounts.*

See (A) pl. S. S. 3.

1. **G**uardian [*his Account*] is within the Statute. Arg. Chan. Cafes, 20. S. P. Nels. Pasch. 15 Car. 2. in Case of Heath v. Henly. Ch R. 76. in S. C. —

If one receives the Profits of an Infant's Estate, and six Years after his coming of Age he brings a Bill for an Account, the Statute of Limitations is as much a Bar to such a Suit, as if he had brought an Action of Account at Common Law; For this Receipt of the Profits of an Infant's Estate is not such a Trust, as (being a Creature of the Court of Equity,) the Statute shall be no Bar to; For he might have had his Action of Account against him at Law; and therefore no Necessity to come into this Court for the Account; For the Reason, why Bills for an Account are brought here, is from the Nature of the Demand; And that they may have a Discovery of Books, Papers, and the Parties Oath for the more easy taking of the Account which cannot be so well done at Law; But if the Infant lies by for 6 Years after he comes of Age, as he is barr'd of his Action of Account at Law, so shall he be of his Remedy in this Court; and there is no sort of Difference in Reason between the two Cases. Trin. 1729. Abr. Equ. Cafes, 304. Lockey v. Lockey.

2. *Infirmul computasset* brought for a Sum certain upon an Account stated, tho' between Merchants, is not within the Exception. 1 Mod. 71. Mich. 22 Car. 2. B. R. Martin v. Delboe,

3. Account stated, but carried over to a new Account, is slipped out of Statute of Limitations is not pleadable where there was a current

Account; but if it were a stated Account above 6 Years ago, it is pleadable to it. 12 Mod 579. Mich. 13 W. 3. Cudmore v. Ellis.

4. The Statute of Limitations is no Plea in Par in an open Account; per Jeffries C. Vern. 456. Pasch. 1687. Scudemore v. White.

(F. 2) *Accounts between Merchants.*

See (A) pl. S. S. 3.

1. **A**ccount was made between A. and B. both Merchants; B. confessed 1200l. to be Arrear, but A. claimed more; Before the Account was intirely ended A. died, and his Executor filed a bill in Chancery against B. and he pleaded in Bar the Statute of Limitations of 21 Jac. this Matter was referred to three Judges who certified that it was no Bar; because the Account was not ended, and also because it was between Merchants. Jo. 401. Mich. 13 Car. Sandys v. Bloodwell.

2. The Exception as to Merchant's Accounts in 21 Jac. 16. extends only to Merchants Trading beyond Sea, and not to Inland Merchants. Chan. Cafes 152. Mich. 21 Car. 2. Sherman v. Withers.

3. Accounts stated between Merchants are not within the Proviso of the Statute 21 Jac. but Accounts Current; per three Justices, absente Keeling, but adjournatur. Lev. 287. Pasch. 22 Car. 2. B. R. Webber v. Tyrrrel.

Vent. 91. cites S. C. (as it seems) by the Name of Webber

v. Petit — S. C. by the Name of Webber v. Tyrrrel adjudged for the Defendant

2 Saund. 127.

The Defendant pleaded the Statute of Limitations, but did not say that the Cause of Action did not arise

4. Case &c. in which the Plaintiff set forth, that the Defendant was a Merchant, and sent several Goods beyond Sea, and promised, that if the Plaintiff would give him so much Money, he the Defendant, would give him so much out of the neat Proceed of such a Parcel of Goods &c. the Defendant pleaded, that the Cause of Action did not arise within six Years; and upon a Demurrer this was adjudged a good Plea; it is true, the Statute is not pleadable to an Account current between Merchants, but it is to an Account stated, as this is. Nels. Abr. 1125. Limitation pl. 13. cites 1 Mod. 70. Martin v. Delboe.

within six Years; it was insisted that this was a Sum certain and that the Cause of Action arose from the Time of the Ships coming into the Port, and the six Years are to be reckoned from that Time; Twisden said, he never knew that the word (Accounts) in the Statute was taken only for Action of Account, and that an *Injunctio Computasset* brought for a Sum certain upon a stated Account, tho' between Merchants, is not within the Exception; so Judgment was given for the Defendant. 1 Mod. 70. Mich. 22 Car. 2. B. R. Martin v. Delboe; and this is all that is there, which seems somewhat obscure. But the S. C. reported. Vent 89. sets forth, that after the Return of the Ship the Defendant with some other Owners made up an Account of the Merchandize returned in the said Ship amounting to 9000 l. whereof the Plaintiff's Share was 1700 l. which he demanded of the Defendant and that he refused to pay it &c. Kelyng. and Rainsford were of Opinion, that here being no Account stated between the Plaintiff and Defendant it was directly within the Statute; but Twisden inclined otherwise, because the Plaintiff declared upon an Account stated, and tho' that was between Strangers, yet he by bringing his Action upon it admits it, et adjournatur. — It is added there (by the Editor as it seems) that Judgment was for the Defendant and cites 1 Mod. 70, 71. for his Authority — Sid. 465. reports S. C. and that the Doubt was, whether this was an Account stated, it not being made between Plaintiff and Defendant; the Court did not deny the Difference between stated and un-stated Accounts between Merchants, as to the being or not being within the Statute, but would advise upon the Pleading, viz. whether it thereby appeared that there be an Account stated. — S. C. Lev. 298 Mich. 22 Car. 2. B. R. reports the Doubt as above, and that the Plaintiff afterwards pray'd leave to discontinue, and had it, tho' after Argument.

S. P. by North. Mod. 270 Trin. 29 Car. 2. C. B. in S. C. by Name of Farlington v. Lee.

5. Where a Merchant's Account is once stated the Plaintiff must bring his Action within six Years; but if it be adjuted, and a following Account is added, there the Plaintiff is not barred, because it is a running Account. 2 Mod. 312. Trin. 30 Car. 2. B. R. Parrington v. Lee.

4 Mod. 105. — Carth. 5. Renew v. Axton. — So Bills of Exchange for Value Received. Carth. 226. Cheevly v. Bond. — Statute excepts only Accounts current between Merchants, and not Accounts stated; if an Action is brought against a Drawer for Value received, this is no Account current, but stated. 4 Mod. 105. Patch. 4 W. & M. B. R. S. C. Jo. 401. Vent. 20. cites Webber v. Pettit.

6. Bills of Exchange and other Transactions between Merchants are not excepted out of the Statute of Limitations, but only an Action of Account. Show. 341. Mich. 3 W. & M. Cheevly v. Bond.

7. Forbearance of Suit for 20 Years will be a good Bar in Equity, tho' in a Demand by one Merchant against another; and tho' the Statute has always been construed to except Accounts between Merchant and Merchant, yet that is to be understood with this Distinction, that if open Accounts are by subsequent Acts continued, they are not barred by the Intervention of such length of Time from the original Transaction; but if such Account is deserted by the Complainant, it is in such Case barred; and the Plea of Acquiescence and also of the Statute of Limitation allowed. G. Equ. R. 224. Hill. 12 Geo. Bridges v. Mitchell.

See (A) pl. 6. S. 3. and in Note.

(G) Actions on the Case.

1. **A** Sumpfit to Indemnity; resolved that tho' Parcel of the Damnification was before six Years of the Action brought, and other Parcel within six Years, that the Action well lies, notwithstanding the Statute. 21 Jac. 16. Jo. 330. Hill. 9 Car. B. R. Peck v. Ambler.

2. Debt

2. *Debt upon Escape* is out of the Statute of Limitation. 1 Sand. 37. Mich. 18 Car. Jones v. Pope.——But an *Action on the Case* for Escape is not. Sid. 305. S. C.

3. A *Judgment in France* is to be considered here only as a simple Contract Debt, and is within the Statute of Limitations. 2 Vern. 540. Hill. 1705. Duplein v. De Rouen.

4. In Action for Case against an Executor, Plaintiff declares, that upon a marriage Treaty, it was agreed between the Plaintiff and Testator to pay the Plaintiff 100*l.* and whilst that should be unpaid, he should pay 10*l.* a Year; 28 Years after the Agreement made, the Plaintiff brought Action for all the Arrears; the Defendant pleaded the Statute of Limitations, whereupon the Plaintiff demurred; it was moved, that all could not be barred by the Statute; and Judgment was given for the Plaintiff, no Counsel being retained for the Defendant. All. 62. Pasch. 24 Car. B. R. Harvy v. Thorn.

(H) *Beyond Sea*, Infants, Feme Covert, Persons Imprisoned, Non Compos. See (A) pl. S. S. 2.

1. **P**romise to an Infant six Years after Infancy is allowed. See 2 Mod. 71. Pasch. 28 Car. 2. C. B. Crofier v. Tomlinson.

2. A. brought an Action upon the Case upon an Indebitatus Assumpsit for Wares sold; B. pleaded the Statute of Limitation of Actions in Bar; A. replied, that he is a Merchant, and was in Ireland, and did not return thence till such a Time, and shews precisely when, and that within six Years after his Return he brought this Action; upon this Replication B. demurred; and upon the Demurrer, Judgment was given for A.—B. brought a Writ of Error to reverse this Judgment and assigned for Error. 1st. That the Replication of A. upon which the Demurrer was joined is double; For first he alledgeth, that he is a Merchant, and so is a Person out of the Statute of Limitations: And 2dly, he shews that he brought his Action within six Years after his Return, which is needless. 2dly. he saith, that he did not return into England, whereas the Statute is General; if he return, and he may return into Wales; but to that the Court answered, that to return into England, or into Wales, was all one as to the Intent of the Statute. 3dly. the Action was an Action upon the Case and that Action is not mentioned in the Statute; but Roll Ch. J. said, this is no new Case; for it hath been ruled that an Action upon the Case is within the Statute; Jerman J. said, the Proviso of the Statute is intended to be as large as the Body of the Act, Nicholas J. to the same Effect, and said, that the word Trespass mentioned in the Act doth comprise in it an Action upon the Case; the Judgment was affirmed, Nisi. Sti. 230. Trin. 1649. B. R. Robinson v. Walker.

3. A. was *falsely imprisoned for 13 Years together*; the Statute of Limitations shall not run upon him whilst in Prison; but he shall have six Years to bring his Action after Enlargement; so tho' the wounding was above six Years ago. Cumb. 26. Trin. 2 Jac. 2. B. R. Aldrith v. Duke——3 Mod. 110. S. C.

4. Statute 4 & 5 Annæ. 16. alters the Law in Case of Limitations as to *Defendant's being beyond Sea*, so that now the Limitation is prevented by it. 2 Salk. 420. Trin. 1 W. & M.

5. Trespass &c. for an *Assault &c. at Fort St. George in partibus transmarinis (viz.) apud London*, and for detaining him in Prison till he made Fine of 200*l.* &c. and taking from him his Goods, viz. 3000 *Pagodas*, the Defendant as to all, besides the taking the *Pagodas*, pleaded, that the Cause of Action did not arise within four Years; and as to the taking the *Pagodas*, that it did not arise within six Years; the Plaintiff replied as to the Trespass, In Assumpsit Defendant pleaded Non-assumpsit infra sex Annos; the Plaintiff replied that

the Debt was *pass*, that *he was beyond Sea*, and as to the taking the *Pagodas*, that the Contracted *Cause of Action did arise within six Years*; Defendant demurred; the Court at Teneriff resolved, the Statute of Limitations does not by Equity extend to this Ultra Mare Case, where the Defendant was beyond Sea; for the Plaintiff might have *viz in Paro- Chila &c* sued an Original against the Defendant and continued it for as many Years Warda præ- as he pleased. Lutw. 946. Hill. 11 W. 3. C. B. Davis v. Yale.

Cheap (London) and that within six Years after his Return he brought the Action; it was urged, that this Case is not within the Statute, which saves the Action till the Defendant returns; but here it is founded upon the Petition of the Plaintiff which is not mentioned in the Statute; but per Cur. it is within the Reason and Intent of the Statute, and gave Judgment for the Plaintiff. Lev. 143. Mich. 16 Car. 2. B. R. Beven v. Clapham. Sid. 228. S. C. but this Point is not mentioned there. As to the Pleading the Statute of Limitations the Absence of the Defendant is not material; For the Act of 21. Jac. 16. provides only for the Absence of the Plaintiff, per Cur. Hard. 502 Mich. 20 Car. in the Exchequer in Case of Berkley v. Morrice.

See (A) pl.
S. S. 3.

(I) Debt.

1. **D**EBT upon Tally is not within the Statute of Limitations; per Windham J. Sid. 306. Mich. 18 Car. 2. B. R. in Case of Jones v. Pope.

2. Statute of Limitations does not extend to *Debts upon Copyhold Fine*. 1 Lev. 273. Trin. 21 Car. B. R. in Case of Hodgson v. Harris. Per Twifden J. said that it had been so adjudged.

S. C. Lev. 273. the Court inclined, that it was not within the Statute, but adjournatur. — 2 Saund. 64. S. C. and after 2 Arguments the Court resolved for the Plaintiff, viz. Kelynge Ch. J. principal-

3. Submission to an Arbitrement was by Parol, and Debt was brought for 15*l.* upon Award in writing under Seal; the Defendant pleaded the Statute 21 Jac. 16. and said, that it was *not brought within three Years*; and upon a Demurrer the Doubt was, whether Debt upon Award be within the said Statute, the Words of which are to this Purpose; Actions of Debt grounded upon any Lending or Contract without Specialty; the Court were of Opinion, that Debt upon Award is not within the said Statute; and they did not ground their Opinion upon the Writing and Sealing, because this did not make it a Deed; but because *this is no Action*, which is grounded upon Lending or Contract, which Debts are only within this Statute; and the next Term the Defendant perceiving the Opinion of the Court agreed to waive the Plea above, and pleaded a new issuable Plea. Sid. 415. Pasch. 21 Car. B. R. Hodfden v. Harridge.

ly, that there was a sufficient Specialty to prevent the Statute of Limitations, and Twifden J. principally that this Action was not within the Limitation of the Statute, because it was not founded upon any Lending or Contract, the other Justices consenting to both Points; and so a Rule was given for Judgment for the Plaintiff, Nisi &c. and afterwards the Rule was made absolute, and the Plaintiff had his Judgment accordingly; whereupon the Defendant brought a Writ of Error, but afterwards was Non-suit as the Reporter, who was Counsel in the Cause for the Plaintiff, said it was related to him. Ibid. 67. — The Action must be brought for the Money awarded and not upon the Assumpsit to stand to the Award; per Holt Ch. J. 11. Mod. 44.

S. P. Sid. 415. in Case of Hodfden v. Harridge. And in an Action of Debt brought by the said Plaintiff against the same Defendant it was held upon Demurrer, that Debt did lie

4. The Statute of Limitations does not extend to *Debt on the 2 E. 6. for not setting out of Tythes*, because *oritur ex Maleficio*. Mod. 246. Pasch. 29 Car. 2. C. B. in Case of Cockram v. Welby.

5. Case was brought against a Sheriff, for that he levied such a Sum of Money upon a *Fi. Fa.* at the Plaintiff's Suit, and did not bring it into Court at the Return of the Writ; Per quod deterioratus est &c. Defendant pleaded the Statute 21 Jac. 16. it was insisted, that this is within the Statute; because it *Ex quâ Contractu*; to which it was answered on the other side, that this Action was not brought upon the Contract, but that if they had brought an *Indeb. ass.* then the Plaintiff had grounded himself on the Contract and there had been more Colour to bring him within the Statute; but that this was Action on the Case for not having the Money here at the Day,

Day, per quod &c. North said that Indeb. Ass. would lie in this Case against the Sheriff, or his Executors, and then the Statute had been pleadable; and in the next Trin. Term the Plaintiff had Judgment Nisi Causa &c. if the Fi. Fa. had been returned, then the Action would have been grounded upon the Record and it was the Sheriff's Fault that the Writ was not returned; but that however the *Judgment in this Court is the Foundation of the Action.* Mod. 245, 246. Patch. 29 Car. 2. C. B. Cockram v. Welby.

against the Sheriff for the Money before the Return of the Writ, and that this Action is not within the Statute of Limitations;

For tho' it be not a Matter of Record till the Writ returned, yet it is founded on a Record and has a strong Relation to it. 2 Show. 79. Trin. 31 Car. B. R. Cockram v. Welbye.

(I. 2) Detinue.

See (A) pl. S. S. 3.

1. **P**Laintiff brought a Writ *De Rationabili Parte Bonorum*, and counted of Custom in the County of Nottingham, and shewed all specially, and the Conclusion was, that he *detaineth particular Goods of the party Plaintiff*, which appertained to him as his Part and Portion; and upon *Non detinet* pleaded, it was found that the Plaintiff was intitled to this Action many Years before the Statute of 21 Jac. and that he had not brought his Action within the Time limited by the said Statute; and upon the special Verdict, the Case being argued by Serjeant Ward for the Plaintiff, it was adjudged for the Plaintiff. Hutt. 109. Trin. 6 Car. Shervin v. Cartwright.

It was resolved that this is an original Writ in the Register, and tho' it concludes upon the Detinue, yet it is not *Detinue*, and therefore is not within the Statute

of 21 Jac. which was made with *Intent to limit usual Actions*; and therefore Judgment for the Plaintiff. Litt. R. 341. Trin. 6 Car. C. B. S. C. by Name of Sherwin v. the Executors of his Father.—6 Mod. 25, 26. Arg. S. P. and says the Reason given why a *Rationabili Parte Bonorum* is not barred by the Statute of Limitations is, because it is not a *Common Law Proceeding*, but according to a particular *Custom*.

(K) Error.

BY 10 & 11 W. 3. 14. No Fine, Common Recovery, or Judgment shall be reversed for Error unless the Writ or Suit be commenced and prosecuted with Effect within 20 Years after, provided that Persons disabled, as Infants &c. his Heirs, Executors &c. may have Writ of Error within 5 Years after such Disability removed.

(L) Formedon.

See (A) pl. 6. S. 4. and pl. 8. S. 1.—Bendl. 195. S. C.—D. 2-8. a. pl. 2. S. C. and 3. Justicesheld, that this Formedon in Descender is out of the Statute of 32 H. 8. and the Seisin of the

1. **I**N Formedon the Demandant declared of a Gift to his Ancestor in Tail, who was seized in Time of H. 6. and conveyed the Descent to R. and alleged that he died within 50 Years, and from R. alleged the Descent to the Demandant; the Tenant demurred, because the *Seisin* was not alleged within 60 Years according to the Statute; but adjudged for the Demandant; because Formedon is not a Writ of Right; For it lies of Rent which a Writ of Right does not, and Formedon is founded upon the Gift, which must necessarily be shewn. And. 16. pl. 33. Mich. 10 & 11 Eliz. Whitton v. Sir H. Compton.

Donec never was traversable, nor intended to be within the ancient Statute of Limitations; For the Formedon was given 10 Years after making the Statute of Westminster 1. but Welsh J. doubted, and afterwards the Demandant had Judgment

2. In Writ of Formedon *in the Reverter, or Remainder, or Sci. Fa. upon a Fine of such Nature*, the Demandant need not *allege*, either in the Writ or Count any Limitation by the Statute of 32 H. 8. viz. within 50 Years after the Title &c. in as much as before that Time no Limitation was mentioned in such Writs, nor in Formedon in Descender; but this comes of the Part of the Tenant to be traversed as in Avowry, viz. not seized of the Services after the Limitation. D. 315. b. pl. 101. Mich. 14 & 15 Eliz. Anon.

For this is a New Right which he had not before; and tho' where a Man releases his Right he cannot pursue his Action or Remedy, yet if

3. *Discontinuance* by Tenant in Tail by Fine *sur Concessit* for three Lives of A. B. and C. and another Fine afterwards to the Use of himself and his Heirs is no Bar to the Issue by Statute 21 Jac. 1. 16. of Limitations, tho' 20 Years were passed after Right of Action, viz. Formedon accrued; for tho' he was barred of this Action after 20 Years passed, yet he has Title of Entry only after the Discontinuance for three Lives determined, and he shall have 20 Years to enter after his Title of Entry accrued to him, which in this Case was by the Determination of the Lease for three Lives. Lutw. 731. Hunt v. Bourn.

he a Right and several Remedies, the Discharge of one is not a Discharge of the other, and tho' 4 H. 7. of Fines enures by way of Bar to the Right yet 21 Jac. 1. 16. enures by way of Bar to the Remedy, and the word Right there is a Right of Entry. 2 Salk. 422. Hill. 1 Annæ. B. R. S. C.

See (A) pl. 6. S. 4 and 8. S. 3.

(M) Rent.

1. **O** Riginal Grant of an Annuity is not within 32 H. 8. 2. but otherwise if it be by Grant of a Rent-charge; per Popham, Gaudy and Fenner J. Noy. 37. Dean and Chapter of Rochester v. Bilhop of Rochester.

2. Rents which were saved by the Statute of Chantries is not within the Statute of Limitations of H. 8. to be barred by 40 Years; per three J. but two held Contra. Cro. C. 80. Mich. 3 Car. C. B. Falkner v. Bellingham.—Ibid. 214. S. C. Judgment reversed.

3. If Judgment be in a Per Quæ Servitia, such Rent is out of the Statute, because there is a Record thereof. Cro. C. 82. in Case of Falkner v. Bellingham.

4. The Words in the Stat. 21 Jac. 1. 16. That all Actions of Debt, for Arrearages of Rent shall be limited &c. have been construed to extend only to Actions of Debt for Arrears of Rent, which was reserved on Lease Parol, and not upon Lease in Writing. 2 Saund. 66. Hill. 21 & 22 Car. 2. in Case of Hodfden v. Harridge,—cites Hutt. 109. Freeman v. Stacy.

5. The Case in Co. Rep. on the 32 H. 8. concerns only Customary Rents between Lord and Tenant, and extends not to any Rent commencing by Grant, or whereof the Commencement may be shewn; per Cur. 2 Vern. 235. Trin. 1691. Collins v. Goodall.

See (A) pl. 6. S. 3.

(N) Seisin.

1. **A** College brought a Writ of Right, and it was moved, whether it should count of its Seisin within 30 Years, because the Corporation never dies, and then if he count of his own Possession, the same is without Limitation. And it was held, That if the Guardian of the College was ever seized, he ought to count upon a Seisin within 30 Years; But upon the Seisin of his Predecessor, he ought to count of a Seisin within 60 Years

60 Years, as another common Person; For the Change of the Teste of such a Seisin is as the dying seised and Descent of a common Person. Le. 153. Trin. 31 Eliz. C. B. All Souls Scholars in Oxford v. Tamworth.

(O) Trespafs, Trover &c.

See (A) pl. 8. S. 3.

1. **T**ROVER was brought of a Ship. The Defendant pleaded Statute of 21 Jac. cap. 10. The Plaintiff replied, that the Ship was delivered to the Defendant, at Tunis Ultra Mare, to re-deliver it when required, and that Defendant sold the Ship at Tunis &c. and continued there till 3 Car. and then came to England, and the Plaintiff requested the Delivery and he refused, but converted after to his own Use &c. Defendant demurred, and Whitlock and Jones J. held, that the Action well lies. For when one delivers Goods to one to be re-delivered when required, and the Party converts it to an Use, and after he comes to the Possession of it again, and converts it to his Use again; If in this Case the first Conversion was before the Time of Limitation, and the other after the Time, the Plaintiff may have Action upon the last Conversion, and is not bound by the Statute. For the Owner of the Goods has Election, upon which Conversion to bring the Action; But if the Time of Limitation be passed, he can not have Detinue for the Goods, because the Cause of Action of Detinue was presently after Time of Delivery, and so the Time to bring Action was gone; But in this Case, the Owner may seize the Goods tho' barr'd of Action.

2. It was said, that the Conversion Ultra Mare is not of Necessity to be taken as Conversion against the Plaintiff. 3. It was not the Intention of the Statute, that the Plaintiff should be ty'd to bring Action upon the Conversion Ultra [Mare] and be ty'd to a Time, when he cannot have Action against the Party, (he being Ultra Mare) and therefore they thought that when the Party comes into England, and he is then requir'd to deliver it and he denies, but converted it before to his own Use, and this within the Time of Limitation, that the Action was well brought; but Croke (absente Richardson) e contra. But it was adjudged for the Plaintiff. After, in Easter Term, the Case was moved again, when Richardson was present, and he was of Opinion with Croke, whereupon Judgment was pray'd, but it was not agreed by all for the first Point, that the Statute of Limitations does not bar the Plaintiff of his Action, when the Defendant was Ultra Mare, according to the Opinion of Whitlock and Jones. Jo. 152. Hill. 7 Car. B. R. Swayne v. Stevens.

S. C. Cro. C. 245. Hill 7 Car. B. R. and Ibid. 333. And it was agreed Una Voce, that Trover is within the Statute, and is within the general Words of Actions upon the Case, and in the last Proviso it is expressly mention'd As to the Point of Defendants being beyond Sea being within this Statute or not, the Court was divided, in Case the Plaintiff did not file an Original. And 3 Justices held, that when it is alleged, that Defendant returned from beyond Seas

Primo Caroli, and that Tertio Caroli the Plaintiff required the Delivery and he refused, and afterwards the said first Day of October converted them to his own proper Use, it shall be intended that the said Goods came a second Time to Defendant's Hands, and that they being in his Hands the Plaintiff required the Delivery of them, and that afterwards the same Day, he converted them, and that upon this Conversion the Plaintiff had grounded his Action, and the Plaintiff had Election, upon which Conversion he would bring his Action; and then he is clearly out of the said Statute of 21 Jacobi, the Action being brought within two Years after the last Conversion, and so well brought; But Croke doubted, how this Action should be maintained without shewing how they came to the Defendant's Hands, where it is allowed, that once he sold them in 19 Jacobi, and converted the Money to his proper Use; and the Allegation, that he after refused to deliver, and converted them to his proper Use, without shewing how he came to them, cannot be good. But the other three Justices being against him they gave Rule, that Judgment should be entered for the Plaintiff, unless &c. Cro. C. 334 Mich 9 Car. B. R. Swayne v. Stephens.

(P) Time

(P) Time limited. How to be computed.

1. **B**OND to make Assurance of Land, and if Obligee refuses to accept the Assurance, and shall make *Request* to have 100 l. in Satisfaction of it, then if upon such Request within 5 Months after he pay the 100 l. that then &c. at the Day he refuses the Assurance, and 10 Years afterwards he makes *Request* to have the 100 l. it was held, that a Request at any Time during his Life was good. Cro. E. 136. Trin. 31 Eliz. B. R. Boyton v. Andrews and Simpson.

2. A. promised B. that if he would make Apparel for his Wife, and prepare Stuff and Lace for it, he would pay for the Stuff and making, as much as should be required. B. brings Assumpsit, and shews that he provided &c. and the Value &c. and that he required A. such a Day to pay him, which was within 6 Years before the Action; but the Promise was laid to be 7 Years before. Defendant pleaded the Statute, and that Plaintiff did not bring his Action within the 6 Years after the Promise. Upon a Demurrer, Richardson J. said, that the Action ought to be brought within 3 Years after the Promise; But by the other 3 Justices, the Intention of the Statute is within 6 Years after the Cause of Suit given, which is not until after Request. Het. 138. Hill. 4 Car. C. B. Bill v. Lake.

As if A. promise B. so much when he shall marry his Daughter the 6 Years there shall be after the Marriage; per 3 J. ibid. 139 Or if if the Promise be of so much after his Return from Rome, or other Place, from whence it is not impossible to return within 6 Years, the Payment shall be after the Return, and there is no Cause of Action before; and also the Promise and Request are intire; For the Request is part of the Promise, and the Promise is not intire without the Request. Ibid. — It was said by Hedley, that there is a Difference where the Request is necessary, and where it is alleged for Form only. *As if I sell a Horse for 10 l. generally, and after the 6 Years bring an Assumpsit against the Vendee, and shew in the Declaration, that I was to be paid when I should require it, & licet sapius requisitus, within the 6 Years &c. Here I shall be barr'd; For it was due by the Contract, and the Request is but formal. Or if a Man bring Action within the 6 Years, and afterwards is Non-sued for want of Request shewn, when it was necessary, and makes a new Request after the 6 Years, and brings his Action, it is good; which was granted by the Court. Ibid.*

3. If a Man brings an Action within the 6 Years, and afterwards is Non-sued for want of Request shewn, where it is necessary, and makes new Request after the 6 Years, and brings his Action, it is good. Het. 139. Trin. 5 Car. C. B. in Case of Starkey v. Taylor.

4. Action was brought within the Time; Defendant is outlaw'd, and the Time pass'd; and after the Outlawry is reversed in C. B. for Default in the Exigent. — Resolved, that a new Writ brought within a Year after this is good by the Statute, and so Judgment given in C. B. was affirmed. Hill. 8 Car. B. R. Jo. 312. Lamb v. Finch.

reversed by Error, but avoided by Plea, the first Original is not determined, but he might have proceeded thereupon; and to begin a new Original, and in another County, [as in the Principal Case it was] is not according to the 21 Jac. 16. nor within the Intent of the Statute. But the other 3 J. held neither the Variance in the County, nor in the Damages laid (which in one Action was to 500 l. and in the later Action to 600 l.) to be Material to the Action, it being transitory and averred to be for one and the same Cause, and that a Reversal by any Means is sufficient, and within the Statute.

5. If an Assumpsit be to do a Thing on Request, as to indemnify, and a Damnification accrues not at one Time, but Parcel at one Time and Parcel at several Times after, in this Case Plaintiff may have an entire Action after the last Time of Damnification, and tho' Parcel was before the 6 Years, and Parcel after within the 6 Years, yet the Action well lies notwithstanding the 21 Jac. 16. Jo. 330. Hill. 9 Car. B. R. Peck v. Ambler.

6. Where the Promise is not made actually to pay upon Request, or so expressed in Words, yet where there was not any Cause of Breach of such Promise or Ground of Action against the Defendant, until Request to make Recompence (as in the Principal Case of A's Dog biting B's Sheep, and

S. C. cited
Arg. Gibb.
289

S. C. Godb.
457. by
Name of
Shuttsford
v. Borough,

and A's desiring B. to make what he could of the Sheep, and he would recompence B. the Residue) until such Request A. did not know what to pay, nor was any Thing due; For the Duty arises from the Request, and the Non-payment after is the Cause of Action, and therefore the Action brought within 6 Years after such Request, tho' it be more than 6 Years after the Promise, is well. Vid. Cro. Car. 139. Trin. 4 Car. B. R. Shutford v. Penow.

adjudged that the Statute of 21 Jac. is no Bar; and that it was so resolved. 1 Car. B. R. in Drake's

Cafe, and Hill. 16 Jac. in Hill and Wade's Cafe, and the Meaning of the Statute of 21 Jac. was to bar the Plaintiff but from the Time that he had a compleat Cause of Action, and that was not until the Request made. And when divers Things are to be done and performed before a Man can have an Action, there all these Things ought to be completed before the Action can be brought. And therefore, if a Man promise to pay J. S. 10 l. when he is married, or when he is returned from Rome, and ten Years after the Promise J. S. marieth, or returneth from Rome, because the Marriage or the Return from Rome are the Causes of the Action, the Party shall have six Years after his Marriage, or return, to bring his Action, altho' the Promise was made ten Years before. And in the Principal Cafe, the Cause of Action is the Breach, and that cannot be until after the Request made; and where a Request is material, it ought to be shewed in Pleading. And so it was resolved by the whole Court, (Nemine Contradicente) that the Action was well brought, and within the Time limited by the Statute. And Judgment was entered for the Plaintiff. Godb. 457, 458. Mich. 4 Car. B. R. Shutford and Borough's Cafe.

A Promise is to do a Thing upon Request or Notice. The Statute of Limitations is not pleadable to the Promise, but to the Request or Notice; For the Action arises upon the Request. 1 Lev. 48. Mich. 13 Car. 2. B. R. Web. v. Martin. — Jo. 194. 329. Godb. 457. Shutford v. Borough. — Mod. 89. — Sid. 66. S. C.

7. If an Action for Words is brought within 2 Years after the Loss of Marriage, the Statute of Limitations is not pleadable, tho' the Words were spoke ten Years before, if the same Words are not actionable without the Loss of Marriage. 1 Lev. 69 Trin. 14 Car. 2. B. R. Littleboy v. Wright.

8. The Statute of Limitations ought to be accounted from the first Conversion, tho' the Substance be destroyed, as for killing Sheep &c. 2 Sid. 115. Mich. 1658. B. R. per Glyn Ch. J. in Cafe of Radelord v. Bludworth.

If a Trover be before 6 Years, and a Conversion after, the

Statute cannot be pleaded. per Car. Far. 99 Mich. 1 Ann. B. R. Mountague v. Lord Sandwich.

9. The Statute of Limitations may be pleaded to an Action, if the Time be elapsed before the Day wherein the Bail is filed, tho' not before the first Day of the Term wherein the Action is brought; For the Action shall not be said to be depending till the Bail is filed. Vent. 135. Trin. 23 Car. 2. B. R. Tatlow v. Bateman. — 2 Lev. 13. S. C.

10. It was rul'd, that where one was imprisoned for 13 Years together, the Statute of Limitations shall not run upon him whilst in Prison; but he shall have * 6 Years after Enlargement, to bring his Action. Comb. 26. Trin. 2 Jac. 2. B. R. Aldrish v. Duke.

2 Show. 493. S. C. by Name of Aldridge v. Drake, adjudged for

the Plaintiff — 3 Mod. 110. S. C. by Name of Aldridge v. Duke, adjudged for the Plaintiff. And it having been moved in Arrest of Judgment, that the Verdict, being general, was inconsistent with the Plaintiff's Replication; For that is within 6 Years, and the Verdict finds him Guilty of the Whole 13 Years in the Declaration, It was answered, that the Defendant having pleaded Not Guilty at any Time within the 6 Years, if the Verdict find him Guilty within that Time, it is against him. But if he had pleaded Not Guilty generally, then Damages must be for the 13 Years, tho' the Plaintiff of his own shewing had brought his Action for a Thing done beyond the Time limited by the Statute. And per Cur. If false Imprisonment be for 7 Years, and the Jury find the Defendant Guilty but for 2 Days, it is a Trespass within the Declaration. This Statute relates to a distinct, and not to a continued Act; For after 6 Years it will be difficult to prove a Trespass. — * N. B. The Statute says but 4 Years; and as to the Pleading thereof see (S) Blackmore v. Tiddlerly.

11. So of a Wounding, which was above 6 Years ago. Comb. 26. in Cafe of Aldrish v. Duke.

12. Tho' the Cause of Action accrues before the Grant of Administration, yet the Administrator shall have 6 Years from the Time of granting the Administration, per Holt Ch. J. Carth. 337. Hill. 6 W. 3. B. R. in Cafe of Curry v. Stephenfon, — cites Cro. J. 60, 61. Sandford's Cafe in Saffin's Cafe.

4 Mod. 50. S. C. — 2 S. C. — 421. S. C. — If there is no

Statute will not take Place till Administration is taken out. 2 Vern. 695 Trin. 1715. Joliffe v. Pitt and Whittier. H h 13. Court

13. Count as Administrator for *Money received to the Use of Baron and Feme, as Administratrix* of A. B. &c. the Defendant pleads Non-assumpfit infra sex Annos; the Plaintiff replies, and shews that A. B. died such a Year and Day, and that the Defendant *received the Money* immediately after his Death, which was *more than 6 Years passed*; but that *Administration* was committed such a Year and Day, which was *infra sex Annos*; upon which the Defendant demurred, because it was a Departure; the Court seemed to incline, that it not being 6 Years after the Administration, tho' the Money was received before, yet it would be no Bar within the Statute, according to the Reason of Saffin's Case. Skin. 555. Mich. 6 W. & M. B. R. Curry v. Stevenfon.

Cro. E. 548.
Cap v. Lan-
caster —
In an Indeb'

14. A. gives to B. a Note for 100l. payable on demand; this is a present Duty, and the Difference is, where the Debt is to arise on a *Collateral Act* to be done. Gibb. 289. Trin. 5 Geo. 2. B. R. Wilcox v. Huggins.

Assumpfit, the Plaintiff declared on a *Promise & pay on Demand*; and Non-assumpfit infra sex Annos was pleaded, to which Plaintiff demurred; because declaring on a Promise on demand, he thought nothing was due till Demand; and that Defendant should have pleaded Non-assumpfit infra sex Annos after Demand, or that no Demand was within 6 Years Per Cur. If the Promise were for a *Collateral Thing*, which would create no Debt till Demand, it might be so; but here it is an *Indebitatus Assumpfit*, which shews a Debt at the Time of the Promise; therefore the Plea is good. Jud' nisi pro Def' 12 Mod. 444. Hill. 12 W. 3. Collins v. Benning.

(Q) *Avoided and Action Restored.* By what Act.

1. **W**HERE a Man is indebted to another for *divers Wares*, and the Debt is superannuated according to the Statute of 21 Jac. cap. 16. and afterwards they account together, and the Party is found to be indebted unto the other in so much Money for such Wares, in that Case, altho' the Party were without Remedy before, yet now he may have Debt upon Accompt, because now he is not bound to shew the Particulars, but it is sufficient to say, that the Defendant was indebted to the Plaintiff upon Accompt, pro diversis Mercimoniis &c per Reeve and Foster J. Mar. 105. pl. 182. Pasch. 17 Car. White v. Grubbe.

* Ch. Prec.
385. Pasch.
1714. An-
drews v.
Brown.—
12 Mod. 557.

2. *A Promise of Payment within 6 Years, tho' the Debt was contracted long before, will evade the Statute of Limitations. But Confession, or † only Acknowledgment that he ow'd the Plaintiff so much will not do it. 2 Show. 126. Trin. 32 Car. 2. B. R. Dickson v. Thomson.

Mich. 13 W. 3. in Case of Hayward v. Kinsey.—† Ch. Prec. 386.—An Acknowledgment without a Promise is an Evidence of a new Promise. Carth. 41. in Case of Heylin v. Hastings.—A Promise after the 6 Years brings the Matter out of the Statute of Limitations; ‡ *Owning the Debt* does not go so far, but is Evidence of a Promise, agreed per all the Judges of England. 6 Mod. 309. Mich. 3 Ann. B. R. Dean v. Crane. —‡ 12 Mod. 224. Heylin v. Hastings.—After the 6 Years a Promise is made to the Executor, who declares of a Promise made to the Testator; Declaration of Promise to himself might have been good; But per all the Judges of England, the Evidence did not maintain the Declaration. 6 Mod. 310. Mich. 3 Ann. B. R. Dean v. Crane.—1 Salk. 28. Dean v. Crane. 11 Mod. 57. Green v. Crane.—If the Defendant do but own the Debt within 6 Years, it is Evidence of a new Promise. 12 Mod. 577, 578.—But after the 6 Years a bare Acknowledgment of the Debt without a Promise to pay, has been ruled not to be sufficient to bring it out of the Statute. Cham. Prec. 386. in Case of Andrews v. Brown.

S. C. cited

10 Mod 314.
per Cur. and
said, that in
that Case
there was an
express Promise,
upon which the Plaintiff
declared, viz. *I deny that I owe you any Thing, prove it and I will pay you.*—This Promise was after the 6 Years, to the Executors. Carth. 410. S. C.—12 Mod. 225. S. C. and P.

3. Prove the Debt and I will pay you; such conditional Promise will bring the Case out of the Statute of Limitations, upon proving the Delivery of the Goods at any Time. 1 Salk. 29. Hill. 10 W. 3. B. R. Heyling v. Hastings.—5 Mod. 425, 426. S. P. seems to be S. C.

4. An Executor *durante Minoritate* brought an *Assumpsit*, and pending it the Infant came of Age, and brought a new Writ *recenter*, to which *Non-assumpsit infra sex Annos* was pleaded, and this Matter set forth in the Replication, and Judgment for the Plaintiff. Arg. 12 Mod. 571. Mich. 13 W. 3. in Case of Hayward v. Kenfey.—cited as Thoroughgood's Case in C. B. Trin. 8 W. 3. Rot. 370.

5. So if one be *outlaw'd*, and within 6 Years after he reverses it, and then *after the 6 Years a new Writ is brought*, the Statute is no Plea. 12 Mod. 571.

6. If a Debtor by Note or Book after 6 Years *puts out an Advertisement in any News Paper*, summoning in all Persons to whom he is indebted, and that they shall be paid, this will revive the Right, and bring out of the Statute Debts before barred by it. Pasch. 1714. Ch. Prec. 385. in Case of Andrews v. Brown.

or Bearer, which had been much handed about, and at length came to the Hands of the Plaintiff. A. became a Bankrupt and died, and long after A's Death, and also after 6 Years D. the Executor of A. recovered a Debt due to A. of 5000*l.* and put out an Advertisement in the Gazette, for all Persons who had any Debts owing from A. to come to him and make them out, and they should be paid. J. S. brought a Bill against the Executor of D. to be paid, and had a Decree for 500*l.* which was the Money due by the Note, and Interest allowed from the Time of the Bill brought. Chan. Prec. 385. Pasch. 1714. Andrews v. Brown.

Abr. Equi. Cases 305. S. C.—A. gave a Promissory Note in 1688, payable to J. S.

7. If a Debtor by Will *directs the Payment of all his Debts*, this revives a Debt barred by the Statute; so that his Executors must pay it. Ch. Prec. 385. Pasch. 1714. Andrews v. Brown.

S. P. and tho' it was insisted that Defendant's

Statute was good, and that the Law extinguishes the Debt; For that a Right without a Remedy is an Absurdity. But Ld. Chancellor said, that the Statute is not an Extinguishment of the Debt, but the same is subsisting in Conscience, and that a Promise in such Case is not to be considered as a new one, but as a Re-continuance of the old. Sel. Ch. Cases in Ld King's Time. 57. Trin. 11 Geo. 1. Blackway v. E. of Strafford.

8. If a Creditor sues out a *Latitat* against J. S. and continues it, and *Defendant dies*, Plaintiff may bring a *Bill in Equity* against the Executor of J. S. and Plaintiff need not go on in the old Action; and the Statute of Limitations is no Bar. Vid. 2 Vern. R. 695. Trin. 1715. Jolliffe v. Pitt and Whittler.

Plea of the Carth. 234.

(R) In what Cases the Statute must be *pleaded*, or may be *given in Evidence*.

1. **W**HEN it is *apparent within the Record*, that the Action is brought *after the 6 Years certainly*, the Court said, they did not doubt but the Statute ought to be shewn in Arrest of Judgment. But the Doubt is, *whether when a General Issue is pleaded in Assumpsit or Trespass, and it does not appear in the Assumpsit or Trespass, that it was above the 6 Years, the Statute now may be given in Evidence*. Het. 139. Hill. 4 Car. C. B. in Case of Bill v. Lake.

2. In Assumpsit, after Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Promise is alleged to be made beyond the Time limited in the Statute of 21 Jacobi, and the Action is not brought within the Time limited thereby; and all the Court held, *if it appears so by the Plaintiff's own shewing, that the Action is not brought within the Time limited by the Statute, the Plaintiff cannot maintain his Action, but Judgment shall be given against him; or if the Contract in the Assumpsit or Debt be alleged to be within the Time limited by the Statute; and upon Non-debet or Non-assumpsit pleaded, it appears upon the Evidence, that the Assumpsit or Contract was beyond the Time limited, the Action lies not, and the Defendant shall take Advantage thereof, if it be specially found by the Jury*. For the Statute is in the Negative, that he shall not maintain

S. C. Het. 111. S.C. argued, but Adjourned — Upon a like Point, Jones and Whitlock J conceived that the Defendant ought not to have the Advantage of this Statute, such

unless he had such an Action, but within the Time limited by the Statute; But in the Principal Case it appeared upon the View of the Record, that the Action was brought within the Time limited; and therefore it was adjudged for the Plaintiff. Cro. C. 115. Trin. 4 Car. B. R. Brown v. Hancock.

And Statute hath divers Exceptions; so that if it be brought after the Time, yet if the Plaintiff were an Infant or feme covert &c. it were well enough. But Hide Ch. J. and Croke conceived, forasmuch as it appeareth by the Plaintiff's own shewing in his Declaration, that it is out of the Limitation of the Statute; and the Statute is in the Negative, that it shall not be brought at all, unless it be brought within the Time limited by the Statute; therefore the Defendant shall have Advantage thereof by Exception, without pleading; whereupon the Court would further advise. Cro. C. 163 Mich. 5 Car. B. R. Trankersley v. Robinson.—So in Action for Words spoke more than two Years before, because Defendant had admitted the Action, and not pleaded the Statute 21 Jac. but had pleaded Not Guilty, Jones and Berkeley J. held, that the Plaintiff ought to have Judgment; because the Defendant hath not pleaded the Statute of Limitations; For there may be divers Causes, that he could not bring the Action before this Time, viz. That he was in Prison, or within Age, or beyond Sea, or that he had sued the Defendant to Outlawry, and the Defendant had reversed the Outlawry, and this Action brought within a Year after the Reversing of the Outlawry, (as in Truth the Case was) for then the Action is well brought. But Adams moved, that he should have then shewn it in his Declaration. But it was adjudged for the Plaintiff Cro. C. 381. Mich. 10 Car. B. R. Stile v. Finch.—S. P. But Jones and Berkeley J. held, that he shall not now have Advantage thereof: And Jones said, that he knew it had been so ruled twice in the Time of the Lord Lea Chief J. and in the Time of Sir Randall Crew Ch. J. For otherwise there should be a Mischief in this Court more than in another Court in the Common Bench, where they prosecute by Original and Outlawry; and if the Outlawry be reversed, the Statute aids the Plaintiff. But here they proceed by Latitat, whereby the Cause of the Action doth not appear, and may peradventure divers Years continue by Process before the Defendant may be arrested; and the Plaintiff in his Declaration need not shew the Cause wherefore he did not commence his Suit sooner; for if he should do so, the Declaration would be more prolix than would be convenient. But if the Defendant pleads the Statute 21 Jac. then the Plaintiff by the Replication ought to shew good Cause, why he did not bring his Action within the Time limited by the Statute; otherwise he is barred: For the Statute allows of many Impediments, viz. Infancy, Imprisonment, Ouster &c. and others therein mentioned, which shall be sufficient Causes, that the Action was not brought sooner. But Croke doubted thereof, because by his own shewing it appears that the Action is not brought within the Time limited by the Statute; and the Statute is in the Negative, that it shall not be brought but within the Time; so the Court, Ex Officio, ought to abate it, unless he had shewn wherefore it was not brought within the Time. But by the Opinion of the other Justices, it was adjudged for the Plaintiff, unless other Cause &c. Cro. C. 404, 405. Pasch. 11 Car. B. R. Hawkins v. Billhead.

A Promise was made 7 Years since, to pay Money within three Months after. The Defendant pleaded *Non-assumpsit infra sex Annos ante Exhibitionem Bille*, whereas it should have been *Causa Actionis non accrevit infra sex Annos*; tho' in this Case it appears within the Declaration that the Time of Payment was not within the 6 Years before; yet because the Defendant had not pleaded it, he cannot have Advantage of it. Vent. 191. Hill. 23 & 24 Car. 2. B. R. Puckle v. Moore.—Mod. 89. Mich. 22 Car. 2. B. R. S. P. and tho' it differs as to the Term and Year of the King, yet seems to be S. C. and it was there urged, that the *Non-assumpsit infra sex Annos* relates to the Time of Payment as well as to the Promise; But Hale Ch. J. said, that could not be. And Twissden J. said, that if I promise to do a Thing upon Request, and the Promise was made 7 Years ago, and the Request Yesterday, I cannot plead the Statute; but if the Request was 6 Years ago, it must be pleaded specially, viz. That *Causa Actionis was above 6 Years since*.—Formerly it was held, That the Party should not take Advantage of the Statute of Limitations without pleading it; But now the Law is otherwise; per Cur. 10 Mod. 313. Pasch. 1 Geo. 1. B. R. in Case of Stafford v. Forcer.

3. The Plaintiff declares as Executor of A. of a Promise made 30 Years before: The Defendant pleads *Non-assumpsit infra sex Annos*. The Plaintiff replies, that he assumed within 6 Years. The Defendant re-joins as before, and Issue was joined upon it, and found for the Plaintiff. And it was moved in Arrest of Judgment, because the Plaintiff in his Replication hath departed from his Count, and cited Cro. Car. 228. Tyler v. Watts. Hide Ch. J. Twissden and Windham J. were for the Plaintiff. Because if the Defendant had demurred upon the Replication, it had been for the Defendant; but here he hath joined Issue, and therefore good. Keyling J. for the Defendant; because the Plaintiff ought to have given an Account of the Time betwixt the Time laid in the Count and the Replication; but after Judgment was given for the Plaintiff. Raym. 86. Mich. 15 Car. 2. B. R. Lee v. Raynes.

4. The Statute of Limitations must be pleaded, as all Matters of Law must which do not go to the Gift of Action, but to the Discharge of it. G. Hist. of C. B. 54.

If Assumpsit be brought upon a Promise 20 Years before, no Benefit shall be had of the Statute of Limitations without pleading it. 1 Lev. 110 Mich. 15 Car. 2.

B. R. Lee v. Rogers.—Formerly it was held, that the Parties should not take Advantage of the Statute of Limitations without pleading it. But *the Law is now otherwise*, per Cur. 10 Mod. 313 cites 1 Salk. 28. Dean v. Crane and 29. Heylin v. Hallings.

5. 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; But in Case, on Non Assumpfit, the *Statute of Limitations* hath not been given in Evidence, for it speaks of a Time past, and relates to the Time of making the Promise. 1 Salk. 278. Anon. Coram Holt Ch. J. at Hertford. 1690.

(S) Pleadings.

1. **W** RIT of Right bore *Teste 20th February, 6 Jac.* and the Declaration of the Explees was *alleged in the Time of Queen Elizabeth, of the Seisin of the Demandant himself*; whereas, by the Statute 32 H. 8. cap. 2. a Writ of Right of his own Seisin cannot be but within 30 Years before the Writ brought; And this Seisin may be before that Time, and for that Reason the Writ is ill, and the Judgment given thereupon is erroneous; And for this Cause chiefly the Judgment was reversed. Cro. J. 293. Mich 9 Jac. B. R. Lilburn v. Heron.

Yelv. 211. S. C. and P. And that if the Plaintiff had counted of his own Possession in the Time of this King generally, it had been good;

For it appears to the Court judicially, that it is within 30 Years, in as much as the King has not reigned so long, but Queen Elizabeth reigned 40 Years and more.

2. Action on the Case was brought, upon a Promise *to re-deliver such a Deed and Money upon Request*, but did *not count of any Request made*; and upon this Defendant demurr'd. And it was moved, that this Action lay not without actual Request made. And a Difference was taken between an Action to recover the Thing itself only, and an Action to recover Damages; As Plaintiff might have brought Detinue for the Deed, without any Request made before; For the bringing the Action amounts to a sufficient Request, where only the Thing itself is to be recovered. But where the Action is to recover Damages, there it does not lie, without actual Request before made; and of this Opinion was all the Court, for which Judgment was given against the Plaintiff. Sid. 66. Mich. 13 Car. B. R. Ward v. Martine.

Keb 177 S. C. stated, as here, of a Promise to deliver a Deed, and pay 40 l. on Request; but says, that the Defendant pleaded Non Promisit within 6 Years, to which the Plaintiff de-

murred, as no good Plea to the one, and good to the other, which on general Demurrer by the Plaintiff, cannot be good. And *ibid.* pag. 197. reports, that it was adjudged for the Plaintiff. But the Case in Keb. is by the Name of **Webb v. Martin**.—S. C. Lev. 48. by Name of **Webb v. Martin**. But there it is stated, that the Assumpfit was, in Consideration of the Delivery of a Deed by Plaintiff to Defendant the Defendant assumed *to re-deliver the Deed upon Request*; And also, in Consideration that Plaintiff had delivered to him another Deed, the Defendant promised to pay him 40 l. and alleged the Delivery of the first Deed; and tho' such a Day after he made Request, he did not deliver the first Deed, nor paid the 40 l. Defendant pleaded the Statute, and that *Non Assumpfit infra 6 Annes* before the Action brought. Plaintiff demurred, because the Cause of Action, as to the first, did not arise upon the Promise but upon a Refusal after Request, and the Request was within six Years, and so held the Court. Then it was moved, that the Payment of the 40 l. was to be without Request, and so the Plea good as to that. But it was answered, that the Plea being *inure to both Parts of the Declaration, and ill in part, is ill in all*; Upon which it was adjourned. But afterwards the Court held the Plea ill in the whole, for the Reason alleged. And they cited a Case of **Wright v. Ade** to have been so adjudged, and gave Judgment for the Plaintiff for all.

3. Assumpfit upon a Promise, 1 June, 1 W & M. the Defendant pleaded *Non Assumpfit infra sex Annos ante Impetrationem Brevis Originalis*, upon which the Plaintiff demurred; And now it was argued for the Plaintiff, that this Plea, tho' it was the usual way of pleading before the Statute of the first of this King, by which it is enacted, *That from the 10th of December*, (which was the Day that King James departed, *till the 12th of March*, the Time,

S. C. 2 Vent 107. and resolved, that since the Statute is, that those Days shall not be any Part of the Time,

therefore pleading Non Assumpsit infra sex Annos, is to be understood of six Years, exclusive of those Days between 11 Dec. and 15 Feb. S. P. And that of late Years, the

March, 1688, when the now King assumed the Government) *stat ut de accented any part of the Time, within which any Person, by Virtue of the Statute of Limitations, might bring his Action, but that he shall have so much Allowance of Time, as is from the 10th of December, to the 12th of March, for bringing his Action,* which Time contains 92 Days, and therefore the Plea now ought to be pleaded, *Non Assumpsit infra sex Annos, and 92 Days;* and so it has been pleaded since this Statute. Yet by all the Court the Plea is good, and they would not alter the former way of Pleading; But if the Case be so, that tho' he has not promised within the 6 Years, but has promised within the 6 Years and 92 Days, this shall come in by the Replication. 3 Lev. 283. Trin. 2 W. & M. C. B. Snode v. Ward.

general Pleading of Non Assumpsit infra sex Annos has been allowed. 2 Vent. 185. Trin. 2 W. & M. C. B. Godfrey v. Ward.

In an Indeb. Ass. the Replication was of an Original in Trespass, *Quare clausum fregit*, ea Intentione quod predictus J. C. (the Defendant) capiat &c. and that the Plaintiff might declare against him &c. It was said to be according to the Course of late, to declare in any Action upon a Clausum fregit, as they do upon a *Latitat* in B. R. The Court agreed the Practice; but whether this was sufficiently set forth in the Replication [was doubted] for it mentions *raising of the Course of the Court*, but is only, that he prosecuted such a Writ, *Ea Intentione*, to declare. And the Court, being informed that there were a great many Precedents in this Manner, appointed them to be looked into. Et Adjournatur. 2 Vent. 259. Mich. 2 W. & M. C. B. Every v. Carter.

4. In an *Indeb. Assumpsit* for Goods sold; The Defendant pleaded the Statute of Limitations; The Plaintiff replied, that *before the 6 Years* were out, *he brought an Original in Trespass* against the Defendant, *ea Intentione* to declare against the Defendant, *in an Assumpsit secund' Consuetud. Cur. de Tempore ejus &c.* The Defendant said, that there was *No such Record;* And the Plaintiff produced an Original in Trespass, brought within the Time, *against the Defendant and two others,* and it was in *Trespass and Assault in London.* And it was moved, that this Record did not make good the Replication. For it is against three, and it should have been in a *Clausum fregit;* For that was said to be the Course of the Court, to declare in any Thing upon such a Writ; But the Prothonotary informed the Court, that the Original being in London, the Curfitor would not make a *Clausum fregit* into London, (for which no Reason was given,) and that therefore, tho' in other Counties it is to be a *Clausum fregit*, yet *Trespass and Insult* would do in this Case, and so was the constant Practice. And the Plaintiff's Replication is, that he brought an Original in *Trespass* generally; so it may be applied to this, and it is not material, tho' others be joined in the Writ with the Defendant. But the Court doubted of the Practice. Vent. 193, 194. Trin. 2 W. & M. in C. B. Norwood v. Woodly.

S. C. 2 Show. 566. Trin. 4 W. & M. Adjournatur. And Holt Ch. J. said, that an Attachment of Privilege is but as a *Latitat*, and not as an Original. S. C. and that it must be shewn, that there were Continuances till the Time of declaring; And a *Latitatio* Processum is not sufficient to shew a Matter before Declaration, though it has been held so for Mat-

5. *Assumpsit* for Fees due to an Attorney; The Defendant pleaded *Non Assumpsit infra sex Annos.* The Plaintiff replied, that on such a Day, two Years before he had sued out an *Attachment of Privilege* against the Defendant, upon which Writ, *Taliter processum fuit*, that the Defendant, (on such a Day) in *Hilary Term, Anno 2 Willi &c.* appeared, and the Plaintiff declared against him *Modo & Forma &c.* And upon a Demurrer to this Replication it was held ill, because the Plaintiff did not set forth any *Continuance of this Writ of Attachment, (per vic. non misit breve)* which was sued out above two Years ago; For it is impossible that the Defendant should appear in *Hilary Term, Anno 2 Will.* to a Writ returnable two Years before, and no other Writ is set forth by the Plaintiff. But if the Plaintiff, after the *Taliter processum fuit*, had shewn the last Attachment, and the Return thereof, upon which in Truth the Defendant did appear, it had been well enough, without shewing any of the *Continuances.* Thereupon the Plaintiff moved to discontinue; which was granted. Carth. 144. Trin. 2 W. & M. B. R. Rudd v. Berkenhead.

ter after 2 Salk 402. by Name of Budd v. Berkenhead.

6. Trespafs for *imprisoning* him, and detaining him in Prison, from 32 Car. 2. till the 3d. of April 4 Jac 2. The Defendant pleaded as to all, till 34 Car. 2. such a Day, *Non cul. infra quatuor Annos*, and as to the rest, a *Plaint and a Capias* issued. The Plaintiff demurred; Et per Cur. Tho' the Imprisonment be complained of as one continued Imprisonment, yet the Defendant may *divide the Time*, and plead the Statute as to part, and then may reply the Continuance; Therefore as to this, Judgment was given against the Plaintiff upon his Demurrer, but for him as to the rest; Because the Capias was awarded by the Court ex Officio, and it did not appear that the Defendant meddled with it. 2 Salk. 420. Mich. 3 W. & M. Rot. 411. B. R. Coventry v. Apley.

7. Where the *Duty arises upon Consideration Executory*, (as a promise to pay at a future Day) the Plea must *not* be *Non Assumpsit infra sex Annos*, but must be *Causa Actionis non accrevit infra sex Annos*. 2 Salk. 422. Hill. 1 Annæ. B. R. Gould v. Johnson.

See Mod. 70. Martin v. Delbo. Lev. 298. S. C. — 10 Mod. 104. Sawkil and

Warman.—And 294. Joffelyn and Lucier. — Vent. 191. Hill. 23 & 24 Car. 2. B. R. Puckle v. Moor.

8. Holt Ch. J. said, that upon *pleading* the Statute of Limitations, he always used to plead *the Return*, and not the Purchase of the Writ; For it was the Return that gave the Possession of the Cause to the Court. And if one was to *continue & Latitat* for several Years, he must get the first returned, upon which Return you may make your Continuances down, tho' you never take out another. Farr. 3. Pasch. 1 Annæ. B. R. in Case of Atwood v. Burr.

9. Action of *Affault and Battery*; the Defendant *pleads No Affault &c. infra sex Annos*, (which by the Statute is limited to 4 Years) the Plaintiff demurs; The Defendant joins in Demurrer; And per tot. Cur. Judgment was for the Plaintiff. For tho' this was an *argumentative Plea*, viz. that what was not done within 6 Years, could not be done within 4 Years; Yet suppose they had joined Issue, and a Verdict had been, that it was within 5 Years, the Court could not have given Judgment for the Plaintiff; And should such argumentative Pleas be allowed or countenanced, they would inveigle the Court in their Judgment; And therefore it was resolved, that the Plea of the Statute of Limitations should be *precise and direct*; For the Court said, there was *no such Statute* as to bar an Action of Affault and Battery not done *infra sex Annos*; but the Statute is express *infra quatuor Annos &c.* Whereupon Judgment was given ut supra. 11 Mod. 38. Blackmore v. Titherly.

S. C. 2 Salk. 423, 424. Hill. 3 Ann. B. R. says, that after Argument, it was adjudged an ill Plea; For if it be considered as at Common Law, there was no such Plea; If on the Statute, the Act is not pursued, and the De-

fendant could not take Issue on it; For *Quod est Culp. infra sex Annos* is an Issue immaterial; Because it may be, the Jury might find him Not Guilty, *infra quatuor Annos*, but Guilty *infra sex Annos*. Judgment for the Plaintiff. 2 Salk. 423, 424. Hill. 3 Annæ. B. R. Blackmore v. Titherly.

10. Debt was brought in the *Palace Court*, and after some Proceedings there the *six Years expired*; The Defendant sued a *Habeas Corpus*, and removed the Cause in B. R. where the Plaintiff declared *de Novo*, and the Defendant pleaded, that the Cause of Action did not accrue within 6 Years before the Terte of the Habeas Corpus; And this was held to be a good Plea, but that the Plaintiff might reply the Suit below, and shew that to have been within the 6 Years; not that this Suit was a Continuance of the Suit below, but that the Plaintiff had rightfully and legally pursued his Right; And it should not be in the Power of the Defendant, to defeat or hinder him of a Remedy, without any Default; As where one brings an *Action* before the Expiration of 6 Years, and dies before Judgment, the *six Years being then expired*, this shall not prevent his Executor. 2 Salk. 424. Mich. 6 Annæ. B. R. Matthews v. Phillips.

11. In Debt, the Plaintiff counted *Pro Opere & Laboro*, and that the Defendant promised on 1st. of April, to pay upon 1st. of May &c. Defendant pleaded in Bar, *Non Assumpsit infra sex Annos*. Plaintiff replied, that he was beyond Sea at the time the Action was made, and that the Action was brought within

6 Years

6 Years after his Return Defendant demurred. The Question was, Whether the Matter, set forth in the Replication, brings the Plaintiff within the saving Clause of the Act? The Court was strongly of Opinion for the Plaintiff; But Adjoinatur. 10 Mod. 205. Hill. 12 Annæ. B. R. Aubry v. Fortescue

12. In *Assumpsit*, the Plaintiff counted, that J. S. who is dead *intestate*, gave a Note to him, bearing Date the first of December, 1702. reciting, that whereas W. R. had, at the special Instance of J. S. lent to R. S. Brother to J. S. 100 l. and whereas R. S. had given Bond to repay it on the 2d. June following. J. S. promised, that if R. S. did not repay at the Time, he would; and avers &c. Defendant pleaded *Causa Actionis non accrevit* &c. and Verdict for the Plaintiff. It was moved in Arrest of Judgment, that Plaintiff could not have Judgment; Because it appears upon the Declaration, that the Cause of Action accrued above 6 Years before the Death of J. S. It was urged, that the Note was only the Form of the Promise, and Evidence of it; and therefore, if a Promise made without a Note be capable of Continuance, a Promise by Note must be so too. And also cited Vent. 191. and Rayn. 86. But per Cur. there is a Difference between Declarations upon a parol Promise, and a Promise by Note; In the former, the Day is not material, but in the latter it is. The Issue here is upon a Promise by this very Note, and therefore it is impossible in the Nature of the Thing, that an Evidence of a subsequent Promise, or a subsequent Note, can prove a Promise by this Note. Formerly it was held, that the Parties should not take Advantage of the Statute without pleading it; But now the Law is otherwise. And cited the Case of *Dean v. Crane*, and Judgment in the principal Case was arrested. 10 Mod. 311. Pasch. 1 Geo. 1. B. R. Stafford v. Forster.

1 Salk. 29. S. P.

13. *Executor brought Assumpsit on the Promise of Plaintiff to his Testator*, and set forth in the Declaration, that Testator had been dead more than six Years before the Action brought, and had a Verdict; but Judgment was arrested, and resolved by all, that it could not be cured by Verdict. Cited per Cur. 10 Mod. 313, 314. Pasch. 1 Geo. B. R. as the Case of *Dean and Crane*.

14. In *Assumpsit*, the Count was of a Promise 16 Jan. 1706; The Defendant pleaded in Bar the Statute of Limitations, and that *Causa Actionis non accrevit infra sex Annos* before the exhibiting of the Bill. The Plaintiff replied, that the Bill was exhibited 23 June, 1713, and that the Cause of Action did arise within 6 Years before the exhibiting the Bill. Defendant demurred; But Judgment was given for the Plaintiff. For this being the Case of a parol Promise, the Day in the Declaration is not material. 10 Mod. 348. Hill. 3 Geo. 1. B. R. *Cole v. Hawkins*.

15. In Case the Plaintiff declared, and laid Damages to 400 l. the Defendant pleaded the Statute of Limitations, viz. *Non Assumpsit infra sex Annos*. The Plaintiff replied, that he sued out a *Latitat* to take the Defendant two Years before the Action brought, for 150 l. On Demurrer it was insisted for the Defendant, that these were different Actions; For that no Man would take out a *Latitat* for 150 l. and declare *ad Damnum* 400 l. It is true, if the Plaintiff had averred it to be one and the same Cause of Action, it might be otherwise; and so it was ruled by the Court. 8 Mod. 109. Mich. 9 Geo. *Holloway v. Thurston*.

16. It was said and urged by Counsel, Arg. and agreed by the Master of the Rolls, that a Defendant, insisting upon the Benefit of the Statute, by way of Answer, shall at the Hearing have the like Benefit thereof, as if he had pleaded it. Trin. 1723. 2 Wims's Rep. 144. in Case of *Norton v. Turvill*.

(T) *Equity.* Relief in what Cases against the Statute.

1. **A** *Trust* is not within the Statute of Limitations; per the Master of the Rolls. Trin. 1723. 2 Wms's Rep. 145. in Case of Norton v. Turvill. 105 l. was lent by the Lady of the Lord Hollis, and in the

Note, which was given for it, it was written that the Money was to be *disposed as the Lady Hollis should direct.* An Action at Law for this Money being barred by the Statute of Limitations, a Bill was exhibited for Relief, and the Statute of Limitations insisted upon. But in Regard the Money was looked upon as a *Depositum*, and a Trust thereupon to the Lady, a Decree was obtained for the Money. 2 Vert. 245. Palch. 26 Car. 2. Lord Hollis's Case.

The Rule in this Court, that the Statute of Limitations does not bar a Trust Estate, *holds only as between Cestuy que Trust and Trustee, not between Cestuy que Trust and Trustee on one Side, and Strangers on the other*; for that would be to make the Statute of no Force at all, because there is hardly any Estate of Consequence without such Trust, and so the Act would never take Place. Therefore where a Cestuy que Trust and his Trustee are both out of Possession for the Time limited, the Party in Possession has a good Bar against them both. Per Ld. Hardwicke, 7 July 1740. in the Case of Lewellin v. Mackworth.

2. A Debt beyond the Statute of Limitations was ordered to be paid, because *directed to be paid by Will.* Toth. 115. cites Hill. 1632. Halsted v. Little.

3. A *Note* was given to *affure Lands* to the Value of 500 l. per Annum, upon the Marriage of a Woman with T. S. for her Jointure, and above 20 Years after this Note was given, the Plaintiff exhibited a Bill in Chancery to compel the Performance of it; And upon a Demurrer to the Bill it was held, that the Plaintiff was barred by the Statute of Limitations. Nels. Abr. 1125. Limitation, pl. 11. cites W. Jones 417. Row v. Lord Newburgh. This Case came before the Lord Keeper, assisted by Ld. Ch. J. Bampstone, and Jones J. and as to this Point it

seemed to them, that the Promise was barred by the Statute, but they did not declare their Opinion absolutely. Jo. 415. Hill. 14 Car. Row v. Ld. Newbury.

4. The Statute of Limitations was pleaded, and *over-ruled*; and this Court, with the Judges, were of Opinion, that the Plaintiff had no Remedy at Law, but made a Decree for the Plaintiff. Chan. Rep. 125. 15 Car. 1. Harrison v. Lucas.

5. Where a *Real and Personal Estate* are both subject to payment of Debts, if the personal Estate is sufficient, there ought to be no further Account of the Real; But if the real Estate is expressly charged with the Payment, then so long as it remains subject to the Payment thereof, it will *draw both Estates to an Account at any Time*; Because the personal Estate ought, in the very Nature of the Thing, to go in case of the real Estate; And therefore the Statute of Limitations cannot interpose, or be any Bar to an Account thereof. Fin. R. 458. Trin. 32 Car. 2. Davis & al. v. Dee & al.

6. If *all the Courts of Justice are shut up, so as no Original can be filed,* yet this Statute will bar the Action, because the Statute is general, and must work upon all Cases which are not exempted by the Exception. 2 Salk. 420. in Case of *Hall v. Wyborn.* Trin. 1 W. & M. B. R. says, it was so held by Bridgman Ch. J. in one Bynton's Case. S. C. cited 15 Mod. 246. Hill. 12 Ann. B. R. and said, that this Resolution was often approved by Holt Ch. J.

7. Defendant was *ordered not to insist on the Statute* of Limitations. Per Ld. Wright 2 Vern. 503. Trin. 1705. Gilbert v. Emerton. Denied in the Case of Peers v. B.

Jamy. 2 Vern. 574. — And denied Ch. R. 205. 13 Car. 2. Cradock v. Marsh. — Denied 13 Car. 2. Ibid. 214. Hurdret v. Calladon. — If, *pending a Suit in Chancery,* the Statute of Limitations takes Place, and the Bill is dismissed, as being a Matter properly determinable at Common Law, Chancery will

not suffer the Statute to be pleaded in Bar of the Plaintiff's Demand. Vern. 73. Mich. 1682. Anon. — 2 Chan. Cases, 217. Pasch. 28 Car. 2. Anon.

If a Suit be in Chancery in Debt for Rent, by Lease, Parol, or simple Contract, and the *Suit begins* *within Time of Limitation, and be dismissed after Time of Limitation, the Court will not order Defendant to take no Advantage of the Statute.* 2 Chan. Cases, 217. cites *Boscawen v. Boscawen* — But if in such Suit the Party is stayed by *Act of the Court*, as by Injunction &c. it is otherwise; For the Act of the Court shall do no Prejudice as in Case of Demurrers at Law. 2 Chan. Cases 217. Pasch. 28 Car. 2. Anon. —

8. Per Ld. Hardwicke, there may be a Case, where the Circumstance of *concealing a Deed* shall prevent the Statute's barring; But then it *must be a voluntary and fraudulent Detaining*; For to say, that *merely having an old Deed in one's Possession* shall deprive a Man of the Benefit of the Act, is going too far, and would be a hard Construction of a Statute made for the quieting Possessions. It must therefore be an intentional Concealment. 7 July, 1740. in the Case of *Lewellin v. Mackworth*.

(U) Equity; *What Proceedings in Equity are within it.*

1. **T**HE Statute of Limitations speaks nothing of *Bills in Equity*, yet these are construed to be within it. The Case of not *reviving a Decree, which is only to Account*, is within all the Mischief designed to be prevented, viz. to sue a Man after his Vouchers may be lost, or his Witnesses dead. For if the Party may delay 6 Years before he revives his Bill, he may do so for 26, 36, or 46 Years. There can be no Doubt, if it be *only a Bill and Answer, and the Suit abated, the Executor must bring his Bill of Revivor within six Years, else the Suit would be barred*; Per King C. And he said, the Reason holds still as strong in the Case of a *Decree to Account, which is in Nature of a Judgment Quod computet*; where, if Plaintiff had died, his Executor or Administrator could not formerly carry it on, as now by the Statute he may; And though it may seem a material *Objection, that when there is a Decree to Account, the Defendant as well as Plaintiff may revive*, he said, it would however be very hard for Equity to force a Man to revive a Suit against himself, at the same time that he swears he owes nothing; And therefore directed that the Plaintiff amend his Bill, and Defendant his Answer, to bring the Matter more fully before the Court. After which the Defendant died, and Plaintiff brought another Bill against his Administrator, to which the Administrator pleaded the Statute of Limitations; and upon arguing the same in Mich. 1727, before his Lordship, he disallowed the Plea, saying, that a *Bill of Revivor after a Decree to Account is in the Nature of a Sci. Fa.* and not within or barable by the Statute of Limitations, though the Demand seemed to be a very stale one, and not to be countenanced. Wms's Rep. 742 to 745. Mich. 1721, 1727. Hollinhead's Case.

(W) In Criminal Matters.

1. **P**ARTY robbed shall have an *Appeal of Robbery* 20 Years after the Robbery committed, and shall not be bound to bring it within a Year and a Day, as in the Case of an *Appeal of Murder*. 4 Le. 16. Trin. 26 Eliz. B R. Doyle's Case. — 2 Show. 392. S. C. cited Arg.

2. Statute of Limitations is no Plea to a Suit *pro Violentia Minuum* &c. but that is because the Proceeding is pro Reformatione, and not for Damages; and so at Common Law it is no Plea to an *Indictment for Trespass*,

Trespafs; otherwise in an Action. Per Holt. Ch. J. 2 Salk. 424. Obiter. Hide v. Partridge.

3. 7 W. 3. 3. No Person shall be indicted, tried, or prosecuted for Treason or Misprision of Treason, (whereby any Corruption of Blood may ensue) committed or done within England, Wales, and Berwick upon Tweed, unless the Indictment be found by a Grand Jury, within three Years after the Offence done.

Provided not to extend to Persons designing &c. to assassinate; nor to Impeachments in Parliament, nor to counterfeiting the Com, Great or Privy Seal, Sign Manual, or Privy Signet.

As to more of Limitation in general; See *Beyond Sea*, *Seisin*, and other proper Titles.

Lis Pendens.

(A) *What is.*

1. IF one sues out an Original returnable 15 Martini, but the same is not delivered to or returned by the Sheriff, and as he is coming to C. B. upon a Supposition that the Writ was returned, he is arrested by Procefs out of London &c. he shall not be discharged by the Privilege of C. B. For no Writ or Plea is depending in C. B. 9 H. 6. 54. b. pl. 40.

See Trial (C 2) pl. 29. &c. It is no Suit depending till the Parties have appeared, or been forced to appear, but

only a piece of Parchment thrown into the Office, which may lie there for ever, and never come to a Suit. Abr. Equ. Cafes 59. in Case of Moor v. Welsh Copper Company.

2. A Suit is determin'd by a Recovery. Br. Quare non admittit, pl. 1. cites 34 H. 6. 41.

3. A Writ is pending presently upon the Purchase thereof; For if a Stranger purchase the Land before the Return thereof, it is *Champerty*. Cro. E. 677. in Case of Arundell v. Arundell.

4. A Suit cannot be said to be begun and depending all upon the same Day. Cro. E. 858. Barnes v. Greenwell.

5. Where the Original Writ comes out of the Chancery, and is returnable in the C. B. or B. R. there, in as much as the Original comes out of another Court, the C. B. or B. R. has no Record before the Return of it; But where Procefs issues out of the same Court, and is returnable in the same Court, there the Suit shall be said depending before the Return or serving of Subpæna. 5 Rep. 47. b. Littleton's Case.

6. Where an Original Writ is purchased out of Chancery, returnable in C. B. or B. R. in such Case, after the Return of the Writ, it shall be said pending from the Day of the Teste of it, and if the Tenant alien before the Return, and after the * Teste, this shall be said an Alienation pending the Writ. 5 Rep. 47. b. Littleton's Case.—48 b. Drywood's Case. S. P.

* 2 Sid. 94.

7. An Action shall not be said to be depending till the Bail is filed. Vent. 135. Tatlow v. Bateman.—2 Lev. 13. S. C.

8. Subpæna served, and Bill filed is a Lis Pendens against all Persons; but the Service of a Subpæna, without a Bill's being actually filed, makes no Lis Pendens; but the Bill being filed, the Lis Pendens commences from the Service of the Subpæna, tho' it be not returnable till the next Term, and tho' the Party lives never so remote. See Vern. 318. Patch. 1685. Anon.

Cro. J. 340. Freeman v. Sheen.

9. A Suit commenced by *Latitat* for a false Return of a Member of Parliament is a good Commencement of a Suit, by three Judges; contra Holt. 12 Mod 26. Culliford v. Blanford.

10. Where the Statute of Limitations is pleaded, the Plaintiff may reply, that he purchased a *Latitat* within the Time, ea Intentione to de-
 clate

clare in Action. 1 Sid. 53. And this shall save his being barred. Holt agreed that Case, because it was *to give an old Right of Action veiled*; but he never knew an Instance, where suing out a Latitat did save a Limitation of an Action of *Debt upon a Penal Statute*; but the Time of Commencement ought to be reckoned from the filing the Bill. Besides there was no need of suing by Bill for such Penalty, but it might have been by Original. But notwithstanding Judgment was pro Quer' by the other three. 12 Mod. 27. cites Hall and Wymark's Case.

11. It was pleaded to an Action in B. R. that there was another Action for the same Cause depending in C. B. Nul tiel Record was pleaded; Rejoinder was that Defendant had *discontinued* the Action in C. B. Defendant demurred, and Resp. Outter awarded. 12 Mod. 307. Marley and Blunt.

12. A Bill, which is not to be brought to a Hearing, (as a Bill for perpetuating the Testimony of Witnesses to prove a Will of a Real Estate, in which no Relief is prayed) is not such a Bill as can properly create a Lis Pendens, so as to affect a Purchaser claiming under one of the Parties, after the filing the Bill; But it is such a Suit, wherein the Proceedings under it, when they are rightly carried on, must affect those who claim as Purchasers under one of the Parties after the filing of the Bill. Per Lord Chancellor. Barn. Chan. Rep. 454. Patch. 1741. Garth v. Crawford.

(B) The Force and Effect of it.

1. IF a Purchase be made in Chancery under a Decree there of a *Reversion expectant on an Estate for Life, and then the Tenant for Life dies*, such Purchaser shall not be drawn to take his Money again with Interest, notwithstanding the Pretence of Pendente Lite. Per Cur. See Chan. Rep. 71. to 76. Kennedy v. Vanlore.

2. The Rule for binding Titles Pendente Lite (which is the Rule of Practice at this Day) was the Ld Bacon's Rule, and that Rule is, That Lis Pendens binds, if it be in full Prosecution. Arg. Chan. Cases 151. And Ld Keeper said, that it is not Form, but the Substance of a Decree, that all be bound that come in Pendente Lite. Ibid. 152. Mich. 21 Car. 2. in Case of Style v. Martin.

3. A. purchased and paid the same Day that the Bill was exhibited; yet lost his Purchase, tho' he had no Notice of the Suit. Mich. 29 Car. 2. Chan. Cases 301. cites it as Sir Robert Aulin's Case.

4. Where a Man is to be affected with a Lis Pendens, there ought to be a close and continued Prosecution with actual Notice; you may affect any one by an original Bill, but as to Notice purely by a Lis Pendens, you shall not affect any one who is not Party to the Suit by an original Bill, unless the former Cause has proceeded to a Decree. Per Ld North. Hill. 1684. Vern. 286 Preston v. Tubbin.

5. If the Suit be proceeded in with Effect, the Interest of all Persons that come in Pendente Lite, tho' they are no Parties to the Suit, shall be bound and avoided by a Decree in that Cause; Per Solicitor General. Vern. 287. Hill. 1684. Preston v. Tubbin.

6. A Purchase after a Bill filed, and Subpœna served, and Defendant in Contempt for not answering, tho' without actual Notice, and for a valuable Consideration, will be set aside; and this is in Imitation of the Common Law. But in Case of a fair Purchase without Notice, the Plaintiff will be held to strict Proof; and there being some Defect in part of the Proof on the Plaintiff's Side, the Court refused to give him Leave to amend or make any new Proof after Publication. But a Purchase Pendente Lite, without any valuable Consideration, and to avoid and elude a Decree, ought to be highly discountenanced; even tho' the Alienation be made for never so good Consideration, per Ld Ch. King. But his Lordship said, that

that tho' this Court will oblige all to take Notice of its *Decrees*, as much as of *Judgments*, yet there seems not the same Reason as to the *filing of a Bill*, which is often kept in the Six-Clerk's Desk, and by that Means difficult to get Notice of it; and dismitted the Bill; but being only because of a Slip in Proof, it was to be without Costs. Trin. 1728. 2 Wms's Rep. 482. Sorrel v. Carpenter.

7. The Pendency of a *Bill in Chancery relating to an Infant's Estate is Notice* to all the World of *the Infant's being a Ward of this Court*, so as to make Persons concern'd in the Marriage of such Ward without Leave of the Court guilty of a Contempt, tho' they had not any actual Knowledge of her being such a Ward. Barn. Chan. Rep. 407. April 6, 1741. Moor v. Moor.

(C) Pleadings.

1. **A** *Acceptance of Part of a Debt on Bond Pendente Billa* goes in Bar, and not in Abatement; For the Plaintiff for this Part is barred for ever, and this Receipt is a lawful Act; but an *Entry* pending the Writ shall abate it; For it may be unlawful. Cro. E. 342. Mich. 36. and 37. Eliz. B. R. May v. Middleton.

2. A pleaded that he was a *Purchaser* for a valuable Consideration without Notice of any Incumbrance; but it appearing that the Purchase was made *Pendente lite*, the *Plea* was over-rul'd, and a Decree to reconvey and deliver the Writings. Fin. R. 321. Mich. 29 Car. 2. Fleming v. Page and Blaker.

3. *Legatee Infant* sues in a *Court Ecclesiastical*, and pending that Suit, sues in *Chancery*; the former Suit depending being pleaded, the *Plea* was disallow'd; For there is no such Security for the Infant's Advantage, as here, and possibly not for Interest if plac'd out, and for bringing in Account here &c. Hill. 33 & 34 Car. 2. 2 Chan. Cases 85. Howell v. Waldron.

* Lodger.

* See Actions. (E).

(A) Lodger or Guest in private Houses. *Who is consider'd as such; and his Power.*

1. **L**odger has a *possessory Right* against all Strangers, and even the Landlord himself; and if he comes and takes Goods out of the Room, an Action of Trespass lies; the Key of the Room being given is more than a bare Use, such as a *Guest* has. It is an *Interest* not determinable, but at a Week's End. Arg. Show. 51.

2. In an *Account* no Allowance shall be for *Diet*, where the Plaintiff came as a *Guest* at the Defendant's *Invitation*. Mich. 1681. Vern. 19. Arundel v. Roll.

2. The Defendant had a *Bond* from the Plaintiff for 50*l.* in 1684, and in 1685. the *Defendant lodged and dined with the Plaintiff*; and in 1699. the *Defendant brought an Action at Law on the Bond*, against the *Plaintiff* who brought this *Bill to have a Discount for the Diet and Lodging*, and tho'

there was no Agreement for that Purpose, and such Length of Time passed, yet the Master of the Rolls decreed it to an Account, and said, that so it should be, if the Defendant had been a Bankrupt, and the Plaintiff should have had a Discount against the Commissioners or Assignees, and that a Discount was Natural Justice in all Cases. Hill. 1699. Abr. Equ. Cases 8. Arnold v. Richardson.

(B) Favour'd or Punish'd.

1. **L**andlord in Private-Houses is not answerable for Loss of Lodger's Goods. 5 Mod. 428. Arg.

Before this Act it was not Felony for a Lodger to take away the Landlord's Goods, tho' with Design to steal them.

5 Mod. 428.

Parkhurst v. Foster. — 1 Salk. 388. S. P. & C. — Show. 50. the King v. Meers. S. P. — Kelyng 24. Raven's Case. — Ibid. 51. S. P. But see there that Keling after was of another Opinion. Ibid.

2. 3 & 4 W. & M. cap. 9. Enacts, that *If any Person or Persons shall take away with an Intent to steal, imbezil or purloin any Chattel, Bedding, or Furniture, which by Contract or Agreement he or they are to use, or shall be let to him or them to use in or with such Lodgings; such taking, imbezelling, or purloining, shall be to all Intents and Purposes taken, reputed, and adjudged to be Larceny and Felony, and the Offender shall suffer as in Case of Felony.*

It seems not to have been clearly settled before this Statute, whether a Lodger, who stole the Furniture of his Lodgings, were indictable as a Felon, inasmuch as he had a kind of a special Property in the Goods, and was to pay the greater Rent in Consideration of them; but if it had appeared clearly, from the whole Circumstances of the Case, that the first Intention of the Party in coming to the House was not to have the Conveniency of lodging in it, but only under the Colour thereof to have the better Opportunity of rifling it, and to evade the Justice of the Law, by endeavouring to keep out of the Letter of it by gaining a Possession of the Goods with the Consent of the Owner, Sergeant Hawkins says, he cannot see any good Reason, why such a Person should not be esteemed as much a Felon as a mere Stranger, inasmuch as his whole Design was to defraud the Law, and the Consent of the Owner was grounded on a Supposition of his coming as a Lodger, and could never have been gained if the Truth had appeared, which the Party shall get no Advantage by falsifying: And it brings a Contempt upon the Justice of the Nation to suffer its Laws to be evaded by such little Contrivances. However this Question is now settled by this Act. 1 Hawk. Pl. C. 91. Chap. 33. S. 10.

(A) Longitude.

1. 12 Annæ Sess. 2. cap. 15. S. 1. **A**ppoints certain Commissioners for examining and judging of all Proposals for the discovering the Longitude at Sea.

S. 3. Gives to the first Discoverer of any Method his Executors, Administrators, and Assigns, 10,000l. if it determines the Longitude to one Degree of a great Circle, or 60 Geographical Miles; 15,000l. if it determines the same to two Thirds of that Distance; and 20,000l. if it determines the same to one half of the Distances, to be paid as therein directed.

And by S. 5. If any such Proposal shall not be found of so great Use as aforementioned, yet if the same, in the Judgment of the Commissioners, be found of considerable Use to the Publick, the Authors shall have such less Reward as the Commissioners shall think reasonable, to be paid by the Treasurer of the Navy.

Lunatick, Non Compos, and Ideot.

(A) Custody. Who shall have it, and How.

1. 17 E. 2. 9. **E**NAcTs, that *The King shall have the Custody of Natural Fools, taking the Profits thereof without Wast, and finding them Necessaries, of whose Fee soever the Lands be holden, and after the Death of such Ideots shall render them to the right Heir, so that the Lands shall not be sold, nor the Heir disinherited.* By the words of the Statute the King shall have the Custody of them during

their Lives. Dalt Just. 95. cites Stamf. 34, 35.—But he shall find Necessaries for Maintenance of the Ideot, his Wife, Children and Family. Ibid. Cites Stamf. 35. 37.

2. 17 E. 2. 10. Prerog. Reg. ENAcTs, that *The King shall provide that the Lands of Lunaticks be safely kept without Wast, and they and their Families (if they have any) shall be maintained with the Profits thereof; and that the Residue be kept for their Use, and be delivered unto them, when they come to Right Mind, so that the Lands shall not be aliened, neither shall the King have any Profits thereof to his own Use; but if they die in such Estate, the Residue shall be distributed for their Souls by the Advice of the Ordinary.*

3. Dean of Pauls was Lunatick, the Archbishop of Canterbury shall have the Custody of him. D. 302. b. Marg. pl. 46. cites Temps H. 8. Pace's Case.

4. It was found by Office that F. was a Lunatick, for which the King seized his Lands and his Body, and committed the Custody thereof to one H. *quamdiu* he should be a Lunatick, to take the Profits to his own Use, rendering Rent &c. And now in Trespass H. prayed Aid of the King, et non Allocatur, because the Patent is void; For the King cannot grant the Lands of a Lunatick to another to take the Profits to his own Use; because himself is not intitled to them, otherwise than to sustain the Person of the Lunatick, his Issue, Wife and Family, and to give the Surplusage to the Lunatick when he recovers his Memory. But otherwise it is of an Ideot; For the King there shall have the Profits to his own Use, making Allowance to the Ideot for his keeping. Mo. 4. Hill. 28 H. 8. Rot. 420. Frances v. Holmes.

49. S. C.—S. C. cited 4 Rep. 127. b. in *Wentley's Case*; and that if one be appointed by the King, or if one of his own Head takes upon him to meddle with the Lunatick's Affairs, he is only as a Bailly to the Lunatick, and shall be accountable as such to the Lunatick or Non Compos Mentis, his Executors or Administrators, and cannot cut Trees but for necessary House-bote, Plow-bote, and Cart-bote, and to repair ancient Pales, and what a Bailly may do, he may do, and no more.—S. P. and that if the Lord of a Copyhold-Manor commits the Custody of a Lunatick Copyholder, such Committee cannot bring *Trespass* in his own Name, because he is only as a Servant.—And it was clearly agreed in the Court of Wards, that an *Ideot Copyholder* ought not to be order'd in that Court for his Copyhold, but in the Court of the Lord of the Manor. D. 302 b pl 46. Trin. 13 Eliz. Anon.—And it is there said in the Marg that in the Time of King H. 8. one *Pace Dean of Pauls*, was in Custody of the Archbishop of Canterbury, being Lunatick, and that it was a Question in the Court of Wards, who should have the Custody, and upon Precedents shewn, the Archbishop had him in Custody, and not the King; and says that this Case was cited by Mr Eyres, in a Reading at Lincoln's-Inn.

5. An Ideot, that is a *Copyholder*, shall not be ordered in this Court as to his Copyhold, but in the Court of the Lord of the Manor. D. 302. b. pl. 46. Trin. 13 Eliz. in the Court of Wards.—And the Ward of the Land and the Body was committed by the Statute. Ibid.

6. Land

The * King shall not have the Custody of Copyhold Lands of an Ideot 6. Lord of a Manor hath not Power to dispose of the *Copyhold* of a Lunatick, without special Custom; per Cur. But. 17. Hard. 434 cites 4 Rep. 126. Beverley's Case — * D.lt. Just. 95 cites 8 Rep. 17.

*Put it being insisted, that there is not the same Objection against the next of Kin of the Lunatick on Account of the Personal Estate, as there is against the Heir with Regard to the Real Estate, because the Personal Estate may increase, and probably will, by good Management during the Lunatick's Life, so that the longer the Lunatick lives, the better it will be for the next of Kin, and consequently for their * Interest to prolong the Lunatick's Life, Ld C. King granted the Commitment accordingly of the Personal Estate, and all Parties agreed that the Commitment of the Real Estate should go to J. S. a neighbouring Gentleman of a fair Character, who was likely to manage it to the best Advantage* 2 Wms's Rep. 544 Trin. 1729. Neale's Case.

* S. P. by Ld Ch. King 2 Wms's Rep. (63S.) Mich. 1731. Ex parte Ludlow.

8. *Custody* of a Lunatick shall never be granted to one that will *make Gain* of it. Mich. 29 Car. 2. 2 Chan. Cases 239. Lady Mary Cope's Case. — Grant of the Custody of a Lunatick *Abfque Compoto* is void. Hob. 153. cites D. 26. — And. 23. Frances's Case. — Mo. 4. S. C.

2 Chan Cases 70. S. C. — North. K. directed the Validity of the Patent to be tried at Law. Vern. 137. Hill. 1682. S. C. — It passes an Interest coupled with a Trust. 5 Mod. 44. Prodgers v. Frasier.

9. If the *Custody* of an Ideot may by Patent be granted to a Man his *Executors, Administrators and Assigns*? Per Ld Ch. Nottingham, it seems not. Vern. 9. Mich. 33 Car. 2. Prodgers v. Frasier.

10. An Irish Peeress was committed to the Fleet by Ld C Parker for not producing the Lunatick according to an Order of Court, and being instrumental in removing him from Place to Place, to evade his being produced. But his Lordship said, that if upon the producing him he should be found a Lunatick, his *Wife must have the Commitment of his Person, and also an Allowance suitable to his Estate and Quality*; and that the Estate must all be accounted for; and *his Personal Estate, upon his Death without Children, will go one Moiety thereof to her*. Note, afterwards a Jury found him a Lunatick, and the Custody of his Person was granted to his Wife, she being discharged from her Commitment. Wms's Rep. 701, 702. Trin. 1721. Ld Wenman's Case.

11. Where *two Persons equally Kin to a Feme Lunatick, the one a Man, and the other a Woman*, and neither of them being Heir at Law to the Lunatick, contend for the Custody, and the Objections against the one are no stronger than against the other; Ld Ch. King granted the Custody to the Woman, as being of the same Sex, and so probably better knowing how to take Care of the Lunatick, and in this Respect be more tender of her; and tho' the Equality of Kindred seemed to intitle both, yet having found by Experience, that granting it to two had proved inconvenient by occasioning Law-Suits, and putting the Estate to great Expence, he granted it to the one only. 2 Wms's Rep. (635.) Mich. 1731. Ex parte Ludlow.

12. Tho' a *Father devises the Custody* of a Lunatick, who is *beyond the Age of 21*, the Will is void, and the Devisee shall not have it. 2 Wms's Rep. (638.) Mich. 1731. Ex parte Ludlow.

13. The Custody of a Lunatick's Estate was *granted to the Husband and Wife, the Wife being next of Kin* to the Lunatick. She died. The Ld Chancellor held, that the *Husband's Right* to the Custody of the Lunatick's Estate is *determined*, it being a Joint Grant, and a meer Authority

ity without any Interest; and said, it had been so determined in Ld King's Time. Sel. Chan. Cafes, in Ld Talbot's Time. 143. Mich. 1735. Lyne's Cafe.

(B) *Power of the Committee.* And Allowances.

1. **T**HE King shall have to his own Use (and therefore may lease rendering Rent) all the Possessions of a Fool Natural (not of any other Ideot) during his Ideocy; but not that to which he has *Title of Entry or Action*; and therefore upon Office found, that the Ancestor of the Ideot died seised of the Estate Tail, it is sufficient to traverse the Dying seised; For this only intitles the King. Finch. 43.

Vern. 9. S. P. Mich. 53 Car. 2.

2. The King cannot grant the *Profits of the Lands of the Lunatick* to another to his own Use, but of an Ideot he may. Mo. 4. Hill. 28 H. 8. Frances's Cafe—And. 23. S. C.—8 Rep. 170. b. S. P. Tourson's Cafe.—Finch. 43.

3. Copyholder for Life becomes Lunatick, and A. his Cousin seizes his Land; afterwards the Lord grants the Custody to B. and A. takes the Corn to the Use of the Lunatick, and B. brought Trover and Conversion in his own Name; but per Cur. he should have brought it in the Lunatick's Name and as this Cafe stood, neither the Lord nor the Committee have any Thing to do to meddle with the Corn. Noy 27. Hill. 13 Jac. C. B. Cox v. Dawson.

4. The Allowance (according to the Quality and Estate of the Lunatick) must be Liberal and Honourable. 2 Chan. Cafes 240. Mich. 29 Car. 2. Lady Mary Cope's Cafe.

Chancery is to take Care of the Benefit and Comfort of the

Lunatick where no Creditor complains, and not to heap up Wealth for his Executors or next of Kin; per Lord Macclesfield. 2 Wms's Rep. 262. Mich. 1724 Justice Dormer's Cafe.

5. No Committee of a Lunatick should get 6d. by him save for Food, Clothing, and Physick; he should account Daily before a Master, and the Overplus be placed out on Security where the Administrator of the Lunatick might know how to find it; per Finch Chanc. 2 Show. 172. 33 Car. 2. Progers v. Fraier.

4 Rep. 127. b. Beverley's Cafe.—The next of Kin may be called to be present at the

Account to be yearly made before the Master. 2 Chan. Cafes 241. Mich. 29 Car. 2. Lady Mary Cope's Cafe.

6. Committee of a Lunatick cannot make Leases, nor any ways incur for the Lunatick's Estate without special Order of this Court, where the Profits are not sufficient to maintain the Lunatick; nor shall any Allowance for Improvements, or Buildings on the Lunatick's Estate be made him. Vern. 262. Mich. 1684. Foiter v. Merchant.

Ley. 47. Blewit's Cafe

7. Referred to a Master to Examine and Report what Maintenance was reasonable to be allowed for Lunatick's Son, ut sup.

8. 4 Geo. 2. 10. Ideots or their Committees, how enabled to convey Trust Estates.

See this Act more at large at (K)

(B. 2) What Interest the King has in his Lands &c.

1. **I**T is sufficient if the King be answered of the Possession, because, tho' the Ideot had *Title of Action* to the Land by way of *Entry, or by Action*, yet if he had not Possession the King shall not have Custody of the Land, * Dalt. Just. 95. cites Fin. Law. 95.

Land, and so see that of a Chose in Action by Ideot, and not in Possession, the King shall not have it. Br. Chose in Action, pl. 12. cites 1 H. 7. 24. at the end.

2. The King shall be answered of the Issues of the Land of an Ideot but *from the Time of his Title found by Office*. Dalt. Jul. 95. cites 8 Rep. 170. and Stamf. 84. and 33.

3. The King shall have the Lands *to his own Use and may let the same to Farm rendring Rent*. Dalt. Jul. 95. cites Finch. 95.

See (B) Cox
v. Dawson

(C) *Actions or Suits in Right of Lunatick. In whose Name, and where he must be Party.*

1. **A** Lunatick [was ordered] to answer by his Friend. Toth. 227. cites Mich. 15 Car. Thomas v. Howorth.

2. The Custody of a Copyholder, that was a Lunatick, was committed to J. S. and a *Trespass* was done upon his Land; the Court was of Opinion that the *Action* should be brought *in the Lunatick's Name*. Poph. 141. Anon.—Hutt. 16. S. P. and seems to be S. C.

3. Where Committees of a Lunatick sue for any Thing in the Right of the Lunatick, in such Case the *Committee* as well as the Lunatick is made Party. Chan. Cases 19. Hill. 14 & 15 Car. 2.

It was over-ruled as to the Lunatick's being made a Party

Chan. Cases 113. Mich. 20 Car. 2. Palmer v. Parkhurst—Where a Suit is on the Lunatick's Behalf, he must be made a Party. Chan. Cases 153. Mich. 21 Car. 2. Attorney General v. Woolrich.—Unless where it tends to *Stultify himself*. Chan. Cases 153. cites Smith's Cases.—Actions ought to be in the Lunatick's Name. Noy. 27. Cox v. Dawson.—A Lunatick shall have a *Quare Impedit* in his own Name. Hutt. 16. cites it to have been so Ruled.—Noy. 27. cites it to have been so adjudged—Committee may bring Action of *Debt for Rent* due on a Lease made by the Lunatick before he was Lunatick. D. 302. b. Marg. pl. 46. cites 33 Eliz. B. R. Sowper v. Goodbody.

(C. 2) *Actions, Suits, &c. by or against a Lunatick.*

Br. Ideot pl. 1. cites 33 H. 6. 18.—Br. Garden, pl. 2. cites 33 H. 6. 18.

1. **A**N Ideot shall *not* be received to *plead by Guardian, nor Prochein Amy*, but it shall be always *in proper Person* in every Action brought against him, and he that will plead the best Plea for him shall be admitted. F. N. B. 27. (G) cites P. 33 H. 6. 20. and 12 E. 2.

2. *A. in 1664. was found a Lunatick, and had lucid Intervals, and that he was Lunatick in 1647. and that during his Lunacy he was prevailed upon to Assign a Debt, which he did under Colour of Satisfaction, and which was suggested not to be valuable; Upon a Bill brought in behalf of the Lunatick the Defendant said, that the said Debt was assigned in Payment of Purchase Money for a Manor bought of Defendant by the Lunatick in 1656. at which Time A. was not Lunatick but did usually buy and sell &c. Upon hearing the Cause by Tirrel J. when all the Matter appeared as above, he ordered Defendant to account and satisfy the Debt with Damages, but directed nothing as to the Defendant's having the Manor again, or any Account of the Meise Profits. It was intited that the Lunatick in Case of a Bill brought for his Benefit, as in this Case, ought to be * made a Party; but that Opinion was over-ruled by the Judges, and the Lord Keeper upon a Re-hearing. But his Lordship stayed the passing the Decree and gave Liberty to the Defendant to traverse the Inquisition.* Chan. Cases 112. Mich. 20 Car. 2. Attorney General on behalf of Smith v. Parkhurst & al.

* But in a like Case where Defendant demurred because the Lunatick was not made a Party the Demurrer was ruled good, the Lord Keeper declaring that it was as necessary to make the Lunatick a Party as an Infant where a Suit was in his behalf; but in Case of an Ideot it must be otherwise; but a Lunatick may recover his Understanding, and then he is to hav-

hav-

have his Estate in his own Disposal. Chan. Cafes 153. Mich. 21 Car. 2. Attorney General on behalf of Woolrich v. Woolrich.—But the Book notes the Difference between the two Cafes, viz. that Smith's Cafe was to be relieved against an Act done by the Lunatick himself in Assigning a Debt he being a Lunatick at the Time; so that his being a Party had been to Stultify himself which the Law does not admit; and Quere how it can be done by Information on his behalf? but in *Woolrich's Cafe*. 4 Rep. the King has the Custody of the Person, Lands, and Goods of the Ideot, so as to provide for him and to prevent Alienation, and therefore by *Sci. fa.* may avoid a Feoffment and other Disposition made by the Ideot. But the Book says that that is no Breach of the Rule that a Man cannot be admitted to Stultify himself; because the Ideot is not Party to the Record in a *Sci. fa.* and that in that Cafe it is the same Thing, and the Writ the same as to the Alienation of Non Compos, or a Lunatick, or Ideot, and the King shall Protect those that cannot Protect themselves; and the Alienation of a Non Compos as well as of an Ideot, being found by Office shall be avoided, and that he supposes it was upon that Ground those Bills were founded; For the Court declared those Bills proper to be brought by the Attorney General. And that in *Woolrich's Cafe* the Bill was to be relieved upon a *Marriage Agreement for the Lunatick's Benefit before his Lunacy*, so that his being a Party to the Bill did not tend to Stultify himself and might be the Reason why he should be a Party to it; and the other Bill tending to Stultify himself might be a Reason why he should not be a Party to it. Chan. Cafes 153, 154.

3. If a Suit be against an Ideot after Inquisition, the Ideot cannot plead it, but the King shall send a *Superfedeas* to the Judges suggesting the Inquisition. Arg. Parliament Cafes 153. in Cafe of Leach v. Thompson.

4. An Ideot cannot bring any *Appeal* whatsoever. 2 Hawk. Pl. C. 162. cap. 23. S. 32.

5. An Ideot or Non Compos at the Time cannot be an Approver. Because no such Persons ought to be admitted to take the Oath before the Coroner without which there can be no Approvement. 2 Hawk. Pl. C. 205. cap. 24. S. 5.

(C. 3) Ideot Bound by what Acts.

1. FINE was levied by Ideot a Nativitate, who dies; the Use shall be to the Conufee. 2 And. 193. Lewis v. Winne,—tho' after found fo by Office. 12 Rep. 123. Mich. 12 Jac. Mansfield's Cafe.

And first, much as he was not disabled to levy the Fine, he Principal. 12

shall not be disabled to limit the Uses which are but the Accessory, the Fine being the Principal. 12 Rep. 123. Mansfield's Cafe.

2. Infant runs parallel with an Ideot in all Cafes but this, viz. that an Ideot is not admitted to disable or Stultify himself; per Holt. 3 Salk. 301. Hill. 9 W. 3. B. R. Thompson v. Leach.

3. There is a Difference between a Feoffment and Livery made propriis Manibus of an Ideot, and the bare Execution of a Deed by sealing and Delivery thereof, as in Cafes of Surrenders, Grants, Releases &c. which have their Strength only by Executing them, and in which the Formality of Livery and Seisin is not so much regarded in the Law, and therefore the Feoffment is not merely void but voidable; but Surrenders, Grants &c. by an Ideot are void ab Initio. Carth. 435. Hill. 9 W. 3. B. R. Thompson v. Leach.

4. Before Office found the King cannot avoid the Alienation of an Ideot, and after Office the Practice is to sue a *Sci. fa.* to him in Possession, or the Alienee. Arg. Parl. Cafes 152. in Cafe of Leach v. Thompson.—Fitzh. tit. Scire facias, pl. 2. 106.

5. Even after an Office the King cannot have the Profits from the Time of the Alienation. Arg. Parl. Cafes 152. Ibid.

The King shall have the Profits but only

from the Time of the Office, and no Precedent can be found, that the King was answered of the Mesne Profits before the Office found, but only after the Office, and so the Quere in Standf. Prærog. Reg. fol. 54. b. is well resolved 8 Rep. 172. b. Tournion's Cafe.

(D) Acts

(D) *Acts or Grants &c. of Lunatick &c. Confirmed or avoided.*

1. **F**EOFFMENT is made to A. and Letter of Attorney to B. who is then *Sanæ Memoriae*, to make *Livery*, which afterwards is made by B. *being then Non Compos*; yet it is a good *Livery*; because it has *Relation* to the Authority before. Cro. E. 447. Mich. 37 & 38 Eliz. C. B. in Case of Jennings v. Bragg.

2. If a Lunatick or Non Compos *levy a Fine* of Lands, the 5 Years begin at his Recovering his Senses, and he must bring his Action within 5 Years after, and in pleading he shall shew, that at the Time of the Fine he was Non Compos, and all the special Matter; but if he die without recovering his Senses, *his Heir* shall have his Action or make his *Entry* when he will; For he is *excepted out of the Act*, and is bound to no Time. So of *being over Sea*. 4 Rep. 125. b. Pasch. 1 Jac. B. R. Beverley's Case.

3. *After 20 Years* and 2 Purchases Chancery thinks it not proper to examine a Non Compos Mentis, and dismissed the Bill. Chan. Rep. 40. 5 Car. 1. Winchcomb v. Hall.

4. The Defendant pleads a *Fine levied* by a Lunatick; Over-ruled in Trin. 15 Car. and an Order too for a Commission to examine whether a Lunatick or not. Toth. 167. Sacheverel v. Brimington.

5. *Voluntary Conveyance* to Defendant, who was Cousin German equally with the Plaintiff, by one that was not Lunatick, but only a Person of a *weak Understanding*, who could read, and taught a Child to read, was set aside, by Finch C. 2 Chan. Cases 103. Pasch. 34 Car. 2. White v. Small.

6. If he *grants a Rent*, and Grantee distrains for the Arrears, he may bring Trespass, per Cur. 3 Mod. 310. Thompson v. Leach.

7. *Letter of Attorney* or *Bond* by Non Compos is void; it is true the Books say generally, that his Deeds or Bonds are not void; But that must be understood as that the Obligor cannot plead *Non est Factum*; Because it appears to be a Deed fairly executed, but it is of no Force, because of this latent Defect or Incapacity, which the Law requires should be pleaded and put in Issue specially; and so are *all his Acts in Pais*, except his *Feoffments* and *Livery and Seisin*, and those are only voidable. The Reason is, because of the Respect the Law gives to a Feoffment, on the Account of its * Solemnity in the Transmutation of a Freehold. And the *Writ De Non Compos Mentis*, which says *Demisit*, must be understood of a Feoffment or a Fine. Those being the Ancient, and only Conveyance at that Time; per Holt. 3 Salk. 301. Hill. 9 W. 3. B. R. in Case of Thompson v. Leach.

Way of Release with Warranty. Cumb. 469. Thompson v. Leach.—12 Mod. 173 S. C. and P.

8. His Deeds are * void, *because* the Law has appointed no Act to be done for the avoiding them; per Holt. 3 Salk. 301. Thompson v. Leach.

9. *The Heir* of a Lunatick need not have a *Sci. Fa. to avoid the Feoffment of his Ancestor* made during his Lunacy, but may *enter* without it; Per Holt Ch. J. and Judgment accordingly. Cumb. 468. Hill. 10 W. 3. B. R. Thompson v. Leach.

10. *The King*, during the Life of the Non Compos, *cannot avoid the Feoffment without a Sci. Fa.* Cumb. 468. Thompson v. Leach.

11. A Bill will not lie in Canc. to perpetuate the Testimony of Witnesses to a Lunatick's *Will* in his Life Time made before his Lunacy. Vern. R. 105. Mich. 1682. Sackvill v. Ayleworth.

12. A *Settlement* by one that was in Fact a Lunatick, tho' in other Respects it be reasonable and for the Convenience of the Family, yet it ought

* 3 Mod. 310. S. C.

12 Mod 174. S. C. and P. S. C. and P. per Cur. 3 Mod. 311.—* S. P. It being done upon the Land, and in View of the Country, and the Feoffee might have afterwards a Confirmation of his Title by Way of Release with Warranty.

ought to be set aside in Equity; Per Wright K. Vern. R. 412. Hill. 1700. Clerk by Committee v. Clerk.

13. A *Purchase by Deeds, Fines and Recoveries at a great Under-Value* from one that was a Lunatick, (but found so afterwards) and a *stated Account* was set aside, tho' Defendants insisted on a Trial at Law; but decreed, that Defendant be allow'd what he prov'd he had paid for the Use and Benefit of the Lunatick; Per Harcourt Ch. 2 Vern. R. 678. Hill. 1711. Addison per Committee v. Dawson, Mascall & al.

14. A Bill was brought by a Lunatick and his Committee, to set aside a *Settlement*, which had been obtained from him by the Defendant *before the issuing out of the Commission of Lunacy, but subsequent to the Time* wherein by the Commission he was found to have been a Lunatick, and the Bill charged several Acts of Insanity and Dilraction, previous to the making of the Settlement, and the issuing out of the Commission; and charged likewise, that the Commission of Lunacy was still in Force. To this Bill the Defendants demurr'd, for that it was against a known Maxim of Law, that any Person should be admitted to *stultify himself*; because, during the Continuance of the Lunacy, he cannot be supposed to know what he did; But my Ld Chancellor over-rul'd the Demurrer, and said, that Rule was to be understood of *Acts* by the Lunatick *to the Prejudice of others*, that he should not be admitted to excuse himself on Pretence of Lunacy; but not as to Acts done by him to the Prejudice of himself; besides, here the Committee is likewise Plaintiff, and the several Charges of Lunacy are by him in Behalf of the Lunatick; and it has been always held, that the Defendant must answer in that Case; and so he was ordered to do here, tho' the Settlement was not unreasonable in it self, being to limit the Estate in Question to the Defendants, the Uncles, in Case of Failure of Issue Male of the Lunatick, with Power for the Lunatick to charge the same with considerable Portions for his three Daughters, and a Power of Revocation. Abr. Equ. Cases 279. Mich. 1729. Ridler v. Ridler.

(D. 2) Act. Avoided. *How, and by whom.*

1. **I**N Trespas the Question was, if a *Man make a Feoffment, being non Compos Mentis*, whether he may enter or not, and if he cannot enter, whether his Heir may enter, and per Lacon, Athton and Prisot, he who made the Feoffment cannot enter; for he cannot disable himself; nevertheless, per Prisot, the Reason is, because he cannot know in his Sanity what he did when he was Non Compos Mentis; and the Opinion of all the Court was, that a *Man shall not defeat a Feoffment made by himself when he was Non Compos Mentis, tho' he returns to his Senses, and this neither by Action nor by Entry; But per Cur. his Heir may enter.* Br. Entre Cong. pl. 47. cites 39 H. 6. 42.

2. A Non Compos cannot *stultify himself*; but the * King (during his Custody) and his † Heir (after his Decease) for the Inheritance, and Executors for a Testamentary Estate shall *avoid* respective Acts in the Country of Non Compos Mentis, Ideot or Lunatick. Jenk. 40. pl. 77.

Statute of Prerogativa Regis, and not of any Right remaining in the Non Compos, who made the Feoffment.—† S. P. as to the Father, but the Heir after his Death may avoid the Feoffment of his Ancestor; For *De ipso descendit Jus*, tho' the Father had not a Right in his Life Time. Arg. Godb. 302 Pasch. 21 Jac. in the Exchequer Chamber, in Case of Sheffield v. Rateliff.

* Arg Godb. 302. cites 4 Rep. 166. b. and saith, that it is in respect of the

(D. 3) Other Matters.

1. **I**N the Case of an Ideot the Court, Ex Assensu Partium, disposed of and settled his Land in such Manner as he should not sell it, but to his younger Brother. 2 Bull. 320. Hill. 12 Jac. Requith v. Requith.
2. An Ideot is maintainable by the Parish where the Father is settled, not where born. 2 Salk. 427. Mich. 11 W. 3. B. R. Hard's Case.
3. Fools and Madmen are tacitly excepted out of all Laws whatsoever. Per Holt Ch. J. Carth. 483. Pasch. 11 W. 3. B. R. London City v. Vanacker.

(E) How the Lunacy shall be tried, and what is a good Return.

1. **A** Suspected to be Lunatick heretofore, now becomes in the same Condition upon his Arraignment by Covin, or otherwise in Reality. Resolv'd, that an Inquest be impanelled to inquire if it was of Malice or not. Savil. 50. Somervill's Case.—Resolved, if he shall be found Lunatick by Covin, there being a Disimulation, he shall be tryed upon the principal Matter, and not condemned to Pain Fort & Dure, as in Cases of Felony. But if he will not answer directly, being of sound Memory, he shall be condemn'd upon a *Nilil dicit*, and notwithstanding he shall have Judgment which pertains to High Treason, and not be put to Pain Forte & Dure. Savil. 56. Somervill's Case.
 And if he be found Lunatick, his Trial shall be deferred till he be of sound Memory. But it was fully and absolutely agreed, that if he had pleaded the General Issue Non Culp. that if after he shall come upon Evidence, and not speak directly, yet he shall not be taken Lunatick, in as much as he has answered directly. Savil. 57. S. C.
2. A Motion was that a Lunatick, being by his Confinement become of sound Mind, might be inspected, and make a Settlement of his Estate. But North K. refused to make any Order in it, but directed, that if he made any Settlement of his Estate, it should be done before the Justices of the C. B. by Fine, that so they might examine and inspect him. And that, as he was now found a Lunatick on Record, they should reply to it, that he was now restored to his Understanding, that so Issue might be taken upon it, and try'd in C. B. Vern. R. 155. Pasch. 1683. Anon.
3. A Special Return was made to a Commission of Lunacy, which was filed; but Ld Chancel'or said, he must be found either Mad or Not Mad; and if the Return had not been filed, it had been no Return; but since it is filed, it must be quashed, and an Alias Commission go. Sel. Ch. Cases in Ld King's Time. 47. Trin. 11 Geo. 1. Freak's Case.

(E. 2) Office found. Of the finding an Ideot, and who shall be said an Ideot &c.

1. **A** Writ may be awarded to the Escheator, or to the Sheriff of the County where such Ideot resides, both to examine him, and also to inquire by a Jury &c. of such Ideot, and of his Lands &c. Dalt. Just. 94. cites Fitz. 232, 233. Stamf. Fol. 34.—Regist. 226. 267.

2. But

2. But there can be no Seifure of the Lands &c. without an Office first found. Ibid. cites Stamf. 55. Dalt. Jult 95. cites S Rep. 170
 and Stamf. 34. For by the Office it appears of Record that the King has a Right to feife the Land.

3. A Person, who was presented for an Ideot in the Time of Edward 6th. could write Letters and Acquittances and such like, and therefore was adjudged an *Unthrifit*, but no Ideot. Br. Ideot, pl. 4. cites Brent's Cafe.

4. Tho' a Man be found an Ideot, yet he ought to be examined by the Council, or otherwise he shall not be bound by the Inquisition; per Dyer. Dal. 95. pl. 19. 15 Eliz. in Brent's Cafe.

5. When a Man is found Ideot a Nativitate by Office found, he that is so found (falsely as is supposed) may come in Person into the Chancery before the Chancellor, and pray that before him and such Justices and Sages of the Law as he shall call to him (and are called the Council of the King) he may be examined if he be an Ideot or no, or his Friends may sue a Writ out of the Chancery returnable there to bring him into the Chancery *ibid. Coram Nobis & Concilio nostro examinand'*, and if it be found on such Examination that he is no Ideot, the Office thereof found, and all the Examination which had been made by force of the Writ, or Commission of the King, is utterly void; without any Travers or Monstrans of Right, or other Suit. 9 Rep. 31. Mich. 33 & 34 Eliz. in Cafe of the Abbot of Strata Marcella.

Tho' it be found by Inquisition that J. N. is an Ideot, yet this is traversable in such Manner, that he may come into the Chancery and pray that he may be examined, and the Trial shall be upon

Examination; and if he be found an Ideot upon the Examination, or no Ideot, it is peremptory, as held there, and they will examine him if he can count to 20 d. or if he knows who was his Father, or Mother, or his own Age, or the Days of the Week &c. And if he can understand the Letters, and read by instruction of others, then it seems that he is not an Ideot. Br. Ideot. pl. 4. cites F. N. B. 233. (B).

6. Inquisition of Ideocy taken and *Melius Inquirendum* upon it; See Ley. 25. Pasch. 8 Jac. Darwin's Cafe.

7. A Man Deaf and Dumb from his Nativity is Non Compos; secus if by Accident; but one Deaf, Dumb and Blind by Accident is Non Compos. Br. Eschete. D. 56. 13. Marg. cites a Reading by Wakering Reader in Lincoln's Inn 1626. +

(F) Forfeitures by Lunaticks.

A. Seised of an Estate of Inheritance, Part whereof was held of the late Queen by Knights Service in Capite, died seised thereof, leaving B. his Son and Heir of full Age a Lunatick; all which was found by Office, and the Government of the said B. his Manors, Lands &c. were granted by the said Queen to J. S. by Indenture, who with the Rents Issues and Profits thereof maintained the said B. his Wife, Children, House and Family, according to the Covenants of the said Indenture; and the Question was, whether the King ought to have any mean Rates, as the Cafe standeth? It was resolved by the Ch. Justices and Ch. B. Mountague, Hobart, and Tanfield, that the King ought not to have any mean Rates of the Lands of the said B. for want of suing Livery by the said B. For that the said B. at the Time of the Death of A. his Father, was, and yet remains a Lunatick, & Mentis suæ Non Compos, and thereby disabled to tender, or sue a Livery; Whereupon a Decree was had accordingly. Ley. 56, 57. Pasch. 15 Jac. Metcalf v. Barrington.

(G) Punishable.

(G) *Punishable.* In what Cafes.

The King shall avoid such Feoffment; per Coventry. Arg. 2 Roll. R. 337. — Godb. 316. Arg. in Sheffield and Radcliff's Cafe. S. P. — * Because the Party himself had a Right of Entry, which is given to the King. Arg. Godb. 316.

1. **O**NE Non Compos Mentis cannot do *Felony*, but may be *Attaint of Treason*, and if he makes a Feoffment in Fee, and does *Treason*; is this not given to the King; but if he be * *disseised*, the King shall have the Land. Arg. 2 Roll. R. 324. cites 4 Rep. 124. Beverly's Cafe.

* Pl. C. 260. 4 Rep. 124 in Beverly's Cafe.

2. If a Lunatick *hurts a Man*, he shall be answerable in *Trespass*, tho', if he * *kills a Man*, it is not *Felony*. Hob. 134. Patch. 14 Jac. in Cafe of Weaver v. Ward.

3. If an Infant or Lunatick *commits a Trespass*, they shall answer it in Damages. Arg. 12 Mod. 332. Mich. 11 W. 3. in Cafe of Mason v. Keeling.

(H) *Offences by others in respect of the Lunatick, &c. Punished. How.*

1. **I**deot Feme has Issue by her Baron, and Office is found; the Baron shall not be Tenant by the *Curtesy*; because his Title is over-reached by the Office. Arg. 2 Roll. R. 322.

G. Equ. R. 87. Trin. 1 Geo. 1. S. C. — Ch. Prec. 412. Mich. 1715 S. C. — The Marriage, tho' good, is no *Superfedas*

2. Forcibly taking away a Lunatick under Commitment, and *marrying her* is a Contempt for which Chancery will commit the Person; but if the Marriage is afterwards held good in the Spiritual Court (as it may be by being *consummated in one of her lucid Intervals*) and upon Inspection it appears that she is restored to her understanding, the Husband shall be discharged, and the Commission of Lunacy vacated. Abr. Equ. Cases 278. Trin. 1702. Ather's Cafe.

to the Commitment of the Lunatick; per Lord Wright. Ch. Prec. 203. Trin. 1702. Mrs. Ash's Cafe. — And said it was so held in Fane's Cafe.

3. In Cafe of a Marriage with a Feme Lunatick, Chancery ordered all Deeds and *Securities relating to her Fortune, and all her Jewels to be lodged with one of the Masters*, in Order to secure some Provision for her, if she should survive her Husband, and also for Children, if any. Ch. Prec. 412. Trin. 1 Geo. 1. Packer v. Windham.

S. C. cited 2 Wms's Rep. 111 in Cafe of Eyer v. the Countess of Shaftsbury.

4. And for this Contempt Mr Packer the Husband, and others concerned in procuring the Marriage were *committed to the Fleet*. Ibid.

5. An *Information* was against one for being the *Contriver of a Marriage of an Ideot that had Lands of Inheritance*. 9 Mod. 98. Mich. 11 Geo. 1. Smart v. Taylor.

6. A Commission of Lunacy was granted, and the Persons who had him in their Custody were desir'd to produce him, which they not doing, the Ld C. Parker made an *Order for producing him*. Afterwards on his not being produced, the *Wife* of the Lunatick was order'd to attend, and it appearing by Affidavits that she had been with him, and was *instrumental in removing him from Place to Place to evade his being produced*, his Lordship order'd her to be *committed to the Fleet, tho' she was an Irish Peeress*. Wms's Rep. 701. Trin. 1721. Ld Wenman's Cafe.

(I) Lunatick.

(I) Lunatick. *Lord or Copyholder.*

See (C).

1. **L**ORD of a Manor being Lunatick, may by his Steward, whom before his Lunacy he had constituted for Life, grant Copyhold Estates according to the Custom, whether for one Life in Possession, or one Life in Possession, and another in Reversion; but the Committees cannot grant any Copyhold Estate. But by Way of Caution it was ordered that he should grant none without the Privity of the Committees, nor before the Court was acquainted therewith, and gave Warrant for the granting. Ley. 27. Trin. 9 Jac. Blewitt's Case.

2. *Lord of a Manor* cannot commit or dispose of the Copyhold of a Lunatick, without special Custom. Hutt. 17. Anon.

(K) Lunatick and Trustee enabled to transfer.

1. Stat. 4 Geo. 2. cap. 10. S. 1. Enacts, that *It shall be lawful for Persons being Ideot, Lunatick, or Non Compos Mentis, or for the Committees of such, in their Name, by Direction of the Lord Chancellor, by an Order made upon hearing all Parties, on the Petition of the Persons for whom such Ideots &c. shall be seised or possessed in Trust, or of the Mortgagors, or the Persons intitled to the Monies secured upon any Lands whereof such Persons being Ideot &c. shall be seised or possessed by Way of Mortgage, or of the Persons intitled to the Redemption thereof, to convey such Lands as the Lord Chancellor shall by such Order direct, and such Conveyance shall be good.*

S. 2. *Such Persons being Ideot &c. and only Trustees or Mortgagees, or the Committees of such may be impowered and compelled by such Order to make such Conveyances, in like Manner as Trustees or Mortgagees of Sane Memory.*

(L) Pleadings.

1. **I**T was found by Inquest of the Office returned in Chancery, that W. N. was seised of certain Manors, and held them of the King in Chief, and died seised, and the Tenements descended to R. a Natural Fool from his Birth, as Son and Heir, and that N. held the Tenements; upon which the King sued a *Scire Facias* against N. to say *why the Land should not be seised* into his Hands, for the Ideocy of R. who came and said, that R. such a Day released all his Right to the Possession of M. then Tenant of the Land; at the Time of the making of which Deed R. was of good Memory; which M. interceded him, absque hoc, that R. was a Natural Fool from his Birth; and it was not denied, but that the *Tertenant may traverse the Office* in this Form, and after they passed over to another Matter, viz. The Alienation without Licence * Br. Ideot, pl. 2. cites 20 Aff. 2.

2. Office found that J. S. died seised of such Land by Gift in Tail made to him, which descended to W. his Son and Heir, who was an Ideot, and N. came and *traversed the Office*, and made Title, absque hoc that the said J. S. was seised Prout &c. the Day on which he died, and it was found against the King. And by Hullely and Fairfax, this Case of the Ideocy is not like to the Case of the Ward of the Land and Heir; For there the King shall be answered as to the Tenure; but in Case of the Ideot, the King shall be answered only as to the Possession; For if an Ideot has Title to the Land by Entry, or by Action, if he has it not in Possession yet, the

* Orig. (Conus.)

King thall not have it ; and so Judgment was given upon the Traverſe ; for the Iſſue was upon the Poſſeſſion, & non reſert, whether the Ideot has Right or not, if he has not Poſſeſſion, quod nota. Br. Ideot, pl. 3. cites 1 H. 7. 18. & 19.

Maerefme.

(A) To whom it appertains.

See Trees.
Waſt, ando-
ther proper
Titles —

Roll. R. 178. 1. **I**F Leſſee for Liſe or Years cuts Timber or prostrates the Houſes
S. C. — demised, the Lessor shall have the Timber ; For the Lessor has
4 Rep. 62. b. the general Ownership and Property in the Inheritance in the Tim-
— But if a ber. Co. 11. 81. b. Bowles's Case. — and * Liſord's Case.
Houſe be
flung down by
Tempeſt, and Leſſee ſells the Timber, it is not Waſt ; For after the Dejection (of which he is excuſed
by Reaſon of the Tempeſt) the Timber is become a Chattle, of which no Waſt can be committed. 2 Roll
Waſt (E.) pl. 31. cites 29 E. 3 33. Curia. — As it ſeems it is ſo to be intended. Ibid. cites 40 Aff.
22. — * 11 Rep. 48.

Palm. 32. S. 2. **I**F Leſſee for Liſe or Years cuts Timber Trees, and barks them and
C. — Jo. carries them away immediatly, yet they belong to the Lessor who has
225. S. C. — the Inheritance ; For they are Parcel of the Inheritance, and the Leſ-
— Cro. C. for may have Trover and Conversion for them, tho' he never ſeiſed
242. S. C. them before the carrying them away, and that the Leſſee carried
— 5 Rep. 76. them away immediatly after the Cutting and Barking, ſo that all
b. Pager's was but one intire Act. Between Bertie and Herd, adjudged
Case. — upon a ſpecial Verdict in B. R.
And Leſſor
may bring a
Bill in Chan-
cery, becauſe it may be impoſſible to diſcover the Value, that being in the Poſſeſſion of him that cut
it ; Per Ld Ch. Maccleſfield ; and that in ſuch Caſe, where there were Trees blown down by the
Storm, and ſeveral Tenants for Liſe, with Remainder to their firſt &c. Son in Tail, but neither of
them having any Son, the Timber was decreed to the firſt Remainderman in Tail. 2 Wms's Rep. 241.
Mich. 1724. cites it as the Caſe of the Duke of Newcastle v. Vane.

So where af- 3. **I**F a Feoffment be made of Land to the Uſe of A. for Liſe, the
ter the Re- Remainder to the Uſe of his 1, 2, 3, and other Sons in Tail, the Re-
mainder li- mainder to the Uſe of B. for Liſe, the Remainder to the Uſe of his
mited to the 1, 2, 3, and other Sons in Tail, and after B. has Iſſue C. a Son,
firſt &c. Son wherey he is Tenant in Tail in Remainder, and after A. not having
of B. in Tail any Son cuts Timber Trees, and then ſells Part of the Timber coming
Male, the off the Trees, and after C. ſeiſes the Reſidue of the Timber coming
Remainder of the Trees, and A. re-ſeiſes it, C. may have Trover and Conver-
was further ſion againſt A. for all the Timber ; For the mere Property of the
limited to C. Trees is in him who has the immediate Inheritance of the Land at the
and D. and Time of the cutting of them. And tho' the Remainder for Liſe to B.
the Heirs is an Impediment of an Action of Waſt during his Liſe, yet it is not
of their Bo- any Impediment to C. as to the Property of the Trees, being ſe-
dies, Remain- vered from the Land, which B. cannot have for the Debility of his
der to the Eſtate ; and the Poſſibility of the Eſtate, which may come to the
Feoffor in Fee, Son of A. if A. ſhall have any Son, is not any Impediment,
and A. and B. inasmuch as it is a mere Poſſibility, which peradventure never will
had no Sons, happen, and is Nothing in Law till it happens, and may be deſtroy'd
and C. died by the Feoffment of the Leſſee. Mich. 24 Car. B. R. between
without Iſſue, one Molety of
whereby the Heir of the Feoffor, aſto
one Molety of

Uvedale and Uvedale. Adjudged upon a Special Verdict. Intratur the Premises had the first Estate of In-
Cr. 23 Car. B. R. Rot. 694.

heritance; A. having cut Timber sold it, and the Heir of the Feoffor brought his *Bill for an Account of a Moiety of the Timber.* And Ld Ch. Macclesfield held, that the Right belonged to those, who at the Time of its being severed from the Freehold were seised of the first Estate of Inheritance, and that the Property becomes vested in them, and his Lordship thought the Bill for an Account proper, in order to discover the Value, and that A. the Defendant was not to be allow'd what Money he had laid out in Timber for Repairs, since his selling shewed, Quo Animo he cut it down. 2 Wms's Rep. 240. Mich. 1724. Whitfield v. Bewit.

So if *Tenant for Life leases for Years, excepting the Timber &c. and Lessee for Years assigns his Lease to Remainderman in Fee,* he in Remainder cannot fell any Trees, tho' he may carry away any that were felled before. Ley. 20. Sir Allen Percy's Case.

Tenant for Life, Remainder for Life, Remainder in Fee; Tenant for Life cuts Timber; The Property belongs to Remainderman in Fee. 5 Rep. 76 b.—and he may seise them, tho' he cannot bring Action of Wast during the mesne Remainder for Life. Allen St. Udall v. Udall.

4. If Trees are *blown down* by the Wind, Quære, if Lessee shall not have them? For 44 E. 3. in Wast it is ruled, that Lessor shall not have Wast or Trover for them against Lessee, if he takes them. D. 90. b. 9. Lessor shall have Windfalls; Per Anderson. 4 Le. 166.

Lewknor's Case.—143. Arg.—*Windfalls,* which have Timber in them, belong to those in Reversion; but if *Dotards,* which have no Timber in them, then Tenant for Life may have them. Mo. 812. Countess of Cumberland's Case.—Roll R. 181. S. P. Bowles v. Berrie.—4 Rep. 63. 9. Herlackenden's Case.

5. If the Timber be *carry'd off into another's Land, and hew'd out or cut into Boards,* Lessor may take them. Mo. 19. But if the Trees are fix'd on the Land, or if a House is made of the Timber, it is otherwise. Qu. Mo. 20.

6. If *Lessee covenants to repair,* and the Grounds are rotten, he may cut Timber to repair them. Mo. 23. pl. 80.

7. If *Lessee for Years* without Impeachment of Wast *cuts Trees,* and leaves them on the Land, and dies, his *Executors* shall have them, and not the Lessor. Arg. 4 Le. 139.

8. *Birches* in such Countries, where they are necessary for Use in Building, are Timber, and belong to the Inheritance, and not to Tenant for Life. Mo. 812. Countess of Cumberland's Case.

9. *Feme Tenant in Tail after Possibility without Impeachment of Wast* by Force of the Clause (without Impeachment of Wast) shall have Timber of *Houses blown down* by the Wind, and *Trees,* and when they are severed from the Inheritance, either by Act of the Party, or the Law, and become Chattels, the entire Property of them is in the Tenant for Life, by Force of the said Clause. 11 Rep. 84. Lewis Bowles's Case. 4 Rep. 63. Herlackenden's Case. Contra.

10. If a *House falls per Vim Ventis,* Tenant for Life, Years, in Dower, by *Curtesy &c.* have a *special Property* in the Timber, to *rebuild* such a House with the Timber, as the other was, for his Habitation. 11 Rep. 82.

11. If Lessor *grants that Lessee may do Wast,* he may convert to his own Use. 11 Rep. 83. in Lewis Bowles's Case.—cites 3 Ed. 3. 44. a. b. Walter Idles's Case.

12. If Trees are *aridæ,* Lessee shall have them; For then they are Fuel. Arg. Roll. R. 181.

13. *Absque Impetitione Vastii* gives a Power to fell and sell. Roll. R. 183, 184. Bowles v. Berrie. 11 Rep. 82. b. Lewis Bowles's

Case. acc. But 4 Rep. 63. Herlackenden's Case is that Tenant for Life dispensable of Wast shall not have the Trees. Arg. 2 Roll R. 325.—But Absque Impetitione Vastii per aliquod breve de Vasto discharges only the Action, but doth not give the Property, and the Lessor after the cutting may seise the Trees. 11 Rep. 82. b. Lewis Bowles's Case.—Co. Litt. 352. 220.

Magistrate.

(A) His Power.

1. **M**ayor or Magistrate may *send for any* to examine him, and is not bound to shew the Cause in his Warrant, nor is it necessary for the Officer to know the Cause. Cro. J. 81. . . . v. Bowcher.
2. A *Contemptuous Carriage* and Behaviour to a Magistrate is a Breach of the good Behaviour, and he to whom such Affront is offered may bind to the good Behaviour, or, if he has no Sureties, commit him till he find some; Per Holt Ch. J. Farr. 29. the Queen v. Rogers.

Maihem.

Fol. 112.

(A) What shall be said a Maihem.

1. **A** Maihem may be committed in cutting off my Fingers. 1 Le. 139.—*So of cutting the Thumb or Nose.* 1 Jo. 183.—*So knocking out one's fore Tooth, putting out one's Eye &c. it is otherwise of knocking out his grinding Teeth, cutting off one's Ear, Nose &c. for these are but Deformities; For Maime is the wrongful spoiling of a Member Defensive in Sight.* Fin. Law. §. 204.
 2. A Maihem may be committed in cutting off my Finger next to the little Finger. 28 E. 3. 94. per Seaton.
 3. **So** a Maihem may be committed in cutting off any of my Fingers. 28 E. 3. 94. per Seaton.
 4. Any Hurt to a Man's Body, whereby he is render'd * less able in Fighting, as the cutting off, disabling or weakening a Hand or Finger, striking out an Eye, or fore Tooth, or Castration &c. are properly Maihems, and come under the Notion of Felonies; but the cutting off an Ear or Nose are not properly Maihems, because they do not weaken a Man, but only *disfigure* him. Hawk. Pl. C. Abr. 124. S. 1.
- S. P. So of breaking his Skull, striking off his Arm, cutting off his Leg or Foot, or whereby he loses the Use of any of his said Members. Co. Litt. 288. a. — * S. P. 2 Hawk Pl. C. Abr. 146. S. 5.

(B) What shall be good Cause of Justification.

1. **I**t is good Justification of a Maihem, that the Plaintiff who is maimed assaulted him, and he fled from Place to Place, and the Ill which he receiv'd was upon his own Assault. 25 E. 3. 41. admitted by Issue. 28 E. 3. 94.
- 2 Salk. 642. Cockroft v. Smith.

2. The

2. The *Defence* of a Man's *Possession* will not justify a Maihem, but only the *Defence* of his *Person*. 2 Hawk. Pl. C. Abr. 148. S. 10.

(C) Appeal. Bars.

1. **I**t is a good Bar in Appeal of Maihem, that the Plaintiff was Nonfuit in other Appeal after Appearance of the Defendant. 4^o E. 3. 1. adjudged.

2. In Appeal of Maihem it is good Bar, that the Plaintiff hath recovered in a Trespas of Assault, Battery, and Wounding, which is the same Battery and Wounding for which this Appeal is brought; For in both Actions Damages are to be recovered, and he hath recovered Damages in the Trespas for the Wounding, which makes the Maihem, and therefore the Defendant shall not be punished for it again. Adjudged Co. 4. 43. Hudson and Lee. 2 Hawk. Pl. C. cap. 23. S. 22.

3. It is a good Plea in Bar of Appeal of Maihem, that the Plaintiff assaulted the Defendant in such a Manner as endanger'd his Life; but it seems that the Common Plea of Son Assault demetne, without some special Circumstance, is no Bar of a grievous Maihem, as the cutting off a Leg &c. For such a Revenge bears no Proportion to the Provocation. 2 Hawk. Pl. C. Abr. 147. S. 10.

4. Notwithstanding an Appeal of Maihem supposes the Fact to have been done feloniously; yet, inasmuch as at this Day it only subjects the Appellee to Damages, it may be barred by an Arbitrement, or by an Accord with Satisfaction executed; or by a Release of all Manner of Appeals; or by a Release of all Manner of Demands, or by a Release of all Manner of Actions, or by a Release of all Actions personal, or by a Nonfuit in a former Appeal after Appearance. But a Nonfuit in an Action of Trespas is no Bar of an Appeal of Maihem. 2 Hawk. Pl. C. Abr. 148. S. 11.

(D) What Court may take Cognizance of it, and How.

1. **I**nferiour Courts have Power to judge on View of Maihem, and to increase Damages; and per Pemberton Ch. J. a barbarous Battery, as cutting the Nose may be construed Maihem for the Increase of Damages. 2 Jo. 183. Anon. — Vent. 353. reports, that per Cur. none but the Courts at Westminster can increase Damages upon View. Anon.

(E) Punished. How.

1. **I**t is said, That anciently Castration was punished with Death, and other Maihems with the Loss of Member for Member; but afterwards no Maihem was punished in any Case with the Loss of Life or Member; but only with Fine and Imprisonment. 1 Hawk. Pl. C. 112. cap. 44 S. 3.

2. But 22 E. 2. Cur. 2. cap. 1. Enacts, that If any on Purpose and of Malice forethought, and by lying in Wait, shall cut out or disable the Tongue, put out an Eye, slit the Nose, or cut off a Nose or Lip, or cut off or disable any Limb or Member of any Subject of his Majesty with Intention to Maim or disfigure him, such Persons, Counsellors, Aiders and Abettors shall suffer Death, as in Cases of Felony, without Benefit of the Clergy.

Such like In-
Arrestment
which can-
not but endanger the maiming him, and in such Attack happens not to kill, but only to maim him, he may be indicted on this Statute together with all those who were his Abettors &c. and it shall be left to the Jury on the Evidence, whether there were a Design to murder by maiming, and consequently a malicious Intent to maim as well as to kill; in such Case the Offence is within the Statute, tho' the primary Intention was Murder. 1 Hawk. Pl. C. 112. cap. 44. S. 6.

Mainprize.

(A) In what Actions, Suits or Things [Persons] may be mainprised in Writ of Error.

1. **I**F a Man be in Execution for Debt upon Judgment in B. and brings Writ of Error in B. R. De Rigore Juris, he ought not to be put to Mainprize in B. R. 7 D. 6. 28. h.
2. But he may be let to Mainprize by Special Grace. 7 D. 6. 28. h.
3. But the Diversity is if Writ of Error be brought in Parliament upon Judgment in B. R. 7 D. 6. 28. h.
4. But if a Man be in Execution upon Judgment in B. R. and he says, that * he will sue a Writ of Error at the next Parliament, he shall not be let to Mainprize upon this Suggestion, 7 D. 6. 29,

* Fol. 113.

See Audita
Querela
(B. 2).

(B) In Audita Querela.

1. **I**F the Audita Querela be grounded upon a Matter of Writing, he shall be let to Mainprize; Because it is apparent to the View of the Court. My Reports 14 Ja. K. R.
2. If the Audita Querela be grounded upon a Matter in Fact, he shall not be let to Mainprize; For it may be false, and then he shall be out of Execution by this false Suggestion. My Reports 14 Ja. B. R. Piers.
3. If A. recovers Damages against B. and takes him in Execution, and after B. purchases a Manor, to which A. is a Villain Regardant, and upon this Matter B. sues an Audita Querela, yet he shall not be let to Mainprize; Because the Audita Querela is grounded upon a Matter in Fact. 41 E. 3. Audita Querela 18.
4. If an Infant sues an Audita Querela upon a Statute for Infancy, after which he is inspected by the Court, and found within Age, he shall be let to Mainprize. 20 E. 3. Audita Querela. 27. adjudged.
5. Four Men sued Audita Querela upon a Statute Merchant, so that they were in Execution, and the one appeared, and the other three were not there, but the fourth made the Suit for all; and because they cannot do this without being there in Person, or by Attorney, or by Mainprize, therefore Capias was awarded against them, and that he who appeared should sue Writ to let him to Mainprize. Br. Mainprize, pl. 82. cites 29 Alf. 41.
6. In Audita Querela, they were at Issue, and Nisi Prius granted, and therefore the Plaintiff was by Mainprize notwithstanding the Statute; and
per

per Persey, he shall be by Attorney at the Nisi Prius. Br. Mainprize, pl. 14. cites 46 E. 3. 32.

7. In Audita Querela the Plaintiff, upon sufficient Defeasance pleaded, would have been by Mainprize, and could not before the Venire Facias returned; quod nota. Br. Mainprize, pl. 16. cites 47 E. 3. 25, 26.

8. The Conusor upon Statute Merchant in Audita Querela shall not be by Mainprize before he has given some Answer; Quod Nota. Br. Mainprize, pl. 18. cites 48 E. 3. 1.

9. Where the Conusor finds Mainprize to appear from Day to Day till Judgment rendered upon Audita Querela sued, and he appears at the Day of the Inquest, and when they come to say their Verdict, he makes Default and is Non-suited, this is a Forfeiture of the Mainprize, which was of the Sum in the Statute; by which the Conusor prayed Execution against the Conusor, and against the Mainperners also, of the Sum &c. and could not have both, but shall hold him to the one by Award; Quod Nota; by which he took the Conusor, his Lands and Goods, and Relinquished the Mainperners. Br. Mainprize, pl. 21. cites 50 E. 3. 12.

10. He who sues Audita Querela shall find Surety of the Sum. Br. Mainprize, pl. 92. cites 11 H. 6. 31.

* Maintenance.

* Maintenance is of two Sorts, viz. Curialis, i. e. in Courts of Justice pendente Placito; and Realis, i. e. to stir up and maintain Quarrels, viz. Complaints, Suits,

(A) ** Embracery.

1. **I**F a Man gives Money to a † Juror, impannell'd to give his Verdict for one of the Parties to the Action, this is Embracery. II D. 6. 11.

and Parts in the Country, other than their own, tho' the same depend not in Plea and this is punished with great Severity. 2 Inst. 213.—Co. Litt 368 b.—Mo. 816. S. P.—1 Hawk. Pl. C. 249. cap. 83. S. 2, 3.—** See (R) pl. 2.—See Embracery.

‡ He who laboureth the Jury, if it be but to appear, or if he instruct them, or put them in fear, or the like, he is a Maintainer, and he is in Law called an Embraceor, and the Action of Maintenance lies against him, and if he take Money, a Decies tantum may be brought against him. And whether the Jury pass for his Side or not, or whether they give any Verdict at all, yet shall he be punished as a Maintainer or Embraceor, either at the Suit of the King or the Party. Co. Litt 369. a.—And Serjeant Hawkins says, it seems clear that any attempt whatsoever to corrupt or influence, or instruct a Jury, or any way to incline them to be more favourable to the one Side than to the other, by Money, Promises, Letters, Threats, or Persuasions, except only by the Strength, and the Arguments of the Counsel in open Court at the Trial of the Cause is a proper Act of Embracery. Hawk. Pl. C. 259. S. 1.—|| It is Embracery as well in the Party himself as in a Stranger. Mo. 816. Jepps v. Tunbridge.

It is said that generally the giving of Money to a Juror after Verdict, without any Precedent Contract in Relation to it is an Offence favouring of the Nature of Embracery; because if such Practices were allowable, it would be easy to evade the Law by giving Jurors secret intimations of such an intended Reward for their Service, which might be of as bad Consequence as the giving of Money before Hand. Hawk. Pl. C. 259. S. 3.

It has been adjudged, that the bare giving Money to another to be distributed among Jurors is an Offence of the Nature of Embracery, whether any of it afterwards be actually so distributed or not. 2 Hawk. Pl. C. 259. S. 4.

2. Maintenance against 2, because the Plaintiff had Action of Covenant in C. against J. N. upon which they were at Issue, and the Jury returned, and the Defendant came and gave Money to the Jury, Select, to J. K. and so of each, and spoke great Words to them, in Maintenance of the Quarrel of the Defendant to the Damage &c. Norton said, it appeared, that the Defendant is an Embraceor, by which the Plaintiff ought to have Decies tantum &c. Judgment &c. Per Hanke, an Embraceor is he who takes upon him

him to make the Inqueit appear, Scilicet, a Leader of Inqueits; by which the Defendant said, that he was Attorney of the Defendant in the Writ of Covenant, Judgment si Actio; & per Cur. an Attorney cannot give any thing to the Jury; wherefore he said, that he was Attorney, and gave Evidence to the Jury for his Client, Absque hoc, that he gave &c. or did other Maintenance, and the other e contra, that he gave &c. and as for the other he said, that he was Bailiff and returned the Pannel, and summoned the Jury to appear, Absque hoc, that he did other Maintenance, and the other e contra; And per Thirne & Cur. Attorney, Sheriff, Bailiff &c. ought not to give Rewards to the Jury for the Party, nor any Promise to them. And Thirne said, that speaking of great Words is not Maintenance. Br. Maintenance, pl. 9. cites 13 H. 4. 16.

* See (B. 2) (M) pl. 7. — Champerly is the unlawful Maintenance of a Suit in Consideration of some Bargain to have part of the Thing in dispute, or some Profit out of it. 1 Hawk. Pl. C. 256. cap. 84. S. 1. — Co. Litt. 368. b. — † He who purchases Bona fide pending the Writ is a Champertor; For it is against the Statute, and also by Intendment he will maintain to eschew his own loss. Br. Champerty, pl. 8. cites 50 Ass. 3. — And it was held by the Justices, that there is no Diversity where a Man sells his Land pending the Writ, and where he gives it; because it is prohibited by the Law, that none shall purchase pending the Writ. Br. Champerty, pl. 10. cites 8 E. 4. 13. — But it was touch'd, that a Man may make Feoffment to his Use pending the Writ, because the Feoffee has nothing to his own Use. Ibid.

1. **I**f † pending a Real Action a Stranger purchases the Land of the Tenant in Fee for good Consideration, and not to maintain the Plea, this is not Champerty, tho' by Intendment the Stranger for his Interest will aid the Tenant in his Plea. 21 E. 3. 10. b. 52. by Issue. Contra 50 Ass. 30.

2. **I**f a Man purchases Land of B. pending a Suit in Chancery against B. by A. for the Land, this is not Champerty, tho' the Purchasor has Conuſance of the Suit. Pasch. 9 Car. B. R. in an Information against Hill and Winston, upon the 32 D. 8. of Maintenance Per Curiam agreed; and Rich. then said, that it was so lately resolved in Master Brownlow's Case, upon Reference to certain Judges out of the Star-Chamber.

3. **I**f a Man maintains the Tenant in a Præcipe quod reddat to have Part of the Land, a Writ of Champerty lies; Because this is Champerty, as well as if he had maintained the Demandant. 21 E. 3. 10. b. 52. 30 E. 3. 4. adjudged.

4. **I**f a Man undertakes to maintain one Party for Part of the Land pending the Plea, tho' he doth not purchase it of him pending the Plea, yet this is Champerty. * 30 Ass. 15. adjudged. 33 E. 3. 4.

5. **I**f a Man maintains one Party to have Part of the Land, it is Champerty immediately, before the other hath lost the Land; For he may have Writ of Champerty pending the Plea. 47 Ass. 5.

6. The Father may enfeoff his Son pending the Plea; For a Man may have Aid of Sages, and of his Friends. See the Statute of Articuli super Chartas, cap. 12. and Quare; For by the Opinion of Herle Justice, a Man may have Aid of Sages and of his Friends. Br. Champerty, pl. 11. cites 6 E. 3. & F. N. B.

7. **I**f a Man maintains one Party to have Part of the Land, it is Champerty immediately, before the other hath lost the Land; For he may have Writ of Champerty pending the Plea. 47 Ass. 5.

8. The Father may enfeoff his Son pending the Plea; For a Man may have Aid of Sages, and of his Friends. See the Statute of Articuli super Chartas, cap. 12. and Quare; For by the Opinion of Herle Justice, a Man may have Aid of Sages and of his Friends. Br. Champerty, pl. 11. cites 6 E. 3. & F. N. B.

Fol 114.

9. **I**f a Man maintains one Party to have Part of the Land, it is Champerty immediately, before the other hath lost the Land; For he may have Writ of Champerty pending the Plea. 47 Ass. 5.

10. The Father may enfeoff his Son pending the Plea; For a Man may have Aid of Sages, and of his Friends. See the Statute of Articuli super Chartas, cap. 12. and Quare; For by the Opinion of Herle Justice, a Man may have Aid of Sages and of his Friends. Br. Champerty, pl. 11. cites 6 E. 3. & F. N. B.

7. If the *Tenant* in a Real Action Grants a * *Rent, Common, or other Profit apprender out of the Land*, to maintain &c. this is Champerty; and yet the *Rent, Common &c.* is not in demand, but they are Profits out of the Land. 2 Inst. 209. * S. P. 207.

8. If one recover Land, and be in Possession by Writ of Seisin, he may sell it, tho' he was not in Possession, nor any Ancestor or other by whom he claims by the Space of a Year next before; yet in such Case, if any new Suit be commenced before the Sale, this shall be Champerty, but not punishable by 32 H. 8. but by the ancient Statutes. Mo. 655. Mowfe's Case.

9. An Attorney following a Cause to be paid in Gross, when it is recovered, is Champerty. Hob. 117. in Case of Box v. Barnaby.

10. A Counsellor took a Bond of his Client conditioned to convey one Half to him of the Estate on recovering the Whole; the Court declared that the Bond ought to secure what was actually disbursed, and to make reasonable Allowances for Care &c. in the Recovery. Mich. 32 Car. 2. Fin. R. 477. Skapholm v. Hart.

(B. 2) Statutes as to Champerty.

1. WEST. 1. 3 E. 1. cap. 25. Enacts, that no * Officers of the King by themselves, nor by other, shall maintain Pleas, Suits, or Matters hanging in the † King's Courts for Lands, Tenements, ‡ or other Things, for to have Part or Profit thereof by || Covenant made between them; and he that doth, shall be punished at the King's Pleasure. * Ld. Coke in his 2 Inst. 207 calls them Ministers of the King, and says it was taken in the

King's Time to extend to the Judges of the Realm; and cites a Record, in which Record, and most other of that Time (Ministri Regis) extends to the Judges of the Realm as well as to them that are Ministerial Offices. —† By these Words are intended only his Courts of Record. 1 Hawk. Pl. C. 257. cap. 84. S. 4. —‡ Within these Words are included Leases for Years, and other Goods and Chattels, Debts and Duties. 2 Inst. 209. —|| Under the Word Covenant, which in a strict Sense signifies only an Agreement by Deed, all Kinds of Promises and Contracts of this Kind are included, whether they be made by Writing or by Parol. 1 Hawk. Pl. C. 257. cap. 84. S. 5.

Maintenance in Consideration of a Rent granted out of Land in Variance is within this Statute; but Rent granted out of other Lands is no way within the Purview of it. Ibid. S. 2.

2. West. 2. 13 E. 1. cap. 49. Enacts, that the Chancellor, Treasurer, Justices, or any of the King's Council, Clerks of Chancery, Eschequer, nor any Justices, or other Officer, or any of the King's House, Clerk or Lay, shall not receive any Church or Advowson, Land, or Tenement in Fee, by Gift, or by Purchase, or to Farm, by Champerty, or otherwise, so long as the same Thing is in Plea, nor shall take any Reward thereof in Pain to be punished at the King's Will, both Byer and Seller. This Statute extends only to the Officers then named, and not to any other Persons. 1 Hawk. Pl. C. 257. cap. 84. S. 5.

12. — And it so Strictly restrains all such Officers from purchasing any Land hanging a Plea, that they are not to be excused by a Consideration of Kindred or Affinity, and they are within the Meaning of the Statute by barely making such a Purchase, whether they maintain the Party in his Suit or not, when such a Purchase for good Consideration, made by any other Person, or any Tenant, is no Offence, unless it appear that he did it to maintain the Party. Ibid. S. 13. — 2 Inst. 484.

3. 28 Ed. 1. St. 3. cap. 11. Enacts that none shall take upon him a Business in Suit with an Intent to have Part of the Thing sued for, neither shall any upon any such Covenant give up his Right to another; in pain that the Taker shall forfeit to the King so much of his Lands and Goods as do amount to the Value of the Part so purchased for such Maintenance, to be recovered by any that will Sue for the King in the Court where the Plea hangeth. This shall not Prohibit any to take Counsel at Law for the Fee, or for his Parents or Friends. In the Construction of this Statute the following Points have been holden, 1. That a Contingency executed hanging a Plea.

in Pursuance of a Bargain made before, is not within the meaning of it. 2d. That Champerty in any Action at Common Law, whether it be Real, Personal, or mixt, is within this Statute; altho, it seems the better Opinion, that the Purchase of Land, while a Suit of Equity concerning it is depending, is within the Purview of it. 3d. That a Lease for Life or Years, or a voluntary Gift of Land hanging a Plea.

much within the Statute as a Purchase for Money. 4th. That a *Surrender* made by a *Lessee* to his *Lessor* is not within the meaning of it; For since the *Lessor* may lawfully maintain his *Lessee* without such a *Surrender*, surely a fortiori, he may do it after the *Surrender*. 5th. That no *Conveyance*, or *Promise* thereof, relating to *Lands* in *Suit*, made by a *Father* to his *Son*, or by any *Ancessor* to his * *Heir Apparent*, is within the Statute, since it only gives them the greater *Encouragement* to do what by *Nature* they are bound to do. 6th. That the *giving Part* of the *Land* in *Suit* after the *End* of it to a *Counsellor* for his *Wages* is not within the meaning of it, if it evidently appear that there was no kind of *Precedent Bargain* relating to such *Gift*; but it seems dangerous to meddle with any such *Gift*, since it cannot but carry with it a strong *Presumption* of *Champerty*. 1 Hawk. Pl. C. 258. cap. 84. S. 14, 15, 16, 17, 18, 19. — * S. P. Sav. 96. Mich. 30 & 31 Eliz. in Case of *Finch v. Cokaine*.

4. 33 Ed. 1. Enacts that none of our Court of Pleaders, Apprentices, Attornies, Stewards of great Men, Bailiffs, or any others, shall take any Plea or Suit to Champerty, or for Maintenance, in Pain that they, together with the Consenters thereto, shall suffer three Years Imprisonment, and be fined at the King's Will.

5. By 32 H. 8. 9. All Statutes concerning Maintenance, Champerty and Embracery, shall be put in Execution.

(C) In what Actions it may be [Champerty.]

S. P. Br
Champerty,
pl. 2. cites 47
E. 3. 9. per
Kirton and
Finch. —

1. **I**F a Man Maintains in an Action of * Debt to have Part of the Money, this is Champerty as well as if he had maintained in a Plea of Land. 47 Aff. 5.

* So of other Personal Actions. 1 Hawk. Pl. C. 257. cap. 84. S. 6. — See (B. 2) pl. 3. in Notis.

(C. 2) Champerty. In what Cases it lies.

1 Hawk. Pl.
C. 257. cap.
84. S. 8.

1. **A** Man shall have Champerty, tho' he has lost nothing, and where the Plea is yet pending. Br. Champerty, pl. 2. cites 47 E. 3. 9.

2. In Champerty the Defendant said, that before the Formedon brought in which the Maintenance is supposed, the Tenant for 100l. to him paid sold the Land to the Defendant, and that the Tenant in the Formedon was seized to the Use of the Defendant at the Time of the Formedon brought, absque hoc that he purchased the Land to maintain modo & forma; and per Cur. if a Man takes upon him to Maintain and Promises to do it, and after does not maintain, Action does not lie, and the Traverse above is good; per tot. Cur. Br. Champerty, pl. 9. cites 9 H. 7. 18.

3. Quære, if Champerty lies upon Suit upon Subpæna; For the Statute makes mention only of Plea, and therefore quære if Subpæna be Plea or not. Br. Champerty, pl. 6.

(C. 3) Champerty. Who shall have it, and against whom.

And the Dis-
feisor may
have one Writ
of Champer-
ty and the
Tenant another.
Ibid — S. P. tho' the Disfeisor has nothing in the Land; because he may be charged with Damages. 2 Inst. 565.

1. **T**HE Disfeisor in Affise who lost Damages shall have Writ of Champerty against the Maintainer in the first Action as well as the Tenant. Br. Champerty, pl. 2. cites 47 E. 3. 9. per Kirton and Finch.

2. If the Demandant be *Nonfuit*, yet he may have an Action of Champerty. 2 Inst. 563.

3. If the *Tenant* makes a *Fcoffment in Fee hanging the Writ*, if one does maintain the Demandant to have Part, the *Fcoffor* shall have the Action of Champerty; For he remains *Tenant* to the Demandant. 2 Inst. 563.

(C. 4) Champerty. *Writ, Proceedings, Count and Pleadings.*

1. **C**Hamperty against two, because they took a *Plea to maintain*, and purchased the Land in Debate to Champerty and shewed between whom the Plea was moved, and of what Tenements. Skipwith demanded Judgment of the Writ, because it is not said * for which Party they purchased to maintain; & non Allocatur; For *Non-tenure* in this Action is no Plea; by which they said that they purchased of one B. who was seised of the Tenements for his Money, Absque hoc, that they purchased the Tenements to Champerty; Prit; and the others e contra. Br. Champerty, pl. 4. cites † 22 E. 3. 10.

* If Writ of Champerty does not make mention for whose Part the Defendant maintained to have Part of the Thing in demand, the Writ shall abate,

by which the Plaintiff brought another Writ. Br. Champerty, pl. 13. cites 22 H. 6. 7.—Ibid. pl. 5. cites F. N. B.—† It should be 21 E. 3. 10. b. pl. 33.—And see Br. Nontenure pl. 17. which cites 21 E. 3. 10. S.C.

2. Champerty was brought and in the Writ no mention was made of Imprisonment by three Years, and Fine to the King according to the Statute of Westm. 2. nec of Westm. 1. and therefore upon Search made it was said to the Plaintiff, that he shew by what Statute his Writ is warranted, or otherwise his Writ shall abate; and so it seems there that the Statute ought to be rehearsed in Writ of Champerty. Br. Champerty, pl. 1. cites 20 H. 6. 30, 31.

3. In Champerty, Devers demanded Judgment of the Writ; For the Party is not named of what *Mystery* he is and what *Addition*, because in this Action lies Proceſs of Outlawry, and it was said that Proceſs of Outlawry lies in Maintenance and Conspiracy, and not in Champerty, by which it was awarded that he answer. Br. Champerty, pl. 5. cites 21 H. 6. 7. and 22 H. 6. 7.

(D) At Common Law.

1. **T**HERE was a Maintenance at Common Law, and the Statute only adds a more grievous Pain. 11 D. 6. 11.

2. There was a Maintenance at Common Law for which the Maintainer might be indicted. 22 E. 3. 1.

3. 7 E. 1. Rot. Clauso. Membrana. 19. The King sent a Writ to the Justices Itinerant of Kent commanding them to enquire of Hen, Qui quasdam det. stabiles confederaciones & malas allegationes præstitis mutuo Sacramentis & amicorum, & benevolorum suorum partes in placitis & loquelis ipsos tangentibus in comitatu illo utpote in Assisis, Juratis, & Recognitionibus tallaciter manutenedis & defendendis, & ad inimicos suos fraudulenter & quantum in ipsis est plerumque exhærendos inter se facere temere præsumperint, & si quos inde culpabiles inveniat, sine dilacione capi, & in Prisona nostra salvo custodiri faciatis donec aliud inde Præceperimus &c.

Eodem modo to the other Justices in Eyre.

* See (R)

(E) * *What shall be said Maintenance.*

pl. 1. —
Intent (D)
—Maintenance is the
unlawful
Maintenance
of a

1. **I**f a Man becomes a Bail for another, in a Suit, and after sues to save the Party and Mainpernors, [*this is not Maintenance;*] For it is lawful for him to endeavour to save the Mainprise. 14 H. 6. 6. b.

Suit in Consideration of some Bargain to have part of the Thing in Dispute, or some Profit out of it. Hawk. Pl. C. 256. S. 1.—And is either by Word, Writing, Conveyance or Deed. 2 Inst. 212. —
* S. P. Br. Maintenance, pl. 22. cites S. C.

Br. Maintenance, pl. 12. cites S. C. —

2. **I**f a Man notifies to another whom to take of his Counsel for hastening his Cause, this is not any Maintenance. 19 H. 6. 30. b.

Maintenance; per Markham, the Defendant is Sheriff of the County of N. and Party, for that &c. he came to him, and said, that the now Plaintiff had a Capias against him, and prayed him to give him his Counsel what is best to be done, and he counselled him to purchase Superjedeas in C. B. which is the same Maintenance &c. Judgment &c. and per tot. Cur. it is not Maintenance; For every Man may so give Counsel; for otherwise none may counsel his Friend, nor one Husbandman give Advice to another; For that which ought to be justified, ought to be a Maintenance justifiable; but if it be not any Maintenance, then the general Issue suffices. Br. Maintenance, pl. 17. cites 22 H. 6. 35.—And after Markham added to the Plea absque hoc that he is guilty of any other Maintenance; per Cur. this is no Plea clearly, for no Maintenance is confessed. Ibid.—Wherefore he said ut supra, absque hoc that he is guilty of the Maintenance supposed by the Writ; Per Brown, nothing shall be entered but Not Guilty Markham said, enter it as you will. Quod Nota bene. Ibid.—A Man is in no Danger of being guilty of Maintenance, in giving another friendly Advice what Action is proper for him to bring for the Recovery of ascertain Debt, or what Method is safest to take to free him from such an Arrest, or what Counsellor or Attorney is likely to do his Business most effectually; For it would be extremely hard to make such neighbourly Acts of Kindness, which seem rather commendable than blame-worthy, to come under the Notion of Maintenance, which always seems to imply a contentious and over-busy intermeddling in other Men's Matters, in which Respect it is so highly criminal. Hawk. Pl. C. 250. S. 9.

* The Sense here seems imperfect; And Hob. 115. S. C. is, that it was not in Effect and Truth his.

3. **I**f a Man buys a Title in this Manner, that if he can recover he shall pay 200 l. otherwise nothing; though he has taken Estate in the Land, and so maintains his own Title, yet till he recovers, * it is not in Effect; And it was not intended that he shall have it for no thing, so that all the Time till Recovery he maintains it at the Peril of the Owner, and this is but a Shift and Fraud; And therefore is Maintenance punishable in the Star-Chamber. Hobart's Reportse 161. Flower's Case. And there Quere, whether it lies upon the Statutes at the Common Law Courts?

4. **I**f a Man makes J. S. his Attorney to recover a certain Debt, where this J. S. is not an Attorney allowed in the Court where the Suit is, but he prosecutes the Suit by force of this Warrant, this is Maintenance; For otherwise a Man may make such Warrant of Attorney to any great Man, and may lawfully sue &c. Pasch. 37 El. B. between Constantine and Barnes said, that it was the Ld. of Lincoln's Case in the Star-Chamber, where he was censured for it.

General Attorney who sues in the Chancery, and is not

5. So if a Man makes J. S. his general Attorney to prosecute all his Causes, if he sues in his Name, this is Maintenance. Pasch. 37 El. B. per Curiam, between Constantine and Barnes.

learned in the Law, may well meddle, but cannot proffer Money to the Inquest, but may pray them to appear. Br. Maintenance, pl. 7. cites 34 H. 6. 25. per Chocke.

Fol. 115.
1 Hawk. Pl. C. 254 S 27.

6. **I**f a Solicitor laies out Money in a Suit for his Client upon a Promise of Re-payment, whether this be Maintenance? See Mich. 13 Ja. B. between Leach and Denton. Mich. 12 Ja. B.

—W. brought an Action upon the Case against G. and declared, that whereas he, at the Request of the

the Defendant, did sollicite and prosecute an Action of Trespafs between the said G. Plaintiff, and J. S. Defendant; the said G. did promise to pay the said W. 100 l. The Defendant pleaded Non Assumpsit, and it was found for the Plaintiff. It was moved in Arrest of Judgment, that the soliciting and the prosecuting of another Man's Suit was not lawful for any, but for an Attorney or Counsellor of Law. But the Court did all agree, that it is lawful to be a Solicitor, if it be not for Maintenance, or that he lay not out Money for Maintenance. Hob. 67. Mich 22 & 23 Eliz. in B. R. Worthington v. Gaston.

7. 1 R. 2. 7. *None shall give Liveries for Maintenance of Quarrels, or other Conspiracies, in Pain of Imprisonment and grievous Forfeiture to the King; And the Justices of Assise shall diligently enquire of such as gather together for such Purposes, and shall punish them according to their Demerits.* Hawk. Pl. C. 256. cap. 83. S. 42. — In Action upon the Statute of

Liveries, Fulth. said, as to one Robe given to A. this same A. was retained with us for a Year, taking for his Salary 20 s. in the Office to be our Receiver of certain Tenements in D. Judgment si Actio; and it was challenged, because he did not shew of how many Lands or Tenements; And it is said, that he need not to do it, nor to shew what Salary he gave him. And as to another he said, that he was his Steward of his Courts of the Manor of D. Judgment &c. And as to another, that he was his menial Man, and in his House, and to go and ride with him, and to serve him as his Valet. And as to another, that he was his Parker of his Park of L. and to all the others Not Guilty, and Not Guilty was held no Plea, but shall answer to the Writ, that he did not give the Robes. Br. Action sur le Statute, pl. 14. cites 8 H. 6. 9. 10.

8. A Man alleged Gift of a Livery to B. against the Statute, and that the Defendant took it, and after used it, and did not say where he used it, and therefore ill by the best Opinion. Br. Pleadings, pl. 75. cites 5 H. 7. 17. A Man was indicted for giving of Liveries; but nothing was mention-

ed of the wearing of Liveries in the Indictment; And therefore, per Keble, the Indictment is not good; But by Wood, the giving of Liveries is an Offence without the wearing. Br. Indictments, pl. 50. cites 6 H. 7. 12.

9. *Speaking of great Words* is not Maintenance, per Thirne, Br. Maintenance, pl. 9. cites 13 H. 4. 16.

10. If he who has nothing to do with the Matter, and who is not learned in the Law will shew to the Jury, or to the Party, or his Counsel, the Truth of the Matter, and all Circumstances as perfectly as a Man learned in the Law, yet it is Maintenance. Br. Maintenance, pl. 14. cites 21 H. 6. 15, 16. and 22 H. 6. 5. per Afcue. 1 Hawk. Pl. C. 250. cap. 85 S. 6.

11. If a Man of great Power in the Country will say in Presence of Persons, that he will expend 20 l. for the one Party, or will give 20 l. for Labour for the Party, yet if he does not give any Thing in Fact it is Maintenance; For it may be, that those who are of the Jury dare not pass against the Will of the great Man. Per Newton Ch. J. Ibid. 1 Hawk. Pl. C. 250. S. 7 S. P. — It is said, that a Man of great Power, not learn-

ed in the Law, may be guilty of Maintenance, by telling another who asks his Advice, that he has a good Title. Hawk. Pl. C. 250. S. 9. — But a bare Promise to maintain another is not in itself Maintenance, unless it be either in Respect of the publick Manner in which, or the Power of the Person by whom, it is made. Ibid. S. 7.

12. *The giving Money for labouring the Jury* is Maintenance, though they are not labour'd in Fact. Per tot. Cur. Ibid.

13. *And if a Man threatens the Jury to beat them, in Case they will not pass for such Party,* it is Maintenance; per Paton. Ibid.

14. *And Maintenance at one Day pending the Suit is Maintenance during all the Suit,* and yet Release made after this Day is a good Plea. Quod nota. Ibid.

15. If a Great Man, of whom a Jury are in Fear, stands at the Bar with the one Party, it is Maintenance, tho' he does nothing, nor says nothing. Ibid. per Newton. S. P. For such Kind of Practices do not only tend to dis-

courage the other Party from going on in the Cause, but also to intimidate Juries from doing their Duty. 1 Hawk. Pl. C. 250. cap. 83. S. 7.

16. If a Man labours to indict me, by which I am indicted, it is Maintenance; For the Indictment is the Action of the King, and the Statute prohibits If a Man doth assist one who is

Plaintiff in the Star-Chamber, *hibits it in all Quarrels and Actions;* per Newton. But Paston to the contrary thereof. *Ibid.*

it is not Maintenance, because it is for the Benefit and Advantage of the King; *But* if a Man doth assist an Informer in another Court in an Information upon a Penal Law, the same is such a Maintenance, for which he may be punished in this Court. Mich. 6 Jac. in the Star-Chamber. Godb. 159.

17. Decies tantum; by some of the Justices, if a Man Impanell'd and Return'd upon Issue takes Money of the one Party for his Verdict, and after is not sworn upon the Issue, yet Decies tantum lies, and some e contra, and that Action of Maintenance lies, quod nota. Br. Maintenance, pl. 15. cites 21 H. 6. 54.

S. P. Br. Maintenance, pl. 52. cites 31 H. 6. 9.

18. If A. gives Money to B. to lay out in a Suit between C. and D. and B. does not distribute it, yet A. is punishable in Maintenance, and if B. does distribute it, it is Maintenance in both. Jenk. 101. cites 29 H. 6. F. Maintenance 11. 21 H. 7. 40.

A Bond assign'd to a Subject where the Assignor is not indebted to

19. If a Man assign an Obligation to another for a precedent Debt due by him to the Assignee, there that is not Maintenance; *But* if he assign it for a Consideration then given by Way of Contract, that is Maintenance. Noy. 52. Harvey v. Bateman.——Cites 34 H. 6. 30.

the Assignee, and for that Debt is Maintenance. 3 Le 234. South v. Marsh.——If the Assignment wants a good Consideration, it is void; For it will be Maintenance. Arg. 10 Mod. 223. cites 3 Le. 234. Noy. 52. Cro. E. 552. 170. 34 H. 6. 30. Br. Maintenance, 8. 1 Bullf. 187.——*But* if Surety pays the Debt on which Obligeé promised him to sue the Principal on the same Bond, and to pay the Surety what he should recover &c. this is no Maintenance. Palm. 189. Morris v. Badger.

S. P. because after a Juror has given his Verdict, he has nothing more to do. 1 Hawk. Pl. C. 250. cap. 83. S. S.——*But* it was held by all the Court in B. R. that he may exhort his Companions to pass for the Party as he thinks the Right to be, and this is no Maintenance. Br. Maintenance, pl. 39. cites 17 E. 4. 5.

20. Prayer of Judgment by a Juror is Maintenance; per Jenney, which Littleton agreed. Br. Maintenance, pl. 40. cites 18 E. 4. 1. 2.

S. P. tho' it be done for the Right of the Matter. Br. Maintenance, pl. 39. cites 17 E. 4. 5.

21. If a Juror gives Money to any of his Companions for any Party, it is Maintenance, and he shall be punished; per all the Justices, quod nota. Br. Maintenance, pl. 32. cites 18 E. 4. 4.

* Tho' the Statute says Rights or Titles in the plural Number, yet the singular Number is contain'd in the Plural, and within the Statute. Pl. C. 86. b.

22. 32 H. 8. 9. Enacts, that No Person shall bargain, buy or sell, or by any Ways or Means obtain any * pretended Rights or Titles, or take any Promise, Grant or Covenant to have †† any Right &c. of any Person &c. of or to any Manors &c. unless he who shall sell &c. the same or those under whom he claims have been in Possession thereof, or of the Remainder or Reversion thereof or have taken the Rents or Profits thereof for one whole Year next before the Bargain &c. made, upon Pain that the Person selling &c. shall forfeit such Lands &c. and the Buyer or taker thereof, the Value of such Lands &c. One Moiety to the King &c. and the other to the Party that will sue for the same by Action of Debt &c.

Hill. 6 & 7 E. 6. Patridge v. Strange. —— S. P. Co. Litt. 369 a. b.——For the better Understanding of this Statute, you must observe, that Title or Right may be pretended two Manner of Ways. 1st. When it is merely in Pretence or Supposition, and nothing in Verity. 2dly. When it is a good Right or Title in Verity, and made pretended by the Act of the Party, and both these are within the said Statute; For Example, If A. be lawful Owner of Land, and is in Possession, and B. who hath no Right thereunto, granteth to, or contracteth for the Land with another; the Grantor and the Grantee (albeit the Grant be merely void) are within the Danger of the Statute; For B. hath no Right at all, but only in Pretence. If A. be disseised in this Case, A. hath a good lawful Right, yet if A. being out of Possession, granteth to, or contracteth for the Land with another, he hath now made his good Right of Entry pretended within the Statute, and both the Grantor and Grantee within the Danger thereof. A Fortiori of a Right in Action Quod nota. Co. Litt. 369. a.

It is further to be known, that a Right or Title may be considered three Manner of Ways. 1st. As it is naked and without Possession. 2dly. When the absolute Right cometh by Release, or otherwise, to a wrongful Possession, and no third Person hath either Jus Proprietatis, or Jus Possessionis. The Third, When he hath a good Right, and a wrongful Possession. As to the first, somewhat hath been said, and more shall be said hereafter: As to the second, taking the former Example, if A. be disseised, and the Disseisee release unto him, he may presently sell, grant or contract for the Land, and need not tarry for a Year; For

For

For it is a Rule upon this Statute, that whosoever is the † *absolute Owner* of any Lands, Tenements or Hereditaments (as in this Case the Disseisor is) may at his Pleasure bargain, grant or contract for the Land; For no Person can thereby be prejudiced or grieved; and so if a Man ‡ *mortgage his Land, and after redeem the same, or if a Man recovers Land upon a former Title, or be remitted to an ancient Right,* he may at any Time bargain, grant or contract for the Land, for the Reason aforesaid. As to the third, if in the Case aforesaid, the *Disseisor died seised, and A. the Disseisee entereth, and disseises the †† Heir of the Disseisor,* albeit he hath an ancient Right, yet seeing the *Possession is unlawful,* if he bargain or contract for the Land before he hath been in Possession by the Space of a Year, he is within the Danger of the Statute, because the Heir of the Disseisor hath Right to the Possession, and he is thereby grieved: & sic de Similibus; and albeit he hath a pretended Right (and none in Verity) but getteth the Possession wrongfully, yet the Statute extendeth unto him, as well as where he is out of Possession. Co. Litt. 369. a.

† 1 Hawk. Pl. C. 265. cap. 86. S. 15. — ‡ It was agreed by Montague Ch. J. and all of the Serjeant's Inn in Fleetstreet, that if a Man || *mortgages his Land, and redeems it,* he may sell his Land within one Year next &c. without Danger of the Statute aforesaid; For so is the Intendment of the Statute; For the *ancient Statutes are that none shall maintain,* and yet a Man may maintain his Cousin, and so the like; For it is not intended but of *unlawful Maintenance,* and so of pretended Title, and not of that which is clear Title. Br. Maintenance, pl. 38. cites 6 E. 6. — || 1 Hawk. pl. C. 265. cap. 86. S. 15.

J. S. possess'd of a Term granted it to T. S. his Brother, 12 May 20 Eliz. and afterwards, 8 October, 121 Eliz. he himself being in Possession mortgag'd the same to J. N. who suffer'd him to continue in Possession. T. S. granted his Estate to J. S. who mortgag'd it to G. who let J. S. continue in Possession till 10 December 22 Eliz. when G. entered. J. S. was indebted to B. and C. and requested J. N. to grant his Estate in the Premises to B. and C. for Security of their Money, to which J. N. consented, provided J. S. would find him other Security for his Debt; whereupon J. S. propos'd the said C. and B. and J. N. accepted them, and at J. S.'s Request, granted his Interest to them. 2d of February 22 Eliz. the said J. N. having Notice of the Grant to G. In an Information by G. against J. N. Periam and Mead J. held, That J. N. was not within the Penalty of this Statute, because J. N. granted his Interest to B. and C. at the Request of J. S. who was the Mortgagor to secure the Debt he ow'd them, and therefore it shall not be intended that that Grant was made for any unlawful Maintenance against the Statute. Besides J. S. had Possession, and receiv'd the Issues and Profits of the said Lands for a whole Year before the Grant, notwithstanding he was not in Possession for a whole Year before the Day of the Date of the Grant. 3 Le 78. Mich. 24 Eliz. C. B. Stamp's Case.

As if A. be in Possession or hath received the Issues and Profits for a whole Year, and afterwards a Stranger enters upon him and hath Possession for a Quarter or Half a Year, yet he who was in Possession for a Year before, may grant his Interest without Danger of the Statute &c. 3 Le. 79. Mich. 24 Eliz. C. B. in Stamp's Case.

†† So, if he enters upon the Disseisor himself, and sells &c. For notwithstanding his Entry was lawful, and he had both the absolute Property and Possession of the Land; yet inasmuch as the Disseisor claims a Title to it, which is yet in Dispute, such a Sale by the Disseisee seems within the Intent of the Statute, which meant absolutely to restrain all Persons from transferring their disputed Titles to any Stranger whatsoever. 1 Hawk. Pl. C. 265. cap. 86. S. 16.

Note, The Words of the Statute be (*any pretended Right*) therefore a Lease for Years is within the Statute; For the Statute saith not (the Right, but any Right) and the Offender shall forfeit the whole Value of the Land. But yet if a Man makes a * Lease for Years to another to the Intent to try the Title in an Ejectione Firmæ, that is out of the Statute, because it is a Kind of a Course of Law; but if it be made to a Great Man, or any other, to sway or countenance the Cause; that is within this Statute. Co. Litt. 369. a. 369. b. — * 1 Hawk. Pl. C. 264. cap. 86. S. 12. — S. P. it made by a Superiour to an Inferiour. 2 Brownl. 271. Trin. 7 Jac. C. B. Anon.

Lease or Promise for Years made against the Form of the Statute is within the Danger of the Statute as well as Estate for Life in Tail or in Fee; For if a Lease, Promise or Bargain may be made for one Year, it may for two, and so on to 10 or 120 &c. and a Man will maintain as much for such Estate as for an Estate for Life &c. and the Words are (*any Right or Title*) in which Case if he had Fee and promis'd a Lease for Years, this is a Right or Title, and is contain'd under the Word (any); and under this Word (any) the less Estate shall be contained in the greater. Pl. C. 87. a. Hill. 6 & 7 E. 6. Partridge v. Strange and Crocker.

If A. pretends Title of Fee Simple in Land, and B. takes a Lease of him for 100 Years, where A. who pretends had not been in Possession by the Space of a Year &c. according to the Statute B. shall be punished by the Statute, which prohibits any to obtain &c. or take, promise or grant to have the pretended Right or Title of any Person; and yet he does not obtain the pretended Right or Title of the Lessor; For his Right or pretended Title is Fee Simple, and not of Estate for Years; For otherwise he may take Lease for 5000 Years &c. and so defraud and frustrate the Statute. 2 And. 57. in Case of Smith v. Colehill.

But he who gains the Possession of Lands, by Virtue of a Judgment at Law in Affirmance of an ancient Title cannot come within the Meaning of this Statute in Respect of any Lease made of such Lands; For it can never be imagined, that it was the Intent of the Statute to oblige all Persons, who should recover their Lands, to occupy them themselves, which would be generally inconvenient, and often wholly impracticable; and therefore it must be admitted, from the Necessity of the Case, That such Persons may lawfully lease their Lands and Houses to proper Tenants, to be manured and occupied for the usual Rents: But if it shall appear, That the Title to such Lands is still contested notwithstanding such Recovery, and that such Lease was in Truth designed for the Maintenance of the Title Serjeant Hawkins says, he can see no Reason why it should not be as much within the Statute as any Case whatsoever. 1 Hawk. Pl. C. 265. cap. 86. S. 16.

If a Man has a lawful Title to enter into Lands, but has not been in Possession, and he enters, and makes a Lease for Years thereof, it is within the Statute; For the Mischiefe is, he would let it to another to have the Maintenance and Embracery, and make Conventions and Suits, and to remedy this,

the Statute was made; For if a Man has Title, he may recover according to his Title; Per Anderson Ch. J. and Periam J. agreed thereto, and said, that if a Man recover in *Formedon* or *Cessavit*, and make a Lease, it is not within the Statute, tho' he has not been in Possession for a Year, and he thought the Plaintiff need not prove that it is a pretended Right, because the Statute expounds what is a pretended Right, viz. if he hath not been in Possession. Goldsb. 101. Slywright v. Page.

The Case above was, that a Man was seised in Fee, and made a Feoffment to J. S. to the Use of himself, and M. his intended Wife, and to the Heirs of the Husband. The Marriage took Effect, and then the Husband made a Feoffment to a Stranger, and died, afterwards M. before she was in Possession, made a Lease for Years to a Half Brother, the Defendant by Indenture without any Entry or Delivery of the Deed upon the Land, he knowing that she never had been in Possession. The Court held this Lease within the Statute, tho' objected that being made by one out of Possession, and not sealed or delivered upon the Land, was not good in Law, as to pass any Interest; For by Means of this pretended Lease, the Possession might be disquieted; For amongst the Vulgar People it is a Lease, and it is a Lease by Reputation. Lc. 160. Slywright v. Page.

Mo. 266. S. C. is, that the Lease was made to try the Title.—But Goldsb. 101. S. C. says nothing of its being made to try the Title.—And. 201. S. C. acc.—1 Hawk. Pl. C. 294. cap. 86. S. 14.

But if one that has not been in Possession offers a Lease to J. S. who was ignorant of the Lessor's not having been in Possession, and J. S. agrees and takes a Lease, in this Case J. S. is not within the Statute; Per Anderson Ch. J. Goldsb. 101. in Case of Slywright v. Page.

‡ ‡ Also where the Statute speaks (of any Right or Title to Lands &c.) A customary Right or Pretence thereof to Lands holden by Copy is within this Statute. Co. Litt. 369. b.

If one who has a pretended Right or Title to Copyhold Lands, bargains and sells it to another, this is within this Statute; For the Statute says, *If any bargain, buy or sell &c. any Right or Title* in, or to any Lands or Tenements; so that these Words (any Right or Title) extend to all Manner of Rights or Titles, and by Consequence to Copyhold Lands. And a great Part of the Land of the Realm is granted by Copy, and therefore the Intention of the Makers of the Act was to include this for the avoiding of Suits, Maintenance and Champerty, and not to leave all Copyhold Estates to the Mischiefs mentioned in the Preamble of the said Act. Per Wray Ch. J. 4 Rep. 26. a. Pasch. 31 Eliz. B. R. in Case of Kite v. Queinton.—S. P. 2 Brownl. 134 in Case of Bagnal v. Tucker.

This Proviso *Provided that it shall be lawful for any Person being in ‡ lawful Possession of the Thing, whereunto Title is made, by taking the yearly Profits to buy or obtain by any reasonable Way or Means the pretended Right of another Person to the same.* (which is rather added for Explanation than of any Necessity)

extends only to a pretended Right or Title, and not to a good and clear Right, and therefore without Question, any that hath a just and lawful Estate, may obtain any pretended Right by Release or otherwise; for that cannot be to the Prejudice of any; nay, as hath been said, a * Disseisor, that hath a wrongful Estate, may obtain a Release of the Disseisee, and that is not within the Body of that Act, and consequently standeth not in need of any Proviso to protect him. Co. Litt. 369. b.

* S. P. And it seems clear, that such a Release cannot come within the Meaning of the Statute, if the Disseisee had the true Title, and no other had any pretence of Title to the Land; For in such Case it is clear, that the End of the Release is not for Maintenance, but for the Settlement of all Disputes. But if such a Disseisee had had but a contested Title, and such Release were intended only to enable the Disseisor to defend himself with the dubious Title of his Disseisee, surely it cannot but be as much within the Meaning of the Statute as any Conveyance to one wholly out of Possession. 1 Hawk. Pl. C. 265. cap. 86. S. 17.

And therefore if there be Tenant for Life, the Remainder in Fee by lawful and just Title, he in Remainder may obtain and get the pretended Right or Title of any Stranger, not only for that the particular Estate, and the Remainder are all one; but because it is a Mean to extinguish the Seeds of Troubles and Suits, and cannot be to the Prejudice of any. Co. Litt. 369. b.

And where the Statute saith, (being in lawful Possession by taking the yearly Rent &c.) those Words are but explanatory, and put for Example: For howsoever he be lawfully seised in Possession, Reversion or Remainder it suffices, tho' he never took Profit. But the Matter observable upon this Proviso, is, that if a Disseisor makes a Lease for Life, Lives or Years, the Remainder for Life in Tail or in Fee, he in Remainder cannot take a Promise or † Covenant, that when the Disseisee has entered upon the Land or recovered the same, that then he should convey the Land to any of them in Remainder, thereby to avoid the particular Estate, or the Interest or Estate of any other; For the Words of the Proviso are (buy, obtain, get or have by any reasonable Ways or Means) and that is not by Promise or Covenant to convey the Land after Entry or Recovery; For that is neither lawful, being against the express Purview of the Body of the Act, nor reasonable, because it is to the Prejudice of a third Person. But the reasonable Way or Mean intended by the Statute is by Release or Confirmation, or such Conveyances as amount to as much; and this agrees with the Letter of the Law, viz. the pretended Right or Title of any other Person; and Rights and Titles are by Release or Confirmation, as by reasonable Ways and Means lawfully transferred and extinct; and the Words of Promise or Covenant &c. which are prohibited by the Body of the Act, are omitted in the Proviso. Co. Litt. 369. b.

† S. P. Because such a Covenant seems to favour as much of Maintenance, as if they had been Strangers to the Land. 1 Hawk. Pl. C. 266. cap. 86. S. 17.

‡ A. seised of Land infeoffed W. R. and W. S. upon Condition to infeoff him and M. his Wife, Remainder to D his youngest Son in Tail, with divers Remainders over, but not shewing to whom. And the Estate was executed accordingly; afterwards A. made a new Feoffment to the same Trustees, on Condition to re-infeoff him and his second Wife for Life, Remainder to B. his second Son in Tail &c. B. procured the Deeds of the first Entail to be cancelled. A. died, D. entered and took the Profits. B. purchased the Title of J. N. who was not in Possession. An Information was brought against B. and a Copy or Draught of the first Deed

Deed written by the Defendant himself was produced, by which it appeared, that *the Remainder for Want of Issue of D. was limited to B.* upon which the Question was, whether B. in the last Remainder might buy a pretended Title by the Proviso in the Statute. And when D. after A's Death entered for the Forfeiture, he *defeated all the new Remainders*, and re-continued the former. And therefore it was insisted for B. the Defendant, that this was no Offence within the Statute, because the Remainder and particular Tenant make but one Estate, and the seisin of the one is the seisin of the other. But it was answer'd, that by the buying the Title of the particular Tenant he intended to defeat all the first Remainders, and also the Intention of the Statute, as appears by the Words, ought to be taken, viz. That he who buys a pretended Title ought to be in Possession by the taking the Annual Rents and Profits which B. did not in this Case. Ideo Quære. D. 52. b. pl. 6, 7, 8, 9. Trin. 34 H. 6. Anon.—|| Orig. (1stature).

None shall unlawfully maintain any Suit or Action, retain any Person for Maintenance, embrace Jurors or suborn Witnesses, on Pain of 10l. the one Moiety to the King, and the other Moiety to him that will sue for the same &c.

* A Stranger wrote to a Juror returning him to

appear at the Day, and to do in the Cause according to his Conscience. Adjudged Maintenance. 2 Le. 134. Mich. 28 Eliz. cites it as one Gifford's Case.

Applying to a Juror by one that is no Party to the Suit by Word or Writing to appear is Maintenance; otherwise by a Party to the Suit. Mo. 816. Jepps v. Tunbridge &c. — Goldsb. 182. pl. 120. Maidston v. Hall. — cites Gifford's Case.

The Prosecution to be within one Year.

23. A. possessed of a Rectory for Term of Years was ejected by B.—C. by A's Commandment re-enters to his Use, and after B. continues the Possession, and A. within four Days after grants all his Interest which he had in the said Land, to C.—This Grant was good enough, notwithstanding that at the Time of the Grant he had not Possession, and that the Grant was made out of the Land. Dal. 56. pl. 1. 6 Eliz. Waly v. Burnell.

24. A Widow in Consideration, that the Plaintiff at her Request had taken great Pains, and expended 1500l. on her Suits, and other Business depending, promised to pay all the Charges which he had expended, and 200l. more when requir'd. Dyer thought the Consideration good, and lawful and charitable, viz. to aid and ease a feme sole in her Widowhood in her Affairs, Suits, and Quarrels, which well may be out of Suit in Law divers Ways. And the Word depending is not of Necessity intelligible to be inter Partes Litigantes in Actione dependent' in aliqua Curia Legis, &c. and then it cannot be Maintenance; so he concluded his Argument with the Plaintiff, and the Plea in Bar insufficient. D. 355. b. 356. b. Pasch. 19 Eliz. Onely's Case.

Promise to pay so much to A. for his Labour about the Business of J. S. is Maintenance. Yelv. 197. cites Onely's Case. —D. 355. b. Onely's Case. —See Cart. 230. per Vaughan Ch. J.

25. A. by Indenture between him of the first Part, B. his Son and W. R. and W. S. of the second Part, covenanted with B. his Son to assure Lands to the said W. R. and W. S. and their Heirs before such a Feast To the Use of A. for Life; and then follows, viz. And it is agreed, that the said A. may assign Part to his Wife, Part to his Daughters, and Part to his Bastards, the Remainder of the whole upon the Determination of Estates to be limited to the Use of B. and the Heirs Male of his Body, the Remainder to the Use of C. Bastard of A. and the Heirs Male of his Body, Remainder over; And covenanted that he and all others &c. should stand seised to the Uses aforesaid. And further it was agreed, That if any to whom the Inheritance is appointed as before, should do any Act to the Prejudice of the Inheritance of any Person to whom any Estate is limited, then such Person's Estate should cease, and W. R. and W. S. be seised to the Use of him and his Heirs, to whose Use the Inheritance is next limited according to the Purport thereof; by Force of which A. was seised for Life, and surrender'd to B. after which a Fine Come ceo &c. was levied by B. and W. S. to W. R. with Warranty and Proclamations, by which C. enter'd and demised to J. N. to the Intent that J. N. should bring Ejection. An Information was brought against C. setting forth that he was not in Possession, nor had any Right of Entry &c. and that A. is living and B. is dead. It was insisted for the Defendant, that it appears by the Information, that when B. made the Lease he had nothing in the Land, and so the Lease merely void; For it is not alleg'd to be made by Deed indented, nor upon the Land, nor in such other Manner as to be accounted any Lease, and consequently no Of-

* Hawk Pl.
C. 264 cap.
86 S. 14.

fence against the Statute. It was agreed to be * no Lease, but yet it was said an Offence against the Statute; because *the Words of the Statute are to be understood according to the Common Understanding*, and Speech which passeth *between Person and Person*, and not in the dark Sense according to the Operation of Law. And the Court agreed, that B. took not any Use by the Indenture for Want of a Consideration to vest the Use in him (Fatherly Love not being sufficient to convey any Thing to a Bastard) and so the Uses void as to him, notwithstanding it is by Way of Remainder; and adjudged for the Plaintiff. And. 75. Trin. 19 Eliz. Gerrard v. Worfeley.

If Sheriff returns a Jury at the Denomination of any Person, it is a Misdemeanor in him, and in Case of Turner v. Burnaby.

26. Applying to the Steward of the Lord of a Liberty to *return an indifferent Jury*, and not of Knights and Esquires, because the Dispute concern'd a Lord of a Manor, and the Steward representing the Matter to his Lord &c. is not Maintenance. 2 Le. 133. Mich. 28 Eliz. Ld Cromwell v. Townsend.

27. If a Bond be for Performance of Covenants contain'd in a Lease, and Lessor assign the Lease, he may assign the Bond also, because they are Concomitants, and he hath an Interest in the Lease, and therefore he may sue the Bond; but if the Covenants are first broken, and afterwards he assign over the Lease, if the Assignee sue the Bond, it is directly Maintenance; but if after the Assignment, the Covenants are broken, it is no Maintenance to sue; but if he assign over the Bond, and reserve the Lease in his own Hands, and then the Covenants are broken, and the other sue the Bond, it is Maintenance. Agreed Arg. Godb. 81. pl. 96. Mich. 28 & 29 Eliz. B. R.

It is usual among Merchants to make Exchange of

Money for Bills of Debt, and it is no Maintenance; and per Gawdy J. it is no Maintenance to assign a Debt with a Letter of Attorney to sue for it, except it be assigned to be recovered, and the Party to have Part of it. Cro. E. 170. Penson v. Hickbed.—Assignment of a Debt or Recognizance to a Stranger is an illegal and void Consideration. Cro. J. 552. Barrow v. Grey.—Buying of Debts is Maintenance at Common Law, and punishable by Information, and Indictment. Jenk. 108. pl. 6.—Unless it be by the Debtee of the Vendor. Jenk. 292. pl. 35. cites Lane v. Mallony.—All. 60. Hodson v. Ingram.

29. Damages to be recovered for Trespas, Battery &c. cannot be assigned over, because they are as yet uncertain, and perhaps the Assignee may be a Man of great Power, who might procure a Jury to give him the greater Damages. Arg. Godb. 81. pl. 96.

* The Case here seems to be not rightly stated in the Report, and that the Word (Males) is omitted; and this appears more plainly afterwards.

30. A. seised in Fee gave Lands to B. and the Heirs * of his Body, Remainder to C. and the Heirs Male of his Body, Remainder to the Right Heirs of A.—B. died having Issue a Daughter.—C. made a Lease for Years of the Lands. The Court held this to be no Maintenance within the Statute; For he in Remainder may make a Lease for Years. 2 Le. 48. pl. 63. Trin. 33 Eliz. C. B. Taylor v. Brounsal.

31. Then it was given in Evidence, that a Common Recovery was had against B. with single Voucher, and so the Remainder limited to C. destroyed, and that after that Recovery C. made the Lease; But it was answered by the other Side, that the Recovery was never executed, and so no Discontinuance of the Remainder, and then the Lease made by C. was good. And the Truth of the Case was, that such Recovery was had, and an Hab: fac. Seisnam awarded, and returned, but no Execution was had upon it, nor the Recoveror never entered. And whether C. who is a Stranger to the said Recovery, shall be admitted against the Recovery to say that no Execution

tion was, was the Question, and therefore all the Matter was found by Special Verdict. 2 Le. 48. Taylor v. Brounfall.

32. Also it was given in Evidence, that the Land was given to B. and the Heirs Males of his Body; and then when the Daughter, who is not in Truth inheritable, enters, whether such Entry (she being Privy in Blood to C. her Uncle) shall be a *Dissaisin or Abatement &c.* as in the Case of Littleton, where the youngest Brother enters after the Death of the Father? For in such Case, the Youngest Son does not get any Freehold, but is only a Tenant at Sufferance. And Anderson held, that when the Daughter enters and takes a Husband, who leases for Years and the Lessee enters, the same is a Dissaisin; But Periam doubted; For he said, when the Younger Son entered, the Freehold was in him, which Anderson doubted. 2 Le. 48. Taylor v. Brounfall.

33. If the King's Lessee for Years be ousted by a Stranger, yet tho' he be out of Possession, he may assign over his Term; For the Reversion being in the King, he cannot be out of Possession but at his Pleasure. Cro. E. 275. Hill. 34 Eliz. C. B. Wingalt v. Mark.

34. Action upon the Statute of Maintenance for *maintaining a Suit in the Spiritual Court.* Warberton moved, that this Action lay not: For the Statute of 1 R. 2. cap. 4. whereupon the Action is founded, is to be intended *only of* maintaining Suits in the Courts of Common Law: And upon view of the Statute, the whole Court was of that Opinion, and willed him to demurr. And Drew remembered a Case in the Court Pasch. 37 Eliz. between **Constantine v. Barus**, whereupon it was ruled, that no Action lay for maintaining a Suit in the Spiritual Court. Cro. E. 594. Mich. 39, 40 Eliz. C. B. Tisdale v. Eddington.

Goldsb. 113. pl. 1 S. C. by Name of Tisdale v. Altree. And per tot. Cur. the Word Alibi in the Statute means the King's Court only.

—Nov. 68. S. C. by the Name of Tisdall v. Bevington. That such Maintenance is neither within 32 H. 8. nor 1 R. 2. cap. 4.

35. One of the Defendants, supposing that he had Title to certain Lands, which were in the Possession of the Plaintiff, *contracted to sell* them to one other of the Defendants, *and sealed a Lease to another* of the Defendants for Years to try the Title, and this to the Use of him for whom the Contract was made; But nothing was done upon it, nor any Action brought, and the Year and Day long since expired, and before any Bill exhibited in the Star-Chamber; yet all the Defendants were find there this Term, because it is Maintenance at the Common Law, tho' not upon the Statute of 32 H. 8. because of the Year expired. Mo. 751. Hill. 1 Jac. in the Star-Chamber. Leigh (Sir Olfine) v. Helyar Barker & al.

S. C. cited 1 Hawk. Pl. C. 202. cap. 86. S. 1. For all Practices of this Kind are by all means to be discountenanced as manifestly tending to Oppression, by giving

Opportunities to great Men to purchase the disputed Titles of others, to the great Grievance of the adverse Parties, who may often be unable or discouraged to defend their Titles against such Powerful Persons, which perhaps they might safely maintain against their proper Adversary.

36. A. was out of Possession, and recovered in an Ejectione firmæ in May 2 Car. & Habere factis Possessionem was awarded; And 29 September 4 Car. he sold the Land; and whether he might sell presently or not was the Question. It was determined, that he being put into Possession by Writ might sell presently, and so it was holden in Sir John Olley's Case, 7 Car. in this Court. Croke J. took a Difference between a Recovery in a real Action, and in an Ejectionment adjourned. Godb. 450. Hill. 8 Car. B. R. the King v. Hill.

Per Barkley J. If a Dissisor recovers in Ejectionment, and he afterwards sells the Land, it is a pretended Title. Godb. 450.

in Case of the King v. Hill ——— If in a Formedon a Man be out of Possession - Years, and then recovers, he may sell the Land presently; per Jones J. said to have been so adjudged 36 Eliz. in C. B. in Page's Case. — Per Croke J. there is a Difference where the Recovery is in a real Action, and where it is in an Ejectionment. Godb. 450. in the Case of the King v. Hill.

37. A Suit in Chancery cannot make a pretended Title nor Maintenance. Godb. 450 Hill. 8 Car. B. R. cites it as resolved by all the Judges of England in Brownlow's Case.

It is not law- 38. Commencing a Suit against another, and *in Name of another*, and
ful for any *without his Privity*, is Maintenance. Mar. 48.
Man to med-
dle in the
Cause of another, if he have *not an Interest in the Thing*; For otherwise it will be Maintenance. Arg.
Goldsb. 81. Reynolds v. Truclock.

39. Upon Indictment for Barretry the Evidence was, that one G. was
arrested at the Suit of another in an Action for 4000 l. when in Truth, he
owed him nothing; and coming before the Ld. Ch. J. to put in Bail the De-
fendant solicited against him. Sed per Cur. this is not Barretry, unless
Defendant *knew that there was no Cause of Action* after the Action brought,
but it might be Maintenance. 3 Mod. 97. Anon.

If a Custom 40. For Suit, Custom, Common, or Copyhold *where several participate,*
be in Quest- there they may *contribute*, but *not where they claim several Franktenements*
ion betwixt or *Copyholds of Inheritance*, in which they have not a *joint and equal In-*
the Lord of *terest*. Noy. 99. Sir Edward Meredith v. his Tenants.
the Manor
and a Copy-
holder, all the other Copyholders may expend their Money in Maintenance of the other and the Cust-
tom. Godb. 81. Arg. Mich. 28 & 29 Eliz. B. R. Anon.

41. Not only he who lays out his Money to assist another in his Cause,
but also he who by his *Friendship or Interest saves him that Expence which*
he might otherwise be put to, or but endeavours so to do, is guilty of Main-
tenance; as where one persuades, or endeavours to *perswade a Man to be*
of Counsel for another *gratis*. 1 Hawk. Pl. C. 249, 250. cap. 83. S. 5.

(F) *At what Time* it may be done, [or rather, at what
Time being done, it shall be said Maintenance.]

Br. Mainte- 1. **A** Maintenance cannot be, unless he has some Plea pending at the
nance, pl. 1. Time. 3 D. 6. 54.
cites S. C.
per Martin,
and that it was not denied, and that the Writ in the Register is Quod *Manutenuit in such an Action*
&c. *pro Parte J. N. Quod Nota*.

S. P. yet if it 2. **F**or if a Man gives Money to another before the Suit commenced
plainly ap- to aid him in the Suit, and he after purchases the Writ and pursues it,
pear that it yet this is not Maintenance, because no Suit was pending at the
was given Time of the Writ purchased. 3 D. 6. 54.
merely with
a Design to
assist him in the Prosecution or Defence of an intended Suit, which afterwards is actually brought;
surely it cannot but be as great a Misdemeanor in the Nature of the Thing, and equally Criminal at
Common Law, as if the Money were given after the Commencement of the Suit, tho' perhaps it may
not in strictness come under the Notion of Maintenance. 1 Hawk. Pl. C. 250. Cap. 83. S. 10.

3. Maintenance; if the Plaintiff in any Action *recovers against the De-*
fendant, yet he may have Action of Maintenance against every one who
Maintain against him; because the *Statute is a Prohibition in itself*. Br.
Maintenance, pl. 35. cites 7 E. 4. 15.

4. If I bring a Writ and one *Maintains so that my Writ is not returned,*
Action of Maintenance does not lie; for it is not of Record till the Writ
be Returned. Br. Maintenance, pl. 36. cites 10 E. 4. 19.

5. One may as properly be said to be guilty of Maintenance, within
the Meaning of the Words (*adhuc manutent*.) in an Action of Mainte-
nance for supporting another *after Judgment* as for doing it hanging the
the Plea; because the Party grieved may be discouraged thereby from
bringing a Writ of Error or Attaint. 1 Hawk. Pl. C. 250, 251. cap. 83. S. 10.

(G) *Justifiable*.

(G) *Justifiable. What Persons may maintain.*

1. **I**f an Issue be taken between two, whether all the Inhabitants of the Vill have such Prescription, all the Inhabitants may maintain the Issue, tho' they are not Parties and the * Lord of the Vill may also; because it concerns him. 18 E. 4. 2.

Godb. Sr. S. P.—As where Action was brought for digging the

Soil, and the Defendant justified, because it was a Church-yard and all the Inhabitants had their Dead there, all the Inhabitants of the Vill may maintain in this Action &c. ut sup. Br. Maintenance, pl. 41. cites S. C.—1 Hawk. Pl. C. 252. cap. 83. S. 18—* S. P. 1 Hawk. Pl. C. 253. S. 20.

2. Lessee for Years brings Trespass, if the Issue be upon the Right of the Inheritance the Reversioner may give Evidence with the Lessee and it is not Maintenance. 6 E. 4. 29.

The Plaintiff in Trespass shall not have aid of his Lessor,

for the Lessor may come and give Evidence with the Plaintiff, and none shall have Maintenance against him. Br. Maintenance, pl. 33. cites 6 E. 4. 2. per Moile J. quod nullus Negavit—S. P. for tho' the Judgment which may be given against the Lessee cannot directly bind his Inheritance, yet the Verdict may be a Prejudice to his Title, being given on a Supposal of his not having a good one. 1 Hawk. Pl. C. cap. 83. S. 12.

3. Maintenance against two, because they maintained for the Part of J. N. in a *Quare Impedit* between the Plaintiff and the said J. N. such a Day, the Defendant said that at another Day before the Day in the Declaration the Bishop awarded an Inquiry upon Right of Patronage, upon which he was compelled to be sworn by the Law of the Church, and gave Verdict for the said J. N. Absque hoc, that he was guilty of any Maintenance after this Day, and the other e contra, and found for the Plaintiff; and it was pleaded in Arrest of Judgment that this Matter is not Maintenance, because he is compelled to be sworn by the Law, and by Forſcne J. the Plea is good, for this is Maintenance, but it is a Maintenance justifiable. Br. Maintenance, pl. 5. cites 28 H. 6. 6.

So where a Juror passes for the Party at Common Law, and Maintenance is brought against him, it is a good Justification with Traverser ut supra. Ibid.—And if a Man be at Bar,

and another informs the Court that this Man can declare the Truth, and prays that he be called and sworn, by which the Court swears him, and says upon his Oath for the one Party, this is Maintenance justifiable. Ibid.—But if he had said for the one or for the other of his own Head, it is Maintenance punishable. Ibid.—And if Jurors come to a Man and pray him to inform them of the Truth, and he informs them, it is Maintenance justifiable. Ibid.—But if he comes to the Jury of his own Head, or labours to inform them, it is Maintenance punishable. Ibid. by Fortescue, quod non Negatur.

4. Maintenance by R. against S. because he maintained one F. in Debt brought by F. against R. now Plaintiff, the Defendant said that R. now Plaintiff was in Debt to the said F. in 10l. and the said F. was in Debt to the now Defendant in 10l. by which F. assigned the Debt which the now Plaintiff owed to him to the now Defendant in full Satisfaction, and delivered to him the Obligation to which the now Plaintiff agreed, and also the said F. commanded the now Defendant, that in Case the now Plaintiff did not pay that he should Sue him in his Name, and because he did not pay, the Defendant sued in the Name of F. which is the same Maintenance &c. and per Wangford and Prifor, Debt which is certain may be assigned over by Assent of the Parties, contra of Damages in Trespass not recovered; For this is uncertain and because the Defendant has Cause to meddle, he may well justify. Br. Maintenance, pl. 8. cites 34 H. 6. 30.

As if a Man is Bound to F. N. to my Use it is lawful for me to sue in Name of the other; and Cestuy que Use may maintain Action in Name of his Feoffees. Quare, for it was not adjudged. Ibid.

5. It is justifiable in the Case of Common &c. Mo. 562. Ameredith's Case.

But that is for such only as claim

Common or Custom, but it is otherwise where the Tenure is in Question, because the Tenure of one is not the Tenure of another. Mo. 788. Lord Grey's Case.

6. A Man's *Bail* may come and see that his Appearance be Recorded. Br. Maintenance, pl. 7. cites 34 H. 6. 25.—But cannot maintain him any further. Ibid. pl. 42. cites 18 E. 4. 12.—1 Hawk. Pl. C 252. cap. 83 S. 19.

(H) Consanguinity.

See (I).

Br. Main- 1. **SOME** Books say generally that a Man may maintain his
tenance, pl. 3. cites S. C. Blood. 9 D. 6. 64.
per Babing. and Marten.—pl. 14. cites 21 H. 6. 15, 16. and 22 H. 6. 5.—pl. 17. cites 22 H. 6. 35. per
Newton.

1 Hawk. 2. So it is of him to whom the Land may descend. 19 E. 4. 3. b.
Pl. C. 251.
cap. 83. S. 14.

1 Hawk. Pl. 3. So the Baron may where the Land may descend to his Wife. 19
C. 252. cap. E. 4. 3. b.
83. S. 20.

4. But otherwise it is in personal Actions. 19 E. 4. 3. b.

5. A Man may stand with his Kin at the Bar in an Action; and it is
justifiable. 21 D. 6. 15. b. 11 D. 6. 42. 12 D. 6. 2. b.

6. So a Man may pray another to be of Counsel with his Kin. 9 E.
4. 32.

7. Some Books are generally, that a Man may maintain his Ally.
9 D. 6. 64.

8. The Son and Heir may give Money of his own to one to be of Coun-
sel with his Father. Br. Maintenance, pl. 14. cites 21 H. 6. 15, 16, and
22 H. 6. 5. Per Afcue.

But per
Markham,
this is by
Reason of
the Interest,
which the Heir has ; but Afcue said, that he has no Interest in the Life of his Father. Br. Ibid. —
Br. Maintenance, pl. 18. per Rede J. cites 41 H. 7. 2. but should be 14 H. 7. 2. according to the o-
ther Editions.—And so may the Father for his Son and Heir ; For he is bound to find him. Contra of
another Cousin. Br. Maintenance, pl. 7. cites 34 H. 6. 25. per Chocke.—A. pretending Right to
a Mesuage, whereof he nor any of his Ancestors were in Possession by the Space of a Yeat next be-
fore &c. made a Demise thereof to B. his Son and Heir apparent, to the Intent that he should bring Ejectment.
This was adjudged in C. B. per tot. Cur. not to be within the Intent of the Statute of 32 H. 8. 9. For
the general Words of the Statute shall not be intended to restrain the Son, who is his Father's Heir,
from maintaining him, as well for the Natural Duty, which he owes him, as for the immediate Possibility
of the Inheritance which he has, which were lawful Maintenances at Common Law. And adjudged
accordingly. Sav. 95. pl. 175. Mich. 30 & 31 Eliz. Finch v. Cokaine.—S. P. Yet it hath been
holden, that such a Sale to a Brother of the half Blood, is within the Meaning of the Statute. 1 Hawk.
Pl. C. 265. cap. 36. S. 16.—If a Man makes a Lease to a Son, for a small Term to try the Title
in an Ejectment, it shall be intended Maintenance punishable. 2 Brownl. 271. Trin. 7 Jac. C. B. Anon

Mo. 266. S. 9. Brother of the half Blood cannot maintain. Le. 166. Slywright v.
C.—Goldsb. Page.—And. 202. S. C. says, that Brother of the whole Blood shall not be
101. S. C.—punished by the Statute, by the greater Opinion of the Court.
S. P. But in
Case of Bro-

ther or Cousin, if he gives any Money, it is Special Maintenance. Br. Maintenance, pl. 20. cites 9 E.
4. 32.—It was ad judged, that a Lease made by one Brother to another Brother, who was of the half
Blood, to the Intent to bring Ejectment, was within the Restraint of the Statute of 32 H. 8. 9. because
there is not an immediate Possibility to inherit between them. But Quare, if they were Brothers of the
whole Blood, or if it was between the Father and the Son, who was not his Heir apparent, if it shall
be within the Restraint of this Statute. Sav. 96 cites Mich. 30 & 31 Eliz.

(I) Affinity.

(I) Affinity.

See (H)

1. **I**F the Father of my Wife be brought into Chancery, upon an Attachment, I may come to comfort, and stand with him at the Bar, 19 E. 4. 3. b. and it is not Maintenance. There is a Difference between Action Real and Personal. For

where the Land may come to my Wife by Remainder, Reversion, Descent &c. I may maintain in Action Real. Br. Maintenance, pl. 43. cites S. C.

2. Retaining Counsel for his Brother in Law is justifiable. 6 E.

4. 5. b.

3. But if his Feme, who causes the Affinity, dies without Issue, he cannot aid his Brother in Law. 6 E. 4. 5. b. 14 D. 7. 2. For the Cause is determined. Br. Maintenance,

ance, pl. 18. cites 41 H. 7. 2. Per Rede.—And it seems by Townsend Serjeant, that Defendant ought to aver, that the Feme was alive at the Time of the Maintenance; and by Markham he cannot maintain, but during her Life. Quære, Br. Maintenance, pl. 34. cites 6 E. 4. 5.—S. P. so long as the same continues. Hawk. Pl. C. 252. cap. 83. S. 20.

4. A Man may stand at the Bar with his Ally, and justifiable. 21 D. 6. 15. b.

5. A Man can not give his own Money to a Man to be of Counsel with his Father in Law. 19 E. 4. 5. But the * Father, Son, or Heir Apparent to the S. P. without

Party, or the Husband of such an Heiress may. Hawk. Pl. C. 252. cap. 83. S. 20.—* S. P. without any Expectation of Re-payment. 2 Inst. 564.

6. But if his Father borrows certain Money of his Son in Law, and after he delivers Parcel of the same to a Counsellor to be of his Counsel, this is not Maintenance; For it is not his Money. 19 E. 4. 5. FO. 116.

7. A Man may maintain in his Suit an Ally, Scilicet, the Baron who has married the Cousin of his Wife. 20 D. 6. 1. Br. Maintenance, pl. 4 cites S. C.

8. A Man cannot justify to give Money to a Jury to pass for his Ally. 20 D. 6. 1. b. Br. Maintenance, pl. 4 cites S. C.

9. Nor can justify the Promise of an Annuity to a Juror to pass for his Ally. 20 D. 6. 1.

10. It was said, that a Man may maintain for his Gossip; For this is Affinity. Br. Maintenance, pl. 34. cites 6 E. 4. 5. S. P. that he may lawfully stand by him at

the Bar and Counsel and assist him, and also pray another to be of Counsel to him, but cannot justify the laying out any of his own Money in the Cause. Hawk. Pl. C. 252. cap. 83. S. 20

(K) Master for the Servant.

1. **T**HE Master may maintain the Quarrel of his Servant. 19 E. 4. 3. b. 9 D. 6. 64. Br. Maintenance, pl. 3. cites S. C. Per Babing.

and Marten.—pl. 17. cites 22 H. 6. 35. Per Newton.

2. He may give Money for him, if any of his * Salary be in his Hands. 19 E. 4. 3. b. Br. Maintenance, pl. 32. cites 31 H. 6. 9. per

Fortescue J.—S. P. if it be with the Servant's Assent. Br. Maintenance, pl. 7. cites 34 H. 6. 25. per

per Laken.—Pleading, that the Party for whom was his Servant, *without saying, that the Retainer was with the Servant's Money*, was held good. For it shall be so intended. Br. Ibid. pl. 44. cites 31 H. 6. 9.—pl. 52. cites S. C. For a Bar is good, if it be good to the Common Intent.—The Defendant justified, because the Party for whom &c. was his Servant, *wherefore he retained J. M. learned in the Law; to be of his Counsel, and did not say, that he retained de Propriis*, for this is not lawful; and because it may be intended, that he retained *with the Money of his Servant*, therefore it is a good Bar to a Common Intent, Quod Nota, by Judgment. Br. Barre, pl. 99. cites 31 H. 6. 1.—But Br. Maintenance, pl. 14. cites 21 H. 6. 15, 16, and 22 H. 6. 5. where it was held by the Court, that the Master might retain Counsel with his own Money.—Ibid. pl. 6, cites 28 H. 6. 7. 12, accordingly, per Priot.—But per Priot, the Master can not maintain his Servant *unless in Things done in the Right of the Master, or by his Command*. Br. Maintenance, pl. 7. cites 34 H. 6. 25.—In *Præcipe quod reddat* against Servant Master * cannot expend his own Money, because this Action may proceed without Loss of Service, but out of the wages he may; but where *Debt or Trespass* is brought against the Servant, it is otherwise for fear of losing his Service. Br. Maintenance, pl. 24, cites 21 H. 7. 40. Per Fineux Ch. J.—Jenk. 102. pl.—2 Hawk. Pl. C. 253. cap. 83. S. 22.

But Master coming to the Bar, and there speaking for his Servant is Maintenance, and he was committed to the Fleet. Hct. 78. Salkend's Case — Mo. 6.—1 Hawk. Pl. C. 253. cap. 83. S. 22.

3. The Master may come with his Servant, and stand with him at a Trial between the Servant and another. 11 D. 6. 42.

1 Hawk. Pl. C. 253. cap. 83. S. 22. 4. So a Man may for his Chaplain retained in his House. 19 D. 6. 30 b.

But the Plaintiff replied, that after the Retainer, and before the Maintenance, he discharged him of his Service at W. in the County of M. to which he agreed; Prift. and the others contra. Br. Maintenance, pl. 12. cites S. C.—Br. Labourers, pl. 27. cites S. C.

5. A Man may justify the notifying to his Chaplain retained with him in his House whom he shall take of his Counsel for hastening his Cause. 19 D. 6. 30. b. And it is there said, that this is not any Maintenance.

6. The Master's requesting a Counsellor to be of Counsel with his Servant against another is Maintenance justifiable. Br. Maintenance, pl. 14. cites 21 H. 6. 15, 16. and 22 H. 6. 5.

7. Maintenance; the Defendant said, that he for whom he maintained was his Servant, and prayed Moxle Serjeant at Law to be of his Counsel, by which he was of his Counsel, which is the same Maintenance; to which the Plaintiff said, that the Defendant at the same time delivered 100 s. of his own Money to J. and S. to distribute to the Men of the Country to maintain the Quarrel of the said Servant, of which he has brought his Action, which was traversed and found for the Plaintiff; and it was adjudged Maintenance, tho' the said J. and S. did not distribute the said Money, because the Defendant intermeddled with a Thing prohibited by the Law, by which the Plaintiff recovered by Judgment. Br. Maintenance, pl. 6. cites 28 H. 6. 7. 12.

* S. P. Br. Maintenance, pl. 14. cites 21 H. 6. 15, 16. and 22 H. 6. 5. Nor to deliver to the Jury, nor to embrace them to pass for the Party; for they cannot lawfully take Money; Contra of them who may lawfully take Money, as Counsellor of the Law, Attorney, Solicitor, Officer, for Process and Pleas &c. per Opinionem Cur.

8. He cannot give Money * to Jurors nor to others not learned in the Law. Ibid.

9. In Action on the Case brought against Apprentice, the Master may maintain the Apprentice with his Money. Mo. 814. Stone v. Walter & al.

(L) Servant for the Master.

1 Hawk. Pl. C. 253. S. 23. 1. THE Servant may justify the standing with his Master in a Trial between him and another. 11 D. 6. 42.

2. The

2. The Servant may maintain the Quarrel of his Master and others, and travail in Speed of the Action; For he is obliged by Covenant to do diligent Service. * 19 E. 4. 3. b. 3 D. 6. 53. b.

* Br. Maintenance, pl. 43. cites S. C.—1 Hawk. Pl. C. 253.

cap. 83. S. 25. S. P. if he is retained as his Servant, to do all Manner of Service, and not for a particular Occasion only.

3. The Servant may justify the shewing the Muniments and Deeds of his Master to his Counsel and Jury. 19 D. 6. 31. b.

1 Hawk. Pl. C. 253. S. 23.

4. The Servant cannot give Money to his Master to aid him in the Coits of the Suit. 3 D. 6. 54.

1 Hawk. Pl. C. 253 S. 23.

5. A Servant cannot give of his proper Money to maintain the Suit of his Master. 11 D. 6. 10. b.

1 Hawk. Pl. C. 253. S. 23.

6. The Collector and General Attorney of the Debts of his Master cannot, in a Debt brought for the Master, give the Money of his Master to a Juror to give his Verdict for his Master, because it is against the Law. 11 D. 6. 11.

7. The Servant cannot justify the menacing of the Jury, viz. that they shall not stay in their Houses, if they do not pass for his Master. 19 D. 6. 31. b.

Br. Maintenance, pl. 13. cites S. C.

(M) What Act or Man of Law shall be said Maintenance. See (E) pl. 7

1. If a Man of Law gives Counsel to the one Party, or be a Counsel with him in a Trial, this is justifiable. 11 D. 6. 10. lawfully fet forth his Client's Cause to the best Advantage. 1 Hawk. Pl. C. 254. cap. 83 S. 26.

Having received his Fee, he may

2. If a Man of the Law gives of his proper Money for Maintenance of the Suit of his Client, this is not justifiable. 11 D. 6 11.

S. P 1 Hawk. Pl. C. 254. cap. 83. S.

26.—So for a Solicitor to prosecute and pay Money for another. Cited Het. 129 — An Attorney may lawfully prosecute or defend an Action in the Court wherein he is an allowed Attorney, in the behalf of any one by whom he shall be specially retained, and * may assist his Client by laying out his own Money for him to be repaid again, and may justify such Maintenance in other Courts, wherem they are not allowed Attornies; but they are more justified by a general Retainer to prosecute for another all his Causes, than if they were not retained at all; and it is certain that they ought not to carry on a Cause for another at their own Expence with a Promise never to expect a Re-payment; and it seems justly questionable, whether Sollicitors, who are no Attornies, can in any Case justify the laying out their Money in another's Suit. 1 Hawk. Pl. C. 254. cap. 83. S. 27.—* S. P. 2 Inst. 564.

3. If the Attorney of one Party gives or promises any Money to the Jury, this is Maintenance. 13 H. 4. 16. b. 17.

S. P. whether the Money given be his

own or his Clients. Br. Maintenance, pl. 49. cites 11 H. 6. 10.

4. So it is if a Sheriff's Bailiff of a Liberty or other Officer so do. 13 D. 4. 17.

Fol. 117.

5. If the Attorney of one Party speaks great Words to the Jury in Maintenance of the Quarrel of the Part of his Client, this is not Maintenance. 13 D. 4. 17.

6. If the Attorney declares the Evidence of his Client to the Jury, this is not Maintenance. 13 D. 4. 17.

7. If he who is of Counsel of the Party who Recovers receives Parcel of the Land recovered for his Wages, this is not Champerty punishable. 13 D. 4. 17.

But Quære, if it had been agreed between him and his Client

before the Action brought, that he should have Part for his Wages, if it would not be Champerty; contra where he recovers Rona Fide without such Promise or Agreement Precedent, and then gives Parcel for his Wages. Br. Champerty, pl. 3. cites S. C. and 12 H. 4. 26 — S. P. 2 Inst. 564.

In the Construction of this Statute the following Points have been holden, 1. That Counsellors &c. who are not sworn, are as

much within the Meaning of it as Serjeants &c. who are sworn. 2. That all Fraud and Falschood tending to impose upon, or abuse the Justices of the King's Courts are within the Purview of it, as in the following Instances. 1. Where an Attorney *sues out an Habere facias Sciznam* falsely reciting a Recovery in a real Action, where in Truth there was no Recovery at all, and by Colour thereof puts the supposed Tenant in the Action out of his Freehold. 2dly. Where one brings a *Præcipe* against a poor Man, knowing that he had nothing in the Land, on purpose to get the Possession from the true Tenant. 3dly. Where one procures an Attorney to appear for a Man, and confesses Judgment without any Warrant. 4thly. Where one pleads a false Plea, known to be utterly groundless, and invented merely with a Design to delay Justice, and abuse the Court; and therefore it is said, that if a Client desire his Attorney to plead such a Plea, the Attorney ought to enter upon the Roll, *Non sum veraciter informatus, ideo Nihil dicit.* 1 Hawk. Pl. C. 254, 255. cap. 83. S. 29, 30, 31, 32, 33, 34. — 2 Inst. 215.

9. In Maintenance the Defendant said that he was of Counsel with the Plaintiff, and Counsell'd him prout ei bene licuit, which is the same Maintenance &c. and if he says that he Counsell'd the Party pro quo &c. who was impleaded by the same Plaintiff by *Capias* to sue *Superfedeas*, which is the same Maintenance &c. it is no Plea, and the same Law if he says further, *absque hoc* that he did any other Maintenance; per Markam, in *Walt, Arguendo, quere.* Br. Maintenance, pl. 48. cites 21 H. 6. 16. and 22 H. 6. 5. 6.

10. If I deliver Money to an Attorney to sue an Action for me, it is justifiable as well for the Messenger as for my Attorney; but without my Authority, it is Maintenance as well in him that pays the Money as in the Attorney; per Frowike Ch. J. Kelw. 50. b. Trin. 18 H. 7.

11. When one is Attorney by Authority of his Master, he may lawfully do every Thing for his Master's Advantage; but if he acts without Commandment and Notice of his Master, Action is maintainable against him; per Frowike Ch. J. Kelw. 50. b. Trin. 18 H. 7.

12. An Attorney may present his Client's Cause without Fees, and yet it is not Maintenance. Arg. Sti. 184. cites Trin. 16 Car. Hill v. Sands. — An Attorney may stir up Men to Suits, if their Suits be lawful; *ibid.* cites 17 Car. Gibson v. Barter, which Roll. Ch. J. denied, and said that stirring up of Suits, and making Bargains to follow them is in it self unlawful, and great Inconveniences do grow by such manner of Practising. *Ibid.*

13. For Fees past Attorney may lawfully take Security of a Stranger; per Ellis J. Cart. 230. Mich. 23 Car. 2. C. B. Pearson v. Humes.

(N) Who may justify in respect of Privity.

Br. Maintenance, pl. 50. cites S. C. — S. P. 1 Hawk. Pl. C. 253. cap.

1. THE Lord may justify the * coming and standing with his Tenant to assist him at a Trial between his Tenant and another in Assise for other Land than that which he holds of the Lord; For a Man is bound to be with his Tenant. 11 D. 6. 39. b. 41, 42. 2. So

83. S. 20. and there he says that tho' he does not find it any where expressly holden that the Lord may justify laying out his own Money in Defence of his Tenant's Title, yet it seems the better Opinion, that he may as well justify it as any other Acts of Maintenance; For the Lord by accepting a Man for his Tenant, seemeth to take him under his immediate Protection; and inasmuch as the Lands were originally derived from the Lord, and he hath the continual Benefit of the Services due from them, the Law in many Cases of Common Right obliges him to Warrant them unto his Tenant; and where it does not oblige him, surely it will at least permit him to do it; but it seems clear that he cannot maintain him in respect of any Lands not holden of him.

2. So he may justify praying the Sheriff to make an indifferent Array in it. 11 H. 6. 39. b. Br. Maintenance, pl. 50. cites S. C. — 2 Hawk. Pl. C. 253. cap. 83. S. 20.

3. Cesty que Use at Common Law of a Manor may justify the coming and standing with a Tenant, who holds of the Manor and assist him at a Trial in Assise against him (for other Land than that which he holds of him; For this appears because the Assise was brought against him and others, and the others were not his Tenants) 11 H. 6. 40. Br. Maintenance, pl. 50 cites S. C. per Babington and Paston — In Debr, where a Feoffee in Use is impleaded and Cesty que Use maintained him, and Action of Maintenance is brought against him, and he pleads this Matter, it is a good Plea; per Littleton, which was agreed. Br. Maintenance, pl. 50. cites 2 E. 4. 2.

4. In Assise against the Tenant and others, the Lord cannot justify the coming and standing with the others at the Trial, * any further than he must necessarily so do in coming and standing with his Tenant. 11 H. 6. 39. b. 40. * Orig. (mes ataque il doit de necessitie en venant & estoier ove son Tenant).

5. The Tenant may justify the standing with his Lord at a Trial between him and a Stranger. 11 H. 6. 42. 1 Hawk. Pl. C. 253. cap. 83. S. 21.

(O) [Who may justify]. He who has Right or Possibility. See (E)

1. If a Man seised of a Rent grants it over to another, and that he shall have the Charters concerning it which are in the Possession of J. S. to his own use, if he recovers them against him, and the Tenant attorns to this Grant; If the said Grantor brings Detinue for the Charters, the Grantee may maintain; Because he has Interest in them by Reason of the Rent. 9 H. 6. 64. S. P. per Babington and Martin Justices. But Brook makes a Quare, and says, if the Charters pass to the

Grantee by the Grant, he ought to have had the Action thereof; but it seems, that tho' the Charters are Choses in Action, yet the Owner has a Property and may give them; and *contra* it seems if a Trespasser had taken them. Br. Chose in Actions pl. 13. cites S. C. — And Paston J. held the Plea not good; For if the Property of the Deeds was in the Grantor at the Time &c. then it passes to the now Defendant by the Sale, and then he himself ought to have brought the Action, and not the Grantee; and if the Property was not in him, then if it was a *Chose en Action*, and the Party put to sue for them, the Defendant cannot maintain, tho' he has the Rent. Br. Maintenance, pl. 3. cites S. C.

2. It is not Maintenance punishable for those, to whom Land may come by Remainder or Reversion, to aid him who is Tenant of the Franktenement in a Real Action brought against him. 19 E. 4. 3. b. Arg. Godb. 81. pl. 96. — Arg. Goldsb. 65. cites 9 H. 6. — Br.

Maintenance, pl. 18. cites [14 H. 7.] 2. Per Rede J. and not deny'd — Ibid. pl. 43. S. P. cites 19 E. 4. 3. 5. They may give Money, where the Land is in Demand, in order to save their Interest. Br. *ibid.* per omnes, and cites 1 E. 6. — S. P. For he who has Interest in the Land may maintain to save it. *Ibid.* pl. 59. cites 1 E. 6. — Br. N. C. pl. 378. S. C. — S. P. Br. Maintenance, pl. 14. cites 21 H. 6. 15, 16, and 22 H. 6. 5. — 2 Hawk. Pl. C. 250. S. 12.

3. If Lessee for Years brings Trespass, and the Issue is upon the Inheritance; He in the Reversion may justify the giving of Evidence with the Lessee. 6 E. 4. 2. b.

4. If the Tenant in Fee of Land brings Trespass Quare Clausum fregit, and then aliens to another, and after the Issue is taken upon the Frantenement at the Time of the Trespass, Scilicet, whether it was the Defendant's or the Plaintiff's, the Alienee may justify the shewing of Evidence to the Jury, to prove it to be the Franktenement of the Plaintiff at the Time of Trespass done. 14 H. 6. 7. b. S. P. Because the Plaintiff's Title is now become his own 1 Hawk. Pl. C. 251. cap. 83. S. 12.

Br. Maintenance, pl. 3. cites S. C. Per Babington and Marten.

5. If I grant, that if my Tenant for Life dies living me, that B. shall have the Land for 10 Years; If after the Tenant be impleaded, B. may well maintain for his Possibility. 9 D. 6. 64. ii.

Quere.—1 Hawk Pl. 251. cap. 83. S. 13. cites S. C. and says, that not only those who have a certain Interest, but also those who have a bare Contingency of such an Interest in the Lands in Question, which possibly may never come in esse, may lawfully maintain another in an Action concerning such Lands.—Mo. 482, 483.

Sec (N)—
Br Maintenance, pl. 3. cites S. C. Per Babington and Marten.

6. The Lord may maintain his Tenant. 9 D. 6. 64.

* Pol 118.
He may maintain after Attornment, but not before.

7. If a Reversion be granted to E. and after, before Attornment, the Lessee is impleaded, E. cannot maintain, because the Grant is void * without Attornment. Yet in this Case, if he afterwards attorn, the Grant shall be good; But he cannot attorn if the Plaintiff recovers. 9 D. 6. 64.

Br. Maintenance, pl. 3. cites S. C. per Babington and Marten.—S. P. Because his Possibility was wholly created by the Act of the Party, and could not be executed but by the Voluntary Attornment of the Tenant, which there was no Remedy to compel him to make by the Common Law; but perhaps the Authority of this Opinion may be questionable, especially if such Grant were made for good Consideration; For since those who have only an equitable Interest in Lands, may lawfully maintain others in Actions relating to those Lands; and since the Grantor in Equity shall stand intrusted for the Grantee after the Grant, and the Tenant be enforced by a Court of Equity to attorn to him, Serjeant Hawkins says, he does not see any good Reason why such Grantee should be esteemed such a Stranger to the Land, that he may not lawfully defend an Action concerning it, in the Event whereof he is so nearly concerned. 1 Hawk. Pl. C. 251, 252. cap. 83. S. 15.

Hob. 92.—
For Custom whereof they all participate, for Common, Copyhold Estates, or such, they may maintain one another, and contribute and be bound to one another for Contribution. But not where the Tenure is in Question, as where they claim their Lands to be Freehold, or Copyhold of Inheritance. Mo. 562. Ameredith's Case cited.—Mo. 788. in Lord Grey of Groby's Case.—But not in the Case where they claim several Franktenements, or Copyholds of Inheritance, in which they have not a Joint and equal Interest. Noy. 59. Sir Edward Meredith's Case.

8. If an Action be commenced against J. S. but it concerns all the Inhabitants of the Town of D. or they claim the same Thing upon the same Title; Tho' they are not Parties to the Action, yet they may appoint a Man to pursue the Suit, and disburse Monies in it, and this shall not be Maintenance. Trin. 12 Ja. V. R. Per Curiam, Hobart's Report 125. between *Ld. Howard and Bell*, and others in the Star-Chamber.

9. If a Man marries my Cousin, who may be Heir to me, it is lawful for him to aid and to maintain me in any Action against me; But if the Feme dies without Issue, then eontra; For the Cause is determined. Br. Maintenance, pl. 18. cites 41 H. 7. 2.—But should be 14 H. 7. 2.

S. P. and every one who touches the Land, may maintain and well done, Quod Nota. Br. Champerty, pl. 6. cites S. C.—And hence it seems that he who has an Interest in the Land, may maintain and disburse Money; For every such one has lawful Interest to meddle in the Matter, as it is said there. Ibid.—But Contra of him who is to have Part of the Thing in Demand, and has no Colour nor Cause to have it, but only for the Maintenance; and so see a Diversity where the Promise is made for a lawful Cause, and where only for Maintenance, which is not lawful. Ibid.—1 Hawk. Pl. C. 252. cap. 83. S. 17.

10. Cesty que Use may pay Charges of the Suit of the Land. Br. Maintenance, pl. 19. cites 15 H. 7. 2.

11. A. being bound for B. has Goods of B. delivered to A. as Security to indemnify him. C. takes away the Goods. B. brings Trespafs against C. for taking the Goods. Maintenance by B. is justifiable, by Reason of the reverting Trust to B. in Case A. should not be damnified. Mo. 620. *Stepney v. Morgan*.

(P) In Respect of Collateral Prejudice.

1. **I**F the Grantee of a Rent or Land with Warranty be impleaded in Assise; at the Trial the Grantee upon Request may stand with him, and deliver to him Evidence to plead in Bar in discharge of the Warranty, and this is justifiable, tho' he does not come in by Course of the Law, as by Voucher or Warranty of Charters; For he may do it to avoid the Veration of Voucher, or of the Warranty of Charters. 11 D. 6. 41. Vid.(Q)pl.8.—Br. Maintenance, pl. 51. cites S. C.—S. P. Because he is bound by the Warranty, to render other Lands

to the Value of those which shall be Eviçted. 1 Hawk. Pl. C. 252. cap. 83. S. 16.

2. Where a Man brings Debt against J. N. and the Plaintiff is indebted to me, and promises me, that if I will aid him against J. N. that I shall be paid of the Sum in demand; if he recovers against J. N. there it is lawful for me to aid and maintain the Plaintiff against J. N. because by the Promise I have an Interest in the Sum in demand. Br. Chose en Action, pl. 3. cites 15 H. 7. 2. Contrary, where I have not any Oñcur to maintain but only to have Part of the Thing in demand without such

Colour. Ibid.—Br. Maintenance, pl 19. cites S. C.

3. Where a Man is indebted to me in 20 l. and another owes him 20 l. by Bond, he may assign the Bond and Debt to me, in Satisfaction &c. and * I may justify to sue for it in the others Name at my proper Costs. Br. Chose in Action. pl. 3. cites 15 H. 7. 2. * S. P. And so may he to whom the Obligation was made; For each of

them may lawfully meddle in the Matter. Br. Champerty, pl. 6. cites S. C.—S. P. if it be for a good Consideration in Satisfaction of a precedent Debt due bona fide to him, and not merely in Consideration of the intended Maintenance; For he has an equitable Interest in the Debt. 1 Hawk. Pl. C. 252. cap. 83. S. 17.

4. A. makes Deed of Gift of Sheep to B. in Consideration that B. was bound for Debts of A. and to save harmless B.—C. takes the Sheep, and in Action of Trespas by B.—A. maintains, the Day not being come for Payment of the Debt, nor B. any ways damnified; this is Maintenance justifiable. Mo. 620. pl. 847. It is justifiable in Respect of the Trust reposed in B. by A. to re-have the Sheep if

B. be not damnified. Per Ld. Keeper, and the two Ch. J. though the Day of Payment of the Bond was now come. Noy. 100, Hill. 43 Eliz. Stepney v. Wolfe.—S. P. 1 Hawk Pl. C. 252. cap. 83. S. 17.

(Q) Maintenance justifiable. What Act. By a mere Stranger. Acts of Charity.

1. **I**F I give Gold or Silver to a Man, who is poor, to maintain his Plea, without any ill will to his Adversary (it seems it is intended in Charity) this is not any Maintenance against Law. 9 D. 6. 64. Br. Maintenance, pl. 3. cites S. C. Per Babing. and Martin. —One

may give Money to the Counsel of poor People, and it is justifiable. Br. Maintenance, pl. 14. cites 21 H. 6. 15, 16. and 22 H. 6. 5 —It is a good Plea that the Party was a poor Man, and he gave him 20 s. of Alms to defend his Suit. Br. ibid. pl. 17. cites 22 H. 6. 35. Per Prisot Serjeant.—1 Hawk. Pl. C. 253. cap. 83. S. 25.

2. A Foreigner may go with another of his Country to a Counsellor, and shew to him who is the best, and this is not Maintenance. 19 C. 3. 3. v. For it is Charity to aid one who cannot aid himself. Br. Champerty,

Champerty, pl. 6. cites 15 H. 7. 2. ——— Br. Maintenance, pl. 19. cites S. C. ——— 1 Hawk. Pl. C. 253, 254. cap. 83 S. 25.

* Br. Maintenance, pl. 43. cites S. C. 1 Hawk. Pl. C. 253 S. 24.
 3. One Neighbour may go with another Neighbour to inquire for a Man knowing in the Law. * 19 E. 4. 3. b. 12 E. 4. 14. b.

* Br. Maintenance, pl. 43. cites S. C. 1 Hawk. Pl. C. 253. cap. 83. S. 24.
 4. So he may inform him of such a Man knowing of the Law. * 19 E. 4. 3. b. 12 E. 4. 14. b.

Br. Maintenance, pl. 43. cites S. C. ——— 1 Hawk. Pl. C. 253. cap. 83. S. 24.
 5. But he can not deliver any Money for him to the Counsellor. 19 E. 4. 3. b.

6. So he cannot give Money to the Sheriff in behalf of his Neighbour to arrest another. 12 E. 4. 14. b.

7. If an ancient Man of the Country, who has knowledge of the Title of the Land, whereof another is impleaded, upon Request comes with him, and stands with him to inform the Jury of the Title of the Land, this is Maintenance against the Law, because he is a mere Stranger, and under such Pretence every Man may maintain if this shall be allowed. 11 D. 6. 41. b. Dubitatur.

8. So if a Man grants an ancient Rent over to another, and the Grantee is impleaded, the Grantor upon Request cannot come and stand with the Grantee, because of the Conusance which he has of the Rent, and because he has diverse Evidences of it, if he be not to * warrant the Rent to the Grantee, for then he is but a mere Stranger. 11 D. 6. 41. b. Dubitatur.

* See (P) pl. 1.

9. If a Man has nothing to meddle, nor lawful Colour, but of his ill Will maintains, this is not justifiable. 9 D. 6. 64.

10. If a Stranger prays a Man of Law to be Counsel with my Adversary, this is not justifiable. 21 D. 6. 16. 32 D. 6. 25.

11. If a Stranger notifies to my Adversary, whom he shall take of * his Counsel for hastening his Cause, this is not any Maintenance. 19 D. 6. 30. b.

* Fol. 119.

(R) Gift of the Action.

S. P. And in such Case he may elect to have Maintenance or
 1. **A**n Action of Maintenance lies for a Champerty, if the Party will; For * every Champerty is a Maintenance. 9 D. 6. 64. b. 14 D. 6. 8. b. Admitted.
 Champerty. Br. Maintenance, pl. 3. cites S. C. ——— * But not e Converso. Br. Maintenance, pl. 19. cites 15 H. 7. 2. ——— Br. Champerty, pl. 6. cites S. C. ——— S. P. For Champerty is but a Species of Maintenance, which is the Genus. 2 Inst. 208.

2. If a Man gives Money to a Juror impanell'd to say his Verdict for one Party, though it be Embracery, yet Writ of Maintenance lies. 11 D. 6. 10. b.

(S)

(S) Conveyances or Securities given for Maintenance &c. what becomes of them.

1. 1 R. 2. **E**NACTS that No Gift or Feoffment of Lands or Goods, shall be made by Fraud for Maintenance; and if any be made, they shall be holden for none. And the Disseisees shall have their Recovery against the first Disseisors, as well of their Lands as of their double Damages, without Regard to such Alienations, so that the Disseisees commence their Suits within the Year after the Disseisin; and the same in every other Plea of Land, where such Feoffments be made by Fraud, where the Feoffors take the Profits.

1 Hawk, Pl. C. 263. cap. 86. S. 3.—A Feoffment on Champerty or Maintenance is not void against the Feoffor, but against him that has Right; per Beamond J. Cro. E. 445. in Case of Upton v. Ballet.

2. A. enters into Bond to B. with Condition, that B. shall have such Land when A. has recovered it. The Bond is void; for it tends to Maintenance. Arg. 2 Roll. R. 201.

3. Bond by a Client to a Counsellor conditioned that if he recovered the Lands he would convey to the Counsellor one half of the Lands. The Counsel dy'd, and his Executors threatned to sue the Bond; decreed the Bond to be delivered up, and ought to secure no more than what the Testator actually laid out, and reasonable Allowances for his Care. Fin. R. 477. Mich. 32 Car. 2. Skapholme v. Hart.

(S. 2) Actions and Procefs. How, and against whom.

1. **W**HERE Maintenance is pleaded by Deed, the Procefs upon the Statute of Conjunctim Feoffatis shall be by Writ, and not by Precept. Br. Procefs, pl. 151. cites 25 Aff. 14.

2. Maintenance was by Bill against one, who maintained *Sedente Curia*; For otherwise he shall be put to Original Writ of Maintenance, and shall not have thereof Bill as it seems. Br. Maintenance, pl. 16. cites 22 H. 6. 24. and Br. Bill, pl. 10. S. C.

3. And if a Man maintains a Quarrel by his Attorney, Action of Maintenance lies against his Master. *Ibid.*

4. Procefs of Outlawry lies in Maintenance; per Vavifor. Br. Procefs, pl. 110. cites 9 H. 7. 21.

(T) Pleadings.

1. **C**HAMPERTY; and rehearfed the Statute &c. and that he brought Writ against B. of the Manor of D. and the Defendant manupit pro illo manerio habendo, and declared by his Count, that he purchased, pending the Writ, to Champerty. Fifth demanded Judgment of the Writ which is *Manu-cepit*, where it should be *Assumpsit*, et non *Allocatur*. And per Fifth, the Statute extends as well to him who takes Lease pending the Writ, as to him who purchases in Fee, pending the Action. And Fifth said, the Writ ought to have been brought, as well against the Tenant who sells or gives pending the Writ, as against him who takes of him pending the Writ, et non *Allocatur*. Fifth said, we did not purchase to Champerty pending the Writ, and durst not demur. Br. Champerty, pl. 7. cites 30 Aff. 15.

By which he said, that before that the Tenant any thing had, T. was seized and infeoffed, the Tenant in the first Action upon Condition to re-give to him and his Feme in Tail, and because he did not re-give

Sive, *F* entered upon him and encoffed the Defendant *Abſque hoc*, that he purchaſed of the Tenant, or of other to Champerty &c. and *Abſque hoc*, that he took of Maintenance &c. to Champerty, pending &c. and the others e contra. Br. Champerty, pl. 7. cites 30 Aff. 15.

S. P. Br. Maintenance; that the Defendant maintained in *Aſſiſe ſummoned and taken before* &c. The Defendant ſaid, that the Plaintiff in the *Aſſiſe* was *Nonſuited*, ſo the *Aſſiſe* was not taken, Judgment of the Writ; and per Gaſc. it ſhall abate. Br. Brief, pl. 111. cites 7 H. 4. 30.

3. In Maintenance the Plaintiff counted how the Defendant gave to one *S. E.* four Marks to purſue an Appeal againſt him &c. And per Marten for Law, he ought to ſay, that the four Marks were given after the Appeal was ſued; For if he gives the 4 Marks before the Appeal ſued, it is not Maintenance; For it is not Maintenance, unleſs Action be pending at the Time &c. quod non Negatur; and alſo the Writ in the Register is quod Manutenuit in ſuch Action &c. pro parte J. N. Quod Nota. Br. Maintenance, pl. 1. cites 3 H. 6. 53.

S. P. Br. Maintenance, pl. 46. cites 8 H. 6. 4. In Writ of Maintenance he ſhall not ſay *Not Guilty*. Br. Action fur le Statute, pl. 14. cites 8 H. 6. 9 and 10.

10, 11. — Br. Maintenance, pl. 11. cites 8 H. 6. 36, 37. S. P. Per Cur. But ſhall answer the Point of the Writ Quod Nota. Wherefore he ſaid, that he did not maintain, Priſt, and the other e contra. — S. P. Per Hewſton Prothonotary, but ſeveral Counſel were contra to him. Ibid. pl. 23. cites 14 H. 6. 7. — But Br. Maintenance, pl. 31. cites 2 E. 4. 6. Contra per Chock, that *Not Guilty* is a good Plea. — So of *Ne Maintaina pas*. Ibid. And pl. 46. cites 8 H. 6. 10, 11. S. P. — Not Guilty is a good Plea, when the Action is grounded on a Penal Statute, per tot. Cur. Cro. E. 257. Mich. 35 & 34 Eliz. Savery v. Tey.

S. P. Br. Maintenance, pl. 2. cites 9 H. 6. 20. by the Opinion of the Court. 5. In Writ of Maintenance the Plaintiff muſt ſbew in what Court, and before whom, the Suit, in which the Maintenance was had, depended at the Time of the Maintenance; For otherwiſe the Defendant knows not how to answer. Arg. 2 And. 99. cites 9 H. 6. 20. and 5 E. 4. 3.

In Maintenance, if the Defendant tenders a Plea which is neither Plea nor Bar, As to ſay that the Party pro quo &c. came and pray'd his Counſel in a Suit againſt him by the now Plaintiff by *Capias*, and the Defendant Counſelled him to purchaſe a *Superſedeas*, which is the ſame Maintenance &c. *Abſque hoc*, that he is Guilty of any other Maintenance; this is no Plea, per tot. Cur. *Because no Maintenance is confeſſed*. Br. Traverſe per &c. pl. 101. cites 22 H. 6. 35.

6. Maintenance; inasmuch as the Defendant maintained C. in Curia Mareſcall' in an Action of Debt brought by the Plaintiff againſt C. Chaunt. ſaid, Actio non; For the Defendant is Couſin to C. and C. was arreſted at the Suit of the Plaintiff, and the Defendant became one of his Mainpernors, Judgment Si Actio; and a good Plea per Cur. at which the Apprentices marvelled, becauſe he did not confeſs any Maintenance; For it is lawful for every one to be Mainpernor; Newton ſaid, that the Defendant gave to the Jurors, to ſome 20 d. and to other ſome 12 d. to give Verdict for C. Chaunter ſaid, he did not give any Money prout &c. and per Cur. becauſe he is compelled to ſbew Special Maintenance, it ſuffices for the Defendant to traverſe it, and he ſhall not be compelled to ſay that he did not maintain modo & Forma &c. Br. Maintenance, pl. 22. cites 14 H. 6. 6.

7. Maintenance againſt A. for maintaining of B. in Treſpaſs brought by B. againſt the Plaintiff in B. R. The Defendant ſaid, that *F.* was ſeiſed in Fee of the Land, where the Treſpaſs was done and died ſeiſed, and the Land deſcended to the ſaid B. as Heir &c. by which he entred, and G. the now Plaintiff entred and did Treſpaſs, and B. brought thereof Action of Treſpaſs, and, pending this, encoffed A. now Defendant, and G. pleaded Not Guilty claiming the Franktenement to him, by which the ſaid A. came to the Jury with his Evidence, and ſbew'd how the Franktenement belonged to him, Judgment ſi Actio; the Plaintiff ſaid, that the Feoffment was made to the Intent that the Defendant ſhould labour the Jury to paſs in the Action of Treſpaſs againſt this Plaintiff; Newton ſaid he encoffed us as we have alleged, *abſque hoc* that we undertook the Matter; Priſt Br. Maintenance. pl. 23. cites 14 H. 6. 7.

8. In

8. In Maintenance the Plaintiff said, that the Defendant, such a Day, Year and Place in this Declaration, gave to W. E. 40 s. of his own Money, to labour the Jury to pass for one M. in Appeal against the now Plaintiff, the which is the same Maintenance of which the Action is brought, and the Defendant said, that he did not give 40 s. to the same W. E. to labour the Jury in that Action to give their Verdict for the said M. modo & forma prout &c. And so to Issue, and found for the Plaintiff to the Damage of 100 Marks. Br. Maintenance, pl. 14. cites 21 H. 6. 15, 16. & 22 H. 6. 5.

But first, the Plaintiff replied, that the Defendant gave 6 s. and 8 d. to J. W. to be of his Counsel of his own Money, and said that

he would be with the said Matter, and maintain with his proper Goods, and gave to them 20 s. over of his own Goods to spend in the Matter; and by the Opinion of the Court it is an ill Replication. Ibid. — S. P. Br. Negativa, pl. 19. cites 21 H. 6. 16. — * Orig [Loquela] — Vid. Loquela, tit. Words.

9. In Maintenance Exception was taken to the Writ, because it was quod manutenuit in Loquela Appelli, where it should be in quodam Appello; For Appellum is not Loquela, and Release of Actions real and personal is no Plea in Appeal, & non Allocatur. Br. Maintenance, pl. 14. cites 21 H. 6. 15, 16, and 22 H. 6. 5.

10. Maintenance at one Day pending the Suit is Maintenance during all the Suit, and yet Release made after this Day is a good Plea, quod nota. Ibid. per Paston.

11. Exception was taken to the Writ quod manutenuit & ad hoc manutenet; where he cannot maintain after the first Plea determined. Ibid.

So where the Plaintiff in this Action

supposed that the Plaintiff in Assise had Execution, and yet well; per Afcue and Finch; For it might be that he would bring Attaint, but dared not for fear of Maintenance, and therefore this Word (manutenet) true, Quære. Br. Champerty, pl. 2. cites 47 E. 3. 9 — Brook says it seems that the Writ is not good ad hoc manutenet; For when the Appeal was determined by Judgment, he cannot any longer maintain this Plea; For now it is no Plea. Br. Maintenance, pl. 14. — But if the Writ of Maintenance be brought pending the first Writ, there he may say quod ad hoc manutenet. Ibid. — But if it be brought after Judgment in the first Plea, then it shall be quod manutenuit, but note the Diversity. Ibid.

12. Bill of Maintenance by W. against J. who was present in Court, because he maintained in the Presence of the Justices one H. in a Suit between the Plaintiff and H. Moile prayed Judgment of the Bill; For he does not say that presens est in Curia; Newton said, The Bill * does not mention that he was present and maintained, but (is only) that, Sedente Curia, he maintained, and this appears by the Bill; brown said, that in the Replication express mention shall be made of his Appearance, which Paston agreed. Per Port. In Bill of Maintenance against an Attorney, he shall make mention of the Appearance of the Attorney, and yet they are always intended to be attending at the Court; and because this Bill was of Maintenance Sedente Curia it shall be intended that they have appeared; For otherwise he could not maintain Sedente Curia; and after the Bill was awarded good, quod nota; and it seems there, that if the Maintenance had not been done Sedente Curia, the Plaintiff would have been put to his original Writ of Maintenance, and should not have Bill thereof. Br. Bille, pl. 10. cites 22 H. 6. 24.

* Orig (Prise de ceo que &c.)

13. That which ought to be justified, ought to be a Maintenance justifiable, but if it be not any Maintenance, then the general Issue suffices. Br. Maintenance, pl. 17. cites 22 H. 6. 35.

If the Defendant in Maintenance be charged with a speci-

al Point of Maintenance, he must answer to the same, and the general Issue then shall be no Plea for him. Heath's Max. 52.

14. A Man alleged the Maintenance the Monday next after the Feast of Saint John, and the Defendant justified the Monday before the Feast of Saint John, and traversed all Maintenances after, and well per Forcive Justice, quod non Negatur. Br. Traverse per &c. pl. 19. cites 28 H. 6. 6.

If the Defendant justifies at another * Day and another Place in the same

County, this is good without Traverse; for it is not Local, but may continue. Br. Traverse per &c. pl. 87. cites 21 H. 6. 15 — * S. P. so that it be before the Date of the Writ; per tot. Cur. Br. Maintenance, pl. 14. cites S. C.

15. Note, that a Man may join general Maintenance, and special Maintenance in one and the same Writ, and well. Br. Maintenance, pl. 52. cites 31 H. 6. 9.

A Man may bring Maintenance of W. N. against the Plaintiff in a Quarrel in C. B. without shewing

16. Maintenance was, *that S. quendam querelam loquere quæ fuit in Curia nostra coram Justiciariis nostris de Banco inter &c.* Judgment of the Writ; for he has not shewn in what Place the Plea was held; for it shall be at Westminster; Prifot said, if it was in Banco Regis which is removeable, yet when the Plea is passed he shall shew where the Court then was; Danby thought that the Writ was good; for it shall be intended to be at Westminster. Br. Brief, pl. 527. cites 34 H. 6. 27.

where C. B. then was; per Needham, Danby and Asteton; but per Davers and Prifot contra, that he ought to say at Westminster, or other Place. Br. Pleadings, pl. 52. cites 36 H. 6. 12.—Maintenance, the Writ was that the Defendant maintained a certain Quarrel between R. W. and the Plaintiff which is yet Pending in the King's Bench, and did not shew where the King's Bench then was, and therefore the Writ was abated. Br. Brief, pl. 25. cites 27 H. 6. 10.—Exception was taken for such Cause, and it was held fatal. Vent. 302. Mich. 28 Car. 2. B. R. the King v. Humphreys.

1 Hawk. Pl. C. 255 cap. 53. s. 39.

17. In Maintenance *Nul tiel Record* is a good Plea for the Defendant; per Davers and Prifot J. quod non ibi Negatur; quod nota. Br. Maintenance, pl. 25. cites 36 H. 6. 12.

18. Maintenance in *quadam Querela* which was between A. and this Plaintiff pro parte A. &c. where the Plea yet pends; Judgment of the Writ, & non Allocatur, but the Defendant awarded to Answer. Br. Maintenance, pl. 21. cites 37 H. 6. 25.

As where a Man justifies as Brother, Cousin &c. he need not shew how he maintained him; For he may maintain in all Things, as to Ride with him, or to be with him at the Bar, and to proffer to the Men of Law for him. Ibid. —So of a Servant. Ibid.—Contra of special Retaine * from Day to Day to be his Servant, there he cannot meddle beyond his Retainer. Ibid.—The Defendant justified, because the Party for whom &c. was his Servant, and he retained J. M. learned in the Law to be of his Counsel, and did not say if he retained de propriis, or with the Money of the Servant's Wages, and yet a good Bar by award; For it shall be intended of the Servant's Money. Br. Maintenance, pl. 44. cites 31 H. 6. 9.—* Journalment.

19. In Maintenance, per Markham for Law, he who is retained with J. N. to ride with him to London, cannot aid him in his Plea in London or Westminster, for this is out of his Retainer, contra where he is retained with him * by the Day to do all manner of Services, there this is a good Plea without shewing how he maintained in Special, because it is lawful for him to maintain in Omnibus. Br. Maintenance, pl. 27. cites 39 H. 6. 5. 6.

20. Maintenance because the Defendant *maintennit in an Action* between the Plaintiff and J. N. pro parte T. P. It is a good Plea that the Action was between the Plaintiff and T. P. and J. S. absque hoc, that there was such Action as the Plaintiff supposed, Judgment of the Writ. Br. Maintenance, pl. 47. cites 6 E. 4. 4. 5.

21 In Maintenance the Defendant said that he was one of the Jurors who was Sworn upon the Issue in the first Action, in which he supposed the Maintenance, Judgment si Actio; per Pigot, you ought to say that you gave the Verdict for the Notice which you had of the Truth in the Matter; but per Cur. the Plea is good as before without it; per Jenney, after the Verdict given, you prayed Judgment for the Plaintiff of the Steward in the first Action, by which he gave Judgment accordingly, of which the Action is brought and by some of the Justices, this Prayer of Judgment is Maintenance, quod Littleton Conceilit. Br. Maintenance, pl. 40. cites 18 E. 4. 1. & 2.

S. C. Pl. C. 78. b. but Coke J. ibid. 87. b. thought there was no necessity of averring that it was a pre-
ceded Right.

22. In Debt upon this Statute for 801. the Count was, *that such a Day and Year* (but did not shew certainly that it was within a Year before the Action brought) *unum Mesuagium &c. in M. in Com. G. de Valore Octogin. Librarum apud M. prædict. barganizaverunt, concesserunt & ad Firmam dimiserunt ad Terminum Annorum* of which said Tenements they the said Defendants, nor any of their Ancestors, nor those by whom the said Defendants claim the same Tenements were in Possession of the same, nor of the Reversion or Remainder

mainder thereof, nor took the Rents or Profits of the same by the Space of one whole Year next before the aforesaid Bargain, Grant or Demise thereof made per quod Actio accrevit &c. The Defendants demurred upon the Declaration, and whether this Lease for Years be within the Statute was the Question; three Exceptions was taken, 1st. That the * Statute was misrecited as made 28. Apr. 32 H. 8. where it was otherwise &c. 2d. That there ought to be an † Averment that the Lessors had a pretended Right or Title, by Reason of the Words of the Statute. 3d. Because it was said ad Terminum Annum, ‡ without shewing Certainty or Commencement &c. and the Court held the two first Exceptions good, and that they ought necessarily to be alleged, but as to the last they all but Coke J. held otherwise, because the Number of Years here is not Material; and also, the Plaintiff is a Stranger to it, and therefore cannot have Notice of the Contract. But for the Matter they were clearly of Opinion that the pretended Title of a Term is within the Purview and Intent of the Statute; another Exception was taken to the Doubtfulness of the Count, viz. barganizaverunt & concesserunt whereas either of those Terms were sufficient, and this by two Justices. D. 74. b pl. 19. Mich. 6 E. 6. Partridge v. Strange.

by intending that there is another Statute to maintain his Action, different from that whereon he himself hath founded it. 1 Hawk. Pl. C. 264. cap. 86. S. 5.—† S. P. because that is the Point of the Action. 1 Hawk. Pl. C. 264. cap. 86. S. 10.—‡ S. P. that it is not necessary to set it forth. 1 Hawk. Pl. C. 264. cap. 86. S. 15.—S. C. cited Arg. and says that this Point was held well enough notwithstanding that the Lease was not to be forfeited, but was a Conveyance to the Point of Forfeiture, viz. the Value of the Lands. 2 Le. 39.

23. The Information must set forth that the Defendant, nor any of his Ancestors, or any by whom he claimed have taken the Profits, and tho' it be laid that the Plaintiff himself has been in Possession of the Land by 20 Years before the buying of the pretended Title, it is not sufficient; For it is but Matter of Argument, and not any express Allegation; For in all penal Statutes the Plaintiff ought to pursue the very Words of the Statute. Le. 208. Mich. 32 & 33 Eliz. C. B. Lancaster's Case.

24. In Assumpsit the Plaintiff counted, that whereas he claimed to have Title to certain Lands in D. the Defendant in Consideration that the Plaintiff assumed to assign his Right, Title, and Interest to the Defendant, he promised to pay him 40 l. &c. After Verdict it was moved in Arrest of Judgment, that this was an unlawful Consideration, and against the Statute 32 H. 8. because it appears not that the Plaintiff was in Possession by the Space of a Year before, so that he could assign to the Defendant, nor that the Defendant was in Possession that he might release to him; Sed non allocatur; For it stands indifferent, whether he was in Possession or not, and a Declaration shall not be avoided but for great Cause, and the Plaintiff had Judgment. Cro. E. 151. Mich. 31 & 32 Eliz. B. R. Dobbins's Case.

25. Error was brought upon a Judgment in Debt upon the Statute 32 H. 8. because the Plaintiff demanded 50 l. for the Value of the Land, and the Jury find the Value 20 l. upon which the Plaintiff had Judgment to recover one Moiety, and the Queen the other Moiety, and no Judgment was for the Residue of the 50 l. viz. that the Plaintiff sit in Misericordia pro falso clamore suo; And for this Cause the Judgment was reversed; tho' in Trespas or other Actions in which the Plaintiff counts Ad Damnum if less be found than he declares for, yet he shall not be amerced, because the Action is grounded upon an Uncertainty. Cro. E. 257. pl. 34. Mich. 33 & 34 Eliz. Savery v. Tey.

26. A. informed against B. and shewed that M. was, and yet is, seised of Lands, and had taken the Profits for two Years before, and that B. pretending Title by Indenture, sold his pretended Title to A. aforesaid for a certain Sum of Money &c. and averred that B. had not Possession, Reversion, or Remainder, or took the Profits for a Year before; And averred, that he (viz. A. the Plaintiff) knew it not to be a pretended Title; And averred also, the * Value of the Land &c. Upon Not Guilty the Jury found for the Plaintiff. It was moved in Arrest of Judgment, 1st. that the Penalty in the Statute shews what manner

* S. P. but he need not recite it, because the Judges are bound ex Officio to take Notice of it, being of a publick Nature; but if he do recite it, he must, at his Peril, take care to recite it certainly, because it is the Ground of the Action; and the Court will not aid him

It was alleged, that the Defendant, not being seised of such Tenements, nor having a Reversion or Remainder

therein, conveyed and granted the 31 Oct. 4 Car. such Tenements by Way of Maintenance and Champerty to W. R. and for Confirmation of the said Conveyance, the Defendant and his Wife by Fine, Hil. 4 Car. granted them to W. R. and does not aver in Facet to that it is a pretended Right &c. as he ought to do. Held ill. Cro. C. 232. the King and Barns v. Hill and Windfor. — * It is not sufficient to set forth the Value of the Land at the time of the Conveyance executed, without shewing the Value at the time of the Bargain; because the Forfeiture is governed by the later. 1 Hawk Pl C. 264. cap. 86. S. 11. — † 1 Hawk. Pl. C. 264. cap. 86. S. 9.

manner of Contract or Bargain the Statute intended; For it is to forfeit the Value of the Lands &c. so bought &c. so that to make a Forfeiture there, ought to be Contract, or Covenant, or Bargain for the Lands themselves, and here the Title is bought, and not the Land; And the Meaning of the Statute was, if the Land was sold &c. and the Misenise of the Statute intended to meet withal was the Conveyance of Title to another, and this cannot be but when the Land itself is sold, and cited new Entries, 19, 20 Eliz. Information 365. and said, that all the Cases in Co. Litt. 369 are of the Land itself. 2. That the * Information is by A. (the Purchaser) who is Particeps Criminis, and that his Averment, that he had no Notice of its being a pretended Title is void and idle, and that he ought only to aver that the other had not Possession; For this is Matter of Fact, but the other is Matter of Law. 3. If A. had bought the Land itself, he might have averred that he knew not the Title to be pretended &c. but when he says he bought the pretended Title, eo Nomine it appears now that he knew it to be pretended; And then his Averment is repugnant; And then if the Averment is void, it appears that the Plaintiff is Particeps Criminis, and it was not the Meaning of the general Words of the Statute, which says (to the Party that will sue for the same) to give Action to the Offender, and to elude the Statute by his bringing Information, and permitting the Land to be undervalued, and bar all others by his Information; But it was argued e contra, that the Words of the Statute are pursued, viz. obtain, get &c. any pretended Right or Title &c. and to that Purpose cited D. 23. **Worslie's Case.** And Book of Entries, tit. Debt. And that the Averment, that he knew not &c. is not necessary, but only to prevent Information against himself. Adjournatur. Litt. R. 369. Palch. 7 Car. C. B. **Withering v. Bancroft.**

27. After Verdict for the Plaintiff in an Information on that part of the Statute 32 H. 8. which gives a Forfeiture of the Value of the Land purchased, unless the Seller was in Possession within a Year before the Sale, it was moved in Arrest of Judgment, because the Information had set forth the Right of these Lands purchased to be in J. S. and that the Son of J. N. had conveyed them by general Words, as descending from his Father; which Title of the Son the Defendant bought; whereas, if in Truth the Title was in J. S. then nothing descended from the Father to the Son, and so the Defendant bought nothing; sed non allocatur; For if such Construction should be allowed, there could be no buying of a pretended Title within the Statute, unless it was a good Title; But when it is said, as here; that the Defendant entered and claimed Colore of that Grant or Conveyance, which was void, yet it is within the Statute, so the Plaintiff had his Judgment. 2 Mod. 67. Hill. 27 & 28 Car. 2. C. B. **Goodwin qui tam &c. v. Butcher.**

28. To a Plea by Defendant on 32 H. 8. 2. of Maintenance, the Plaintiff replied, that Defendants, or some of them, or some other Person under whom they claim, or some other Person by their Consent and Agreement, or to the Use of the said Defendants, or the Plaintiff, or some or one of them was, or were in Possession of the Premises, or the Reversion, or Remainder thereof, or of some other sufficient Estate, or had taken the Rents and Profits thereof by the Space of one Year before the making the Articles for the Purchase; The Defendant demurs, for that the Replication is a Departure from the Matter in the Bill in saying some other Person to the Use of the Defendant or the Plaintiff by their Consent was, or were in Possession of the Premises, and took the Rents &c. for one whole Year before the making the said Articles; which, as the Defendant's Counsel alleged, exceeded the Charge in the Bill. But the Court

Court held the Replication good and pertinent, and over-ruled the Demurrer. Mich. 31 Car. 2. Fin. R. 426. Cock v. Arnold & al.

(U) Punishable ; How, by Actions or Indictments &c. See (B. 2) (E)—Ut-lawry.

1. 1 E. 3. Parl. 2. cap, 14. **E**NACTS, that none shall maintain Quarrels and Parties in the Country to the Let and Disturbance of the Common Law. Maintenance of a Suit in a Court Baron is as much within the Purview of these

2. By 20 E. 3. cap. 4. None shall maintain any Quarrels, save their own, on Pain to have their Body, Lands, and Goods to be at the King's Pleasure.

Statutes as Maintenance in a Court of Record. 1 Hawk. Pl. C. 255. cap. 83. S. 38.—He who barely assists another in taking out an Original, which never is returned, is not liable to any Action brought on these Statutes. Ibid. S. 39.—It is not material, whether the Plaintiff in an Action on the said Statutes was nonsuited, or recovered in the Action wherein the Maintenance is supposed. Ibid. S. 40.—Also it is certain, that he who fears that another will maintain his Adversary, may, by way of Prevention, have an original Writ grounded on the said Statute prohibiting him so to do. Ibid. S. 41.

3. By 4 Ed. 3. 11. Justices of the Benches of Assise, and of Nisi Prius, shall have Power to hear and determine Maintenance, Conspiracy, Confederacy and Champerty, as well as Justices in Eyre, and that which cannot be determined before the Justices of either Bench upon the Nisi Prius, shall be adjourned unto the Bench where they are Justices, and shall be there determined. Note, that this Statute is confirmed by the Statute of 7 R. 2. 15.

4. By 20 Ed. 3. 6. Justices of Assise have Power to enquire of the Misdemeanors of Sheriffs, Escheators, Bailiffs, and other Ministers, Imbracers, and Furors, and to punish such as be found guilty; And the Chancellor and Treasurer are to hear all Complaints thereof, and to apply speedy Remedy thereunto.

5. A Man was indicted of Champerty, and put to answer to it. Br. Indictment, pl. 48. cites 44 E. 3. 38.

6. 1 R. 2. cap. 4. Enacts, that no great Officer of the King shall maintain Quarrels in the Country on Pain of a Fine to be imposed by the King and his Council; And no other Person on Pain of Imprisonment, and to be fined at the King's Will; And if he be the King's Officer or household Servant, he shall also lose his Office.

7. 31 El. cap. 5. S. 4. Provides, that this Act shall not extend to the laying any Offence concerning Champerty, buying of Titles &c. where the Penalty shall be to the Value of 20 l.

8. An Indictment was upon the Statute of Maintenance, and one only found guilty; And it was moved in Arrest of Judgment, that seeing but one was found guilty, it did not maintain the Indictment. 2 Roll. 81. Several were indicted for using of a Trade, and said Uterque eor' usus fuit, and held not good; Sed non allocatur; For that in that Case in Roll. the using of the Trade by one cannot be an using by the other. But this is an Offence that two may join in, or it may be several as in a Trespass. Vent. 302. the King v. Humphreys.

9. All Offenders are not only liable to an Action of Maintenance at the Suit of the Party grieved, wherein they shall render such Damages as shall be answerable to the Injury done to the Plaintiff, but also that they may be indicted as Offenders against publick Justice, and adjudged thereupon to such Fine and Imprisonment, as shall be agreeable to the Circumstances of the Offence; Also it seems that a Court of Record may commit a Man for an Act of Maintenance done in the Face of the Court. 1 Hawk. Pl. C. 255. cap. 83. S. 36.

(W) Judgment.

1. **M**Aintenance against two; the one said, that he was Attorney of the Party, and by Command of his Master retained J. N. of Counsel with the Party, and gave to him 40 d. of the Money of his Master, which is the same Maintenance &c. Quære if Attorney may not retain Counsel without Command of his Client, and if he cannot get Money of his own for the time &c. and the other pleaded Not Guilty, and to the first the Plaintiff said, that the Attorney gave 6 s. 8 d. of his own to one of the Jury, and upon this they were at Issue, and found that the one had given the 6 s. 8 d. prout &c. and that the other was guilty, and taxed Damages jointly for all; and by the Opinion of all the Justices except Needham, because it is brought of joint Maintenance, and in pleading the Plaintiff confessed it was several Maintenance, viz. special Maintenance in the one, and general in the other, therefore the Writ shall abate, and the Jury ought to have severed their Damages; for the Plaintiff is more damnified by the one Maintenance than by the other by Presumption and Intendment of Reason. Br. Maintenance, pl. 26. 36 H. 6. 12.

Maintenance of Writs.

(A) In what Cases the Plaintiff must or can maintain it.

1. **D**OWER against 2 Sisters, the one pleaded Partition and Detinue of Evidences of her Moiety, and the other pleaded such another Plea; there the Demandant was not compelled to maintain his Writ; because the Tenants did not plead this to the Writ, but pleaded in Bar, and also Non-constat, if the Partition was made before the Writ purchased, or pending the Writ. Br. Maintenance de Brief. pl. 38. cites 21 E. 3. 8.

2. Entry in the Per by J. and E. his Feme; he said, that the Name of his Feme is A. and not E. and Demandant said, that she is known by the one and by the other &c non allocatur, but was compelled to maintain his Writ, that she is named E. Br. Maintenance de Brief, pl. 27. cites 21 E. 3. 47, 48:

But per Finch where Outlawry, Excommunication &c. are pleaded,

3. As to Matters in Fact, triable by the Jury, the Jury shall be taken upon it, and the Plaintiff need not maintain his Writ. Br. Maintenance de Brief, pl. 3. cites 40 E. 3. 28.

which are not triable by the Jury, the Plaintiff shall maintain his Writ. Ibid.

4. But per Caund. if the Defendant in Assise says, that the Plaintiff is Covert Baron, or has taken Baron pending the Writ, the Plaintiff shall maintain her Writ, quod Kirton Concessit. Ibid.

Otherwise it is, if he had pleaded Jointenancy in the same Vill; For then he shall maintain his Writ alone,

5. Scire Facias of Tenements in C. the Tenant pleaded Jointenancy, by Deed of the same Tenements in S. which S. is a Hamlet of C. and the Demandant said, that S. is a Vill by itself &c. and because he alleged Jointenancy by Deed in another Vill, it was held, that the Demandant may answer to the Vill only without maintaining his Writ. Br. Maintenance, pl. 25. cites 41 E. 3. 25.

that sole Tenant as the Writ supposed Quære. Ibid.

6. *Præcipe* against two ; at the Grand Cape, the one appeared and took the entire Tenancy, Absque hoc, that the other who made Default had any Thing, and tender'd his Law of Non-summions ; the Demandant maintained his Writ, that Tenant as the Writ supposed. Br. Maintenance de Brief, pl. 5. cites 47 E. 3. 14.

7. Formedon against two, the one pleaded Non-tenure, and the other disclaim'd, and the Opinion of the Court was, that the Demandant may enter ; But per Danby in *Action*, in which the Demandant may recover Damages, he may aver the Defendant to be Tenant, and otherwise not, Quod Nota Diversitatem inde, and so here the Demandant need not maintain his Writ. Br. Maintenance de Brief, pl. 35. cites 36 H. 6. 28.

(A. 2) In what Cafes. *Election*, in what Cafes to maintain it or not.

1. *Præcipe* Quod Reddat against two as Jointenants, and each took on himself several Tenancy, and pleaded in Bar ; the Demandant ought to maintain his Writ ; per Newton. Br. Maintenance de Brief, pl. 13. cites 22 H. 6. 55.

2. And if in *Præcipe* quod reddat against two Jointenants the one makes Default after Default, and the other appears and accepts the entire Tenancy, and pleads in Bar, or if the one says nothing, and his Companion accepts the entire Tenancy and pleads in Bar, the Demandant may accept him Tenant and answer to the Bar ; but he may maintain his Writ if he will ; per Danby. Ibid.

(A. 3) In what Cafes. At what Time.

1. *Præcipe* Quod reddat against Twelve ; Eleven appeared, and one made Default, by which Grand Cape issued against him, and the Eleven had Idem dies, at which Day, the one made Default again, and one of the Eleven who appeared before made Default also, and the Demandant would have maintained his Writ, that all are Tenants &c. and could not per Cur. unless all appear, or that the Process be determined, and so it is not here ; For petit Cape is issued against one, and therefore per Cur. he shall attend the Return of it ; For he may come at the Day and save his Default, and accept the entire Tenancy. Br. Maintenance de Brief, pl. 26. cites 3 H. 6. 52.

(B) In what Cafes. How and what is sufficient Maintenance.

1. *ASSISE* against several of 10l. Rent ; one said, that where it is brought against P. as Tenant of the Rent, one M. is Tenant and Pernour of the Rent not named in the Writ, Judgment of the Writ and it &c. and the Plaintiff prayed the Assise ; and per Cur. the Plaintiff shall maintain the Writ specially, and shall not pray the Assise generally, by which he said, that P. is Tenant of the Land and Deforcor of the Rent, Absque hoc that M. is Tenant, and the other said, that M. was Tenant of the Rent, Prist, Quod Nota. Br. Maintenance de Brief, pl. 19. cites 30 Aff. 5.

2. *Præcipe* Quod Reddat against Lord and Villein, or Mortgagee and Mortgagor ; and the Villein or Mortgagee pleads sole Tenancy to the Writ ; the Demandant

mandant may maintain his Writ by the special Matter ; For otherwise, if the Lord or Mortgagor enters pending the Writ, it shall abate the Writ. Br. Maintenance de Brief, pl. 4. cites 41 E. 3. 16.

3. Writ by several Præcipes against two ; the one said, that the Land in the one Præcipe is the same Land that is in the other Præcipe, and of this pleaded Jointenancy with the other, and the other said the like, and pleaded Jointenancy with the first, and the Demandant said Protestando, that it is not all one Land but diverse & pro Placita, that the one was sole Tenant the Day of the Writ purchased of the one Land, and the other the like of the other Land, and good Maintenance of the Writ by Judgment, and the Plea of the Tenants is not double ; For the first Matter, that the one Land and the other is one and the same Land is void ; For a Man may have Action against two by several Præcipes or Action Simul & Semel ; For he cannot Recover but una vice, and he who has not this may disclaim, or plead Non-tenure. Br. Maintenance de Brief, pl. 30. cites 4 H. 6. 14, 15.

(C) In what Cases. How. Where Jointenancy or Sole Tenancy is pleaded, or one makes Default, or pleads Non-tenure.

1. **P**Ræcipe Quod reddat against two, the one took the entire Tenancy and vouched, and the other did the like separately, and it was held, that the Demandant ought to maintain in his Writ. Br. Maintenance de Brief, pl. 24. cites 41 E. 3. 21.

* It should be 11 H. 4. 16. pl. 55

2. In Scire Facias, the Tenant pleaded Non-tenure of Parcel, and shewed who is other Tenant, as he ought ; and the Plaintiff was compelled to maintain the Writ, that Sole Tenant as the Writ supposed, Absque hoc, that the other had any thing. Br. Maintenance de Brief, pl. 6. cites * 12 H. 6. 16.

Otherwise it is where the Writ is brought against 3, and the one appears always, and the other comes at the Grand Case, and the 3d. makes Default after Default ; For there he shall Count because one always appeared, but in the other Case he shall not Count. Ibid.

3. Entry in the Quibus ; per Cur. if there are two Partners, and the one appears at the Grand Cape and pleads Jointenancy with a Stranger, and wages his Law of Non-summous, and the Demandant says, that he was seised till by those two named in the Writ Disseised, and averred that those two took the Profits, and that he had brought his Action within the Year according to the Statute, and the other said that he did not Disseise him, Prist ; if this Issue be found against the Demandant, the Judgment shall not be other, but that the Writ shall abate. Br. Maintenance de Brief, pl. 16. cites 14 H. 6. 3.

S.P.Br. Traverse per &c. pl. 70. cites 19 H. 6. 13. per Newton.

4. Where a Man pleads Jointenancy with a Stranger &c. the Maintenance is, That sole Tenant as the Writ supposed, Prist, absque hoc that the Stranger had any Thing. Br. Maintenance de Brief, pl. 9. cites 19 H. 6. 12, 13.

S. P. Br. Traverse per &c. pl. 70. cites S. C. per Newton and Fulthorp.

5. But in Præcipe against two if the one takes the intire Tenancy upon him, absque hoc that the other has any Thing, and Vouches or Pleads in Bar as he ought, there the Maintenance of the Writ is, That sole Tenant as the Writ supposes ; For where the Tenant takes Traverse in his Plea, the Demandant shall not take Traverse, and if he does not take Traverse in his Plea, the Demandant shall take Traverse in his Replication. Ibid.

6. In Trespafs the Defendant said, that the Plaintiff had nothing in the Land where &c. but in Common & pro indiviso with A. B. who is alive not named in the Writ, Judgment of the Writ ; and the Plaintiff maintained that it was his several Soil, absque hoc that A. B. had any Thing, and so ad patriam &c. Br. Maintenance de Brief, pl. 10. cites 22 H. 6. 12.

7. Dower

7. Dower against R. and S. — R. pleaded Non-tenure generally, and S. took the intire Tenancy and pleaded in Bar; Bingham, as to R. maintained the Writ, and as to S. that he is Jointenant with R. and to the Plea pleaded by him alone, no Law ought to put him to answer; per Port this is dangerous for you, for one Jointenant may lose his Portion; Bingham said if R. had disclaimed, then S. had mispleaded, but here the Plea is good; quod fuit concessum. Br. Maintenance de Brief, pl. 12. cites 22 H. 6. 44.

8. And if I bring Formedon against F. and P. and F. pleads Non-tenure generally, and P. accepts the intire Tenancy and pleads in Bar, I shall not be refused to maintain the Writ, For I am at no Mischief; per Newton. Ibid.

Otherwise it is if F. makes Default and P. accepts the intire

Tenancy; Quere thereof; for it seems that it is all one. Ibid. — For per June 8 H. 6. fol. 13. in Prae-cipe quod reddat against two, if one appears and says nothing or makes Default, and the other takes the intire Tenancy, and pleads in Bar, the Demandant may answer in the Bar without Maintenance of his Writ; but after June changed his Opinion in the first Case, which was of Land alleged in two Villis which was only in one, and therefore quere. Ibid. — But if the Demandant confesses that the one has nothing, there his Writ shall abate; for there is a great Diversity between confession and not denying as here, quod nota bene. Ibid.

9. Formedon against two; the one said nothing, the other took the intire Tenancy, absque hoc that the other had nothing and vouched to Warranty, and the Demandant counter-pleaded, and the Tenant imparled, and at another Day answered without the Voucher, and so see that the Demandant was not compelled to maintain his Writ; For if the one be Tenant it suffices as it is said there, quod nota. Br. Maintenance de Brief, pl. 15. cites * 57 H. 6. 16.

But Note, that if the other had taken the Tenancy likewise and had vouched or pleaded, there the Demandant ought to

have maintained his Writ; quod nota Diversity elsewhere often. Ibid. — * So it is in all the Editions of Brook but should be 37 H. 6. 16. b. pl. 1.

10. In Trespafs the Defendant said that the Plaintiff had nothing in the Land the Day of the Writ but in Common pro indiviso with J. not named, Judgment of the Writ, and shewed by Descent to the Plaintiff and another, which other enfeoffed J. of his Part; and per Cur. it is good Maintenance of the Writ, that Sole seised absque hoc that the other had any Thing, and need not traverse the special Matter; For it is only Conveyance. Br. Maintenance de Brief, pl. 33. cites 1 E. 4. 7. — So of other Tenancy in Common. Ibid.

11. Formedon against the Baron and Feme; the Baron pleaded Non-tenure for his Feme, and for himself took the intire Tenancy absque hoc, that the Feme had any thing, and vouched; the Demandant said that the Baron and Feme were Tenants as the Writ supposed the Day of the Writ purchased, & hoc paratus &c. and to the Voucher made by the Manner, no Law shall put him to answer; per Danby, you should say absque hoc that the Baron was Tenant of the whole Prout &c. Per Catesby, No; For the Baron has taken Traverse, and where the one Party traverses, the other who rejoyns to him shall not traverse also; but it suffices to maintain the Writ. Br. Maintenance de Brief, pl. 14. cites 9 E. 4. 36.

S. P. Br. Traverse per &c. pl. 130. cites. S. C.

12. When the Tenant pleads in the Negative it suffices for the Demandant to answer in the Affirmative. Ibid. per Pigot.

As where he pleads Non-tenure, it

suffices for the other to say, That Tenant the Day of the Writ purchased, Prist. Ibid. — And in Prae-cipe quod reddat against two, the one to k the intire Tenancy and pleaded in Bar, and the other did the like; it suffices for the Demandant to say that Tenants as the Writ supposed; For every one took the intire Tenancy. Ibid. — Contra to the Writ. Ibid. — The same Law where one takes the intire Tenancy, and the other pleads Non-tenure. Ibid. — Contra of Jointenancy; For there the Demandant must say that sole Tenant absque hoc, that the other had any thing, for there the Tenant pleads in the Affirmative. So per Littleton in Affise against several, the one took the intire Tenancy and pleaded in Bar, the Plaintiff may say that he held jointly with the other named in the Writ, and to the Plea pleaded by the Manner &c. and shall not take Traverse absque hoc that he who pleaded is sole Tenant. Ibid.

13. Upon Non-tenure pleaded the Maintenance of the Writ is that the Defendant is Tenant as the Writ supposed, and de hoc ponit se super patriam &c. and the other the like, and no absque hoc shall be there. Br. Maintenance de Brief, pl. 42. cites Book of Entries.

But upon Jointenancy pleaded the Demandant shall say that the Defendant

ant is sole Tenant as the Writ supposes, absque hoc that the other has any thing &c. quod vide Diversity. Ibid.—For in this last Case the Defendant pleaded in the Affirmative, therefore the Demandant ought to answer with a Negative, but in the other Case, the Defendant pleaded in the Negative, therefore an affirmative by Demandant makes it to be a perfect Issue, and there it suffices for the Defendant to say &c. ipse Similiter, without more. Ibid.

14. Writ of Entry against A. and B.—B. took the intire Tenancy, and said that he did not disseise the Demandant absque hoc, that A. had any thing, and A. took the intire Tenancy absque hoc that B. had any thing, and traversed the Disseisin and the Demandant said that they are Tenants as the Writ supposed; *Prisf.* Br. Maintenance de Brief, pl. 45. cites 13 H. 7. 26.

15. *Fermedon* was brought by A. against B. C. and D.—B. and C. appeared by one Attorney, and D. by an other Attorney, and B. and C. confessed the Action; D. said that at the Day of the Writ purchased he held jointly with B. absque hoc, that C. any thing had in the Land the Day of the Writ purchased; and as to his Moiety of the Tenements he vouched a Stranger. The Demandant maintained his Writ, viz. that the three were Jointenants as to the Writ supposed, & hoc petit quod inquiratur per Patriam, & prædict. D. Similiter; and this was held good pleading and good Issue, per Cur. and the Demandant cannot pray Judgment for any Part till the Issue be tried. D. 6. pl. 4. Mich. 26 H. 8. *Clotworthy v. Kingland & al.*

16. A. and B. were seised to the Use of Baron and Feme before the Statute 27 H. 8. cap. 10. after which a Writ of Entry in the Post was brought against the Baron, and he pleaded Jointenancy with his Feme; and the Question was, whether he ought to mention the Statute; and the Court thought that he ought to shew it; For at the Common Law, when the Tenant pleads Jointenancy with a Stranger, he ought to shew of whose Feoffment. It was further moved, whether the Demandant might aver the Baron Pernor of the Profits only; and the Court held that all Pernancy of the Profits is clearly taken away by the Statute, Quære. D. 32. a. pl. 3. 4. Pasch. 28, 29 H. 8. Anon.

17. Entry in the *Quibus* in the Nature of Assise against A. and B.—A. pleaded Non-tenure in Abatement B. took the intire Tenancy upon him and pleaded in Bar the Feoffment of J. S. and J. N. to him in Fee; the Demandant, as to the Plea of A. in Abatement of the Writ, averred him and B. Tenants of the Franktenement as the Writ supposed; and Issue thereupon joined, and as to the Plea of B. he said, that his Father was seised in Fee, till by the said Feoffors disseised, who being so in by Disseisin enfeoffed B. ut supra, and that after his Father died, and he as Son and Heir entred and was seised in Fee as in his Remitter till by A. and B. disseised &c. and did not aver & hoc paratus est verificare &c. B. rejoined and traversed the Disseisin by the said Feoffors to the Father of the Demandant upon which Point they were at Issue; and at the Day that the Inquest appeared, the Demandant would have relinquished his first Issue; because it was joined unnecessarily, he not being bound to maintain his Writ, but might have demurred upon the Plea of Nontenure of the one, and answered to the Bar of the other; but this the Court would not permit; and upon the Evidence to prove Jointenancy it appeared that A. before the Entry of the Demandant was Termor or Lessee at Will to B. and paid him Rent, and that he re-entred upon the Demandant claiming his former Estate, and by the Opinion of the Court, they were Disseisors and Tenants; because the Termor could not qualify his own Wrong, &c. and it was found for the Plaintiff in both issues, &c. and Judgment given accordingly. D. 134. b. pl. 11 Mich. 3 & 4 P. & M. *Kirton v. Birling.*

18. *Formedon* by F. of the Manor of S. with the Appurtenances. The Tenant, as to one Moiety, vouched C. as Son and Heir of B. Son and Heir of A. &c. as of full Age, to be summoned immediately &c. And as to the other Moiety, (except the Moiety of 7 Houses &c.) he pleaded a Fine executed with Proclamations, (except pre-exceptis) and 5 Years incur'd, and Non-claim in Bar. And as to the Moiety excepted, he pleaded Jointenancy by Fine with

with his Feme, and demanded Judgment of the Writ &c. The Demandant, as to the Voucher, counterpleaded thus, viz. That the said A. the Grandfather of the Vouchee, nor any of the Ancestors of the Vouchee, whose Heir he is, ever had any thing after the Gift, and before the Writ brought, unless jointly with F. S. and F. N. &c. with an Averment of the Continuance of this Estate, during the Life of the Grandfather, and that the said F. S. and F. N. survived. And all the Court held the Counterplea insufficient; because it does not extend to the Seisin or Possession of the Vouchee himself; but if he had been vouched as within Age, and that the Parol ought to demur &c. then to counterplead the Seisin of the Ancestors &c. according to 21 E. 3. fo. 10. is sufficient. And to the Plea in Bar the Demandant took Exception, Quod partes ad finem Nihil inde tempore &c. habuerunt &c. but that a Stranger was thereof seised in Fee; which Exception the Court held good enough. And as to the Plea in Abatement of the Writ, he affirmed the Writ, and traversed the Jointenancy, upon which they were at Issue &c. It was argued, that Jointenancy by Fine pleaded shall abate the Writ immediately, if the Demandant cannot confess and avoid it; For against a Fine levied, which is Matter of Record, he shall not have direct Averment, that he is sole Tenant. But per tot. Cur. Jointenancy of Parcel shall not abate the Whole Writ, but for the Relidue it shall stand; and tho' the Demand be of an entire Thing, as here, yet otherwise it is of Non-tenure of Parcel of an entire Demand, because there the Writ ought to have a Foreprise; contra of Jointenancy. And it was holden that because Jointenancy was pleaded in Abatement of the Writ after Voucher and Bar pleaded, which affirms the Writ good, it was preposterous, and therefore the Court ought not to regard it &c. D. 290. a. &c. pl. 62. &c. Trin. 12 Eliz. Fitzwilliams v. Copley.

(D) In what Cases. How. As to what Part.

1. **D**E B T against F. S. of D. in the County of M. Yeoman, late of A. the Defendant shall answer to both the Vills, but the Plaintiff shall maintain but one only. Br. Maintenance de Brief, pl. 29. cites 19 H. 6. 66.

Major Part.

(A) Major Part, What Act of theirs shall bind the Rest.

1. **I**F the Mayor and greater Number do an Act it shall bind all; because Ubi Major Pars ibi tota. per Brian Ch. J. Br. Corporation, pl. 63. cites 21 E. 4. 7. 12. 27. 67.

2. The Major Part of a Town, that had Right of Turbary agreed upon a Per Gawdy Method to prevent the little Tenants from selling; and held, that the same shall bind such as did not assent. For ubi Major Pars ibi totum 3 Lc. one ought to assent, and cites 265. Arg. in the Chamberlain of London's Case. cites 15 H. 7. 21 H. 7. 40. 8 E. 2. tit. Assise 413. 44 E. 3. 19 and per

Wray Ch. J. There the Ordinance was made to charge the Inheritance, but in the Principal Case, it is only to charge their Goods, wherefore the Assent of the greater Part is sufficient, and a Procedendo was granted. Ibid. in the Chamberlain of London's Case.

Fin. R. 332.
Mich. 29 Car.
2 Davis v.
Degeider.

3. *Bills of Conformity* have been long since *explicd*, and there is no such Equity now in this Court; per Ld. North K. Pasch. 1683. Vern. R. in Alderman Backwell's Case.

4. Where the Major Part of the *Part Owners of a Ship* settle and agree an Account of the Profits of a Voyage, it shall *conclude* the rest, and the Plaintiff ordered to pay Cofts, per Jetteries C. Trin. 1687. Vern. R. 465. Robinfon v. Thompson.

Per Holt Ch. J. The Admiralty have no Cognifance of this Matter. But he

held, that an Action lay for the Major Part for refusing to let the *Ship go a Voyage*, setting forth the Custom and the special Matter, and declaring ad Damnum &c. Carth. 27. Knight v. Berry. Pasch. 1 W. & M. B. R. — A dissenting Owner will not be liable, for he hath not the Benefit of the Voyage, per Holt Ch. J. Show. 30. in Case of Boston v. Sandford. — If some do not agree, and the Major Part do, the others shall not have any Advantage of the Freight; per Holt Ch. J. Show. 107. S. C. — Trin. 32 Car. 2. 2 Chan. Cafes 36. Anon. S. P.

6. Where the *Common Law creates a Charge upon any Precinct*, as to repair Bridges, Ways, Churches, &c. the Common Law gives them the Method of answering the Charge; otherwise where no Charge is by Law laid upon them, there a Majority cannot *vincere Rest*. 1 Salk. 362. Pasch. 1 Ann. B. R. The Case of Blackheath Hundred.

7. There is a great *Diversity* between *Abbot and Convent*, and *Master and Fellows*, *Mayor and Commonalty*, &c. For in Case of Abbot and Convent there must be the Major Part and the Abbot besides; and the Reason is, because the Abbot only *acts cum consensu* of the Major Part of the Rest; but in Case of Master and Fellows &c. the Master himself is but Part of the acting Part, and he is one of the Grantors just as the Rest. 12 Mod. 232. Mich. 10 W. 3. Anon.

8. The Mayor, or any other Officer of a Corporation, hath of Common Right no *casting Vote*; it is true such a Thing may be either by Prescription or Charter; and if there is an equality of Votes, and they cannot agree, they must be brought up in Contempt, and be committed till they do agree, viz. till a Majority do agree. Nelf. Abr. 1155. pl. 13. cites Mod. Cafes 152. the Queen v. Chapman.

Mandamus.

(A) Mandamus. *What it is &c. And in what Cases it lies.*

Raym. 211.
S. C. — 2 Lev.
18. S. C.

1. **T**HE Plaintiff had a *Verdict in Ejectment*, and upon an *Agreement* between the Plaintiff and Defendant, *the Defendant was to hold the Lands for the Remainder of his Term*; And according to that Agreement he held it for 2 Years; but *before the Term expired*, the Plaintiff brought an *Habere facias Possessionem*, and executed it; and now he moved for a Rule for Restitution. But Roll Ch. J. said it could not be, but he might have an Action on the Case against the Plaintiff for not performing the Agreement. Style 408. Hill. 1654. Wood v. Markham.

2. It lies *not for every taking away a Man's Freehold*, as in the Case of a *Keeper of a Park*, or a * *Stewardship of a Court Baron*; per Glyn Ch. J. S. y.

Sty. 457. Trin. 1655. in Case of the Protector v. Craford.—* But see contra by Hale Ch. J. at (E) pl. 2.

3. Mandamus does *not* give any Right, but only restores the Party to his ancient Right. Sid. 286. Pasch. 18 Car. 2. B. R. Batlet's Case.

4. Mandamus's do generally respect *Matters of publick Concern*; per Hale Ch. J. Mod. 84. in Appleford's Case.

5. The true Reason of Mandamus's was, when Aldermen, Capital Burgesses, or such other Officers, concerning the Administration of Justice, were kept out, to swear them into their Places. But it is rarely granted where one has any other Remedy; per Holt Ch. J. 12 Mod. 666. Hill. 13 W. 3. Anon.

6. Mandamus ought *not* to go where the Office is private, or the Party may have an Assise. Per Holt Ch. J. 6 Mod. 18. Mich. 2 Annæ. B. R. in White's Case.

S. P. admitted, Arg. and held accordingly by Glyn Ch. J.

Sty. 457. Trin. 1655. in Case of the Protector v. Craford.

7. Mandamus is always to do some Act in Execution of Law, and not to be in Nature of a Writ De non Molestando. 6 Mod. 229. Mich. 3 Annæ. B. R. Peat's Case.

2 Salk. 572. the Queen v. Peach.

8. Mandamus's are founded upon *Magna Charta cap. 29.* Arg. 10 Mod. 53. Mich. 10 Annæ B. R. in Sir Gilbert Heathcote's Case.

9. All Mandamus's are either to restore Persons turn'd out, or to admit those refused. Per Eyre J. 10 Mod. 54 in Sir Gilbert Heathcote's Case.

10. Since the Statute 9 Annæ. 20. S... a Mandamus is in Nature of an Action, special Pleadings and Replications being therein admitted, and Cofts given to either Side that prevails, and Error lies upon a Judgment on special Pleadings given therein, as was lately admitted in B. R. yet this was held to be no *Superfedeas* to the *peremptory Mandamus*, because such Construction would quite defeat the end of the Statute, and prevent the Officer, who was chosen annually, from having any Fruit of the Mandamus; Per Ld. Ch. J. Parker. And Notice was taken by Ld. Ch. J. King, that the Words of the Statute were, that in Case Judgment were given for the Mandamus, a *peremptory Mandamus* should be granted without Delay. Wms's Rep. 351. Pasch. 1717. in Canc. in Case of Dean and Chapter of Dublin v. Dowgatt.

11. A Bill was brought in Chancery by a Parson of one of the new Churches erected by the Statute 3 Geo. 2. against the Treasurer of the Commissioners, for the Dividend of 3000 l. being the Sum allotted for purchasing Lands for the Benefit of the Rector of that Church for the Time being, and that such Rector should be intitled to the Dividends of S. S. Annuities directed to be purchased in the mean time, to commence from Midsummer, 1730. The Church was consecrated in January 1730, and the Rector inducted in February 1730. The Treasurer paid him the Dividend from Michaelmas 1730, but refused to pay the Dividend from Midsummer before. Lord Chancellor said, that it did not seem to have been the Intention of the several Acts made for building the 50 new Churches, that Disputes of this Kind should be determined in the ordinary Courts of Justice, but only by the Commissioners themselves, as it is in the Acts relating to the Turnpikes. But if this Objection was out of the Case, the natural Court for the Plaintiff to apply to is B. R. to grant a Mandamus, and not to a Court of Equity to take an Account. These Acts have put this Matter into a quite different Method, by directing the Money allotted for the Building to be brought first into the Exchequer, and from thence to be paid out into the Hands of the Treasurer, and when it is in his Hands to be subject to the Order of the Commissioners. If the Commissioners do not do their Duty, the proper Court to apply to is to

B. R. to grant a Mandamus. Barn. Chan. Rep. 377. March 10. 1740. Dr. Vernon v. Blackerby,

(B) In what Cafes it lies for restoring Persons to Colleges and Schools.

S. P. that it lies Per
Glyn Ch. J. 2 Sid. 112.
Mich. 1658.
B. R. —
S. P. Sid
169. in Mid-
dleton's
Cafe. —
S. P. Raym.
12. cited as
Craford's Cafe. — But it lies *not* for an Usher of a School in Cambridge. Per Twifden J. who said it was so held Anno 1655. Sid. 40. in Stamp's Cafe.

1. A Mandamus was granted to restore one to an *Usher of a Free-School* where the *Master and Fellows of a College were Visitors*; But upon arguing the Legality thereof, Glyn Ch. J. doubted if it would lie; And he said, that by the same Rule that a School-master should be restored, every Scholar may claim to be restored; And he conceived that the Visitors might remove the Master of the School, if he do not observe the Rules for Government of the School, and it seemed as reasonable to turn him out, as it is to admit him into the Place. Sty. 457. 1655 the Protector v. Craford.

Lev. 19. S.
C.—2 Show.
1-8. Dr.
Merrit's
Cafe.—
Tho' Holt
Ch. J. said it was used heretofore for swearing a Physician of the College. 12 Mod. 666.

2. A Mandamus was moved for to restore to the Place of *one of the Fellows of the College of Physicians* in London and upon great Debate it was granted; But on the Return Restitution was denied. Sid. 29. Hill. 12 Car. 2. B. R. Dr. Goddard's Cafe.

Mandamus
was moved
for to restore
P. to his Fellowship of Lincoln College in Oxford, being Member of a Lay Corporation, and having a Freehold in it; Sed per Curiam it was denied, for the *Visitor is the proper Judge*; And when one takes a Fellowship he submits to the Laws of the Founder, and the Rules of the College; Besides, a Fellowship is a *Thing of private Design*, and doth not at all concern the Publick. 3 Mod. 265. Mich. 1 W. & M. B. R. Parkinson's Cafe.—Comb. 143. S. C.—2 Show. 170. Allop's Cafe.—S. P. Per Hale Ch. J. 1 Mod. 85. Appletoft's Cafe.

3. It lies not for a *Fellow of a College* where there is a Visitor. Raym. 31. Mich. 13 Car. 2. B. R. Dr. Widrington's Cafe.

4. Mandamus to restore A. a *Fellow of New College*; they return that the College was founded by &c. who made Laws, that they should study so many Years, and then take Orders, and that the Master and Scholars for enormous Crimes, scandalous and dangerous to the College may expel any Fellow, and that the Bishop of Winchester shall be Visitor, and that all Appeals shall be to him, and no other, that this Fellow was expelled for an enormous Crime scandalous and dangerous to the College, and being summoned, and convicted, and expelled, he had appealed to the Visitor, who had confirmed the Sentence; But adjudged that the Writ would not lie, because *Colleges are not spiritual Foundations, but private Societies*, like Inns of Court. Here the Bishop is appointed Visitor by the Founder, and he hath given Sentence, so this Court hath no Jurisdiction; and this will cure all the Faults in the Return. 2 Lev. 14. Trin. 23 Car. 2. B. R. the King v. New College.

5. A Mandamus was not granted to restore a *Chaplain of a College* without appealing to the Visitor. Carth. 168. Hill. 2 & 3 W. & M. B. R. Prohuff's Cafe.

6. A Mandamus was prayed to the Vice-Chancellor of Oxford to restore one Usher to his *Fellowship* of University College, who was expelled; and he having appealed to them as Visitors, they refused his Appeal; Upon reading the Statutes of the College Holt Ch. J. said, if they would have any Mandamus at all, it must be directed to the Vice-Chancellor, Master and Scholars in Convocation; Shower said, that the Vice-Chancellor and Doctors in Divinity, and Proctors, are without Doubt Visitors

of this College, and the Vice-Chancellor and Proctors have three negative Voices, and that if either refuse to accept this Appeal, or to propose it to the Convocation, it cannot be done. Holt said, that the Question is only this, whether or no, if an *original Visitor refuse to accept an Appeal, or to do the Party grieved Justice* we shall compel him to it? And ordered that they be attended with the Statutes of the College, and then they would consider of it. 5 Mod. 452. Mich. 11 W. 3. Uther's Case.

7. Mandamus was granted to restore Doctor Bently to his Degrees of Master of Arts and Doctor of Divinity; 3 New. Abr. 532. cites Hill. 9 Geo. 1.

(B. 2) Returns Good. In such Cases.

1. Mandamus to restore Dr. W. to the Fellowship of a College in Cambridge; the Return was, *that such a Person was Founder*, who appointed a Visitor, and made such Laws &c. by which &c. without shewing for what Cause they expelled him. It was objected, that the Return was not good, nor could it bar B. R. of Jurisdiction; and said, that what is said in *Kenn's Case*, that they are the sole Judges, has been denied; but it was said on the other Side, that this Gift and Foundation was Eleemosynary, sub Modo that they obeyed their Visitors, and if B. R. had a Jurisdiction, they ought to come thither Gradatim, viz. after Appeal, and not per Saltum, as here; adjudged, that the Dr. was well removed, and that B. R. could not restore him, and that they knew not that *Kenn's Case* ever was denied; For whether the Expulsion was right or wrong, they cannot judge thereof, because the Visitor is Fidei Commissarius. Sid. 71. Mich. 13 & 14 Car. 2. B. R. Dr. Witherington's Case.

tho' they were Votaries, yet they were not in Orders. Nota, the Doctor was restored by the Lords of the Council, as cited in the Case of the King v. All Souls. Mich. 33 Car. 2. B. R. Ibid.

2. A Writ of Mandamus was directed *Johanni Goar Presidi*, Sociis & Scholaribus Coll. Sti. Johannis Baptistæ, to which they put a Return without signing it; so that it does not appear to be the Return of the College; It was insisted, that it ought to be signed by John Goar at least; For he is particularly named, and to this the Court inclined; For tho' it was admitted that they need not put their Common Seal to the Return, yet he being particularly named, it is reasonable that he ought to subscribe the Return. But it was said on the other Side, that so it is in Effect; For it is indorsed upon the Return *Responsio Johannis Goar &c.* according to the Direction of the Writ, which the Court held sufficient; For the Return being filed, they shall be estopped to say, this was not their Return, it being made in their Names; and if any other had made it for them, they might have their Remedy by Action upon the Case. Skin. 368. 369. Mich. 5 W. & M. B. R. The King v. St. John's College in Cambridge.

3. The Court refused to grant a peremptory Mandamus to the Master of St. John's College &c. to remove A. B. C. &c. Fellows of the College for not taking of the Oaths, because they were not made Parties. Skin. 546. 549. Trin. 6 W. & M. B. R. the King v. St. John's College.

(C) Restoring

(C) Restoring to Corporations and Freedom.

1. **A**N Alderman of L. was removed, and S. chosen in his Room. A Mandamus was granted to restore him. And the Return being insufficient, it was ordered that the new chosen Alderman should be removed, and S. be restored; but another Alderman died in the mean Time, and then he who was removed prayed to be restored to the Place of Alderman; but adjudged, that he could not be restored to a new Place by Force of his former Election; For by his Removal he is now in Statu quo prius, and so is no Alderman, and therefore not to be restor'd to the Place of an Alderman. And a Writ of Restitution denied per tot. Cur. 2 Bulst. 122. Trin. 11 Jac. Shuttleworth v. City of Lincoln

* Skin. 293. 2. It lies for an * Alderman, † Common-Councilman &c. Raym. 12. Pasch. 13 Car. 2. in Stamp's Case.

Sir James Smith's Case.

—‡ Cumb. 214. Bret and Johnson's Case.——But See (C. 2)

3. It was granted to make one that had served an Apprenticeship Free of a Corporation. Sid. 107. Hill. 14 & 15 Car. 2. B. R. Townsend v. the Mayor of Oxford.——Ibid. Says such Mandamus was granted. Mich. 32 Car. 2. B. R.

S P. Arg. 8. Mod. 28.

4. It was granted to restore an Alderman of Canterbury to the Precedency of his Place of Alderman, being removed. On the Return thereof, divers Exceptions were taken to it, and disallow'd; and after it was held good, and nothing farther done. 1 Lev. 119. Mich. 15 Car. 2. B. R. the King v. the City of Canterbury.

(C. 2) Returns. Good in such Cases.

1. **M**andamus to restore him to the Place of an Alderman was directed to the Mayor and Burgesses of Gloucester, who returned, that their Common Council did consist of 30 Burgesses, and that they had Power to remove an Alderman; and that they called him before 30 of them in Domus Concilii to answer the Matters objected against him for being a Common Drunkard, and because he did not give sufficient Answers, they removed him, but did not say that a Council was assembled apud Domum Concilii; and for this Cause the Return was held ill. Nelf. Abr. 1153. Mandamus (D) Pl. 1. cites 3 Bulst. 189. Taylor's Case.

Pasch. 21

Car. 2. B. R.

2. Mandamus to restore B. to the Office of an Alderman in Northampton &c. the Mayor returned the Letters Patents of Incorporation Anno 16 Car. by which they had Power to amove one for a just Cause, (viz.) That the Mayor and such Burgesses who had been Mayors, might amove; and they return, that B. was amoved per Majorem & Burgeses Secundum Chartam præd. which might be by the Mayor and such Burgesses who had never been Mayors; and to say Secundum Chartam, that is not good, without shewing a Cause, and the Manner of his Removal, that the Court may judge whether they had pursued their Authority Nelf. Abr. 1153 Mandamus (D) pl. 4. Cites 1 Vent. 19. Braithwaite's Case.

3. Upon a Mandamus to the Mayor &c. of Norwich to restore T. to the Place of an Alderman they return, (after divers Clauses of their Charter, and the Act 13 Car. 2. cap. 1.) that he being elected the 16 Car. 2. took the Oaths in the said Act willingly, and made the Declaration there, and caused it to be registered, but did not subscribe it then, nor till May the 30th of the said King, before two Justices of the Peace of the said City. Exception was taken, that it does not appear that he was required

quired to make the Subscription, or that the Declaration was tendered to him to be subscribed; but it was answered, that he ought to subscribe it at his Peril; and that the Proviso, which has a different penning from the other there, makes the Office void, by the Non-subscribing. And the Reason was allowed by the Court. 2 Jones 121. Trin. 30 Car. 2. The King v. Thacker.

4. Mandamus was to the Mayor, Aldermen, &c. of Carlisle to restore Haddock to the Place of *Alderman* &c. There was a very long Return, the Substance was, That the City of *Carlisle* was incorporated by the Name of *Mayor and Citizens* &c. Time out of Mind, and that there were always 12 *Conciliarii* alias *Aldermanni* of the said City, out of which Number, a Mayor was yearly chose, and 32 sufficient Citizens, who together with the Mayor and *Conciliarii* alias *Aldermanni*, were to be the Common Council &c. That King Charles the first did by Letters Patents 21 July 13 Car. incorporate the said City by the Name of *Mayor, Aldermen, Bailiffs and Citizens*, and so sets forth the Letters Patents of Incorporation, wherein there is a Power given to the Corporation to remove a Mayor for ill Government, or other reasonable Cause, but no Power to remove an Alderman; then they return, that Time out of Mind to the Time of the making the said Letters Patents, quilibet *Conciliarius*, alias *Aldermannus*, was removable for just Cause; that T. H. was chose Alderman &c. and was removed for just Cause, setting it forth, and therefore they could not restore him; and this Return was held good; for tho' by the Letters Patents of Car. 1. the Corporation had no Power to remove an Alderman; yet since, a *Conciliarius* alias *Aldermannus*, was anciently removable for just Cause, that Power still remains; For the Letters Patents do not * abridge the Corporation of any of their ancient Privileges; if it should, it would be very prejudicial to most of the Corporation in England, † who had been so Time out of Mind, but of late had surrendered, and taken new Charters. Nelf. Abr. 1145. Mandamus (A) pl. 14. cites Rayn. 437. Haddock's Case.

Pasch. 33
Car. 2. B. R.

* Orig. Merge or Extinguish. — † The Orig. has only the Words (ancient Corporations) and says nothing of (Time out of Mind.)

5. Sir J. S. prayed a Mandamus to be restored to the Office of an *Alderman of the City of London*, suggesting that he was elected *Secundum Consuetudinem* &c. Upon which it was returned, that he was an Alderman as is suggested; but that he did not take the Oaths according to Statute of 1 W. & M. by which his Place became void; and adjudged, that notwithstanding the *Franchises* of the City were forfeited by the Judgment in the *Quo Warranto*, yet that the Corporation remain'd in esse; and therefore, tho' that Judgment was not reversed till the Act of 2 W. & M. yet by the Recital of the Judgment in the Act for Restitution of the City of London, Sir J. S. continued an Alderman after the Judgment in the *Quo Warranto*, and was therefore obliged to take the Oaths by the 1 W. & M. and they are to intend the Return to be true if possible, and a peremptory Mandamus was denied. Skin. 293. 310. Hill. 3 W. & M. B. R. Sir James Smith's Case.

6. Mandamus to restore him to the Place of *Alderman* of the City of E. The Substance of the Return was, That *recessit, elongavit & Habitationem suam reliquit & deseruit* &c. and that several Courts of Common Council were held, and that licet *summonitus*, he did not attend &c. for which he was removed &c. Three Judges were of Opinion, that this Return was good, for that it is the Duty of an Alderman to be Resident where he is chosen; that *deseruit & reliquit Habitationem* must be intended a total Desertion; and tho' he might return again, it is uncertain when; but if he doth return, that will not purge the Forfeiture after a Disfranchisement; but per Holt Ch. J. the Return is ill, because there was no particular *Summons* returned for the Defendant to appear to answer what should be objected against him, and therefore they proceeded against him without hearing him, and by Consequence the Disfranchisement was against Right and Justice; this is the express Resolution in James Wagg's Case. It is true, the Return is licet *summonitus* he did not appear, but that is too general, and he might not be prepared to answer the Charge;

therefore he ought to be particularly summoned to answer a particular Charge. Nelf. Abr. 1153. Mandamus (C) pl. 12.—cites 4 Mod. 37. Glide's Case.

7. Mandamus to the Mayor &c. of Rippon to restore Sir J. Jennings to the Place of *Alderman*; they return, that Sir J. at such a Time, at an Assembly of the Corporation, came, and personally, freely, and *debito Modo resignavit* his Office, *declaring he would continue to serve no longer, whereupon they chose another in his Room*: This Declaration in a corporate Assembly was held good, especially since the Corporation accepted it, and chose another; but till such Election he had Power to waive his Resignation, but not afterwards. 2 Salk. 433. Palch. 12 W. 3. B. R. the King v. Mayor of Rippon.

Burgefs.

8. A Mandamus was to restore the Plaintiff to be a *Burgefs* of Colchester; the Return was, that *Time out of Mind the Burgeffes were chosen by the Commonalty every Year, and that the Plaintiff was chosen one Year, which was expired, but not the next Year*; and so his Office expired. And the Court said, that if that hath been the Usage, this Court will not alter it, but if he had been removed without Cause within the Year, they would restore him. 1 Roll. Rep. 335. Hill. 13 Jac. B. R. Colchester Town v. Northen.

This Case is cited per Sir Edward Northey. Holt's Rep. 551. as the Case of Johns v. Jennings.

9. Mandamus to restore A. to the Place of a *Burgefs* in a Corporation, the Mayor returned *that he was removed at his own Desire and Request*, and it was excepted to the Return, that it did *not set forth how the Corporation commenced*, by Letters Patents, or by Prescription, nor *that the Mayor, &c. had any Power to Disfranchise*; But per Cur. tho' the Return be Insufficient, yet *there appears no Cause to restore him*; for by voluntarily resigning he has *estopped* himself to say the Mayor &c. had not Power to remove, and therefore no Restitution was awarded; and Hale Ch. B. (the Case being put to him) was of the same Opinion, and said that every Corporation as a Corporation have Power to take such Resignation, and consequently may remove for good Cause. 1 Sid. 14. Mich. 12 Car. 2. B. R. the King v. Tiddlerley.

10. Upon Mandamus to restore W. R. to be a *Burgefs* &c. the Return was, that he *refused to pay 2l. which was his Share towards the Charge of renewing their Charter*, and therefore he was deposed; per Cur. this is no Cause either to depose, or imprison him; but they must bring an Action of Debt upon a By-Law. Sid. 282. Palch. 18 Car. 2. B. R. Rippen Mayor's Case.

11. Mandamus to restore one Morris to the Place of a *Capital Burgefs* of the Devizes in Wilts; they Return the Causes of this Removal, but did *not* mention that he had any Notice or particular *Summons to answer the Charge*; and Judgment was given according to the Opinion of the Ch. J. Holt in *Glide's Case*, that the Return was ill. 4 Mod. 37. cites it as Mich. 7 W. Morris's Case.

* S. P. Arg. Palm 453. in Case of the King v. the Mayor of Oxford.

12. A Mandamus issued to restore E. Chalk to the Place of a *Burgefs* of Wilton, to which was *returned a Custom for the Mayor and Burgeffes to remove for Misbehaviour*; then they *set forth several Instances* of Misbehaviour, and that he being thereupon fully heard to all that was Objected in the Common Council of the Mayor and Burgeffes, and it being fully proved upon him, they turned him out. It was objected that it was not said he was summoned; and cited Style 51. 446. 452. 3 Bulst. 189. 2 Keb. 489. Per Cur. The end of the Summons is, that he may be heard for himself, and therefore *where he has been heard, want of Summons is no Objection*; but this was afterwards determined on other Objections. 2 Salk. 423. Mich. 8 W. 3. B. R. the King v. the Mayor and Burgeffes of Wilton.

13. A Mandamus was directed to the Mayor, Aldermen, and Common Council of G. to restore Lane to be a *Capital Burgefs*; they return their *Incorporation by several Charters*, and by the last by the Name of the Mayor and Burgeffes of the City &c. *and that when any Man is chosen, he is to continue for Life*; but *the Mayor &c. may remove him*; and then they return, *that Lane was duly elected*, but that he wrote a scandalous Letter to C. who was,

was, and still is an Alderman of that City which they set forth; and then they return, that upon the 6th. of _____ at a Common Council then held, he being there was charged with writing this Letter, and that he did not deny it; but gave his Consent to be removed, and he was removed by the Common Council. Per Powell J. a Man may resign an Office by Parol, but they have not returned it so; per Holt Ch. J. I do not take a Consent to be turned out to be a Resignation; Per Cur. a Peremptory Mandamus was granted. Holt's Rep. 450, 451. Hill. & Annæ the Queen v. the Mayor &c. of Gloucester.

14. A Mandamus to the Corporation of Doncaster to restore Mr. Vicars to be a Capital Burgefs; to which they return, that the Corporation have Time out of Mind had a Toll for Coals, viz. for every Wain Load going through the Town a Coal of the Value of one Penny; for every Cart Load a Coal to the Value of a Half-penny; and for every Horse Load, a Coal as big as a Piece of Wood, (kept Time out of Mind by the Corporation.) That the said Vicars did, contrary to his Oath, hinder the gathering of this Toll as well by Menaces to the Toll-takers, as by persuading the Owners of the Coals not to pay Toll, and telling them that he would uphold them in their Refusal; after several Arguments the Court was of Opinion that it was not sufficient to turn him out; For Powell J. said, it was no more than saying the Toll was unreasonable, when it appears so to be to the Court, and alio uncertain; Ideo a Peremptory, Mandamus was granted. 11 Mod. 214 the Queen v. Vicars of Doncaster.

15. W. being one of the Council of Coventry was removed, and obtained a Writ of Restitution; and thereupon the Corporation returned, that they had a Custom to elect any to be of the Common Council, and to remove him ad libitum; And that W. was removed, &c. and the Court held, that the Return was good; and this Difference taken, where a Man is a Freeman or Alderman &c. they cannot remove him from his Freedom or Place without Cause; and in such Case such a Custom is void, because the Party hath a Freehold therein; but to be of Council is a Thing collateral to a Corporation. And then the Council surmised that he was an Alderman, and removed, whereupon a new Writ was issued to restore him to his Aldermanhip. Cro. J. 540. Trin. 17 Jac. B. R. Warren's Case.

Common Council Man.

S. C. cited D. 332. b. pl. 28. in Marg —Mandamus to restore J. S. to be one of the Common Council &c. the Defendant's returned that Coventry is an ancient

Corporation, and that the King by a Charter reciting their Customs of which one was to elect and remove a Common Council-man ad libitum did confirm all their Customs, and that by Virtue of the said Custom Time out of Mind used &c. they did remove him; adjudged that the Corporation thus constituted might remove him without shewing any Cause; but this Return was held ill, because it did not appear that the Corporation had any such Power (to remove one ad libitum) but only by the Recital, whereas they should have returned positively, that they had that Power. 2 Salk. 430. Mich. 10 W. 3. B. R. the King v. Mayor &c. of Coventry.

16. Mandamus to restore him to his Place of Common Council Man in the Corporation of Eye in Suffolk; the Return was, that he was amoved for speaking Opprobrious Words of one of the Aldermen, (viz.) he is a Knave, and deserves to be posted for a Knave all over England; it was moved, that this Return was insufficient; For Words are not good Cause to remove a Man from a Corporation, and in this Case the Words have no manner of Reference to the Corporation; wherefore it was ordered that he be restored. Vent. 302. Hill. 28 & 29 Car. 2. B. R. Jay's Case.

17. To a Mandamus to swear him Common Council Man for the Town of Cambridge it was returned, that he had not taken the Oaths according to 23 Car. 2. and good per Cur. after Arguments. 12 Mod. 601. Mich. 13 W. 3. the King v. Love.

18. A Mandamus was granted to restore 9 Persons to their Places of Common Council Men in Chester; they Return that by their Charter in 20 H. 7. they (among other Things) are impowered to chese 40 Common Council Men yearly, and that ante Adventum of this Writ, these 9 Persons were chesen Common Council Men, and so continued for a Year, and then debite amoti fuerunt ab officio per Electionem aliorum. It was objected, that this Return was uncertain, for they may be chesen 40 Years ago, and yet the Return

is true, besides it ought to be *amoti fuerunt*, and *not debite amoti*; and so held the Court and that they ought to have brought several Mandamus's, and 9 Men cannot join in one Mandamus; For the Election of the one cannot be the Election of the other, and perhaps they were chosen at 9 several times, and Holt and Eyre thought the Writ ought to be quashed. 5 Mod. 10. Mich. 6 W. & M. the King v. Chester City.

S. C. Lev. 162. Pasch. 17 Car. 2. and it appearing by the Return that he was suspended only, but not turned out; and therefore per Hyde Ch. J. and Kelving, a Mandamus lies not for *suspending* him, because the Freehold is still in him; but Twicken J. totis Viribus contra; For a Suspension is an Amotion pro Tempore, and perhaps they will never discharge the Suspension, and Windham J. being absent it was adjourned.

19. Mandamus to restore him to the *Place of one of the Approved Men of Guilford*, and upon the Return there appeared just Cause of Restitution; whereupon the Parties by Rule of Court agreed to submit it to 2 neighbouring Gentlemen who awarded that he should be restored; and yet the Approved Men refused to restore him. Whereupon a Motion was made for an Attachment; but per Cur. an Attachment does not lie against a Corporation; but if it be granted Nisi, and the Corporation refuse to restore him, the Court will grant a Restitution. Raym. 152. Pasch. 18 Car. 2. B. R. Mill's Case.—Als. the King v. the Approved Men of Guilford.

Hyde Ch. J. and Kelving, a Mandamus lies not for *suspending* him, because the Freehold is still in him; but Twicken J. totis Viribus contra; For a Suspension is an Amotion pro Tempore, and perhaps they will never discharge the Suspension, and Windham J. being absent it was adjourned.

Citizen. 20. A Citizen was *disfranchised for refusing to stand to the award of two Aldermen in a Cause depending between him and another Citizen*; whereupon he sued in C. B. to be restored again to his Freedom, and a Precedent was shewed of a Writ in H. 6. Time, viz. Writ was directed to the Mayor, Aldermen and Sheriff's in London with these Word, viz. ad restituendum ipsum ad Pristinam Libertates &c. D. 232. b. pl. 28. Pasch. 16 Eliz. Middleton's Case.

was awarded out of B. R. because B. R. it is the highest Court for Preservation of the Peace, and it does not appertain to any other. Ibid. in Marg. cites as per Doderidge.

* S. P. Palm. 451. Pasch. 3 Car. B. R. the King v. the Mayor of Oxford, but adjournatur, tho' in opening the Case a Charter of King James [was shewn] containing a Grant to remove any Alderman for ill Behaviour.—Lat. 229. S. C. transcribed from Palmer.—So of a *Burgess* for contemptuous Words of the Mayor, and Writ of Restitution was awarded. Cro. J. 506. Mich. 16 Jac. B. R. Clerk's Case.

21. Upon a Mandamus to restore a *Citizen disfranchised for speaking contemptuous and scandalous Words &c. to the Mayor*, it was resolved that by the Cause of Disfranchisement returned it must be for some Act done against his Duty and Oath, and to the Prejudice of the publick Weal of the City &c. whereof &c. nor can a Freeman be disfranchised without Authority so to do, either by express Words of Charter or Prescription, unless convicted by due Course of Law before he be removed; if they have such Power and a sufficient Cause is returned tho' it is false, the Party shall never be restored, nor can any Issue be taken upon it; For the Parties are Strangers and have no Day in Court, but the Party convicted may have an Action on the Case upon the special Matter. 11 Rep. 93. Trin. 13 Jac. B. R. Baggs's Case.

So of a *Burgess* for contemptuous Words of the Mayor, and Writ of Restitution was awarded. Cro. J. 506. Mich. 16 Jac. B. R. Clerk's Case.

Freedom of a Corporation. 22. Upon Mandamus to restore 5 Persons to their Freedom of a Corporation the Return was, that *after the Court was adjourned by the Bailiff, the Persons disfranchised staid and affirmed they were a Court, and made several Orders, which they caused to be entered in the Court-Book, and then set forth, that for such Offences Persons have been used to be removed and discharged &c.* Adjudged, that since Custom is the chief Cause of Disfranchising any Person, for thereby the Party looserh his Freehold, there appears no such Custom on this Return; for it is only a Usage to remove &c. which is returned, and that *is not a direct Affirmation of any Custom so to do.* Nels. Abr. 1153. Mandamus (D) pl. 3. cites Style. 477. Yates v. Kingiton on Thames.

(D) To restore &c. to *Preferments or Offices* in, or relating to *Churches*.

1. **I**T lies to restore a * *Church-warden*, *Pariso Clark* &c. per Glyn. Ch. J. 2 Sid. 112. Mich. 1658.——* S. P. 8 Mod. 325. the King v. Singleton.——† Comb. 105. 145. S. P.——6 Mod. 253.

2. A Mandamus was prayed to restore a *Sexton*; the Court doubted at first, whether they should grant it, because he was rather a Servant to the Parish than an Officer, or one that has a Freehold in the Place; But upon a Certificate from the Minister and several of the Parish; that the Custom there was to choose a Sexton, and that he held it for his Life, and had 2*d.* a Year for every House there, it was granted and directed to the Church-wardens. 1 Vent. 153. Mich. 23 Car. 2. B. R. *Isle's Case*.

Raym. 211.
S. C.—2 Lev.
18. S. C.

3. It does not lie for a * *Clerk or Register to a Dean and Chapter*, unless there is an Affidavit, that they have Ecclesiastical Jurisdiction. Comb. 133.——or of an *Arch Deacon*. Show. 253. King v. Hill.—It lies not for a *Deputy Register*, that is only at Will; per Holt Ch. J. Show. ut ante.—Gibb. 194. adjudged that it lies for a *Deputy Register of the Spiritual Court*. The King v. Ward.

* S. P. Because he hath nothing to do with the Publick, his Office being only to enter Leases granted

ed &c. and that therefore he hath no more to do with the Publick, than a Bailiff of a Manor. 3 New Abr. 532.

4. Holt Ch. J. said, he would never grant a Mandamus to *swear the * Register of the Spiritual Court, or an Official*, but would put them to an Affise. 12 Mod. 609. Hill. 13 W. 3. B. R. in *Case of Ballard v. Gerard*. gainst his Will. 6 Mod. 18. Mich. 2 Annæ. B. R. in *White's Case*.

* Holt Ch. J. said, it had gone for such Register, but against

5. It lies to a Bishop to *indult a Man into his Prebend*. Arg. 8 Mod. 28. Mandamus to admit Dr. Sherlock to a *Prebendary*; 3 New Abr. 532. cites Hill. 4 Geo. 1 The King v. the Chapter of Norwich.

Mandamus was granted the Chapter

(E) To Restore &c. to Offices &c. relating to *Manors*.

1. **N**O Mandamus lies for a *Steward of a Court Baron*, because it is a private Thing, and does not concern the Administration of Justice; per tot. Cur. And so Twisden J. said it was adjudged in this Court 1 Sid. 40. Pasch. 13 Car. 2. B. R. *Stamp's Case*.

S. P. Agreed by all. Sid. 169. Mich. 15 Car. 2. in Middleton's Case.—S. P.

Per Holt Ch. J. 12 Mod 666. Anon.—Comb. 127.——S. P. per Twisden J. who said, it was so ruled in 1652. in B. R. because the Suitors are the Judges of that Court; but Hale Ch. J. said, he was of another Opinion, because the Steward is Judge of that Part of the Court which concerns the Copyholds; and is Register of the other Part. Mich. 23 Car. 2. B. R. 1 Vent. 153. in *Isle's Case*.——2 Lev. 18. per Hale, that it lies if *he be not at Will only*; because he is an Officer of Justice——Court Baron is a Court of Justice. Yelv. 191.—But it was said, that the Ld. Ch. J. Holt had denied to grant it to such Steward. 8 Mod 98. in *Case of the King v. Street*.

2. It was questioned, if it lay for *Steward of a Court Leet*. Sid. 40. 2 Sid. 212. Pasch. 13 Car. 2. B. R.

Per Glyn Ch. J. it lies.—S. P. be-

cause the Steward is Judge. 1 Vent. 153. Mich. 23 Car. 2. B. R. in *Isle's Case*——But Holt Ch. J. said, he would not care to grant it. 12 Mod. 666.

(E. 2) To restore &c. to Offices relating to Corporations and Pleadings.

1. A Mandamus was granted to the Bailiffs, and Common Council of C. to restore A. to the Office of *Recorder*; and tho' several Causes were returned of his Removal, yet because *they had not summoned him to appear* and answer for himself, as to the Crimes objected against him, therefore he was ordered to be restored *Nili*. Sty. 446, 452. Pasch. 1655. the Protector [and Bernarditon] v. Town of Colchester.

But it being
insisted, that
tho' the Re-
turn be in-
sufficient,
yet that a
Mandamus

nor any Proceedings thereon *give no Right, but only restores the ancient Right, and if the Party had none before, he will soon be turned out again, which would be a greater Disturbance, therefore they directed, that an Action should be brought, and the Right tried at the next Assizes.* Sid. 216. Pasch. 28 Car. 2. Basset v. Mayor of Barnstaple.—S.C. cited in a Note by the Reporter. Raym 365, in Manaton's Case.

2. A Mandamus was granted to restore the *Recorder* of Barnstaple; The Mayor, to whom the Writ was directed, returned, that *non constat nobis, that he was ever elected*; the Return was adjudged insufficient, and Restitution awarded. Raym. 153. Pasch. 18 Car. 2. B. R. The Recorder of Barnstaple's Case.

3. A Mandamus was granted Ballivis &c. Villæ de Gippo to restore Serjeant Whitaker to the Office of *Recorder*; the Return was Responso Ballivorum &c. Villæ de Gipwico &c. they return their Charter, and *that the Recorder was amoveable pro Malegesturis per Ballivos & Burgenfes, or the greater Part of them, Quorum Ballivos duos esse Volumus; that the Serjeant was chosen ad Libitum, that at such a Sessions of the Peace he had Notice to attend, but did not, and that having Notice to answer, he appeared and answered, and by the Bailiffs and Burgeses &c. the Bailiffs being then present, he was turned out*; and further, that the Inhabitants were never called by the Name of Bailiffs Villæ de Gippo &c. Holt Ch. J. held, that this Mandamus was *ill directed*, for Gippus and Gipwicus are different Names, but then they should have returned this special Matter, and relied upon it; *but now they had admitted themselves to be the Corporation to whom the Writ was directed, by returning Executio &c.* The whole Court held, that tho' the *Bailiffs are only said to be present, they shall be intended to be consenting, either actually, or as included in the Major Part*; and that the Office being a Publick Office, relating to Publick Justice, Non-attendance is a Forfeiture. That his appearing and answering supplied the Defect in the Notice given him in not fixing a Time for his Appearance, and would have cur'd want of Notice of the Charge; but in this Case the *Notice was to answer his Non-attendance at a Sessions of Oyer and Terminer, and therewith he was charged*; whereas he is turned out for *his Non-attendance at a Sessions of the Peace, and indeed answered to that, tho' not charged with it, which the Court held incurable, and a peremptory Mandamus was granted, but to be directed Villæ de Gippo as the former*; and tho' it was *objected against a peremptory Mandamus, because he was only Recorder at Will, yet since they did not return that Matter, but relied upon his Misdemeanors, and not upon their Power, Non allocatur.* 2 Salk. 434. Hill. 4 Annæ. B. R. Serjeant Whitaker's Case.—als. The Queen v. the Bailiffs &c. of Ipswich.

4. A Mandamus was granted to restore one Blagrove to the Office of *Steward of Reading*; and about a Month after he was restor'd, he was turned out again. Whereupon another Mandamus was granted. It was returned, that they were a Borough Time out of Mind, and were incorporated by Letters Patents, Anno 17 Car. 1. which gave them *Power to choose a Steward &c. and that they might under their Common Seal determine their Will, and oust him at their Pleasure, or at the Pleasure of the greater*

Number of them for the Time being ; and this was held a good Return. For the Power of placing and displacing was admitted, and he being in, in Purfuance of the Patent fhall be in by the Patent. 2 Sid. 6. 49.72. Patch. 1658. Blagrave's Cafe.

5. Upon a Mandamus to reftore C. to the Office of *Town Clerk* of Guilford, the Return was, that the Mayor might hold Pleas in Aétion Real, as well as Perfonal, and choofe a Town Clerk, *who ought to hold a Court of Frank-pledge there*, and to make Warrants, and attend the Mayor ; that the Defendant was elected Town Clerk by the Mayor of the Town, but that he *went into a Place remote ; whereupon he being Mayor, chofe another*, and fo could not reftore the Defendant ; it was objected againft this Return, that it was too general to fay, that he neglected his Office ; and alfo that he ought to be fummoned before the Mayor in Court, to anfwer for himfelf. 2 Sid. 97. Trin. 1658. Campion's Cafe.

But afterwards the Cafe coming on again. Mich. 12 Car 2. No Reftitution was awarded, becaufe it appears by the Return, that every Mayor for the Time be-

ing hath Power to choofe a Town Clerk ; whence it follows, that he may remove the old one at Pleafure. 1 Sid. 14. S. C.

6. Mandamus to reftore him to the Place of *Town Clerk* of Hereford ; the Mayor &c. of Hereford returned, That H. *nunquam fuit debito modo admiſſus* to that Place &c. It was argued, that this Return was ill, and that it fhould have been *non fuit admiſſus* generally. Becaufe if the Return be falſe, the Party may have Aétion upon the Cafe for a falſe Return, which he will be deprived of, if the ſpecial Return be allowed. And after feveral Debates, it was held per Cur. that the Return was ill for the Reafons aforeſaid. Sid. 209. Trin. 16 Car. 2. Hereford's Cafe.

7. A Mandamus was granted to reftore one Dighton to his Office of * *Town Clerk* of Stratford upon Avon ; The Corporation returned, that *the King* by his Letters Patents granted, that they ſhould have a *Town Clerk*, who *ſhould continue Durante Beneplacito of the Mayor and Aldermen*, and that the ſaid Dighton was choſen Town Clerk, and then turned him out ; the Queſtion was, if the Corporation has an Arbitrary Power to turn him out, or ought to ſhew a reaſonable Cafe. And per tot. Cur. The Continuation of him in his Office is in the Will and Pleaſure of the Corporation, and therefore Reftitution was denied. But the Court adviſed to repeal the Patent, becaufe inconvenient. Raym. 188. Trin. 22 Car. 2. B. R. Dighton's Cafe.

8. Mandamus to the Mayor &c. of Oxford to reftore Slatford to the Office of *Town Clerk* ; they return *their Charter*, which gives them Power to choofe a *Town Clerk* to hold at the Will of the Mayor &c. and they farther return the Statute 13 Car. 2. cap. 2. and that of W. & M. about taking the Oaths, and that *the Office being void, they choſe Slatford, and that he took the Oath of Office Coram nobis Majore & Ballivis, but did not Coram nobis Majore & Ballivis take the Oath of Allegiance, per quod* the Office became void, & *ea ratione* &c. Per Cur. the Party muſt take the Oaths at his Peril, without the Magiſtrate's tendering them to him. 2. The Return that he did not take the Oaths before them was naught, becaufe two Juſtices have Authority to adminiſter the Oath, and he might take it before them. 3. The Corporation *do not* return a Determination of his Office by their Will as the Reaſon for not admitting him, but the ſpecial Matter of not taking the Oaths, and that being inſufficient, a peremptory Mandamus was granted. Salk. 428. Mich. 8 W. 3. B. R. The King v. Mayor &c. of Oxford.

(F) To restore &c. to Offices relating to the Law Common or Civil.

Lev. 5. S. C. accordingly.—Sid. 94. S. C. but Court divided, cites *Underwood's Case* in 1651. who had a Mandamus to restore him to his Place of Attorney in the *Starball's Court*.—*Ibid.* 152. That it was granted in the Principal Case, and cites *Collins's Case*, who was restored to his Place of Attorney of *St. Martin's le Grand*.

And see the Return itself at large 2 Lutw. 1014.

1. Mandamus was granted to restore the Place of Attorney in the *Town Court* of Canterbury. Raym. 9. Hill. 15 & 16 Car. 2. *Hurt's Case*.

2. Mandamus brought to restore an Attorney to his Liberty of practising in a Court in the County Palatine of Chester; The Return was, that the Court was held there before Chamberlain, Vice-Chamberlain, Baron, or the Deputy of the Baron, and that at a Court held there before the Deputy of the Baron, he spoke contemptuous Words of him; and for this Misdemeanor he suspended him from his Practice, & quod aliter non amotus fuit; And the Court held this a good Cause of Suspension, and ordered a Submission to him that received the Affront in open Court before he should be restored. Vent. 331. Trin. 30 Car. 2. B. R. *Parker's Case*.

S. C. Carth 169. That Mandamus will not lie to restore a Proctor.—3 Mod. 332. S. C.

3. Mandamus was granted to restore a Proctor in the Court of Arches; But upon the Return thereof, and after Argument, it was resolved by Holt Ch. J. Gregory and Eyre J. (absente Dolben), that this was not such a publick Office for which a Mandamus would lie. 3 Lev. 309. Trin. 3 W. & M. the King v. Lee.

4. Upon a Mandamus to the Commissary of York to admit Mr. Dryden a Deputy-Register under Dr. Sharp; It was objected, that the Writ did not lie for an Ecclesiastical Officer, because he is under the Enquiry and Censure of his proper Judge; nor for a private Officer, because he may have his Action on the Case for a Disturbance, or an Assize, in Case the Place be a Freehold; And herein was cited the Case of Lee, and the express Opinion of my Ld. Holt therein, that a Mandamus did not lie for a Deputy Register; The Court held, that this Writ lay for a Register, an Officer much less spiritual than a Prebendary, or the Degree of Dr. in Divinity; Also this Mandamus is at the Suit of Doctor Sharp, and sets forth his Title to the Office of Register Exercendum per se vel sufficient deputatum suum; and that the Commissary had refused Mr. Dryden, whom he appointed his Deputy; and that therefore the Mandamus was well awarded, because he had no other way to get his Deputy admitted. 3 New. Abr. 531, 532.

(G) To restore &c. to Offices &c. in general; And Pleadings.

It lies for a Constable. Raym. 12. Pasch. 13 Car. 2. in Stamp's Case.

1. A Constable chosen and sworn in the Leet according to the Custom, was displaced by the Justices, and another elected by them was sworn in; Whereupon those of the Hamlet, according to their Custom, did again chuse their former Constable, and displac'd the other, which other [or second Constable] pray'd a Writ of Restitution; But the displacing the first Constable was held unlawful, and the other chosen by the Justices to be removed; And this being agreed by the whole Court, no Writ of Restitution was granted; But the first Constable was ordered to be restored. Buls. 174. Trin. 9 Jac. Constable of Strepney's Case.

2. It will not lie to restore a Man to be *Clerk of the City Works*; But Glyn Ch. J. said, that in this Case the Court knew not without Information what the Office was, and so cannot be Judges whether the Return of the City be sufficient or not if a Mandamus should be granted; But he thought a Mandamus would lie in two Cases: 1. to restore to an Office which concerns the Execution of Justice. 2. If the Office or Degree be for the Publick Good; And bid them to move it again if they pleased. 2 Sid. 112. Mich. 1658. the Case of the Clerk of the City of London's Water-Works.

Cited Comb. 347.—
Ibid. 348. S. P.—A
Mandamus was lately granted to restore one Smith to the Office of Clerk of the City-Works;

It appearing by his Affidavit, that the Office was an ancient Office established time out of Mind to survey the Works and Edifices of the City, and to see that all the City-Buildings were well done; and to sign the Workmen's Bills, and that he was admitted into this Office with the Fees belonging to it, quamdiu se bene gesserit; and that there was an Oath of Office taken by him, and the Oaths to the Government; For the Court held, that tho' there was something here that looked like Service by the Nature of the Employment, yet there being an Oath of Office, and Oaths to the Government to be taken, these import a publick Office, for which a Mandamus is proper. 3 New. Abr. 532.

3. A Writ of Mandamus will not be granted to call one to the Bar who had studied the Law 7 Years; For there is no Person to whom the Writ should be directed. Admitted. Raym. 69. Hill. 14 & 15 Car. 2. in Townsend's Case.

B. a Barrister of one of the Temples was expelled the House, and his Chamber

seized for Non-payment of his Commons, whereupon he by Newdigate prayed his Writ of Restitution, and brought the Writ into Court ready framed, which was directed to the Benches of the said Society; but it was denied by the Court, because there is none in the Inns of Court to whom the Writ can be directed, because it is no body corporate, but only a voluntary Society, and Submission to Government, and they were angry with him for it, and that he had waived the ancient and usual way of Redress for any Grievance in the Inns of Court, which was by appealing to the Judges, and would have him do so now. March. 177. Hill. 17 Car. Booreman's Case.—S. C. cited Arg. Sty. 42.

4. Windham J. thought, that Mandamus's had not so great Latitude formerly as now; For by the same Reason that it may now be granted to restore a Master or Fellow of a College, it might heretofore have been granted to restore Abbots, Priors, Monks &c. which never was known to have been done; And therefore thought, that where the Parties have Franktenement, they may have Alliance, and where a less Estate they may have an Action upon the Case. Sid. 169. in Middleton's Case.

5. It was granted to restore one Middleton to the Office of *Treasurer of the New-River Water*, for the regulating whereof certain Persons were incorporated Anno 9 Jac. and amongst other Officers appointed, this of the Office of Treasurer was one. Nels. Abr. 1145. Mandamus (C) pl. 16.—cites Sid. 169. Middleton's Case.

Sid. 169. says, a Mandamus was granted at last, and that the Court said they

would dispute the lying of it upon the Return.—And Lev. 123. S. C. Mich. 15 Car. 2. says, that Twisden held that the Mandamus well lay, but that Hyde Ch. J. thought it did not, because both Corporation and Office were private; But at length they assented that the Writ should go, and they would consider further upon the Return of it; The King v. the Governours of the New Water Works, London.

6. It was granted to restore one Stirling to his Place of *Workman in the Mint*. Sid. 304. Mich. 18 Car. 2. B. R. Mandamus for Stirling to the Moniers.

7. A Mandamus, shewing that H. W. was debito modo constitut' *Secretary of the Courts of the Marches*, by Letters Patents to be exercised by himself or Deputy; And that the President and Council had put out Luke Clapham his Deputy, being duly constituted; they return. *Quod tempore Deliberationis Brevis of Mandamus Luke Clapham was not constituted Deputy*. Per. Cur. tho' a Mandamus does not lie for a Deputy, yet it lies for him who deposes him, either to have him admitted or restored; For otherwise he may be deprived of his Power to make a Deputy. And this Return is ill, that at the time of the Writ delivered he was not constituted Deputy; For perhaps they had put him out of his Place before the Writ came to them, and therefore a

peremptory Writ of Restitution was awarded. 1 Lev. 306, 307. Hill. 22 & 23 Car. 2. B. R. the King v. the President and Council of the Marches.

S. P. 3 New.
Abr. 532.

8. It was denied to restore a *Surgeon to an Hospital*; Because it is not in the Power of the Court; nor is it a publick Office. Comb. 41.

S. P. 3 New.
Abr. 532.

9. It lies for a *Sword-Bearer* to the Mayor of Bristol. Comb. 145. Mich. 1 W. & M. B. R. Roe's Case.

10. So for a *Serjeant at Mace* in Chester. Comb. 287. Trin. 6 W. & M. B. R.

11. Mandamus to restore him to the Office of *Clerk of the Peace* of &c. The Return was, that the Custos Rotulorum of that County was displaced, and another constituted in his Room, to whom the Clerk of the Peace refused to deliver the Rolls. He was for this Misbehaviour indicted and found guilty, and thereupon was removed from his Office &c. Holt Ch. J. said, that the Clerk of the Peace ought to make out all Procefs which cannot be done without the Rolls; but when they are completed, he must then deliver them to the Custos, but so long as they are in Procefs, they are to be with the Clerk of the Peace, and therefore thought it reasonable that Defendant be restored, but the other three Judges contra. 4 Mod. 31. Pasch. 3 W. & M. B. R. the King &c. v. Evans.

12. On a Motion to restore W. to the Place of *Clerk of the Company of Butchers in London* it was alleged, that this was an *Office by Charter in which the Plaintiff had a Freehold*, and quoted the Case of an *Attorney of an Inferior Court* where it goes; But per Holt Ch. J. that Case differs; For 1. the Office of an Attorney concerns the Publick; Because it is an Administration of Justice. 2. He has no other Remedy; But the principal Case is altogether private; And if it be a Freehold, *Assise or Case lres.* 6 Mod. 18. Mich. 2 Annæ. B. R. White's Case.

13. Mandamus was moved for to restore U. to the Place of *Approver of Guns*, and setting his Mark of Approver upon the Guns made by the Company; And said, that selling Guns not mark'd was a Forfeiture of their Charter, and that by a By-Law made by them, they had appointed him an Approver, but now turned him out. But per Cur. it is a Thing in which the Publick has no Concern, nor is there any publick Law for it, and therefore out of the Reason of a Mandamus. But the Way will be to petition the Queen, and the perhaps will order the Attorney General to bring a Quo Warranto against them. 6 Mod. 82. Mich. 2 Annæ B. R. Vaughan v. Company of Gun-makers in London.

14. On a Motion for a Mandamus to restore the *Register of the Blacksmith's Company*, the Court refused it, because they *did not produce their Charter, or a Copy of it with an Affidavit*; For this being a *private Corporation*, they held, they could not take Notice thereof, as they will of a *Town &c.* without such previous Information. 3 New. Abr. 528.

(H) To enforce Things to be done relating to Corporations and Pleadings.

This Case is in Poph. 176. Pasch. 2 Car. B. R. by Name of *Audley v. Audley*. And it seems not very clear that a Mandamus was granted. And Crew Ch. J. doubted, whether in such Case Restitution could be, and said that all the Cases mention'd were where the Person had once Possession.—S. C. Noy. 78. by Name of *Audley's Case*. And that Audley had Restitution.

1. **T**HE Office of *Town Clerk* of Bedford was granted to one in *Reversion* after the Life of the *Town-Clerk* then living, who died, and another was chosen; yet the Court granted a Mandamus to the Reversioner. Nelf. Abr. 1143. Mandamus (A) pl. 3. cites Poph. 196. *Audley v. Ivy*.

2. It lies to the Mayor of Colchester to swear the High Steward chosen there; Per Holt Ch. J. Sty. 355. Mich. 1652. B. R. Col. Baxter's Case.

3. Mandamus upon Removal of an Officer may be to him to deliver Records &c. which are for Publick Justice to the new Officer. Sid. 31. Hill. 12 & 13 Car. 2. B. R. Town Clerk of Nottingham's Case.

4. A Mandamus was granted to the Mayor &c. of Oxford to make one Townsend free of the City, having served an Apprenticeship to a Taylor there for seven Years, and his Master refusing to make him Free. And it was said, that if the Writ would not lie, it would be a great Discouragement to Trade. Raym. 69. Hill. 14 & 15 Car. 2. Townsend's Case.

the Course of their Corporation, is to be enrolled; And, that the said Townsend did bind himself Apprentice by Indenture to one Colly for seven Years, by which he covenanted that he would not contract Matrimony during his Apprenticeship, and that the Indenture was enrolled according to the said Usages; and that he married within the two first Years &c. and afterwards served rather as a Journeyman than an Apprentice; It was argued to be an ill Return, because the marrying is only a Breach of Covenant, and no Reason to bar him of his Freedom, and the other Return of serving rather as a Journeyman &c. is uncertain and not positive; and for this Cause Writ of Restitution was awarded. Raym. 92. Hill. 15 & 16 Car. 2. Townsend v. Mayor of Oxford.——Sid. 107. S. C.——Lev. 91. S. C.

5. Mandamus to L. Mayor of Trevena Befeney, to swear M. into the Office of Mayor there, he being elected by the said Borough; L. returns, that before the issuing the said Writ, viz. 31 Car. 2. He the said L. was removed from the Place of Mayor, and one W. A. was then chosen, admitted and sworn, and from that Time was and is still Mayor Burgi Prædicti, and by Reason of his Office hath the Custody of the Common Seal, and thereupon L. could not restore him; It was argued that this Return was ill, because it is not returned, that the new Mayor Any was debito Modo Electus, and it may be he was chosen out of Time and not according to the Charter, and Returns must be certain, and not taken by Implication, because the Party ousted has Liberty to reply to them; and of this Opinion were two Justices; but two other Judges held, that it should be intended, that he was duly chosen. Raym. 365. Pasch. 32 Car. 2. B. R. Manaton's Case.

of the Borough of Saltash, a like Return was made, and it was resolved by the whole Court, that the Return was insufficient, because it does not answer the Gift of the Writ, for by such Return any Officer may be kept out; because the Party may procure another to be chosen before the Party elected can procure a Writ; and therefore the Defendant ought to have returned, that M. never was elected, and so M. might have had an Action for his false Return; and so a new Writ was awarded to the old Mayor to swear and admit the Plaintiff. Raym. 431. Pasch. 33 Car. 2. Veale v. the Mayor of Saltash in Cornwall.——S. C. 2 Jo. 177. Mich. 33 Car. 2. by Name of the King v. Stephens.——Holt Ch. J. calls this a strange Case, and says that it is contrary to subsequent Resolutions. 6 Mod. 309. in Case of the Queen v. the Mayor of Hereford.

6. Mandamus to the Jurates of Rye to swear T. Mayor. An insufficient Return was made by the minor Part of the Jurats by Design, whereupon a peremptory Mandamus issued, and T. was sworn; afterwards a Mandamus was prayed to swear one Crouch, he being said to be lawfully chosen; but it was denied by the Court, nor would they admit an Examination which of them was lawfully chosen; For after a peremptory Mandamus granted and executed, the Court will intend him to be lawful Mayor till the Matter is tried in an Action. T. Jones 215. Trin. 34 Car. 2. B. R. The King v. Turner.

7. 7 & 8 W. 3. cap. 34. Enacts, that Every Quaker, who shall be required upon any lawful Occasion take an Oath &c. shall, instead of the usual Form, be permitted to make his solemn Affirmation or Declaration; Provided, that no Quaker or reputed Quaker shall by Virtue of this Act be qualified to give Evidence in a Criminal Cause &c. or bear any Office or Place of Profit in the Government. Upon a Mandamus to the Mayor of Lincoln, to admit one Morrice to his Freedom in that City, he having served an Apprenticeship there; the Mayor return'd amongst other Things, that there was a usual Oath to be taken by every one before the Mayor &c. before Admission to his Freedom, and that M. offered to take the solemn

Afterward, the Mayor returned, that if any Person binds himself an Apprentice the same, by himself Apprentice

The Reporter says, that he does conceive, and was, at the Time when the Cause was before the Court, of Opinion that the Return was not good, because only by Implication. Ibid.——In the Case of the Mayor

solemn Affirmation and Declaration, and that he was a Quaker, and *refused to take the usual Oath according to the Custom of the said City*, which they set forth in *hæc Verba*; *that to be a Freeman of that City is an Office and Place of Profit in the Government*; and that there is a Custom there for every Freeman to vote in the Election of two Citizens to serve in Parliament, *and to have Pasture for three Horses in the Common &c.* The Question was, whether the Freedom of this City was a Place of Profit in the Government; it was insisted, that it was, because it intitles him to vote for Representatives in Parliament; but it was answer'd, that was not a Place of Profit in the Government; it is only a Qualification or Privilege to agree or consent to the Person who shall be his Representative in Parliament; Per Cur. This M. hath a precedent Right, and Quakers are usually admitted in London upon their solemn Affirmation, and so in this Case. 5 Md. 402. Pasch. 10 W. 3. The King v. Lincoln Mayor.

8. Mandamus &c. *to the Company of Surgeons to chuse Officers*; they made a Return under the Common Seal, and a Rule was moved for and granted to file an Information against some particular Persons of the Company for that Return. And Holt said, they must proceed by Way of Information, because it being a Matter which concerned publick Government, no particular Person is so concern'd in Interest, as to maintain an Action; and the Information must be against particular Persons, tho' the Return be under their Common Seal; For there is no other Way to try the Right, and if there is a Verdict for the King, a peremptory Mandamus must go, but perhaps they shall set but a small Fine. 1 Salk. 374. Trin. 11 W. 3. B. R. The Case of the Surgeon's Company.

9. Mandamus reciting, *quod cum they ought yearly to chuse two Bailiffs out of those who had not been Bailiff for three Years before, ideo, they were commanded to chuse &c.* They return *their Charter to be to chuse two ex Aldermannis, and that they had chosen two Secundum Formam & Effectum of their Charter generally*; and this was held ill, for they should deny their Constitution to be as set forth in the Writ, or shew a Compliance with it, whereas they have acted according to a Constitution set forth in the Return *different from the Writ without denying the Supposal of the Writ.* 2 Salk. 431. Trin. 11 W. 3. B. R. The King v. the Bailiffs and Burgeffes of Malden.

But if the Mayor had returned an Election de Facto, and that the Parties had given a Bribe to get himself chose, it had been something.

10. Mandamus to swear one into the Office of *Town-Clerk of Hereford*; the Return was, *that upon the Election &c. B. had 18 Voices, and the Party who sued had but 17 Voices*, and that he swore in B. Per Cur. it is a bad Return, because it is argumentative, when it should be express that he was not elected; and Holt Ch. J. said, that the Case in * 2 Jones 177. is a strange Case, and contrary to subsequent Resolutions. Mod. Cases 309. Mich. 3 Ann. B. R. The Queen v. Mayor of Hereford.

Per Holt Ch. J. Ibid. ——— * The King v. Stephens, als. Veale's Case.

11. Mandamus *to admit Dunch to be an Alderman of Norwich*; they return, *that he was elected Alderman by the Ward, but refused by the Mayor &c. because he had not received the Sacrament within a Year next before his Election, and that he was turbulent and factious, and procured his Election by Bribery, and that Non fuit electus*; The Court agreed that several Causes might be returned, and that either Not qualified or Not elected had been a good Return; but Holt Ch. J. question'd, whether the Bribery will make the Election void, because it did not appear to be an Office which concerns the Administration of Justice, and within the Statute of E. 6. The whole Court agreed, that as soon as D. was chose by the Ward it was an Election, and that *there being but one Person sent to the Court of Aldermen, they did not choose but approve only, and that before Approbation the Election was compleat.* So that the Return is repugnant, and the Court cannot tell what to believe; For at first they admit an Election and avoid

it;

it; and yet at last return that there was no Election at all; and a peremptory Mandamus was granted. 2 Salk. 436. Patch. 5 Ann. B. R. the Queen v. the Mayor &c. of Norwich.

12. A Motion was made for an Information in Nature of a Quo Warranto against a Common-Council Man of Bristol for refusing to take upon himself the Office after he was chosen. But the Court denied the Motion, and said their Remedy was to proceed by their By-Laws, in order to compel him, he not being such a publick Officer as a Sheriff &c. but if they had applied to the Court for a Mandamus they should have had it. 11 Mod. 142 Mich. 6 Ann. B. R. the Queen v. Hungertord.

13. Where a Mandamus was granted to oblige a Corporation to proceed to the Election of a Capital Burgess, and being afterwards moved, that a Day should be fixed for the Election, that all Parties might have Notice; For that otherwise the Person obtaining the Mandamus might steal an Election by Surprise; the Court refused to grant the Motion, and held, that their Power was only to command an Election, but not to subscribe the Manner of it, which was left to the Law, and which must make it good or bad accordingly. 3 New. Abr. 528.

14. It is usual to grant a Mandamus to Magistrates to deliver the Ensigns of their temporal Offices. Arg. 8 Mod. 28. Hill. 7 Geo. in Case of the Dean of Trinity Chappel in Dublin.

15. 11 Geo. 1. cap. 4. S. 2. Enacts that if in any City &c. no Election be made of the Mayor &c. on the Day, or within the Time appointed by Charter or Usage, and no Election shall be made pursuant to the Directions prescribed by this Act, or such Election being made shall afterwards become void; it shall be lawful for the Court of King's Bench, on Motion made, to award a Mandamus, requiring the Members of such City &c. having a Right to vote, to assemble themselves on a Day and Time to be prefixed in such Writ, and to proceed to Election, or to signify to the Court good Cause to the contrary; and thereupon to cause such Proceedings to be made as in other Cases of Mandamus for the Election of Officers of Corporations; and of the Day and Time appointed by the Writ, publick Notice in writing shall, by such Person as the said Court shall appoint, be affixed in the Market-place, or some other publick Place 6 Days before the Day appointed, and such Officer shall preside in the Assembly as ought to have presided at the Election of such Mayor &c. in Case the Election had been made on the Day herein prescribed.

S. 3. In Boroughs and Towns corporate, where the Mayor, or other Chief Officer is to be nominated or sworn at a Court Leet, or some other Court, and it happens that no due Nomination or swearing of such Mayor &c. shall be made it shall be lawful for the Court of Kings Bench upon Motion to award a Mandamus, requiring the Lord or his Steward, or other Officer, to hold such Court Leet, or other Court, at such Time as shall be judged proper by the Court of King's Bench, or to signify to the Court good Cause to the contrary, and thereupon to cause such Proceedings to be made as in other Cases of Mandamus for holding of any Court, and of the Time appointed by such Writ for holding such Court publick Notice in writing shall, by such Person as the Court of King's Bench shall appoint, be affixed in the Market, or some other publick Place 6 Days before the Day appointed; and where a Nomination of Persons in order to the Election of any Mayor &c. is to be made at such Court Leet, or other Court; after such Nomination made, all other Acts necessary to such Election shall be done at such Assembly, as the same ought to have been done if such Election had been made on the Day next after the Expiration of the Time prescribed by Charter or Usage.

(H. 2) To inforce Things to be done relating to Colleges.

Mich. 5 W.
& M. B. R.
Adjournatur.

1. **B**Y the Statute 1 W. & M. 3. it is enacted, that if any Governour, Head, or Fellow of any College or Hall in either of the Universities shall neglect or refuse to take the Oaths &c. for 6 Months after 1 August &c. that then the Government &c. and Fellowship shall be void. Several of the Fellows of St. John's College in Cambridge had not taken the Oaths pursuant to the Statute, and thereupon a Mandamus was directed to Humphry Gower, the Head of that College, setting forth the Statute, and that such Fellows had not taken the Oaths and that they still continued in their Fellowships; therefore by this Writ they were commanded to remove them, vel causam nobis significetis: They return that the College was founded by Margaret Countess of Richmond; that the Bishop of Ely for the Time being was by her appointed Visitor &c. It was objected, that this is a remedial Writ; that no precedent can be produced where it hath been granted to expel Persons, but always to restore them to Places of which they had been deprived, and that it will not lie where there is a local and proper Visitor; sed per Holt Ch. J. the Visitor is made by the Founder, and is the proper Judge of the Laws of the College; he is to determine Offences against these private Laws; but where the Law of the Land is disobeyed (as it is in this Case) the Court of King's Bench will take Notice thereof notwithstanding the Visitor, and the proper Remedy to put the Law in Execution is by a Mandamus. 4 Mod. 233. Mich. 5 W. & M. B. R. St. John's College's Case (in Cambridge.)

4 Mod. 260,
Hill. 5 W.
& M. B. R.
S. C. adjournatur.—Ibid.
368. Mich.
6 W. & M.
B. R. adjournatur.

2. Mandamus to admit Mr. King to the Place of a Scholar in St. John's College in Oxford, being nominated by the Mayor of Bristol, to whom that Right pro hac vice &c. doth belong; the Substance of the Return was that the College was founded by Sir Thomas White, that the Bishop of Winchester for the Time being was the local Visitor; that after the Nomination of Mr. King by the Mayor of Bristol, the President of the College and 10 Fellows assembled to consider of his Qualifications, and that upon Proof, it was their Opinion, that he had committed several Facts inconsistent with good Manners; he was therefore refused as incapable &c. The better Opinion was, that this Return was too general, for there was no particular Fact returned, so that it was impossible to try the Truth of it in a collateral Action. 4 Mod. 368. Mich. 6 W. & M. B. R. the King v. St. John's College in Oxford.

Mich. 10 W.
3. adjournatur.

3. The Countess of Clare founded Clare-hall in Cambridge, and put the Master and Fellows under the Power of the Chancellor of that University for the Time being, whom she appointed Visitor; afterwards one Mr. Dickens added a Fellowship to the Foundation, to which one Jennings being chosen Fellow, and the Master refusing to admit him to it, he brought a Mandamus to the said Master and Fellows, who return the local Statutes, one of which was, that the Majority of the Fellows, and the Master should chuse a Fellow; and that the Master (Dr. Blythe) did not consent to chuse Mr. Jennings; then they return several Offences mentioned in those Statutes, and that the Foundress did appoint the Chancellor to be Visitor in omnibus &c. It was insisted that this Return was good, and that Mr. Jennings was never duly elected, because by the Statutes of the Place, the Master's Consent was absolutely necessary, and here he never consented; besides the Examination of this Matter doth not belong to B. R. because the Foundress hath appointed a Visitor; all which is very true, in Respect to the old Foundation by the Countess of Clare (viz.) that the Fellows shall be subject to such Restrictions and Limitations as she hath prescribed by her Statutes; but the new Fellowships erected by Mr. Dickens shall not be subject to those Restrictions imposed by the Foundress, therefore the better Opinion was, that a peremptory Mandamus should go. Nels. Abr. 1154, 1155. Mandamus (D) pl. 12. cites 5 Mod. 421. Jennings's Case.

4 Whether

4. Whether a Mandamus will lie to a Visitor to compel him to execute his Jurisdiction was said by my Lord Hardwick in Dr. Bentley's Case, Hill. 9. Geo. 2. not to have been determined, tho' a Rule for that Purpose to shew Cause, was made 12 Annæ. and he seemed to think, that if this Power of a Visitor be a Jurisdiction, yet it is Forum Domesticum, and not any publick Jurisdiction, or rather a Decision of the Founder, er upon his own private Charity than any Jurisdiction at all. 3 New Abr. 533.

5. 1 Geo. 1. cap. 13. S. 13. Enacts that if any Head of a College or Hall in either of the Universities &c. refuses to admit such Person as is nominated by the King to succeed such Person as have refused to take Oaths appointed to be taken by this Act within the Time therein limited, the King's Bench may issue out a Mandamus to the Visitor to admit such Person.

6. Where the Bishop of Ely procured a Mandamus to the Vice-Master of Trinity-College Cambridge to compel him to execute a Sentence of Deprivation pronounced by the Bishop against Doctor Bentley Master of the said College, and which Sentence the Vice-Master by the Statutes of the College was obliged to execute; and it appearing on the Face of the Writ, that the Bishop himself was general Visitor, and that therefore it belonged to him to enforce the Execution of his own Sentence, the Court of B. R. quashed the Writ, being a Matter in which they had no Right to intermeddle, there being a proper Visitor. 3 New Abr. 529.

(H. 3) To enforce Things to be done relating to Spiritual Courts, and Pleadings.

1. A Man made his Executors of Goods in Virginia and died; the Executors refused, and the next of Blood prayed Administration to be granted according to the Statute of 27 H. 8 and the Ordinary refused, and for this they came into B. R. and prayed a Mandamus to command them to grant Administration to the next of Blood according to the Statute, and per tot. Cur. a Mandamus was granted; For this Court has Jurisdiction of all other Courts, as well in Cases of Mistake, as in Cases of Nontake. 2 Sid. 114. Mich. 1658. B. R. Anon.

Hale Ch. J. said he never knew such Writ tho' the Opinion has been so; but Sir William Jones said it was Sir George

Sands's Case after great Debate. Vent. 188.—A Mandamus was moved for to the Surrogate of the Bishop to grant Administration to B. the Case was, that Administration had been committed to one who died, and made an Executor, who would have had it committed to him and not to the next of Kin to the Intestate. Holt Ch. J. said, it cannot be, but it must be committed to the next of Kin to the Intestate; and granted a Mandamus for that Purpose. 11 Mod. 137. Mich. 6 Annæ B. R. Anon.

2. A Mandamus was moved for to the Spiritual Court to deliver to the Heir of the Devisor a Will of Land, which was proved there 14 Years since in Common Form, which they refused to deliver unless the Heir would obtain a definitive Sentence, which would cost 10 l. but the Court doubted whether to grant it or not, because no such was remembered to have been ever granted; and therefore said, that if Precedents of Mandamus in such Case cannot be produced they would not grant it, but that the Party may have Action upon the Case if he will. Sid. 443. Hill. 21 & 22 Car. 2. B. R. Sabine's Case.

It lies to the Spiritual Court to deliver a Will proved there per Testes, to the Executor. Comb. 239. Trin. 6 W. & M. B. R. Anon.

3. A Mandamus was prayed to the Ecclesiastical Court to swear two Church-wardens elected by the Parish, surmising that so was the Custom in that Place, but that the Bishop's Officers had refused to admit them, upon pretence that the Parson ought to choose one; and it was granted. 1 Vent. 115. Pasch. 23 Car. 2. B. R. Anon.

Mandamus to the Archdeacon of Norwich, to swear a Church-warden, suggested

ing a Custom, that the Parisheners are to choose the Church-wardens, and that the Archdeacon refused him, tho' he was chosen according to Custom; the Archdeacon returned, that Non sibi constat, that there was any such Custom: (which Form is not allowable; For it ought to be Positive, on which an Action might be grounded) and that by the Canon the Parson is to choose one &c. The Court said, that Custom will pre-

caul against the Canon, and a Church-warden is a Lay Officer, and his Power enlarged by several Acts of Parliament, and that it has been resolved, that he may execute his Office before he is sworn, tho' it is convenient that he should be sworn, and if the Plaintiff here were sworn by a Mandamus from B. R. they advised him to take heed of disturbing him. 1 Vent. 267. Hill. 26 & 27 Car. 2. B. R. Anon.

4. A Mandamus was moved for to be directed to the Judge of the Prerogative Court to command him to proceed in proving a Will, against which a Caveat was entered; and the rather, for that the Will was not controverted but the Probate stopped for a collateral Cause; and the Mandamus was granted by three Judges absente Hale. Note, the Suggestion for the Mandamus was brought into Court and read before the Mandamus granted. Raym. 235. Mich. 26 Car. 2. B. R. Dunkin v. Mun.

5. A Mandamus was granted to Prove a Will in Common Form, and to have a Probate under Seal. 2 Show. 48. Pasch. 31 Car. 2. B. R. Anon. cites Fitzh. 202. Sty. 22. Dunkomb's Case.

6. Mandamus was prayed to the Ecclesiastical Court to grant a Probate of a Writ under Seal &c. The Case was thus. An Executor named in the Will had taken the usual Oath and then refused, and afterwards a Caveat being entered, and J. S. endeavouring to get Administration &c. desired the Will under Probate, and the Executor contested the Administration to J. S. which the Ecclesiastical Court adjudged against him, supposing that he was bound by his Refusal; thereupon he appealed to the Delegates, and afterwards moved for this Mandamus, which was granted; For having taken the Oath he cannot afterwards refuse, and that Court had no farther Authority; and the Caveat did not alter the Case. 1 Vent. 335. Pasch. 31 Car. 2. B. R. Anon.

7. Mandamus to Sir Thomas Exton, Commissary to the Dean and Chapter of St. Pauls London, to swear Edward Carpenter one of the Church-wardens of Stoke Newington in Surry, the Doctor finding that there was a Dispute between the Parson who claimed a Right by the Canon to choose one, and the Parishioners who claimed a Right by Custom to choose both, and therefore to save himself from a Contempt, and that he might not be liable to an Action for a false Return, he returned the Fact after this Manner, that there was a Suit depending in the Spiritual Court, between the Parson and the Church-warden chosen by him, and the Church-warden chosen by the Parishioners; then he sets forth their Allegations on each side, which were admitted by the Court, and that the Parishioners produced Witnesses to prove the Custom of choosing two Church-wardens, and a Day was appointed for a Proof, but that they neglected to have them then examined, and that the Court was ready to give Sentence for the Right of the Parishioners when they should prove the Custom; then he certifies that he gave the Oath of Church-warden to one of those who was chosen; but this Court awarded a Mandamus to swear the other, because the Spiritual Court cannot try this Custom as alleged in the Return. Raym. 439. Pasch. 33 Car. 2. B. R. Carpenter's Case.

8. Mandamus to the Precentor and Canons of the Cathedral of St. David to Admit Dr. Owen to be a Canon there; a Custom was alleged that Time out of Mind the Precentor and Canons (no Canonry being void) had used to chuse one to succeed to the next Avoidance and to enter his Name in the Registry by the Name of Supernumerary, and that he who was so chosen ought to be admitted to the next Vacancy; and that he was chosen Supernumerary, and afterwards a Canon died; and that the Precentor and Canons being requested refused to admit him; it was objected against the Mandamus, that the Office of Canon was meerly Spiritual, and of Ecclesiastical Cognizance; and on the other Side it was insisted, that the Party had no other Remedy, but by a Mandamus; but the Court delivered no Opinion as to this Point; but the Mandamus was denied, because it is a ridiculous Custom to elect where no Canonry was Vacant. 2 Jones 199. Pasch. 34. Car. 2. B. R. Dr. Owen v. Dr. Stainbow.

9. It doth *not* lie to restore a Parish Clerk who was 4 Years in the Office, *but never sworn*, and therefore turned out by the succeeding Parson; *But* the Court granted a Mandamus to swear him; and then he might take his Remedy against the Parson; For it is a temporal Office, and he hath no Authority to displace him. Nels. Abr. 1151. Mandamus (B) pl. 5. cites March 101.

A Mandamus was granted to restore a Parish Clerk, he being elected by the Parishioners,

and displaced by the Parson. 11 Mod. 221. Pasch 3 Annæ. B. R. Kid v. Doctor Watkinson.

10. Mandamus to the Surrogate of Dr. King the Archdeacon of the Diocese of London, to swear J. S. Churchwarden of C. being elected by the Inhabitants according to the Custom of that Parish; Defendant returned, that it did not appear to him per aliquod Scriptum that J. S. was duly elected; And that the Bishop of London had inhibited Dr. King, and any Person acting under him to swear this J. S. and therefore he could not swear him, and that the Mandamus did not set forth that C. was within the Diocese of London. It was answered, that tho' the Mandamus does not precisely mention C. to be within the Diocese of London, yet when the Return mentions that the Bishop of L. had inhibited the Archdeacon &c. that is sufficient to shew the Court that it was within his Diocese; therefore a peremptory Mandamus was granted. 8 Mod. 325. Mich. 11 Geo. the King v. Singleton.

Non fuit Electus was adjudged no good Return. Ibid. cites the King v. White.

11. Mandamus to the Chancellor or Surrogate of the Bishop of Chester to swear a Churchwarden into his Office, who returned, that the Person was not duly elected, and thereupon an Action on the Case was brought against the Chancellor, in which the Plaintiff declared, that he was duly chosen &c. and that the Defendant refused to swear him; thereupon the Plaintiff moved for a Mandamus to swear him, and it was granted; then he alleges, that he offered himself to the Chancellor to be sworn, who refused and made a false Return of the Mandamus, (viz.) that the Plaintiff was not duly elected, quorum preterea he was deprived of his Office. Nels. Abr. 1146. Mandamus (A) pl. 22. cites 2 Lutw. 322.

12. Mandamus to the Archdeacon to swear a Churchwarden being duly elected, who returned, that he was *pauper latharius & servus minus habilis* &c. and thereupon a peremptory Mandamus was awarded; For a Churchwarden is a temporal Officer, he has the Property and Custody of the Parish Goods, and as it is at the Peril of the Parishioners, so they may trust whom they think fit; And the Archdeacon has no Power to elect or controul their Election. 1 Salk. 166. Hill. 8 W. 3. B. R. Morgan v. Archdeacon of Cardigan.

The Return by the Archdeacon was as here, and that the Person chosen was unfit to execute the Office, and so he could not swear

him; whereupon a peremptory Mandamus was granted; For being appointed by the Parish, they are answerable for him 12 Mod. 116. Hill. 8 W. 3. seems to be S. C. by the Name of the King v. Rees — Carth. 393. S. C.

13. Mandamus to the Spiritual Court to grant Administration to J. S. who, as he suggested, was next of Kin to the Intestate: This Mandamus being granted, was afterwards superseded, because J. S. being formerly cited, refused to come in; whereupon another of Kin sued for Administration, but was opposed by one who pretended there was a Will, which Matter was still depending, and therefore till that was determined the Judge could not obey this Mandamus. And by Holt Ch. J. there is a Difference where there is a Controversy, and where there is no Controversy. In Case of no Controversy we grant a Mandamus upon a Suggestion that J. S. died intestate, and that T. S. is next of Kin, and if it be false they may take Issue upon it; But where there is a Controversy we will not grant a Mandamus till the Controversy be determined. For suppose the Will should prove good, what then will the granting Administration signify? 5 Mod. 374. Mich. 9 W. 3. Anon.

14. Mandamus was granted to admit an Executor to prove a Will, which the Spiritual Court refused unless he would give Security, it being suggested that he was insolvent, and had a Legacy by the Will. Upon a peremptory Mandamus being granted a Bill was filed in Chancery in behalf of the other Legatees, being Infants, and the Court enjoined him from intermed-

He was Executor in Trust for 3 Infants. 12 Mod. 205. S. C. where

it seems to have been the Case of *Paine v. Watts.*

ding with the Assets any farther than to satisfy his own Legacy; For in Equity he is but a Trustee for the Infants; And where a Trustee is insolvent, Chancery will compel him to give Security before he shall enter upon the Trust. Carth. 458. Mich. 10 W. 3. B. R. the King v. Sir Richard Raines.

15. Mandamus to swear A. and B. Churchwardens, suggesting that they were *debito modo electi*; The Return was, *that they were not debito modo electi*; It was objected, that it ought to be in the Disjunctive, *Nec eorum alter electus fuit*; But per Holt Ch. J. it was resolved, that one cannot be sworn upon this Writ; For either both are chosen, or the Writ is misconceived. 2dly. Where the Writ is to swear one *debito modo electus*, shere a Return that he was not *debito modo electus* is a good Return; for it is an Answer to the Writ. But where it is to swear one *electus* Churchwarden, there *Quod non fuit debito modo electus* is naught; Because it is out of the Writ and evasive. 2 Salk. 433. Mich. 1 Anne B. R. the Queen v. Twitty and Maddicot.

16. Mandamus to the Official of &c. to swear A. and B. Churchwardens of the Parish of &c. The Return was, *that they were not duly chosen*; But a peremptory Mandamus was granted, because the Official should have complied with the Writ as far as he could, and have sworn one of them, if the Truth was that one of them was duly chosen; or else he should return that neither of them was chosen; For if the Parishioners claim a Right to chuse two, he should have made a special Return of it, and that the Persons chosen had an *equal number of Votes*, that the Parson had chosen his Man, and that he could not swear either of them chosen by the Parishioners, because they had an equal number of Votes, and at last, by Direction of the Court, they agreed to try the Custom in a feigned Action. 6 Mod. 89. Hill. 2 Ann. B. R. the Queen v. Guy.

17. Mandamus was granted to admit Mr. Faulkes *Apparitor General* to the Archbishop of Canterbury. 3 New. Abr. 531, 532. cites the King v. Doctor Bettefworth.

18. A Mandamus will not lie to oblige the Ordinary to grant *Administration Durante minore etate* of an Infant to the next of Kin, this being a Matter out of the Statutes, and therefore discretionary in the Ordinary to whom to grant it, and if in such Case he grants it to an improper Person, or insists upon unreasonable Security, the Redress must be by Appeal; and if in the last Instance there be any Remedy at Common Law, it must be by Prohibition. 3 New. Abr. 535.

(I) To enforce Things to be done relating to inferior Courts of Law.

So to the Court of Sandwich, to give Judgment in an Action of Assault and Battery. 3 New. Abr. 535.

So a Mandamus to the Sheriff's Court in London to give final Judgment upon a Writ of Inquiry. Ibid. 536.— So a Mandamus to the Bailiff of Andover, to give Judgment in a Cause there depending; but the Court in this Case required an Affidavit of their Refusal, or else it should be presumed, that the Court would do right. Ibid.— So a Mandamus to the Corporation of Liverpool to hold an Assembly for doing the publick Business; which was making Leases. Ibid

1. **A.** being Owner of Ground adjoining to Newgate Market in London, had some his said Ground laid to the said Market for the enlarging thereof, and thereupon according to the Acts of Parliament of 19 Car. 2. cap. 8. and 20 Car. 2. prayed Satisfaction from the City, and had a Jury impannell'd, who gave him 500l. and upon that Verdict the Mayor and Aldermen refused to enter up Judgment, and thereupon A. prayed a Mandamus to make them give Judgment; And it was granted. Raym. 214. Hill. 23 & 24 Car. 2. B. R. Amherit's Case.

2. *Debt for Rent in the Court of Cambridge*, where upon the Evidence the Plaintiff was nonsuited; the Defendant had Judgment, but the Mayor refused to execute the same, taking Security from the Plaintiff for his Indemnity; whereon a Mandamus was moved for, or that the Mayor should shew Cause why he should not execute the said Judgment; But the Court denied the Motion, seeing he had a legal Remedy, viz. a Writ de Executione Judicii out of Chancery. 12 Mod. 196. Trin. 10 W. 3. Wilkins v. Mitchell.

In the Case of the King v. the Bishop of Ely it was said per Lee Ch. J. that the Law had been held contrary ever since. Pasch. 11

Geo. 2. Doctor Bentley's Case.

(K) To enforce doing Things relating to *Justices of Peace &c.*

1. **M**andamus was granted to *Justices of Peace to give Judgment* in a Man's Case upon the Statute for Release of poor Prisoners. See 2 Show. 74. Trin. 31 Car. 2. B. R. the King v. Surry Justices. Comb. 203. Pasch. 5 W. & M. B. R. Trevannion's Case. ces. S. P. but says, the Court have always since refused to intermeddle in that Act, but put them to their Audita Querela.

2. Mandamus to enforce a Constable to return a Warrant for levying Money by Distress upon the Act against Deerstealers was denied. The Sessions may fine him; And if a Mandamus be granted, and he disobey, the Court can only fine him for the Contempt, and the Justices of Peace may do it as well 6 Mod. 83. Mich. 2 Ann. B. R. Morley v. Staker.

3. Mandamus against *Justices of Peace to issue their Precept to inquire of a Force* upon Affidavits of a forcible Entry was granted. 6 Mod. 139. Pasch. 3 Ann. B. R. Goldson & al. Justices of Ipswich's Case.

4. A dissenting Minister having qualified himself in one County removed afterwards into another, and kept a new Conventicle in that County, supposing that he need not qualify himself for that County. The Justices convicted him notwithstanding the Toleration Act; the Attorney General moved for an Attachment against the Justices; but that being denied, he moved for a Mandamus to permit him to preach, which was denied also; For a Mandamus is always to do something in Execution of Law, but this would be in Nature of a Writ De Non Molestando. 2 Salk. 572. Mich. 3 Ann. B. R. the King v. Peach.

6 Mod. 228. 229. S. C. And says that then they moved for a Mandamus for the Justices to take Security from him not to become chargeable

to the Parish, which was also deny'd; For that Matter is only to be upon Complaint of the Church-Wardens and Overseers of the Poor. And at last they moved for a Mandamus to the Sessions to state the Fact Specially; but it was denied; For that the Statute excludes all others from examining the Fact. And finally they moved for a Procedendo to a Certiorari already brought by them in order to appeal the Sessions, which was granted.

5. Mandamus was directed to three *Justices of Peace* in the Country to take Security of the Peace, in Regard of Defendant's great Age and the great Distance. Gibb. 85. Trin. 2 & 3 Geo. 2. B. R. Lewis v. Lewis.

(L) To enforce doing Things relating to *Manors.*

1. **W**Rit shall be directed to the Lord of a Manor commanding him to hold Court by which Justice may be done his Tenants; Per Mountague Ch. J. 2 Roll. R. 107 Trin. 17 Jac. B. R. in an Anonymous Case.

(M) To

(M) To enforce doing Things relating to Nuisances.

1. **M**andamus lies to remove a Nuisance, as a Bowling-Green, or a Mountebank's Stage; but by Northey such a Writ must be grounded on some Record, as in *Jacob Hall's Case* Mod. 76. it was presented by the Grand Jury, or the Justices might record it on their View. Comb. 282. in *Case of the King v. St. John's College Cambridge*.

(N) To enforce Things to be done relating to Officers of Courts.

1. **M**andamus to swear one into the Office of one of the Eight Men of *Ogborne-Court*, he being elected thereunto: Sed per Curiam it was denied, because it did not appear what the Office was, that the Court might judge, whether it was for such an Office for which a Mandamus would lie. Nelf. Abr. 1146. Mandamus (A) pl. 32. cites 2 Mod. 316. Anon.

2. Mandamus to the Dean and Chapter of *Westminster* to admit *Mr. Knipe* to the Office of High Bailiff upon the Nomination of the Duke of Ormond, who is High Steward; it was objected, that it is the Dean and Chapter, and not the High Steward, who is to appoint a Person to this Office; For they have *Retorna Brevium*, and of Common Right they who have such a Franchise have Power to appoint an Officer for that Purpose, who is the High Bailiff, and when he is admitted is called *Ballivus Decani & Capituli &c.* The Dispute is now between two Persons, whether the High Steward, or the Dean and Chapter are to put in the High Bailiff; the publick Justice of the Nation is not concerned in this Matter; if *Mr. Edwin* hath any Prejudice, he may bring an Action; sed per Curiam, such Action will not put him in Possession, so a Mandamus was granted. Nelf. Abr. 1147. Mandamus (A) pl. 38. cites 4 Mod. 281. *Knipe v. Edwin*.

(O) To enforce doing Things relating to Poor and Church-Rates Taxes &c. and Officers.

It was granted. 8 Mod. 1. **M**andamus to Justices of Peace to sign, allow, and confirm poor Rate, but adjournatur for the Words in 43 Eliz. is *Con-*
10. Church-
Wardens of *sent.* Carth. 450. Pasch. 10 W. 3. B. R. the King v. Dean and Chapter of
Bishopsgate *Norwich*.

v. Alderman
Beecher. Mich. 7. Geo. — Ibid. 335. the King v. *Beecher*. — And also to make a Rate, where one Parish wants Contribution from another. 8 Mod. 344. Hill. 11. Geo. the King v. *St. Mary's in Marlborough*.

* 8 Mod. 2. No Mandamus lies to Overseers of the Poor to make a Rate to * re-
338. the King *imburse former Overseers*. 2 Salk. 531. Hill. 2 Annæ B. R. *Tawney's Case*.
v. *Rother-*
Parishhith — It was granted to two distinct Jurisdictions to make a poor Rate for Relief. Comb.
422. Hill. 9 W. 3. B. R. the King v. *Norwich &c.* — Ibid. 478. Pasch. 10 W. 3. B. R.

The Writ is bad; but if it was good, a 3. The Court upon Motion granted a Mandamus to the Commissioners of the Land Tax for *Barnwell* to Tax the Lands there equally. 11 Mod. 206. pl. 6.

pl. 6. Hill. 7 Ann. B. R. The Queen and the Commissioners of the Land Tax for Barnwell. Mandamus was not a proper Remedy

for an unequal Taxation; but the proper Remedy is by Appeal to the Commissioners: *But*, perhaps if the *Assessors refuse to tax any Part*, as the Case of Sturbridge Fair is, a Mandamus lies. The Writ was quashed. 11 Mod. 254 Mich. 8 Annæ B. R. Dr. Butler v. Corbet.

4. It was granted to a Justice of the Peace to grant a *Warrant to distrain for a poor Rate*. 8 Mod. 10. Mich. 7 Geo. Bishopsgate Church-Wardens v. Beecher.

5. On a Motion for a Mandamus to the Old Church-Wardens to deliver the *Parish Books* to the New Church-Wardens &c. it was afterwards shewn for Cause against the Motion that it was new, and the like had never been made before in this Court. But it was insisted on, that the Old Church-Wardens had a Right to keep the Parish Books, and so the Rule was discharged; For a Contest between Parish Officers which of them ought to keep the Books, must be tryed at Law by a feigned Issue. 8 Mod. 98. Mich. 9 Geo. The King v. Street and Stroud.

(P) To whom to be directed.

1. Mandamus was granted to restore a Sexton, and it was directed to the *Church-Wardens*. Vent. 153. Mich. 23 Car. 2. B. R. Ile's Case.

2. Whether a Mandamus ought to be directed to the *Mayor and Aldermen of London*, or to the *Court of the Mayor and Aldermen of London*, to swear a *Sheriff*, where the Custom is to swear the Sheriff in the Court. See Skin. 64. Mich. 34 Car. 2. B. R. Papilion v. Dubois.

3. A Mandamus was directed Jacobo Courteen *Majori Ballivis & Omnibus Principalibus Burgensibus Burgi* de Abingdon, who by the Constitution were to chuse the Mayor out of such Persons as should be propos'd by the Commonalty, commanding them to chuse accordingly: It was objected to the Writ, that it was misdirected; for that this was but a Part of the Corporation, viz. *Chief Burgesses*, whereas the *Name of the Corporation was Mayor, Bailiffs, and Burgesses*; and it was urged, that Persons constituting a Corporation could be considered, but in one of these two Capacities, viz. Their Corporate or their Natural; and that the Writ must be directed to them, either by their Names, or as a Corporation; and they cited *Holt's Case*, 2 Jones 52. in Point. Holt Ch. J. said, That Case was not Law, and that Serjeant Pemberton, Sir. William Jones, and all the Learned Part of the Bar wondered at the Resolution: And tho' it should be true, that a * *Mandatory Writ* might be directed to the whole Corporation, yet it could not be necessary it should be directed to more than those, or that Part of the Corporation that was concerned in the Execution of the Thing required; For it is not in the Power of others to put the Command of the Writ in Execution, and the Writ was held good. 2 Salk. 699, 700. Pasch. 12 W. 3. B. R. The King v. the Mayor &c. of Abingdon.

* Holt Ch. J. said, that it is sufficient to be directed only to such Persons as are to do the Thing required to be done. And therefore where a Mandamus was directed to the Mayor and Aldermen of H. to admit one to the Office of Town-Clerk, it was objected, that the Writ was ill directed; But Holt thought the Word

Aldermen surplusage, and the Writ well enough: But Powell J. contra, Writs ought to be directed to those, and to those only that are to obey the Writ. How will People know who are to obey the Writ, if the Direction is insignificant or immaterial? If a Writ be directed to a Coroner and Sheriff where it ought to be to one only, it is naught: Powys and Gould Justices agreed, and the Writ was quashed. 2 Salk. 701. Trin. 4 Annæ B. R. The Queen v. Mayor of Hereford.

4. A Mandamus was directed to the *Mayor, Aldermen and Commonalty of R.*, who return'd themselves to be incorporated by the *Name of Mayor, Burgesses and Commonalty*. The Court held the Writ naught, because it was

H h h

directed

directed to the Corporation *by a wrong Name*. 2 Salk. 433. Pasch. 12 W. 3. B. R. the King v. the Mayor &c. of Rippon.

5 A Mandamus may be directed to a Corporation by the Name of a Corporation, or to those who have Power of Removal; per Powell J. Holt's Rep. 451. Hill. 8 Annæ. the Queen v. Mayor &c. of Gloucester.

(Q) *How to be brought; Jointly, or not &c.*

1. **FIVE** Persons cannot have one Writ of Mandamus to be restored, for tho' the end of the Writ is to do Justice, yet the Foundation is the Wrong in turning them out, and the *turning out of one is not the turning out of another*; nor can several Persons join in an Action on the Case for a false Return; per Holt Ch. J. 2 Salk. 433. Mich. 12 W. 3. B. R. the Case of Andover.

12 Mod. 332.
S. C.—Nor can several Persons be joined in a Mandamus.
S Mod. 209.
Hill. 10 Geo. the King v. the Mayor of Kingston upon Hull. — 5 Mod. 11. Mich. 6. W. & M. the King v. Chester City.

(R) *Returns, Good or not. In General.*

1. **THO'** a Return be *insufficient, yet if it appears to the Court, that the Party has no Cause* to be restored, the Court will not restore him; per Twifden J. to which the Court agreed. Sid. 14. Mich. 12 Car. 2. B. R. the King v. Tiddlerley.—And to be said it was ruled in Winchester's Case.

2. A Mandamus to restore an Attorney to his Liberty of Practising in a Court within the County Palatine of Chester was returned, that the Court was holden before the Chamberlain, Vice-Chamberlain, Baron or the Deputy of the Baron, and that at a Court before the Baron's Deputy *he spoke contemptuous Words* of him, whereupon he suspended him from his Practice, & quod non Aliter amotus fuit; upon Exceptions offered to the Return, the Court held it good Cause of Suspension, and ordered a Submission to him who received the Affront in open Court before he should be restored. Vent. 331. Trin. 30 Car. 2. B. R. Parker's Case.

2 Lutw.
1014. S. C.

3. Mandamus was awarded to restore Dr. L. to the Office of Archdeacon of Salisbury, and returned *Quod non fuit debite electus*; and argued to be bad, because a negative Pregnant, but it ought to be non fuit electus, ut dicitur. 1 Sid. 209. 210. but per Cur. it is good; For the Writ recites *licet fuit debite electus*, and the Return is a direct Answer, and so held at the end of the Case reported by Siderfin. 12 Mod. 2. Mich. 2 W. & M. the King v. Lambert.

Carth. 170.
Lambert's Case S. C. and P. but says that it had been better to have made a general Return

viz. Nunquam fuit electus in Officium, *will not saying Debite* ——— * *Non fuit electus* is a good return to a Mandamus; but to set forth that a Burgess is *praefectus & juratus*, which is no more than that he is preferred and sworn to that Office, is not good 11 Mod. 174. Pasch. 7. Anne. B. R. the Queen v. Corporation of Cornwall. — * S. P. and a Case was over-ruled that had been adjudged contrary. Gibb. 195. Hill. 4 Geo. 2. B. R. the King v. Ward.

4. To a Mandamus to restore A. to the Office of Common-Council Man of the City of Bristol 3 Articles were returned; and to the first Article it was objected that it was insufficient, the Matter therein contained being no Ground for a Disfranchisement, or if it was, it is not sufficiently alleged; For it is only said *that A. wrote such a Letter*, but not that it was ever published, and the writing only if never published cannot be any Scandal; and to the second it was objected that it was altogether uncertain it being only alleged, *that he threatened the Mayor and Aldermen, and*

it

it does not appear by the return that there are any Aldermen in Bristol, or that he used any particular Force; and as to the third, that it is very Trivial; for nothing is pretended by it, but a Request made by A. to bring the Common Council Book before the Lord Lieutenant *ea intentione &c.* which was never granted; and for ought that appears to the contrary, this Request might have been made by the Majority of the Common Council; then it was insisted that there cannot be any Cause to Disfranchise a Member of a Corporation, unless it be for a Thing done which works to the Destruction of the Body corporate, or to the Destruction of the Liberties and Privileges thereof, and not any personal Offence from one Member to another, and of that Opinion was the whole Court whereupon A. had a peremptory Mandamus to restore him, the Causes returned being altogether insufficient to remove him. Carth. 173. to 176. Hill. 2 & 3 W. & M. B. R. Sir Thomas Earl's Case.

5. The Rule that *all the Matter contained in the Return is to be taken as true*, will not hold where it appears Judicially to the Court to be false; per Cur. Skin. 294. Trin 3 W. & M. B. R. the King v. City of London in Sir William Smith's Case.

6. Nothing is to be intended in the Return to a Mandamus; per Holt Ch. J. Show. 282. Mich. 3 W. & M. in Case of the King v. Evans.

7. A Charter had the following Clause, viz. *That any Officer to be chosen &c. non diutius remanebit in Officio &c. quam infra Burgum Præd. vel Libertat. & Franchefias inde cum tota familia inhabitabit &c.* A. was a Foreigner and was chosen one of the Common Council (out of which the Bailiff must be chosen) and afterwards was chosen Bailiff but being refused to be sworn brought a Mandamus to be sworn and admitted Bailiff; per Holt Ch. J. the Defendant ought to have returned this special Matter and not (as he had done) Non fuit electus. Carth. 227. Pasch. 4 W. & M. B. R. Vaughan v. Lewis.

8. In Case of a Mandamus to a Corporation it is usual for the Mayor to sign it, tho' not legally necessary, therefore let him sign it; per Holt Comb. 324. Pasch. 7 W. 3. B. R. the King v. Mayor &c. of Colchester. * Neither Hand or Seal is necessary, but for false Return, Action lies against the Corporation or the Procurer; per Holt Ch. J. Comb. 422. Hill. 9 W. 3. B. R. Liddleston v. Mayor of Exeter.—* S. C. and P. 12 Mod. 126. For before the Statute of York, the Sheriff need not have set his Hand to any Return.

9. A Mandamus was directed Majori, Ballivis & omnibus principalibus Burgensibus Burgi de A. (except R. and S.) setting forth the Constitution and that R. and S. were capital Burgeses chosen by the Commonalty to stand and serve for Mayor for the ensuing Year; and that they were to choose one of them, Ideo they were commanded to elect one of them accordingly; they returned the Statute 13 Car. 2. Sess. 2. cap. 1. and that within 20 Years, prox. post. 2 March 1663. R. and S. fuerunt electi Burgeses principales, and within a Year before their Election had not received the Sacrament, per quod Electio eorum vacua devenit & non sunt principales Burgeses; and this Return was held naught: 1st. The Court considered it without the last Words, (et non) &c. and as to that the Ch. J. said, the Writ supposes them to be Burgeses, and so the Court must intend them, and this is not answered by the special Matter of the Return, which shews only that he was once elected, and that was a void Election; whereas he might qualify himself and be chosen again, and here is nothing to exclude the Intendment of a subsequent Election, which is according to the Supposal of the Writ. 2dly. The Court considered it with the last Words, and held the (et non sunt principal' Burgeses, &c.) to be only part of the Conclusion or Inference; and the Ch. J. said, the Law requires the most exact * Certainty in these Cases; because the Party cannot traverse nor interplead, and it is not enough to offer a Matter, so that the Party may be able to falsify it in an Action; but the Matter must be so alledged that the Court may be able to judge of it and determine, whether it be a sufficient

Carth 499.—
* The Reason why a Return to a Mandamus requires the utmost Certainty, the Law allows of, is not only that the Party may have sufficient ground to ground his Action upon, if false; but to the end the Court might know what Judgment to give upon it, in Case it were demurred upon, and because it cannot be helped by pleading, per ent

Holt Ch. J. ent Cause, or not; if the Matter set forth in this Return, had been so
 12 Mod. 411. alleged in a Plea in Bar, the Plaintiff might have replied a subsequent E-
 Pasch. 12 lection; Ergo, this Return is uncertain; For there might have been a sub-
 W. 3 the sequent Election. 2 Salk. 432, 433. Pasch. 12 W. 3. B. R. the King v.
 King v Vill fequent Election. 2 Salk. 432, 433. Pasch. 12 W. 3. B. R. the King v.
 deAbingdon the Mayor &c. of Abingdon.

—Remarks

are to be kept to the same strictness since the 9 Annæ. 20. as before. 10 Mod. 108. Mich. 11 Annæ. B. R.
 in Case of the Queen v. Mayor &c. of Pomfret

10. If a Mandamus, Alias & Pluries be issued, a Return in strictness
 ought to be to the Pluries; because the Party is in some sort of Contempt
 for disobeying the two first Writs; yet if there be no Damage to the Par-
 ty a Return to the Original Mandamus may be filed. 11 Mod. 265. pl.
 4. Hill. 8 Annæ. B. R. Anon.

11. To the Return of a Mandamus to restore H. to the Office of *Town
 Clerk* two Exceptions were taken; 1st. That they said *that such a
 Year of Queen Elizabeth, and long before they were a Corporation*; and so
 did not intitle themselves by Prescription, which is ever Time out of
 Mind. 2dly. It is not returned that the Town Clerk was actually chosen
 Annually, but only *that he was annuatim eligibilis*, whereas Time and
 Usage are necessary to Prescription. The first Exception was disallowed,
 because it was only failing in Matter of Surplusage; but the Court held
 the second Exception good; For the Office of Town Clerk is an Office for
 Life, unless restrained by Charter or Prescription which ought to be shewn
 upon the Return, but this is not done; besides, tho' he be Annuatim eli-
 gibilis, he may continue Town Clerk, and will do so till they choose an-
 other; but this does not appear to be done, the Exception therefore is
 good for both Reasons. If the Return had been *eligibilis pro uno Anno tan-
 tum* his Office would have expired at the end of the Year, whether they
 had chosen another or not, but otherwise as this Return is. 10 Mod.
 146. Hill. 11 Annæ. B. R. the Queen v. the Corporation of Durham.

12. A *Repugnant* and *Contradictory* return is naught. 10 Mod. 107.
 Mich. 11 Annæ. B. R. the Queen v. Mayor &c. of Pomfret.

* Sid. 286.
 Basset's Case.

13. It is no good Return that the *Office is full of another Person*; For a
 Mandamus * gives no Right, it only puts the Party in a Way to bring
 his Action and try his Right. Gibb. 195. Hill. 4 Geo. 2 B. R. the King
 v. Ward.

14. Upon a Mandamus for a Deputy Register of the Spiritual Court
 it was returned, that there was a *Contest before the Delegates for this Office
 not yet determined*, and for that Reason that the *Delegates had inhibited
 the Defendant not to admit any Person whatsoever to the said Office, before
 the said Suit was determined*; but the Return was held not good. Gibb.
 195. Hill. 4 Geo. 2. B. R. the King v. Ward.

(S) Return. *By whom* it must be, or may be made, and
when.

1. **A** Mandamus was granted to the Mayor &c. of Norwich; it was
 moved, that the *Sense of the Mayor differed from the Majority of
 the Corporation, and that he would execute the Writ, whereas the Corporation
 were for returning an Excuse &c.* And they prayed, that the Mayor might
 be ordered to deliver the Writ to the Rest of the Corporation; sed non
 allocatur; For he is the Head and Principal, and take your Course a-
 gainst him. 2 Salk. 432. Hill. 11 W. 3. B. R. The King v. the Mayor
 &c. of Norwich.

If the Re-
 turn of a

2. Mandamus was to the Mayor, Bailiffs, and Burgesses, of the Town of
 Abingdon; The Mayor made a Return, and brought it into the Crown-
 Office,

Office, intending to move to have it filed; and now a Motion was made to stay the Filing of it, upon Suggestion, that this Return was made by the Mayor, and Minor Part of the Bailiff and Burgesses, and against the Consent of the greater Number, who would have obeyed the Writ, and therefore they prayed they might disavow this Return and put in another. And per Holt Ch. J. where a Writ is directed to a single Officer, as a Sheriff, and a Return is made by a Stranger without his Privy, he may any Time that Term, wherein the Writ is returned, come in and disavow it, but not after the Term. Dy. 182. But in this Case, where the Writ is directed to several, and the Mayor, who is the most principal and proper Person, returns and brings in the Writ, it is not fit that we should examine upon Affidavits, whether there was the Consent of the Majority: We will take it, and leave you to punish the Mayor for this Misdemeanor if he be guilty; for it is a great Crime, which will not only merit a heavy Fine, but a peremptory Mandamus will be granted, if the Return be falsified. If they were all equal Parties, this might be another Case. The Return was filed, and at the same Time Leave was given to file an Information against the Mayor. 2 Salk. 431. Mich. 11 W. 3. B. R. The King v. the Mayor &c. of Abingdon.

Mandamus be made by a Mayor, the Court cannot refuse it, because he is the Principal Officer to whom it is directed. Carth. 499. Mich. 11 W. 3. B. R. the Case of Abingdon Town.—Return ought to be by the Mayor, with the Consent of the Major Part of the Corporation. 12 Mod. 308.

Mich. 11 W. 3. The King v. the Borough of Abingdon.—Mandamus directed to the Mayor and Burgesses, but Returned only by the Mayor is good. Comb. 41. Hill. 2 & 3 Jac. 2. B. R. Powell v. Price.

3. 9 Annæ. cap. 20. S. 1. Where any Writ of Mandamus shall issue to admit or restore any Burgesses or Officers of Corporations, such Persons, who by Law are required to make Return, shall make their Return to the first Writ of Mandamus.

S. 6. It shall be lawful for the Queen's Bench, Courts of Sessions of Counties Palatine, or the Grand Sessions in Wales, to allow to such Persons, to whom any Writ of Mandamus shall be directed, or to the Persons who shall prosecute the same, such convenient Time to make a Return, Reply, Rejoin, or Demur, as to the said Courts shall seem just.

In Cases which are not within this Statute, a Rule may now be made for the Re-

turn of a Mandamus at a Day certain. Gibb. 4. Mich. 1 Geo. 2. B. R. the King v. the Russia Company.—A Rule was made, that where a Mandamus went above 40 Miles, the Return shall be at least 15 Days, and where under 40 Miles 8 Days at least. 11 Mod. 64. Mich. 4 Ann. B. R. Anon.

4. 11 Geo. 1. cap. 4. S. 9. Where any Writ of Mandamus shall issue out of the King's Bench, in any of the Cases mentioned in this Act, the Persons, to whom such Writ shall be directed, shall make their Return to the first Writ.

(T) Return Traversed, and of taking Issue on it.

1. 9 Annæ. S. 2. As often as any Mandamus shall issue out of the King's Bench &c. and a Return shall be made, it shall be lawful for the Persons suing such Mandamus to plead to, or traverse all, or any material Facts contained in the Return to which the Persons making Return shall Reply, take Issue, or Demur; and such Proceedings shall be had therein, as might have been had, if the Persons suing such Writ had brought their Action on the Case for a false Return; and if Issue shall be joined on such Proceedings, the Persons suing such Writ may try the same in such Place as an Issue joined in such Action on the Case might have been tried.

3 Mod. 101. in Case of the King v. Mayor &c. of Carlisle.

(U) Return. *Ill or false, or no Returns. How punished.*

1. **I**N Case of a Mandamus out of Chancery, *no Attachment lies* for not returning it *'till the Pluries*, because that is in Nature of an Action to recover Damages for the Delay; but upon a Mandamus out of this Court, the first Writ ought to be returned; yet an *Attachment is never granted without a peremptory Rule to return* the Writ, and then it goes for the Contempt. And a peremptory Rule was made. 2 Salk. 429. Hill. 9 W. 3. B. R. Mayor of Coventry's Case.

2. A Mandamus was returned, and there was neither the Hand of the Mayor, or Seal of the Corporation to it; and per Cur. it is well enough without it; before the Statute of York, the Sheriff need not have set his Hand to any Return. If the Return be false, you may bring your *Action against the whole Body Politick, for making a false Return*, and against a *peculiar Person for procuring a false Return*. 12 Mod. 126. Trin. 9 W. 3. Lydton v. Mayor and Bailiffs of Exeter.

If a frivolous Return be made, and purposely to avoid the Justice of the Court an

3. If an Officer make an illegal Return, he shall be *amerced*, and we will not allow him to *quash the ill Return and make another*; and if upon Disallowance of one Return, he *makes a Second bad*, an *Attachment* shall go; per Holt Ch. J. 12 Mod. 410. Trin. 12 W. 3. Anon.

Attachment shall go. 8 Mod. 336. Mich. 11 Geo. The King v. Robinson.

4. Information against the Defendant, late Major of the Bath, for a *false Return* to a Mandamus for electing a *Town Clerk* in the Room of Bushel; the *Return was*, *That before the coming of the Writ J. S. had been duly chosen and sworn into the Office*; It appeared upon Evidence at the Trial, that the Right of Election was in 30 of the Common Councilmen, that they were summoned by the Mayor, and that 28 did meet; that there were 3 Candidates; that one of them had 2 Votes, and another had 13 Votes, and that the 3d had the Mayor and 12 more Votes for him; and that the Mayor pretending he had a *Castling-vote* declared his Mandamus chosen, and at another Court swore him; it was ruled by Holt Ch. J. that the Copy of the Writ, and Return of it in the Crown-Office, is sufficient Evidence to prove this to be the Mayor's Return; that tho' it is requisite to deliver the Writ to the Mayor, as being the Head of the Corporation, yet it is not necessary to prove the Delivery of it to him, no more than it is to prove the Delivery of a Writ to the Sheriff; that the Mayor or any other Officer of a Corporation, hath of common Right no casting Vote; it is true such a Thing may be either by Prescription or Charter; that if there is an Equality of Votes, and they cannot agree, they must be brought up in Contempt, and be committed till they do agree, that is till a Majority do agree; that an Action for a false Return may be brought against all the Corporation, or any particular Member thereof. The Mayor was found Guilty. Nelf. Abr. 1155. Mandamus (D) pl. 13. cites Mod. Cases 152. The Queen v. Chapman.

5. 9 *Anne. cap. 20. S. 3. If Damages be recovered by Virtue of this Act, against any Persons making a false &c. Return to the Writ, they shall not be liable to be sued in any other Action for making such Return.*

6. Where a Mandamus was directed to the Church-wardens of W. to restore A. to the Office of *Sexton*, and served upon the late Church-wardens after their Office was expired, and a Rule being made to shew Cause why an Attachment should not go, for not obeying the Mandamus, and the whole Matter being disclosed by Affidavit, the Court allowed as a good Reason for their not returning the Writ, *That they, at the Time of the Writ delivered to them, were not Church-wardens*. 3 New Abr. 541. cites Trin. 5 Geo. 2. the King v. Wrexham Church-wardens.

7. If an *Attachment issues* for not returning a Mandamus, and the *Sheriff*, who is to serve the Process, *makes Bail* thereupon, this is such a *Misdemeanor*

demeanor, for which an Attachment will be granted against him; for these are not like Attachments in Chancery for want of an Answer, which are only as Attachments of Process, but are Writs on Contempt, in Nature of Executions, and so not bailable by the Sheriff. 3 New Abr. 542. Mich. 9 Geo. 2. the King v. Baskerville, Sheriff of Shropshire.

(W) *Peremptory* Mandamus; Granted in what Cases.

1. **M**andamus to restore Shaw to the Place of one of the Burgesses of Wilton, and after Argument on both Sides a peremptory Mandamus was granted; because the *Crime* for which they removed him, *was not well alleged in the Return.* 12 Mod. 113. Hill. 8W. 3. The King v. Shaw.

2. An *Action* was brought for a *false Return*, and a *Verdict* was for the *Plaintiff*, and a peremptory Mandamus was moved for and opposed, because it was a hard *Verdict* &c. And per Holt Ch. J. when an *Action* is brought for a *false Return*, and that is falsified, we cannot refuse a peremptory Mandamus. Sed Nota, this *Motion cannot be made till 4 Days* are past *after the Return of the Postea*; because the Defendant has so long to move in the Arrest of Judgment. 2 Salk. 430, 431. Trin. 11 W. 3. B. R. Buckley v. Palmer. — Pasch. 12 W. 3. B. R. The Case of the City of Exeter.

3. A *Bill of Exceptions* being mentioned in Time or not is no Cause to stop a peremptory Mandamus. But if a *Motion for a new Trial* had been made, it would have hinder'd it, and a new Trial would have been granted for refusing Evidence. 11 Mod. 175. Trin. 7 Ann. B. R. Wright v. Sharp.

So if a *Writ of Error* had been brought it would not stay the peremptory Mandamus.

Mod. 175. Trin. 7 Ann. B. R. in Case of Wright v. Sharp.

4. 9 *Annæ cap. 20. S. 2.* Enacts, that *Where any Mandamus shall issue to admit or restore any Burgesses &c. and a Return shall be made, and a Verdict be found for the Persons suing such Mandamus, or Judgment be given for them, a peremptory Mandamus shall be granted without Delay, as if such Return had been adjudged insufficient.* See (A) pl. 10. Dean and Chapter of Dublin v. Dougatt.

(X) *Exceptions* to the Writ, and at what Time.

1. **C**ase &c. in C. B. upon a *false Return* of a Mandamus, and upon a *Demurrer* to the Declaration the *Plaintiff had Judgment*, and the Court of B. R. was moved for a *peremptory Mandamus*, but it was denied; For, per Holt Ch. J. every Mandamus recites the *Fact præsent nobis constat per Recordum*; And ask'd, How can we say that in this Case we cannot take Notice of the Records in C. B. And said, that they might have brought their *Action* in B. R. 2 Salk. 428. Mich. 8 W. 3. B. R. Anon.

2. Upon a *Motion* to shew Cause why an Attachment shall not go for not making a Return to an Alias Mandamus, it was excepted to the Writ; because the Clause (*Uel Causam nclis significetis*) is omitted, and so it is a peremptory Writ without the Liberty of being heard; and for this Cause they would have excepted to the Writ, but the Court would not allow it, and said that they might make a Return, and then except to the Writ; for they have nothing before them 'till a Return; and so they directed in the Case of *St. John's College in Cambridge*, and tho' no *Pluries* had iss'd in this Case, yet per Cur. in *extraordinary Cases*, where they are satisfied of the Irregularity and Disorder of the Place, they would require a Return to an Alias. And after, the Court ordered them to take a *Pluries*

5 Mod. 314
S. C. ———
Sid. 31
Town Clerk
of Nottingham's
Case

ries

ries with the usual Clause, and discharged the Rule, and gave Time to make the Return. Skin. 669. Mich. 8 W. 3. B. R. The King v. Owen.

3. Mandamus to the Justices in Sessions in the County of W. to admit one Peat to the Oath of Allegiance, and to subscribe the Declaration according to the Act of Toleration in order to qualify him to *teach in a Dissenting Congregation*, and it was granted; he *ought to suggest whenever is necessary to intitle him to be admitted*, and if that be not done, or if it is false, it will be good Matter to return on the Mandamus. Nelf Abr. 1148. Mandamus (A) pl. 46. cites Mod. Cases 310. Peat's Case.

(Y) *Judgment. And what shall be recovered.*

1. 9 Ann. cap. 20. S. 2. **E**Nacts, that *If on a Return to a Writ of Mandamus a Verdict be found for the Persons suing the Mandamus, or Judgment be given for them, they shall recover their Damages and Coits to be levied by Capias ad Satisfaciendum, Fieri facias, or Elegit; And in Case Judgment shall be given for the Persons making such Return, they shall recover Coits.*

(Z) *Discretionary Power of the Court in Granting or Refusing it.*

1. **S**ince the Statute 11 Geo. 1. for obliging Corporations to elect Officers, it hath been held, that this Court has a discretionary Power of refusing a Writ for that Purpose, but *may first receive Information* about the Election, and if dissatisfied about the Right, may send the Parties to *try it in an Information.* 3 New. Abr. 540. Hill. 8 Geo. 2. the King v. the Mayor and Burgesses of Tintagel in Cornwall.

Manor.

(A) *How it may be.*

Br Comprise
&c. pl. 34
cites 5 H. 7.
38.

1. **A** Man cannot make a Manor at this Day, tho' he makes a Gift in Tail reserving a Tenure and Suit to the Court. Because tho' he may create a Tenure, yet he cannot create a Court; For a Court Baron cannot be without Continuance Time out of Mind. 33 H. 8. Brook Nient Comprise. 31 & Ibidem 34, 35 H. 8. Brooke Tenure 102.

2. The King cannot create a Manor at this Day. Arg. Show. 142. cites Le. 26. Pasch. 27 Eliz. C. B. Marth v. Smith.

3. A Manor may be tho' but *one Tenant.* As if all the Lands which are held of the Manor escheat to the Lord, except the Lands of one Tenant, this Tenant holds the Lands of the Lord of the Manor; and the Seigniority between him and his Tenant is not extinct; but it remains. Per 3 Justices. And. 257. Trin. 30 Eliz. in Case of Long v. Hemming.

(A. 2) *Incident*

(A. 2) *Incident to it. What.*

1. **I**T was doubted whether a Manor, quatenus a Manor, has a Court Baron to hold Pleas; it is true, it has eo Nomine a *Court-Baron to have Suit*; but it was doubted, whether to *hold Plea without Prescription*. 12 Mod. 494. Pasch. 13 W. 3. Holm v. Hunter.

(B) What Thing may be Parcel of a Manor.

1. **A**N Annuity cannot be Parcel of a Manor. 22 E. 4.

Br. Comprife &c. pl. 23. & 26. cites S. C.

2. **A** Rent Seck may be Parcel of a Manor. 22 Aff. 53.

Jo. 235. Br. Prescription, pl. 51. cites S. C.

3. **A** Rent Seck may be Parcel of a Manor; For it may have a good Commencement. For perhaps, the Lord releas'd to the Tenant the Seigniorie reserving the Rent, or the Lord Paramount purchased the Demesne, in which Cases the Rent is Parcel of the Manor. 31 Aff. 23. adjudged.

Jo. 234. Fawlkner v. Bellingham.

can be Parcel of a Manor, but *Rent Service*. Per Popham Solicitor. Arg. Mo. 166.— If a *Mesnalty becomes a Rent by Surplusage*, those that are now Seck and sometimes were Service are Part of the Manor; but a *Rent Charge* cannot be Part of a Manor. Co. Litt. 150. b.

—No Rent

4. So before Time of Memory, the Lord might alien Parcel of the Manor to hold of the Lord Paramount reserving to himself a certain Rent, and this Rent used always alter to pass with the Manor; this shall be Parcel of the Manor. 22 Aff. 53. per Thorp.

A *Rent-Charge* may pass as Parcel of a Manor by Reputation, as by

shewing that the Bailiffs of the Manor had always received it as Parcel of the said Manor; and as Bailiffs of the said Manor had accounted for it as Parcel of the said Manor; and that the Lessees of the said Manor had enjoyed the said Rent as Parcel of the said Manor. Adjudged that this would have been good Matter to induce a Reputation to have incorporated the said Rent with the Manor. Le 15. Pasch. 26 Eliz. B R. Foreman v. Bohun.—Mo. 190. S. C. debated but no Judgment.—A *Rent-Charge by Prescription* may be Parcel of a Manor, and may pass without the Words *Cum Pertinentiis*; As of *Rent-Charge* granted with the Manor to one Coparcener, for Owelty of Partition; Per Mead and Windham J. But Anderson and Fenner Serjeants contra. Godb. 3. pl. 4. Pasch. 22 Eliz. in C. B.—It is a good Title in Assise of Rent, that the Plaintiff and all Lords of the Manor of D. have been seised of the Rent Time out of Mind, as Parcel of the Manor; per Hill, to which Hankford agreed. Br. Titles, pl. 11. cites 12 H. 4. 8.

5. So between two Coparceners upon Partition of two Manors a Rent for Equality may be assigned to one with a Manor, and this Rent has so continued Time out of Mind in the Hands of the Lords of the Manor, this Rent shall be said Parcel of the Manor. 22 Aff. 53.

Br. Comprife &c. pl. 27. cites S. C. and yet it is a *Rent in Gross*.

6. A *Castle* may be Parcel of a Seigniorie. Br. Brief, pl. 165. cites 7 H. 6. 36.—It may be Parcel of a Manor. Br. Comprife &c. pl. 35.

7. In Scire facias to execute a Fine of the Manor of D. or Hundred of Pole demanded Judgment of the Writ; For the Hundred is Parcel of the Manor, and because the Fine was as above, and he cannot vary from the Fine, the Writ was awarded good. Brook says, and so see it is admitted, that a *Hundred* may be Parcel of a Manor, but it seems, that it may be Appendant to the Manor but not Parcel. Br. Variance, pl. 84. cites 72 H. 6. 1, 2.

Br. Manor, pl. 4. cites S. C. and Brook says, see 8 H. 7. 1. that *leet* may be Parcel of a Manor.

8. In Quare Impedit it was greatly argued, if an *Advowson* may lie in Tenure; and if it may be Parcel of a Manor, or only Appendant; For it seems to me, that it may be *Parcel Appendant, but not properly Parcel*. Br. Comprife &c. pl. 34. cites 5 H. 7. 38.

S. C. cited Cro. E. 599. But to have *Deinum Garbam*, or *Cumulum Garbarum seu Granerum* of all his Tenants within his Manor may be Parcel. Cro. E. 5 Mich. 99. 59 & 40 Eliz. B. R. Pigot v. Herne.—Ley. 45. in Stephens's Case.

10. *Catalla felonum* cannot be Parcel of a Manor. Cro. E. 293. Sherwood v. Winchcomb.

11. A Vicaridge may be well Parcel to a Manor; per Coke Ch. J. 3 Buls. 91. cites 5 R. 2.

12. A Warren is not Parcel, nor any Member of a Manor, but it may be appertaining, but that is by Prescription. Cro. E. 547. Hill. 39 Eliz. C. B. in Case of Bowlton v. Hardy.

* S. P. Br. Comprise, pl. 32. cites 32 H. 6. 9.—S. P. Le. 28. in Case of Marsh v. Smith, cites S. C.—Tho' a Manor may be Parcel of another Manor, yet it can not be Parcel of another Manor and both to be in Esse at the same Time; For being Liberties and Franchises of the same Nature Non possunt Stare in simul. And a Fortiori, such Manor held by Copy of another Manor cannot be a Manor to hold a Court Baron; For he can have no Franktenants to hold of him; For a Copyhold Manor is not capable of an Escheat of Freehold. For that which comes instead of another, ought to be of the same Nature, and then the Freehold Escheated, should be Copyhold which is repugnant and impossible. Yelv. 191. The King v. Staverton.

14. It seems that Lands held of one Manor cannot be given to be held of another Manor; But Lands which are Parcel of any Manor may; per Windham J. Godb. 101. pl. 118. Mich. 28 & 29 Eliz. C. B.

(B. 2) Appendant. What may be Appendant to a Manor.

1. A Franchise may be Appendant to a Manor, and may pass by a Feoffment thereof Cum Pertin. Contra of a Franchise in Gross, which a Man has by Grant; For this cannot be granted over. Br. Quo Warranto, pl. 6. cites 6 E. 2. 7. It. Canc.

2. A Vicaridge may be Appendant to a Manor; per Coke, who said, he had seen one so. But 5 R. 2. Quare Imp. is adjudged Contra. Roll R. 237. Mich. 13 Jac. B. R. in Case of the King v. Bp. of Norwich.

(C) What shall be said Parcel of the Manor.

As if A. has a Manor in the County of W. and B. holds Lands of the same Manor in the County of D. by Rent and Services, this Rent and Services are Parcel of the Manor, and in demanding of the Manor, he shall demand it in the Counties of W. and D. where he shall make Surmise. Br. Manor, pl. 2. cites 22 H. 6. 53.—Br. Estopple, pl. 2. cites S. C.—S. P. Br. Comprise, pl. 30. cites

1. THE Land held in Fee of a Manor is not Parcel of the Manor; But the Rent and Services issuing out of it are Parcel of the Manor. Brook Manor. 2 Collect. in Abridgment, 22 H. 6. 53.

cites 8 E. 4. 20.—S. P. But per Eyres J. The *Rent* may be Parcel of the Manor, and so may the Services, tho' the Land is Frank-fee, and whatever is holden of the Manor is not Part. 12 Mod. 13. Parker v. Winch.—Nothing is Part of the Manor but Demesnes and Services, and not the Lands of the Tenants, and Infranchisement only alters the Manner of their Tenure. Hard. 131. in Case of Rich v. Barker.

2. *Tenant in Tail of a Manor discontinues 3 Acres thereof for his Life, and after discontinues the Manor, the Issue, in Formedon of the Manor, shall make an Exception of the three Acres*; and therefore it seems that it is Parcel of the Manor in Reversion severed before the Time, but Quære, if it be not only Parcel of the Manor in Right, and not in Reversion nor in Possession. Br. Comprife, pl. 36. cites 19 E. 2. and Fitzh. Bre. 845.

3. If a *Manor and 200 Acres of Land descend to two Parceners, who make Partition, and one has the said 200 Acres, and the other has the Manor and 10s. Rent per Ann. for Equality of Partition, which 10s. has gone with the Manor Time out of Mind &c.* Inasmuch as this was an ancient Partition, there, whosoever has the Manor, shall have the Rent, and so it seems, that by the Continuance the Rent is become Parcel of the Manor. Br. Partition, pl. 37. cites 22 Aff. 53. per Thorp.

4. If a *Manor be held of another Manor, and after Escheats, this is Parcel of the first Manor, and the Name is nor altered by it.* Br. Comprife &c. pl. 32. cites 32 H. 6. 9. and Fitzh. Barre.

5. If a *Lease for Life, or Gift in Tail, is made of Parcel of the Manor, there during this Interest the Land is not Parcel of the Manor in Possession; but the * Reversion is Parcel of the Manor.* Br. Comprife &c. pl. 19. cites 7 H. 7. 8.

Br. Comprife
&c. pl. 9.
cites 36 H.
6. 19, 20.—
Br. Comprife
&c. pl. 27.

cites Lit. Chapt. of Attornment fol. ultimo accordingly, and that an Entry into the Manor is no Disseisin of the Parcel leased, if the Lessee be not ousted; And so it seems that it does not pass by a Grant of the Manor; For it is severed for the time.—Lands in Lease for Years are not Parcel of the Manor during the Continuance of the Lease, but the Reversion thereof is Parcel. Per Cur. 5 Mod. 246 Winter v. Loveday.—Ibid. 379. 382. S. C. —* S. P. and by the Grant of the Manor the Reversion passes by Attornment of the Donee or Lessee. Co. Litt. 324 b. — But if the Lord makes a Gift in Tail or Lease for Life of the whole Manor, excepting Black Acre Parcel of the Demesnes of the Manor, and after he grant away his Manor, Black-Acre shall not pass; because during the Estate Tail, or Lease for Life it is severed from the Manor, Co. Litt. 324. b.— And so note a Diversity, that a Reversion of Part may be Parcel of a Manor in Possession; But a part in Possession cannot be Parcel of the Reversion of a Manor expectant upon any Estate of Freehold. Co. Litt. 325. a.— But if a Man makes a Lease for Years of a Manor, excepting Black-Acre, and after grants away the Manor, Black Acre shall pass; Because the Freehold being intire, it remains Parcel of the Manor, and one Præcipe of the whole Manor shall serve. Co. Litt. 325. a.— Whereas in Case of the Gift in Tail, or Lease for Life excepting any Part, there must be several Writs of Præcipe, because the Freehold is several. Co. Litt. 325. a.— Pl. C. 103. b. Arg. in Case of Fulmerstone v. Steward.

6. *And where Disseisin or Feoffment upon Condition is made of Parcel of the Manor, this is not Parcel of the Manor till a Regress.* Br. Comprife &c. pl. 19. cites 7 H. 7. 8.

7. *Infra manerium* is within the proper Lands of the Manor, and not the Tenancy. Ben. 112. Marg. Mich. 3 & 4 Eliz.

8. Lord, Mesne and Tenant; *Mesne purchases the Seignory, and afterwards purchases the Tenancy*; now the Tenancy is become Parcel of the Manor. Savill. 21. Pasch. 24 Eliz. Hutton v. Gifford.

9. *Advowson appendant*, as the Soil upon which the Church is built, is Parcel of the Manor; Per Anderson Ch. J. Le. 28. Pasch. 27 Eliz. C. B. in Case of Marth v. Smith.

10. If I grant *Black Acre* (which is Parcel of the Manor of D.) and the Manor of D. There Black Acre shall pass as Parcel of the Manor; Per Anderson Ch. J. who said he could shew an Authority, which Periam J. granted; because it enforced the first Grant. Godb. 130. Mich. 28 Eliz. C. B. in Case of Green v. Harris.

11. *Land incroached out of the Wast of a Manor is still belonging to, and a Parcel of the Manor*; Per Lee and Dodderidge J. Godb. 411. Trin. 21 Jac. B. R. in Sommers's Case.

12. If a *Tenancy escheats* to the Lord, it becomes part of the Manor; but if the *Lord purchase* part, it is only holden of the Manor, and not part of it; but the *Rents and Services* are part. Per Holt. 12 Mod. 138. Mich. 9 W. 3. Anon.

But the Freehold of Copyholds is part of the Demesnes of the

13. The *Freeholds themselves* can never be Parcel of the Manor, but it is the *Services*. Per Holt Ch. J. 11 Mod. 53. pl. 28. Pasch. 4 Ann. B. R. Quære.

Manor, and so is the Pleading. Arg. Skin. 192. Trin. 36 Car. 2. C. B. in Case of Lemon v. Blackwell.

(C. 2) Demesnes of the Manor. *What.*

1. **B**orough, Burgus is a Thing in *Demesne*. Kelw. 76. Mich. 21 H. 7.

Copyholds are as the Demesnes of the Manor, and are the

2. Copyhold is Parcel of the *Demesnes* of a Manor, and there is no *Copyhold* but was at first *Demesne Land*. Per Ley Ch. J. 2 Roll. R. 236. Mich. 20 Jac. B. R. in Case of Smith v. Reynard. Lord's Freehold. Cro. J. 559 in Case of Pimmock v. Hilder.——S. P. because the Tenancy being at the Will of the Lord, the Lands are supposed to be always in his Hands, but in vulgar Acceptation it is otherwise. 5 Mod. 246. Trin. 8 W. 3. Winter v. Loveday.——By Grant of the Demesnes the Copyhold will pass. 2 Salk. 538. S. C.——But otherwise in the King's Case. 1 Rep. 46. b. in Altonwood's Case——2 Roll. R. 236. Smith v. Reynard.——All *Copyholds* are Demesnes; for it is an *inseparable Quality* of every Copyhold, that it was time out of Mind Parcel of the Manor. Admitted. Carth. 428. Mich. 9 W. 3. Winter v. Loveday.

3. The *Freehold of the Copyholds* is part of the Demesne of the Manor, and so is the Pleading. Arg. Skin. 192. Trin. 36 Car. 2. C. B. in Case of Lemon v. Blackwell.

(D) Parcel. *Severance* of the Manor.

1. **I**f Baron and Feme seised of a Manor in Right of the Feme lease an Acre to another for Life, yet the Reversion continues Parcel of the Manor; (For this is not any Discontinuance, the Feme joining in the Lease.) 18 E. 3. 39. 18 Aff. pl. 2.

So in the King's Case. Het 14. in Case of Hartop and Tuck v. Dalby.

2. If a Man leases all the Demesnes of a Manor for Life rendering Rent, yet the Reversion is Parcel of the Manor, so that it shall pass by Grant of the Manor. D. 6. 7. El. 10.

Fol. 121.

Het. 14 Hartop and Tuck v. Dalby,——Jenk. 311. pl. 91.

3. If a Man grants an Advowson appendant for Life, the Reversion is Parcel of the Manor. 5 Rep. 11. b. Ives's Case. 38 D. 6. 38.

Het 14 in Case of Hartop and Tuck v. Dalby. Held to be only a Dispendency pro Tempore.——Jenk. 310. pl. 91.

4. But if a Man lease the Manor for Life, excepting the Advowson, the Advowson in Possession cannot be parcel of the Reversion of the Manor expectant upon the Estate for Life. 5 Rep. 11. b. Ives's Case. 38 D. 6. 38.

5. But otherwise it would be in this Case, if the Lease of the Manor was for Years only. 5 Rep. 11. b. Ives's Case. Contra Com. 104.

6. If Baron and Feme, seised of a Manor in Right of the Feme, lease an Acre to another for Life, and after they grant the Reversion thereof in Fee to the same Lessee, it seems, that this severs the Acre from the Manor during the Continuance of this Estate. 18 E. 3. 39. 18 Aff. pl. 2.

If Baron and Feme seised of a Manor in Right of the Feme, make Feoffment of one Acre to

another, by which it is severed from the Manor, and after make Feoffment of the Residue to him also, and after levy a Fine, Sur Release, to the Feeffee of the said Manor; this extinguishes the Right of the Feme in the Acre severed from the Manor; For this was Parcel of the Manor in Right as to the Feme who had Right to recover it by a Cui in Vita. 18 E. 3. 39. 18 Aff. pl. 2. Curia. See Release (C. a) pl. 1.

7. If a Man leases 10 Acres of the Demesnes of a Manor for 10 Years rendring Rent, and after demises the entire Manor by the Name of the Manor &c. for 20 Years to commence at a Day to come. An Interest of 10 Years in the 10 Acres shall pass to the Lessee of the Manor after the Expiration of the first 10 Years, tho' no Attornment be had by the first Termor; For this passes as Parcel of the Manor, and not as a Reversion; For the 10 Acres never were severed from the Manor; But the Franktenement and Fee of it remain Parcel and Member of the Grofs, and Body and Name of the Manor. Dy 18 El. 350. 18. Com. Bracebridge 423.

S. P. Benl. 283 pl. 286. Mich. 17 & 18 Eliz. Hailey v. Round and East.

8. In Allise, the Baron and Feme was seised of the Manor of D. in Right of the Wife; they lease four Acres to A. for Life, and after the Baron grants the Reversion to F. in Fee. A. attorn'd, and after they alien'd the Manor to F. in Fee, and the Baron and Feme levy'd a Fine Sur Conuissance de Droit come ceo &c. to F. of the Manor; the Baron dies, and after his Death, the Feme makes Contention for the four Acres, because as she thought they were severed by the Lease and did not pass by the Fine; and by the Opinion of the whole Court, they were Parcel of the Manor in Reversion, and passed by the Fine, and were Parcel of the Manor as to the Feme; quod nota. Contra tit. Attornments in * Littleton, Fol. ultimo & Quære. Br. Fines pl. 76. cites 17 E. 3. 52. and 78. 17 Aff. 17.

* Co. Litt. S. 591. & pag. 325 & the Notes there.

9. The Lord of a Manor, wherein there were Copyholders for Life, made a Lease of a Copyhold Tenement, called Harris Farm, to A. and B. for eight Years to commence after the Death of the Lord and his Wife; and by the same Indenture they leased the whole Manor to A. and B. as before; the Copyholder of Harris's Farm surrendered, and then the Lord granted the Copyhold to another to Hold according the Custom of the Manor; afterwards he and his Wife died, upon whose Death the Lease made by the Lord to A. and B. did commence; A. entered and sold his Part, and died. B. entered on the whole as survivor, and the Copyholder entered on him; the Question was, whether the Survivor should have this Harris's Farm, as in Grofs, and not as Parcel of the Manor by the last Lease. Adjornatur. Godb. 127. Mich. 28 Eliz. C. B. Green v. Harris.

(E) Severance.

See (D) (Q).

1. If a Bishop be seised in Fee in Right of his Church of a Manor, and after the Bishop makes a Lease for Life of a Tenement, not warrantable by any Statute, yet the Reversion thereof continues Parcel of the Manor, and will pass by Name of the Manor with Attornment of the Lessee. For this was not any Discontinuance, as if Tenant in Tail had made such Lease. Bakh. 11 Car. B. R. between Walter and Jackson. In Writ of Error upon Judgment in Bank. Said per Barkley, that it was so adjudged in Bank in this Case, and the Court then agreed it, and so affirmed the Judgment. But it was not enter'd till Trin. 11 Car. Intratur Bill. 10 Car. Rot.

2. But if Tenant in Tail be of a Manor, and he makes a Lease for Life of a Tenement not warrantable by the Statute 32 H. 8. This has severed the Reversion of this Tenement from the Residue of the Manor, so that the Reversion shall not pass by the Grant of the Manor with Attornment of the Lessee; Because by the Lease this was a Discontinuance, and a new Fee gained, which was not Parcel of the Manor. Pasch. 11 Car. B. R. in the said Case of *Walter and Jackson*; laid per Barkley to be agreed in Bank.

3. If the Lord of the Manor releases to the Tenant of the Manor the Seignory saving the Rent, this Rent shall be Parcel of the Manor. 31 Aff. 23.

4. So if there be Lord and Tenant of a Manor, and the Lord purchases a Tenancy held of the Manor, by which the Seignory is extinct, between the Tenant of the Manor, who is the Mesne as to this, and the Tenant of the Tenancy; yet the Surplus of the Rent continues Parcel of the Manor to the Tenant of the Manor, who is the Mesne. 31 Aff. 23.

5. If a Man holds by Suit of Mill of the Manor of D. and the Lord granted over his Mill and Suit, and dies, and the Heir of the Lord makes another Mill; he shall have the Suit; for the Suit is to the Manor, and not to the Mill. Br. Grants, pl. 162. cites Fitzh. Assise 399.

6. A seised of a Manor had Issue two Daughters, and died seised; the Daughters entered, and made Partition of the Demesnes only, but the Services of the Freeholders remained in Common; one of the Daughters took Husband, and the Husband and Wife made a Lease of the Moiety of the Manor to J. S. for Years by Parol rendering Rent; the Lessee entered into the Demesnes allotted by the Wife of the Lessor. The Husband died, and the Wife brought an Action of Wast. Per Anderson, by the Partition the Demesnes are now become in Gross, and sever'd from the Manor. 1 Le. 204. Pasch. 31 Eliz. C. B. *Thetford v. Thetford*.

7. A Manor may be granted, Parcel to be held by one Tenure, and Parcel by another, and yet remain entire. Het. 14. Pasch. 3 Car. C. B. *Hartop and Tuck v. Dalby*.

(F) *Destruction.* What Act or Thing will destroy a Manor.

* Fol. 122.

1. If all the Franktenements of a Manor escheat to the Lord, or * the Lord purchases them in Fee, this extinguishes the Manor; Because there cannot be a Manor without a Court Baron, and no Court Baron can be without Suitors. 33 H. 8. *Brook Nient Comprise*. 31 admitted. S. P. Br. Manor, pl. 5.—S. P. Br. Court Baron, pl. 22. cites 2 E. 6.—For Lord of a Manor cannot hold Court, nor do Justice without two Suitors. Ibid.

S. P. Br. Manor, pl. 5.—S. P. and therefore one Franktenement only cannot make a Manor. Br. Comprise, pl. 31. cites 33 H. 8.

2. So, if all the Franktenements of the Manor except one escheat, or the Lord purchases in Fee all but one, the Manor is extinct; Because there cannot be a Court-Baron without two Suitors. 33 H. 8. *Nient Comprise Brooke*. 31.

S. P. per Anderson, which Windham and Periam granted. Le. 204. in Case

3. If upon a Partition the Demesnes are allotted to one Parcener, and the Services to the other, and after the Demesnes descend to her who has the Services, this shall be a Manor again, and all Suits and Services shall be revived; For they were only suspended before. 12 H. 4. 25. b. Co. 6, 64. Finch. 18 H. 6, 26.

of Thetford v. Thetford.——S. P. And. 257. Trin. 30 Eliz. Long v. Heming.——By a Feoffment to A. of the Demesnes, and afterwards a Grant to A. of the Services the Court and Manor are destroyed. Litt. R. 129. per Vernon J.——A. seised of a Manor levies a *Fine of the Demesnes*; The Manor is gone for ever, and though after the Fine he is seised of his old Estate again, yet he has it in another Manor; For the Fine being sur Cognizance de Droit come ceo &c. presupposes a Feoffment. 6 Mod. 45. in Cafe of Ford v. Ld. Grey.——Sec (F. 2)

4. *Alienation of the Manor House*, which the Lord had in Possession, destroys not the Manor, if the Demesnes and Services remain. Per Holt. 5 Mod. 382. Mich. 9 W. 3. in Cafe of Winter v. Loveday.

(F. 2) Manor in Reputation. What is.

Sec Grant,
(H. 20)

1. **E**VERY Manor consists of Demesnes and Services, and a *Fine sur Grant and Render of the Services* destroys the Manor; yet it remains a Manor in Reputation. Per Holt Ch. J. Skin. 661. Mich. 8 W. 3. B. R. the King v. Bishop of Chetter.

(G) Making of a Manor into two.

Sec Copy-
hold (H)——
Dow
Partition
(H)——

1. **I**F 2 Coparceners make Partition, and Parcel of the Demesnes and Services is allotted to the one, and so other Parcel to the other, they have two Manors; Because it is by Act in Law, 18 D. 6. 27. 26 D. 8. 4. Cook. 6. 64.

And therefore it seems that they both shall hold Court; Quære inde; Freeholders as

For it was agreed for Law in the Star-Chamber, that it is no Manor if there be not two

2. In Scire Facias a Fine was levied between R. and M. of two Manors, by which M. acknowledged all his Right in the two Manors, viz. to be the Right of R. come ceo &c. for which acknowledgment R. granted and rendered one Manor to M. for Life, with two parts of the other Manor which N. held in Dower, to hold one Manor and two parts of the other Manor to M. for Life, the Remainder, after his Death, to R. in Tail; and that after the Death of A. the third part should remain to another; and so see a Manor divided. Br. Fines, pl. 17. cites 43 E. 3. 11.

3. If A. has a Manor which extends into two Towns, and he grants the Demesnes and Services in one Town, the Grantee has a Manor in that Town, and he may keep Court; and so has the Grantor a Manor in the other Town, and he may keep Court there. Per two J. Cro. E. 19. Pasch. 25 Eliz. in C. B. in Cafe of Harris and Haies v. Nichols.

Cro. E. 38. S.P. Per Anderson and Windham J. against Periam J. Morris v.

Smith and Paget.——Ow. 138. S. C.——Grantee of the Inheritance of Copyhold for Life cannot hold a customary Court to grant any new Copy. Cro. E. 103. Per omnes J. and Barones in Cam. Scacc Trin. 30 Eliz. C. B. in the Cafe of Melwich v. Luther and Ux.——443. Bright v. Forth.——6 Mod. 151. the Queen v. the Dutchess of Buccleugh Contra.

4. A. seised of the Manor of C. which extends into L. M. and N. conveys to J. S. and his Heirs All that his Manor of N. in N. By this a Manor passeth, and J. S. may hold a Court Baron; Adjudged by two Justices against 1. And Anderson conceived the Form of Conveyance good enough, but it might have been better, had it been All that his Manor of C. in N. Cro. E. 39. Pasch. 27 Eliz. C. B. Morris v. Paget and Smith.

Le. 26. Marsh v. Smith S. C.——Carel was of Opinion, that by Force of such Grant

J. S. might hold a Court Leet in N. there being a Leet within the Manor of C. and that it might be well divided. Cro. E. 39. in Cafe of Morris v. Smith and Paget.——A. suffered a Recovery of the Manor, excepting N. in which were several Copyholders for Life. A Court was afterwards held at N. where a Copyhold was granted for Life to J. S. But such Grant was held to be void; For there was no such Manor as N. either before or now. Cro. E. 442. Mich. 37 & 38 Eliz. C. B. Bright v. Forth.——Per Anderson,

if this Severance had been of *Coppholds of Inheritance*, the Coppholders and their Heirs should have had it. But it *can never be surrendered*; for Surrenders are by Custom, and therefore they ought to be in the Court of the Manor. And a Surrender to the Lord himself in his House, or out of Court, is not good. Quod Beamond conceffit, and Judgment accordingly. Cro. E. 442. Mich. 37 & 38 Eliz. C. B. Bright v. North.

Ow 138. S. 5. A Manor may be determined, *divided* and *suspended*. Per Anderson C. by the Ch. J. Le. 27. Pasch. 27 Eliz. C. B. Marth v. Smith.
Name of Morris v. Paget.—A Manor is an *intire* Thing, and cannot be severed. 6 Mod. 151 the Queen v the Dutchels of Bucclogh.

6. A. seised in Fee of the Manor of M. extending into M. and N. and also of other Lands in N. by his Will *devifes* the Manor of M. to B. his eldest Son and Heir in Tail, and *his Lands in N.* to C. his younger Son &c. Per 3 Justices, and shall have that part of the Manor of C. which lies in the Town of N. 2 Le. 190. Mich. 32 Eliz. C. B. Sir Anthony Dennis's Case.

7. If I grant away the *Moiety* of my Manor, we shall both hold Courts. So if J. be *disseised of a Moiety*, or the *Moiety be in Execution by Elegit*. Per Walmley J. Goldsb. 117. pl. 15. Hill. 39 Eliz. Smith v. Bonfall.

8. A Forcible Entry by a Stranger may be into the *Moiety of a Manor*, and that shall not be an Entry into the other *Moiety*; Per Jones J. But it may be *otherwise by Parceners*. Doderidge J. said, that before Partition one Parcener has *Dinodium Munerii*, and after *Medietatem*. And yet inasmuch as a *Moiety* has all the Privileges of a Manor, *it is a Manor and not the Moiety of a Manor after Partition*; And yet it may well be alleged in such Case, that the Entry was into the *Moiety of the Manor*, because that which is now a Manor is but the *Moiety of a Manor*, and an Exception taken to the contrary was held by the Court not to be of any Moment. Lat. 224. Beverley's Case.

(H) Reviver. When a Manor is extinct, what Act shall revive it.

Arg. And. 84. Het. 14. cites 38 H. 6. 36. Le. 204 in Case of Thetford v. Thetford.

* It should be (4.)

1. IF Coparceners of a Manor make Partition, whereby the Services are allotted to the one, and the Demesnes to the other *et. the Manor is destroyed*; yet if after one of them dies without Issue, by which her part comes to the other, this shall be a Manor again; Because it was severed and re-joined by Act in Law. 12 D. * 6. 25. b. Curia. 18 D. 6. 26. 6 Rep. 64. Finch's Case.

2. If the King grants the *Demesnes* of a Manor for *Life*, After Lessee's Death it is a Manor again. Het. 14. in Case of Hartop v. Tuck and Dalby.

(H. 2) *Seigniorie*. Revived, after it has been in the Hands of the Crown.

The same Law if the King enters for Mortmain, and makes Feoffment Tenend' de Capitalibus Dominis feodi; the Seigniories are revived. Ibid.

1. IF Lands *escheat* to the King, and he gives them *Tenend' de Capitalibus Dominis feodi per servitium debit. & de jure consuet'* There the Seigniorie of the Subject of whom the Lands were held before the Forfeiture is amply revived, and the King by his Patent excluded of any Tenure or Seigniorie. Arg. Mo. 162. cites 33 H. 6. 7. per Prifot.

Br. N. C. 196. pl. 92.

2. If the King has Land by *Forfeiture of Treason*; by this all Tenures are extinct, as well of the King as of others; and there if this Land be after given to another by Parliament saving to all others their Rights, Rents, Services &c. There the Seigniories of common Persons are not revived. 27

H. 8. Brook Parliament, 74. S. 92. Davies Proxies 4. Because the saving cannot save that which is not in Elfé. See Tenure (1) pl. 9.

(I) *What is a Manor. Or of what it must consist.*

1. **T**HAT which *consists of Copyholders only*, and has no * Freeholders, though it be known by the Name of a Manor, yet it is not in Law a Manor for want of Freeholders. 6 Rep. 47. Mich. 4 Jac. C. B. in Sir Moyle Finch's Cafe.——cites the Cafe of Vines v. Durham.—— 2 Roll. 45. 712.——Buls. 57.

* There must be two Freeholders at least. Yelv. 190, 191. cites 32 H. 8. Comprise. Br. 31.

2. Every Manor *must consist of Demesne and Services*, and those are sufficient to support the Being of a Manor; For if the Lord aliens his Mansion-House which he had in Possession, yet if the Copyholds and Services remain, it is still a good Manor. Per Holt Ch. J. 5 Mod. 382. Mich. 9 W. 3. in Cafe of Winter v. Loveday.——Without the Services it cannot be a Manor. Arg. And. 105.

(K) *What passes by the Word Manor.*

1. **B**ARON seised of a Manor in Right of his Wife aliened 4 Acres for Life, and after the Baron granted the Reversion to N. in Fee, and the Tenant attorned, and after the Grantee purchased the intire Manor, to whom the Baron and Feme levied a Fine for Conuifance de droit come ceo &c. of the Manor; and by the Opinion of all the Court in Banco, the Fine extends to the 4 Acres which were severed, for they were Parcel of the Manor in Reversion as to the Feme, tho' they were severed in Possession pro tempore; Nevertheless, by Littleton, Title * Attornments, fol. ultimo, it is not Parcel of the Manor. Br. Manor, pl. 3. cites 18 Aff. 3.

* Co. Litt. S. 591. and see pag. 325. the Notes there.

2. If a Man leases his Manor for Life, except the Advowson, and after grants the Manor Cum Pertin', the Advowson does not pass; for it is not Parcel of the Manor at the Time; So of an Acre of Land. Per Priot. Br. Comprife &c. pl. 28. cites 38 H. 6. 37, 38.

S. P. Br. Grants, pl. 60. cites 38 H. 6. 34 per Priot.——

in Fee is made of a Manor, to which an Advowson is appendant, and Livery is made in the Demesnes, but no Attornment, it was held, that the Advowson shall pass, but none of the Services. 3 Le. 193. Mich. 29 Eliz. B. R. Long's Cafe——Sav. 103. Long v. the Bishop of Gloucester and Hemings. S. C.——If Livery be not made, the Advowson shall not pass, tho' the Word (Grant) be in the Deed; For then the Advowson shall be severed from the Manor which was annexed to it. 2 Roll. R. 91. Trin. 17 Jac. B. R. Atwell v. Harris.

If a Feoffment in Demesnes, but no Attornment, it was held, that the Advowson shall pass, but none of the Services. 3 Le. 193. Mich. 29 Eliz. B. R. Long's Cafe——Sav. 103. Long v. the Bishop of Gloucester and Hemings. S. C.——If Livery be not made, the Advowson shall not pass, tho' the Word (Grant) be in the Deed; For then the Advowson shall be severed from the Manor which was annexed to it. 2 Roll. R. 91. Trin. 17 Jac. B. R. Atwell v. Harris.

3. If a Man has a moveable Estate of Inheritance in 13 Acres Parcel of a Manor, they will pass by the Name of the Manor. Co Litt. 48. b.

4. The Lord purchases in some Tenancies of the Manor, and after sells the Manor; the Tenancies do not pass. Jenk, 232. pl. 4. cites D. 265.——Tenancies are no Part of the Manor. Arg. 2 Show. 440. cites 5 Rep. Mountjoy's Cafe.

5. Two Coparceners of a Manor, consisting of Copyholds, Freeholds, and Demesnes, make Partition of all except the Copyhold and Free Services, after one of them having part of the Demesnes severally by herself, as the other had the other Part, and the * Demesnes remaining in Coparcenary between them makes Lease of her Moiety of the said Manor; whether the part allotted to her that made the Lease passed by the Name of the Moiety of the Manor, was not agreed by the Court, but by the better Opinion of the Court, it seemed that the Demesne was severed from

S. C. 1 Le. 204. Patch. 31 Eliz. C. B.——*(Demesnes) is false printed there, and it should be the Services of the Free-

holders and Copyholders remaining in Coparcenary the Manor, and therefore passed not by that Name. And. 221. Pasch. 28. Eliz. Thetford v. Thetford.

6. By *Devise* of a Manor, *Rents and Services* will pass. 2 Le. 43. Hill. 29 Eliz. C. B. Inchley v. Robinson.

S. P. For they shall not be taken by Intendment. But it is otherwise in a Conveyance; For there the Intent of the Parties will help it. Cro. E. 524. S. C.

7. By a *Fine* levied of a Manor, nothing but a Manor in Truth passes, and not a *Manor in Reputation*. Cro. E. 708. Mich. 41 & 42 Eliz. C. B. Mallet v. Mallet.

* Comprehends the Freeholds as well as the Demefnes and Services. And a Survey of a Manor shall be as well of the Freehold Lands as of the Demefnes. Arg. Ow. 74. 36 Eliz. in Case of Higham v. Deff.—and there is no Difference where the Parcels are expressed, and where implied. Arg. Lat. 63.

8. The * Word Manor includes all Estates and Degrees of Estates of or in the Manor, and by the Grant of a Manor the *Reversion* will pass, even in the King's Case. 6 Rep. 56. Trin. 4 Jac. Ld. Chandos's Case.—D. 233.

If a Man *Leases* 3 Acres, Parcel of his Manor, to J. S. for Life, and after grants the Manor cum Pertin', the *Reversion* shall pass, for this is Parcel in Reversion. Per Prisot. Br. Comprise &c. pl. 28. cites 38 H. 6. 37, 38.—S. P. Br. Grants, pl. 60. cites 38 H. 6. 34 per Prisot.

But it should be really so, and not in Reputation only, to challenge and hold the Privilege of a Manor, as to hold a *Court Baron* &c. Yelv. 191. Mich. 3 Jac. B. R. the King v. Staverton.

9. *Reputation* is sufficient to pass a Thing in Conveyance by Name of a Manor, which in Truth is not a Manor. Yelv. 191. Mich. 8 Jac. B. R. cites 6 Rep. Sir Moyle Finch's Case.

(L) By what Words a Manor passes.

1. A Manor passes by the Name of a *Knight's Fee*. Arg. Ow. 82. cites 7 E. 3.—Bull. 54. Arg. cites 17 E. 3. 8.

But contrary, if the Manor be by Homage, Fealty, Escheage and Rent, and the Rent only is granted; And if the Lord grants his Rent cum Pertin. reserving to him a Relief and Escheat; Quere if the Manor shall pass; Brook says, it seems to him that it shall, if Fealty and Rent makes the Manor; Contrary, where the Manor consists in Homage, Fealty and Rent; Per Thorpe Ch. J. Br. Grants, pl. 76. cites 29 Aff. 20.

2. If a Manor consists of Fealty and Rent, and the Lord grants the Rent, by this the Manor shall pass. Per Thorpe Ch. J. Br. Grants, pl. 76. cites 29 Aff. 20.

3. If a *Feoffment* be made of all his Tenements in D. and there is a Manor which extends into D. and S. nothing shall pass which is in S. and so fee there that it is admitted, that a Manor may pass by the Word Tenement. Br. Grants, pl. 53. cites 9 E. 4. 6.

* Ibid. cites 4 E. 3. fo. 124. pl. 25.—A. gives

4. A Manor may pass by the Name of 8 L. Land; or of a * *Mesuage*. Arg. 1 Buls. 54. cites 6 E. 3. 243. and 9 E. 3.

the Capital Mesuage and all other Lands and Tenements with the Advowson Appendant to it lately belonging to the Monastery of Milton. This comprehends the Manor. For the general Words of all other Lands and Tenements include all in general; For if I give all my Lands and Tenements belonging to such a Monastery, my Manor which belonged to it passes, tho' not given by Name of a Manor. Sav. 104. Trin. 30 Eliz. in Case of Long v. Bishop of Gloucester.

5. If a Man has the Manor of D. and he Leases his Manor of D. or his Manor called D. or his Manor in D. in every Case the Manor passes, per Manwood Ch. B. Mo. 235. says it was so resolved in Anno 1 Eliz.

By this word (Hereditament) the Manor will pass; per Andersonson.

6. The Queen seized of the Manor of Gascoigne, and of the Grange, called Gascoigne Grange in D. did grant all her Lands, Tenements, and Hereditaments in D. It was adjudged per tot. Cur. that the Manor did not pass, and per Anderson Ch. J. it would be the same in the Case of a Common Person. Godb. 136. Pasch. 28 Eliz. C. B. Giles v. Newton.

(M) What

(M) *What Things relating to a Manor pass by what Words.*

1. **M**embers shall be taken for the Towns and Hamlets, where the Manor has Jurisdiction; per Dyer. Ow. 31. Pasch. 6 Eliz. 105. Arg. Golds. Anon.

2. A. lets the Scite of his Manor with all his Lands to the said Manor Appurtenant; Hereby all the Demesne Lands do pass. But if it were with all the Lands appertaining to the said Scite, nothing passed but the Manor-place; per Brown. Ow. 31. Mich. 7 Eliz. Anon.

(N) Manor *suspended.*

See (F) pl. 5.

1. **I**F a Man has a Seigniorie in Fee, and Lands descend on the Part of the Mother to him, the Seigniorie is not extinguished, but suspended. For if the Lord dies without Issue, the Seigniorie shall go to the Heir of the Part of the Father, and the Tenancy to the Heir of the Part the Mother, and yet the Father had as high Estate in the Tenancy as in the Seigniorie. per 2 J. Godb. 4. pl. 5. Hill. 23 Eliz. C. B.

2. If Lord and Tenant are, and the Lord releases all his Right to the Tenant and Heirs of his Body, by this the Seigniorie is suspended during the Tail; and so see that it is taken, that this is not any Extinguishment, tho' the Release be made to him who has Fee Simple in the Land; the Reason seems to be that the Release goes by way of Deafeance of Estate of the Seigniorie, which was in the Lord at the Time of the Grant, and then this shall enure by way of Grant. Br. Releases, pl. 86. cites 13 E. 3. and Fitzh. Voucher 120.

3. Contra where he, who releases, has nothing in him but a Right at the Time of the Release made. Ibid.

4. The Lord may release the Services to the Tenant, for Life of the Tenant, Br. View, pl. and after the Death of the Tenant the Lord shall have the Services again, 96. cites S. C. For the Ground in Littleton, that if a Man Releases for one Hour to him who has the Fee Simple, it shall serve for ever, is, where the Thing which the Tenant had is released, and the Tenant here had the Land, but not the Services, and therefore by such Release the Services are not extinct for ever. Br. Release, pl. 96. cites 13 E. 3. and Fitzh. Voucher 120.

(O) Services *extinguished.*

See Grant (Y) pl. 5, 4.

1. **I**F Three Acres are held by Suit of Court, and the Lord purchases one Acre of the Three, or grants his Seigniorie of one over, the Suit is gone for ever. But if one escheat, or be alien'd in Mortmain, for which the Lord enters, the Suit remains for the Residue, per Periam J. Mo. 203. Pasch. 27 Eliz. C. B. in Knight's Case.

(P) Severance of Parcel. By what Act.

1. **T**HREE Coparceners of a Manor; one levies a Fine sur Cognissance de Droit come ceo &c. of more Acres than the Manor contains. This is a Severance of a third Part of those Acres from the Manor. b. D. 333. pl. 30. Pasch. 16 Eliz.

2. If a Fine be levied of a Manor, and Conusee renders Part to A. for Life, and other Part to B. for Life, and the Rent of the Whole to C. till the Entry of A. and B. It is one entire Manor in the Hands of the Conusee. Arg. Godb. 129. Mich. 28 Eliz. C. B. in Case of Green v. Harris.

3. If

3. If I devise that my Executors shall sell Black Acre Parcel of my Manor, and die; it remains Parcel of the Manor till Sale made. So if the Heir sells the Manor, Black Acre shall pass; For it is but Executory, and remains Parcel till it be executed. Arg. Godb. 129.

4. If A. recovers Black Acre Parcel of a Manor; before Execution it is Parcel of the Manor, and shall pass by Grant of the Manor. Arg. Godb. 129.

(Q) Things severed. Where they shall be again Parcel.

So if Lease for Life be of a Manor except one Acre; during the
 1. IF one makes a Gift in Tail, or Lease for Life, of Parcel of the Manor; during those Estates the Land is no Parcel of the Manor, Pl. C. 422. b. Trin. 14 Eliz. Bracebridge v. Cook.

*In case the Acre is not Parcel of the Manor; but otherwise in the Case of a * Lease for Years.* 11 Rep. 47. b. in Liford's Case—cites 38 H. 6. 38. b. Pl. C. 103. in Fulmerston's Case.—* Arg. Cro. E. 522.—See (Q. 2) pl. 2.

2. A Man seised of a Manor in jure Uxoris, leased Part of it without the Wife for Years, the Reversion is not Parcel of the Manor; but otherwise if the Lease had been made by the Husband and Wife; per Manwood J. Le. 265. 20 Eliz. C. B. in Bracebridge's Case.

3. If 10 Acres of the Demesnes of a Manor are leased for 20 Years, and after a Lease is made of the Manor for 40 Years, there the Reversion of the 10 Acres shall pass presently, and yet it is not properly Parcel of the Manor during the first Term. And it seems, the Franktenement and the Fee of the 10 Acres remain Parcel of the Manor, but yet it is not in all Degrees Parcel. Sav. 113, 114. Pasch. 28 Eliz. in Case of Thetford v. Thetford.

*But if an Acre, or a House had been * excepted, and A. had afterwards purchased the Acre or the House, none of them should be Parcel of it again. And so a Difference between Partes Integrales Similares & Dissimilares, and between Partes Dissimilares solo annexas sine adherentes, and Domus & Partes Dissimilares Excrescentes, as Arbor.* 11 Rep. 50. Liford's Case.—cites 9 E. 3 2. a. b.—1 Roll. R. 101.—Cro. E. 522. in Case of Ive v. Samms.

D. 326. b—
 2 Roll. 100.—
 —But while the Soil is under Water the Jurisdiction belongs to the Admiral. 5 Rep. 107. ut ante.

4. Sale of a Manor to A. and his Heirs, except the Trees, and afterwards the Fioffee purchases the Trees, they are again made Parcel of the Inheritance, tho' they were absolutely divided for a Time. 11 Rep. 50. Mich. 12 Jac. in Lyford's Case.—cites 4 Rep. 63. Harlackenden's Case.

5. The Soil upon which the Sea flows and reflows viz. between High-water Mark and Low-water Mark may be Parcel of the Manor of a Subject. 5 Rep. 107. Pasch. 43 Eliz. Sir Henry Constable's Case.

6. If one grant away any Part of the Demesnes in Fee, they are severed from the Manor, and can never be Part of it again, tho' it be but for an Instant. Skin. 192. Trin. 36 Car. 2. C. B. in Case of Lemon v. Blackwell.—cites 6 Rep. 65.

7. Lands severed from the Manor can never after become Parcel of it in Reality, but it may in Reputation; as if Lands Part of a Manor be aliened away and repurchased, and an Unity of Possession for a considerable Time after. 6 Mod. 151. Pasch. 3 Annæ. B. R. the Queen v. Dutchess of Buccugh.

(Q. 2) Reversion. What passes by a Grant as Parcel of the Reversion. Things severed.

The Prior of B. leased the Scite and all the Demesnes of the Manor of W. to A. for Life render-

1. A. Seised of a Manor in Fee made a Lease for Years of the Scite and Demesnes of the Manor to J. S. and after the Lessor granted the Reversion of the same Manor in Fee, and the Lessee attorned. The Justices held that the Grantee took nothing by this Grant; that the Grantor had not any Reversion in the Manor, and that the Scite and the Demesnes are not the Manor. Bendl. 24. pl. 39. Pasch. 29 H. 8.

ing Rent, and after the Reversion of the Scite and Demesnes and the Residue of the Manor came to the King by the Dissolution of the Priory, and after the King granted the Manor with the Appurtenances to C. for 21 Years by the Words, *All Rents, Services, Profits, and Hereditaments of the said Manor; but no express mention of any Reversion was made, nor any recital of the Lease of the Scite and Demesnes aforesaid;* but a Rent of 74 l. was reserved to the King upon the Lease of the Manor. By the better Opinion the Reversion passed by the Name of the Manor. D. 233. pl. 10. Mich. 6 & 7 Eliz. Aprice v. Rogers.

2. If A. lets an Acre parcel of a Manor for Years, the Reversion there is Parcel of the Manor, and shall pass by the Grant of the Manor; but a Lease of a Manor excepting an Acre, the Acre excepted is not any Part of the Manor to any Purpose, and shall not pass by a Grant of the Manor. *Pl. C. 423. Bracebridge v. Cook.—11 Rep. 47. b in Liford's Case.—Cro. E. 522. Trin. 38 Eliz. Arg. in Case of Ive v. Sams.—cites Pl. Com. 104. per Bromley and 38 H. 8.*

cept one Acre with the Advowson the Acre with the Advowson, will not pass by grant of the Reversion but are severed and disunit from the Manor for ever as a Branch or other Member divided from the Body. 11 Rep. 50. Mich. 12 Jac. in Liford's Case.—2 Le. 221. Bawel v. Lucas. if the Lease be for Years or for Life.—A Lease for Life is made of a Manor, excepting an Acre; By Grant of Reversion of the Manor this Acre does not pass; otherwise if Lease for Years is made with such Exception. A Thing in Possession cannot pass as parcel of a Thing in Reversion, where Lease is made for Life with such Exception; otherwise, if Part of the Manor is leased for Life with such Exception, and after a Grant in Fee of the Manor is made to another, the Reversion of the Parcel in Lease shall pass with the Manor; For the Fee of it was not severed from the Manor, and a Thing in Reversion may pass as Parcel of a Thing in Possession, as in this Case of a Manor the Exception for Life was express Separation pro Tempore; where Advowson Appendant is granted for Life, a Grant of the Manor after to another passes the Reversion of the said Advowson.—Jenk. 510. pl. 91.—Pl. C. 103. b. Arg. in Case of Fulmcrston v. Steward.

3. Tenant in Tail of a Manor leases Parcel for Years, and afterwards makes a Feoffment of the whole Manor and makes Livery in the Demesnes not leased; the Reversion in the Lands leased do not pass; But contrary in Case of a Tenant in Fee of a Manor, and that without Deed with Attornment; per Dyer Ch. J. Le. 265. 20 Eliz. C. B. in Bracebridge's Case.

4. If A. be disseised of one Acre Parcel of his Manor, tho' the Acre in Right is Parcel of the Manor, yet if A. enfeoffs another of his Manor the Right of this Acre shall not pass but is severed from the Manor for ever. 11 Rep. 47. Mich. 12 Jac. in Liford's Case.—cites 38 H. 6. 38. a.

5. If I have a Manor in which is a Park and Fish Ponds, and I demise the Manor, except the Game of Deer and Fish and after I grant over the Reversion, the Grantee shall have the Deer and the Fish as a Thing Attendant on the Inheritance. 11 Rep. 50. b. in Liford's Case

6. The Freehold of Parcel of a Manor in Possession being excepted, where a Manor is leased for Life, does not pass with the Reversion of the Manor; but where part of the Manor is granted for Life, there upon Grant of the Manor, the Possession and Reversion of the said Parcel passes with the said Manor, for this Parcel was Parcel of the Manor and not excepted. Jenk. 311. pl. 91.

(R) By what Act or Grant (as Lease &c.) that which was Parcel shall be so severed as that by Grant of the Manor the Reversion shall not pass. See (C)—Appendant (B)—Grant (Y) pl. 3 & 4

1. IF the King leases Parcel of a Manor for Life, the Reversion of this Parcel passes to the King; For the Reversion had always Continuance in the same Capacity, and no Alteration is made thereof by Force of the Lease. But where the Lease for Life is a Discontinuance, there he gains a new Reversion and this shall not be Parcel of the Manor. And therefore if a Man is seised of a Manor in Right of his Wife, and he leases Parcel
N n n cel

Life of Parcel cel for Life, this is a Discontinuance and he has gained the Reversion in
and after his own Right, so that the Reversion cannot be Parcel of the Manor.
they levy a Arg. Winch. 46. and agreed by the Council on the other Side. Ibid 47.
Fine of the Manor, the Mich. 20 Jac. C. B. Bishop of Gloucester v. Wood.
Reversion will pass by the Fine; per Cur. And so see that it remains Parcel of the Manor in Reversion. Br. Grants, pl. 126. cites 18 Aff. 2.

But where 2. So if *Tenant in Tail* lets Parcel of a Manor for Life, the Reversion
the granting a of this Parcel is not Parcel of the Manor for the Reason aforesaid; Arg.
Lease for Life and agreed by the other Side; For in these Cases the Lessor gains a new
works no dis- Fee Simple. Winch. 46, 47.
continuance, the Reversi-
the Reversi- on continues Parcel of the Manor; As in the Case of a Lease for Life by a Bishop, this is not any Wrong;
For the Successor may enter. See Winch. 47. Bishop of Gloucester v. Wood.

(R. 2) *Seignioriness extinguished* as to Parcel, or all.

1. IF the Lord disseises his Tenant and makes Feoffment in Fee, and the Tenant re-enters, the Lord shall not have the Seignioriness, nor shall the Feoffee have it; quod fuit concessum per totam Curiam. 9 H. 7. 25. a.

2. If Lord, Mesne and Tenant are, and the Mesnalty escheats to the Lord upon the Death of the Tenant without Heir, the Tenant shall hold of the Lord by the same Services as he held before. See Tenure (A. a) pl. 6. cites 7 E. 4. 12. by Needham, Davies County Palatine 67. Co. Litt. 99. b. D. 30 H. 8. 44. 30. and the *Seignioriness is extinct*. 10 Aff. 29. adjudged 2 E. 4. 6. by Danby, 1 E. 3. 6. Brook Tenures 91. Fitz. Avowry 258.

3. If Disseisor of a Manor severs the Demesnes from the Services, and afterwards the Disseisee demands the Manor, it is well; Because as to him it is a Manor still. Arg. Lat. 63. cites 9 E. 4.

4. If Tenant makes Feoffment of his Tenancy, and the Lord as Attorney makes Livery; this does not extinguish his Seignioriness; because what he does is only by an Authority. Mo. 11. pl. 41. Hill 4 E. 6.

S. P. So that the Wife of the Lord shall not have Dower; nor had he himself such Possession, whereof he might be vouch'd. Mo. 56. per Dyer Ch. J. Pasch. 6 Eliz. in S. C.—Dal. 60. pl. 11. S. C.—D. 140. pl. 41. in Marg.

5. If Tenant enfeoffs the Lord and a Stranger to the Use of another and his Heirs, and makes Livery to the Stranger, this is no Extinguishment of the Seignioriness; but if the Livery was made to the Lord it is otherwise; and yet is the Possession instantly carry'd away to the Stranger, by the Statute 2 H. 7. 13. per Dyer. Owen 31. Pasch. 6 Eliz. in Case of Sutton v. Robinson.

6. If Tenant enfeoffs his Lord and a Stranger, and they re-enfeoff the Tenant and his Wife, the Seignioriness is all extinct; For the Land in their Hands was discharg'd of the Seignioriness, and by their Feoffment all passes from each of them, they being Jointenants. Mo. 56. Pasch. 6 Eliz. Sutton v. Robinson.—Ow. 31. S. C.

D. 140. b Marg. pl. 41. —Dal. 60. pl 11. S. C. —So where Tenant enfeoffs the Lord of a Moiety of a Tenancy, and the Lord aliens this over to another, the Seignioriness is extinct pro particula —Mo. 56. Pasch. 6 Eliz.—Sutton v. Robinson.—Ow. 31. S. C.—And if the Lord release all his Right in one Acre of the Lands held, it is Extinguishment of all the Seignioriness. Mo. 56. Sutton v. Robinson.—Dal. 60. pl. 11. S. C.—Ow. 31. S. C.

7. If Tenant does Offence, by which his Land comes to the King by Royal Escheat, it seems that the Seignioriness is clearly extinct; but he doubts of the Purchase of the King; per Shuttleworth. Mo. 237. Pasch. 29 Eliz. Broke v. Smith.

(S) Pleadings.

(S) Pleadings.

1. **A**SSISE of a Rent-charge out of the Manor of D. in D. the Defendant said, that the Manor extended into D. and C. This is a good Plea to the Writ prima facie; The Plaintiff said, that this Parcel which is in C. is the Services of the Manor, and all the Demesnes in D. and a good Replication; For nothing can be charged but the Demesnes, and not the Services. Br. Replication. pl. 28. cites 12 Aff. 40.

2. If a Præcipe be brought of a Manor and 40 Acres, Tenant vouches, and Vouchee enters and vouches himself for the Manor and 40 Acres also as Parcel of the Manor; [tis good] For tho' it was not Parcel, yet if he was enfeoffed as Parcel, he ought to vouch accordingly. See Voucher (N. a) pl. 5. cites 41 E. 3. 23. b.

3. In Avowry Seisin of the Services was alleged in J. N. who granted the Manor by Fine to the Avowant, and the Tenant attorn'd, and for so much Arrear the Lord avowed; the Plaintiff said, that those Services were not Parcel of the Manor at the Time of the Fine levied, and upon Argument the Issue was accepted, and yet it may be, that it was not Parcel at the Time &c. and yet it is Parcel now as by Mesnalty, Escheat, or Forejudger, or by Gift in Tail of these Services, and the Tail was extinct afterwards; but this ought to be shewed by Replication, as it seems. Br. Avowry, pl. 32. cites 48 E. 3. 26.

4. Formedon; and demanded the third Part of the Manor of D. The Tenant said, that at the Day of the Writ purchased S. P. wa s'cised of 30 Acres of Land in D. Parcel of the same Manor, and therefore he ought to have demanded the third Part of the Manor except and Foreprise the 30 Acres aforesaid, Judgment of the Writ, and was compelled by the Court, to say absque hoc, that he himself had any thing in the 30 Acres the Day of the Writ purchased or ever after. Br. Brief, pl. 176. cites 19 H. 6. 12, 13.

5. If A. has a Manor in the County of W. and B. holds Land of the same Manor in the County of D. by Rent and Services, this Rent and Services are Parcel of the Manor; and in demanding the Manor he shall demand it in the Counties of D. and W. where he shall make surmise; and so see that the Land held is not Parcel of the Manor, but the Rent and Services issuing out of it are Parcel of the Manor. Br. Manor, pl. 2. cites 22 H. 6. 53. Br. Estoppel, pl. 90. cites S. C.

6. In Forcible Entry, where the Defendant said, that the House and Land &c. was Parcel of the Manor of B. and intituled himself to the Manor by Escheat, and did not shew in what County the Manor was, and yet good; for it shall be intended in the County where the Land is. Br. Pleadings, pl. 53. So in Avowry of Distress, taken in 3 Acres, because it is held of his Manor, and did not shew cites 36 H. 6. 17.

where the Manor is, and well; For it shall be intended where the the Land is. Br. ibid.

7. If the Manor of C. extends into T. and W. and Præcipe quod reddat is brought of the Manor of C. and does not say in T. and W. yet it is well; For the Manor is entire, and by this he shall recover the whole Manor. Br. Præcipe, pl. 14. cites 4 E. 4. 15. But if he will sever it and recover but a Parcel, then he may demand the

Manor of C. in T. or so many Houses or Acres in T. and then he shall recover only that which is in T. Ibid.

8. If Disseisor of a Manor severs the Demesnes from the Services, the Disseisee must make his Demand according to his Right; and as to him, it is a Manor still. Arg. Lat. 63. cites 9 E. 4.

9. It is said, that where a Recovery is pleaded of a Manor, of which the Land is Parcel, if the other would contradict it, he shall say that Not Parcel of the Manor, and so Not comprised. Br. Comprised &c. pl. 19. cites 7 H. 7. 8.

10. In Formedon brought of Lands in *A. B and C.* Tenant pleads a Fine of all by Name of the Manor and Tenements in *A.* and *B.* and said nothing of the Land in *C.* The Court held, that by the Name of the Manor, the *Lands in all the Villages would pass,* and the Defendant may, if he will, plead as to the Land in *C. Nient Comprise* in the Fine. Brownl. 155. Anon.

11. A Manor cannot be *claimed* unless by *it's Name* of Incorporation, as Anderson term'd it. Ow. 4. Bragg v. Brook — Declaration was de *Mannerio in D.* instead of *De D.* and held ill. 2 Lev. 178. Mich. 28 Car. B. R. Underwood v. Sanders.

See Lev. 28.
Thinne v.
Thinne.

12. A Manor *in Reputation* cannot be demanded by Name of a Manor. Lat. 63. in Case of Hems v. Stroud.

13. If a Man brings a *Præcipe* of a Manor, and in it demands any *Lands Part of the Manor,* he must either *abridge his Pleint,* or if the Tenant pleads this Matter in Abatement, the Writ shall abate *Quia bis petitum;* it being superfluous to demand the same Thing twice; and if Lands are mentioned with the Manor, they *shall be intended to be no Part of the Manor;* because all that is Part of the Manor is comprehended in a *Præcipe* of the Manor; as 36 H. 6. 17. Sci. Fa. to have Execution of the Manor of Dale, and 6 Acres of Land, it is no Plea to say the six Acres are Parcel of the Manor, because the contrary shall be intended. Pig. of Recov. 42, 43.

(T) Customary Manor, its Power.

1. **L**ord of such Customary Manor may *grant Copies,* and *hold Courts;* and such Manor may *pass by Surrender and Admittance;* and *Fines* shall be paid upon Admittances, whether upon Alienation or Descent. Per Fleming Ch. J. Bulf. 57. Mich. 8 Jac. in Case of the King v. Stafferton. Cites 11 Rep. 17, 18. Sir H. Nevil's Case.

(U) Customary Manor forfeited.

S. C. cited
Bulf. 57.

1. **I**F such Customary Manor be *forfeited,* the Lord shall have the Customs and Services belonging to it. 11 Rep. 18. Mich. 10 Jac. in Sir Henry Nevile's Case.

(W) Tried. How.

1. **W**Hether certain Lands are Parcel of a Manor in ancient Demesne or not shall be tried *by the Country;* For it cannot be tried by Doomsday-Book, tho' whether the Manor be Ancient Demesne may. 9 Rep. 31. a. in the Abbot of Strata Marcella's Case.—cites 22 Aff. 45.

(X) Lord of a Manor. Who. And his Power.

1. **B**Y this Word *Lord* shall be intended *the Person of whom the Vill is held,* and not *he who is seised of the Vill;* For if there be 20 *Mesnes,* every one of them is Lord of the Vill, and yet none shall have Common but he who is seised in Possession of the Vill. Br. Prescription, pl. 27. cites 22 H. 6. 55.

2. A Lord of a Manor cannot *justify* under a Royalty to Fish, Hunt, and Fowl *in another Man's Soil*. Arg. 11 Mod. 74. cites Jo. 440. Vent. 122. — Per Holt Ch. J. a Man may have Free Warren in another's Soil *Ratione Privilegii*, but *not Soli*. Ibid. 75.

[For more of Manors in General See tit. **Copyhold** &c.]

(A) Marches of Wales.

1. **E**RROR was brought in B. R. upon a Judgment in Ejectment in Wales before the Justices there, and upon considering the Statute of * 28 H. 8. which wills, that Error upon a Real Action shall be reversed in B. R. and upon Personal by Bill before the President and Council of the Marches, it was doubted, whether Ejectment, being a *mixt Action*, was within this Statute; But at last it was adjudged that Error lay in this Court. Mo. 248. pl. 391. Mich. 29 Eliz. Griffith's Case. * 34 & 35 H. 6. cap. 26. S. 113.
2. In the Court of the Marches of Wales &c. a Man promised to make a Lease of certain Land before Michaelmas (in Consideration of 80l. then presently paid). Before Michaelmas the Land is evicted, and the Lessee sued to be relieved by the Equity of the said Court, and a Prohibition was moved for, because it was above 50l. Per Ley Ch. J. Here he cannot have Debt or Account, but Case he may, and sue to be relieved in Equity and be relieved according to his Case, tho' Action of Debt above 50l. Value cannot be brought in the Court of Marches &c. Yet the Case of the Equity * is not restrain'd; to which Doderidge and Haughton J. agreed. 2 Roll. R. 308. Pasch. 21 Jac. B. R. Arnias v. Brigges. Palm. 364. Brig's Case. * Orig. is (Ne Restraire) but it seems it should be (Nest Restraire).
3. Marches of Wales have three Powers, 1. For Actions at Common Law, as Debt and Trespass *sur Case*, and in them they ought not to hold Plea above 50l. 2d. Of Cases of Equity, and of them no Certainty is put. 3d. Of Criminal Cases. 2 Roll. R. 308. per Chamberlaine J. in Case of Arnias v. Brigges.
4. They have nothing to do with the Possessions of Men, unless in respect of Force Plena Curia. 2 Roll. R. 309.
5. A Prohibition was granted to the Court of the Marches of Wales, because Lands being descended to an Infant subject to a Trust, they had not only enjoined the Possession of those Lands, but of other Lands also descended to him. And the Court said, That they cannot Sequester Lands at all for the Performance of a Decree of their Court to pay Money; For they can only Agere in Personam & non in Rem. Vent. 11. Hill. 20 & 21 Car. 2. B. R. Anon
6. 1 W. & M. Sess. 1. cap. 27. Dissolv'd and took away this Court, but confirmed Judgments and Decrees pass'd there before the first of June 1689.

(A) Margin.

1. **W**HERE a County is in the Margin of a Declaration, and the Trespass or Thing is alleg'd to be done apud D. and does not shew in But Intend- me t shall not be, what

where a particular Bill is in the Margin, to give Jurisdiction to an inferior Court to take away the Jurisdiction of superiour Courts without shewing it. *Ibid.* per eodem.—It is sufficient to put the County in the Margin of the Declaration in an Action, *but not so in an Indictment.* Arg. Vent. 110. cites 1 Cro.

2. On a Motion to quash an Order made by two Justices the Exception was, that it does not appear that they were Justices for that County; For it is set forth to be made by A. and B. two Justices *Com' Prædict.* and there is no County in the Body of the Order for the Prædict. to refer to, and it shall not refer to the County in the Margin; whereupon it was quash'd, per Cur. 11 Mod. 266. pl. 6. Hill. 8 Ann. B. R. Anon.

Mariners.

(A) Mariners Wages. Considered How.

1. SEAMEN'S Wages is a *Chose en Action*, tho' the Service is not then done. 2 Vern. 595. Mich. 1707. Crouch v. Martin and Harris.

2. Seamen's Wages are *assignable*, and the Assignment specifically binds the Wages, and such Assignment shall be paid off before a Bond Debt; per Cowper C. 2 Vern. R. 595. Mich. 1707. Crouch v. Martin and Harris.

2 Vern. 391.
Mich. 1700.
contra. Mitchell v. Edes.—
Ch. Prec.
125. S. C.

Sec (C)—
(F) pl. 5. (A. 2) Mariners Wages. Payable or lost. In what Cases, and How much.

1. WHEN a Vessel hath unloaded, and the Mariners demand their Wages (whereof some have neither Bed, Chest, nor Cabbin aboard) the Master may lawfully keep back Part of their Wages till they have brought back the Ship to the Part from whence she came, unless they give good Security to serve out the whole Voyage. Mieg's Laws of Oleron 8. S. 18.

S.P.2 Molloy
cap. 3. S. 12.

2. When the Master of a Ship hires the Mariners in the very Town to which the Vessel belongs, whereof some at their own finding, others of them at his own Costs and Provision; and it happens, that the Ship cannot procure Freight in those Parts where she is arrived, but must sail further to get it; then the Mariners that are at their own finding ought to follow the Master, and such as are at the Master's own Costs ought to have their Wages increased, Kenning by Kenning and Course by Course, because he hired them to one certain Place. And if they go not so far as to that Place which was agreed upon, yet they ought to have their full Hire, as if they had gone thither; but they must bring back (with God's help) the Vessel to the Place from whence they took her. Mieg's Laws of Oleron 8. S. 19.

2. When

3. *When a Ship is arrived at her Port of Discharge, and gets there into dry Ground, so that the Mariners think her safe every way, then the Master ought to increase Wages, Kenning by Kenning. Mieges Laws of Oleron. 9. S. 26.*

4. *If a rebellious Mariner repent in Time, and offer Amends for a simple Rebellion, and the Master notwithstanding refuse, he may follow the Ship and obtain his Hire. Mal. Lex. Merc. 104. cap. 23.*

Mal. Collection of all Sea Laws 57. S.P.

5. *Mariners ought each one to help and assist others *on the Seas, or else he that refuseth loseth his Hire, and the Oath of his Fellows shall be a Proof against him. Mal. Lex. Merc. 104. cap. 23.*

* S. P. and so they must in Port Molloy 242.

6. *If a Ship pass further than the Mariner was hired, his Hire should be accordingly augmented, except he be hired a Mareages, mais non a deniers, as the Frenchman speaks, or by the Month for all the Year. Mal. Lex. Merc. 105. cap. 23.*

7. *A Master may put away a Common Seaman without any lawful Cause before his Departure, paying the said Seaman the Moiety of what has been agreed upon. Mieges Laws of Wisby 15. S. 3.*

But if he be set out from the Harbour, and have begun the Voyage

the Master that puts him away without a Cause is bound to pay him his full Wages. Mieg's Laws of Wisby 15. S. 3.

8. *If a Mariner be found to be infected with any contagious Disease, the Master is free to leave him in the first Place he shall arrive at, and shall not be bound to pay him any Wages; provided the Sicknes be clearly proved by the Deposition of 2 or 3 Mariners. Mieg's Laws of Wisby 21 S. 62.*

9. *By the Law Marine, if the Master orders his Boat to be Manned out, and the same is unfit for Sea, the Tews or other Accoutrements being impotent, and any Mariners happen to be drowned, he is to pay one Years Wages to the Heirs of the Drowned. 2 Molloy. cap. 3. S. 2.*

10. *If the Ship breaks Ground, and is set Sail, if after she arrives at her desired Port, their full Pay continues till she returns. 2 Molloy. cap. 4. S. 2.*

11. *If a Ship happens to be seized on for Debt, or otherwise to become forfeited, the Mariners must receive their Wages, unless in some Cases where their Wages are forfeited as well as the Ship; As if they have Letters of Mart, and instead of that they committed Piracy, by Reason of which there becomes a Forfeiture of all; but Lading prohibited Goods aboard a Ship, as Wool &c. tho' it subjects the Vessel to a Forfeiture, yet it disables not the Mariner of his Wages; For they having honestly performed their Parts, the Ship is tacitly obliged for their Wages. But if the Ship perishes at Sea, they lose their Wages, and the Owners their Freight; and this being the Marine Custom is allowed by the Common Law as well as the Civil Law. 2 Molloy. cap. 3. S. 7.*

12. *If the Goods are so imbezled or damnified, that the Ship's Crew must answer, the Owners and Master must deduct the same out of their Freight to the Merchants, and the Master out of the Mariners Wages; For before they can claim their Wages out of what the Ship hath earned, she must be acquitted from the Damage the Merchant hath sustain'd by the Negligence or Fault of the Mariners. 2 Molloy. cap. 3. S. 9.*

And the Reason is, for that, as the Goods are obliged to answer the Freight, so the Freight

and Ship is tacitly obliged to clear the Damage; which being done, the Mariners are then let in to their Wages. Ibid.

13. *If a Mariner deserts his Service before the Voyage ended, by the Law Marine he loses his Wages; and so it hath been conceived the same Custom will bar him at Common Law. 2 Molloy. cap. 3. S. 10.*

14. *Money or Cloaths taken up by the Mariners and entered in the Purser's Book is by the Custom Marine a Discount or Receipt of so much of their Wages as the same amounts to, and in Action brought by them for their Wages the same shall be allowed. 2 Molloy. cap. 3 S. 11.*

15. *Upon a Motion for a Prohibition it was agreed, that if the Ship do not return, but is lost by Tempest, Enemies, Fire, &c. the Mariners sh all lose*

lose

If a *Ship* *lost* be ore she arrive at any Port of Delivery, the Seamen *lose all their Wages*, but if she is lost after she comes to a Port of Delivery, then they only lose their Wages from the last Port of Delivery; but if they *run away*, tho' after they come to a Port of Delivery, they lose all their Wages, and wheresoever *Freight* is due, Wages are due. 2 Show. 283. Hill 34 & 35 Car. 2. B. R. Anon.—12 Mod. 442. S. P.—If a Ship goes *Freight of an Outward Voyage*, the Seamen shall have their whole Wages out; but if at their Return the Ship be taken or other mischief happen, whereby the *Voyage homeward is lost*, they shall have but *half Wages* for the Time they were in *Harbour abroad*; per Holt Ch. J. 12 Mod. 408. Trin. 12 W. 3. Anon.—East India Company takes *Bond from the Mariners and Officers not to demand their Wages unless* they return to the Port of London; the Ship arrives at a delivering Port and afterwards is taken by the French, yet they shall have their Wages to the Time the Ship arrived at the delivering Port; per Cowper C. 2 Vern. 727. Mich. 1716. Edwards v. Child & al.

(B) Wages. *Suable for. In what Court, and when.*

A moved for a Prohibition to the Admiralty for Libelling against the Body of a *Ship in the River Thames* for Mariners Wages, and that *had never been extra corpus Comitatus*; the Suggestion was, that a Shipwright was in Treaty with the Captain for the Sale of the Ship; and as a *Trial of a Ship* it is usual for the Captain to go on Board, and to bring Mariners with him, and to employ them about the Ship, and then to launch her, &c. afterwards they disagreed before the Property was altered, and the Workmanship was removed from the Ship, and the Hull returned to the Shipwright. Now the Question in this Case was, if it was within the Reason and Rule of Mariners Wages, the Ship not being benefited by the Men's Work; and the Court at first thought it somewhat difficult. Now, tho' in this Case there was *no Work done at Sea*, yet inasmuch as upon the Face of the Libel it appeared the Suit was for Seamen's Wages, and for the Indulgence due to Mariners, all the Court were of Opinion, the Admiralty had a Jurisdiction, and so denied a Prohibition. 11 Mod. 31. 32. Mich. 3 Annæ. B. R. Ofman v. Wells & al.

1. THE Court will be well informed that the Libel is for Mariners Wages; for otherwise, (as if *Carpenters* Libel for their *Work aboard a Ship in a Haven*, being *infra Corpus Com.*) the Court will grant a Prohibition. 2 Molloy. cap. 3. S. 8. cites the Case of Sitwell & al. v. Love & al. 27 Car. B. R.

2. *Mate of a Ship* libelled in the Admiralty Court for his Wages, and upon Prohibition moved for it was agreed per Cur. that it ought to go in Case of a *Master*; focus in Case of Mariners; and the Mate being a Mean between both, it was doubted; but the Court inclined to consider him as a Mariner, because he is hired by the Master as other Mariners; But the Master is put in by the Owners. And after, (upon Conference with the Common Pleas, where a like Case was under Consideration) it was ruled that no Prohibition should go. 12 Mod. 440. Hill. 12 W. 3. Grant v. Bailly.

3. It is mere ** Indulgence to Mariners to sue for Wages in the Admiralty*; But if the Master sues for Wages there, a Prohibition shall go; For he contracts on the Credit of the Owners, but the Mariners on the Credit of the Ship. 1 Salk. 33. Trin. 12 W. 3. B. R. Clay v. Surgrave.

Prohibition should go unless some sufficient Person would put in Bail to an Action &c. which the Court thought reasonable, otherwise the Debt might be lost; yet a Prohibition was granted absolutely. Carth 518, S. C.—12 Mod. 405. S. C.—* 2 Molloy Cap 3. S. 8. S. P.—And this Indulgence was, because the Remedy in the Admiralty was the *easier and better*, Easier, because they must sever here, whereas they may join there; And better, because the Ship itself is answerable; But it is expressly against the Statute, tho' now *Communis Error facit Jus*. 1 Salk. 33. Clay v. Surgrave.

4. *Prohibition* was moved for to stay a Suit in the Admiralty by a *Surgeon of the Ship* for his Wages, and the Suggestion was, that all was paid to the Master; Per Cur. Payment to the Master is not Payment to the Seamen, but the Ship itself is liable for their Wages, and they would hear Counsel. 12 Mod. 526. Trin. 13 W. 3. Maddox v. . . .

5. 4 & 5 Annæ cap. 16. S. 17. Enacts that all Suits in the Admiralty for Seamen's Wages shall be commenced within six Years after the Cause of Action accrued.

S. 18. If any Person intituled to such Suit for Seamen's Wages be within the Age of 21 Years, Feme Covert, Non Compos Mentis, imprisoned, or beyond the Seas, such Persons shall be at Liberty to bring the same Actions, so as they take the same within six Years after their being of full Age, Discoverd, of sane Memory, at large, and returned from beyond the Seas.

S. 19. If any Person, against whom there shall be any such Cause of Action for Seamen's Wages, be at the time of such Cause of Action accrued, beyond the Seas, such Person, who is intituled to such Action, shall be at Liberty to bring the said Action against such Persons after their Return from beyond the Seas, so as they take the same after their Return from beyond the Seas within such time as is limited for the bringing of the said Action by this Act.

6. Mariners libelled for their Wages in the Admiralty, and a special Contract reduced into Writing was suggested in order to have a Prohibition, but it was denied. 8 Mod. 379. Trin. 11 Geo. the Mariners Cafe.

Vent. 146.
Anon. —
The Charter and Contract made

on Land is only to ascertain them. 3 Lev. 60. Coke v. Crechett. — S. C. cited 11 Mod. 32. — Prohibition shall not go to stay a Suit in the Admiralty for Mariners Wages, tho' the Contract be upon Land; For it is more convenient for them to sue there, because they may all join. 1 Vent. 146. Trin. 23 Car. 2. B.R. Anon. — 1 Vent. 345. S. P. — 2 Vent. 181. S.P. Allifon v. Marf. — 2 Keble, 779. the King v. Pike. S. P. — Winch. 8. — But if there be a special Agreement that Mariners shall receive their Wages in any other Manner than usual, or if the Agreement be under Seal, in both these Cases Prohibition shall go; But where it is in Writing only, it is but a parcel Agreement; And in such Cafe the Anmiralty has Jurisdiction. Per Cur. 12 Mod. 38. Patch. 5 W. & M. Opy v. Addison.

(C) How they ought to behave on particular Occasions.

1. THE Mariners are bound to save and preserve the Merchandise to the best of their Power; and whilst they do so, they ought to have their Wages paid them; otherwise not; Neither is it lawful for a Master to sell the Cordage, without the Merchants Leave; But he is bound at his Peril to preserve the whole so far as in him lies. Miege's Laws of Wisby 16. S. 15.

2. The Mariners are bound to preserve and take Care of the Goods at the Request of the Merchants, Matter, and Pilot. Miege's Laws of Wisby 19. S. 47.

3. For the taking Care of the Goods, the Mariners shall be paid, every time they shall stir the Corn, a Denier for every Last; And if they refuse to do it, so that the Corn comes to be indamaged, they are bound to make up the Damage according to the Judgment of the Matter and Pilot.

* As for the unlading they shall have a Denier for every Last, and the like shall be allowed them for all other Commodities whatever. Miege's Laws of Wisby 19 S. 48.

* Ibid 15. S. 5 is, that they shall have 4 Deniers a Last for Lading, and three Deniers a Last for unlading, and that shall be their Salary for hoisting of Goods.

4. The Mariners ought to shew the Master the Cordage used for hoisting up of Goods, and to acquaint them with any thing that is wanting therein to the best of their Knowledge; And if the Master neglects it, the Damage ensuing thereby shall be upon his Account; But if the Mariners fail in their Duty herein, they shall be answerable for the Mishances that shall happen thereby. Miege's Laws of Wisby 19. S. 49.

5. If it chance otherwise than well with the Master, the Mariners are then holden to bring back the Ship to the Port from whence she was fraughted without Delay, except it be otherwise provided. Mal. Lex. Merc. 104. cap. 23.

(D) Under what Regulations a Mariner must be.

1. **I**F any Vessel happen through Misfortune to be cast away, in what Place soever it be, the Mariners are bound to save as much of the Lading as they can; And if they save part thereof, the Master shall allow them a Competency to get home to their own Country. And in case they save so much as may enable the Master to do this, then he may lawfully pledge to some honest Person such part thereof as may serve for that Purpose; But if they have not endeavoured to save the Things aforesaid, then the Master is not bound to provide for them; But he ought to keep them in safe Custody, until he knows the Pleasure of the Owners. And this he ought to do like a faithful Master; Otherwise he shall be bound to give Satisfaction. Miege's Laws of Oleron. 4. S. 3.

Miege's
Laws of
Wisby 16.
S. 17. S. P.
—S. P. and
that half
ought to be
left on Ship-
board. Mol-
loy 242.—
Ibid. 243.—
All Mariners
are prohibi-
ted to go out
of the Ship,
and to leave

2. When a Vessel departs from any Country, laden or empty, and arrives at any Port or Harbour, none of the Mariners ought to go out of the Ship without the Master's Leave. For in such a Case, if the Vessel should happen to be lost, or by any Misfortune be damaged, they must make Satisfaction for the same; But if the Vessel be moored with two or three Anchors, they may then lawfully go out of her without the said Master's Leave, provided they leave behind them on Ship-board such a Number of the Ships Company, their Fellow Mariners, as is sufficient to look to the Vessel and her Lading; Provided also, that they return again in due time to their said Vessel; For if they stay longer than is meet, and any Mischance happens to the Ship, they ought to make Satisfaction if they have wherewithal. Miege's Laws of Oleron 5. S. 5.

her after the Voyage, and the unloading of the Ship, till the same be unrigged and sufficiently ballasted. Miege's Laws of Wisby 20. S. 54.—They ought not to depart from on Ship-board when once admitted, (which is always when they break Ground) without Licence of the Master; And before they may so do, they are to leave a sufficient Number to guard the Ship and Decks. Molloy. 243.

S. P. Miege's
Laws of
Wisby. 17.
S. 25 ———
* S. P. that
he shall have
his whole
Wages. Mol-
loy 242.

3. When a Difference happens between the Master of a Ship and any one of his Mariners, the Master shall deprive him of three Meals before he turns him out of the Ship; But if the said Mariner do offer in the Presence of the rest of the Mariners to make the Master Satisfaction, and the Master refuses the same, and resolves (notwithstanding such Offer) to put him out of the Ship; In such Case the said Mariner may allow the said Ship to her Port of Discharge, and ought to have his * Wages paid him as if he had come in the Ship, or as if he had made Satisfaction for his Misdemeanor before the Ship's Company. And if the Master take not another Mariner into the Ship in his Stead, as able as the other, and the Ship or Lading happen to be, thro' any Misfortune, damaged, the Master shall make good the same, if he have wherewithal. Miege's Laws of Oleron. 6, 7. S. 13.

Miege's
Laws of
Wisby 17.
S. 24. S. P.,

4. A Master, that has hired Seamen for a Voyage, shall keep the Peace betwix them. and do the part of a Judge at Sea; And if there be any of them that gives another the Lie; before they have Bread and Wine on the Table, he that has given the Lie shall pay 4 Deniers; But if the Master himself gives any other the Lie, he shall pay 8 Deniers; And if any of the Mariners gives the Master the Lie, he shall also pay 3 Deniers. Miege's Laws of Oleron. 6. S. 12.

5. If the Master strike any of his Mariners, the Mariner ought to bear with the first Stroke, whether it be with the Fist or open Hand; But

if the Master do strike more than once, the said Mariner may defend himself. Miegé's Laws of Oleron. 6. S. 12.

6. If a Mariner, whether he be a Pilot, Mate, or common Seaman, being hired by a Master, does afterwards leave him; the said Mariner ought to restore so much of the Pay as he has received, and withal pay a Moiety of the Salary agreed upon for the whole Voyage. Miegé's Laws of Wisby 14. S. 1.

7. And, if a Mariner binds himself to two several Masters, the first that hired him may challenge him, and compel him to go the Voyage. Nevertheless the said Master shall not be obliged to pay him any Wages or Salary for the whole Voyage, but that is left to his Discretion. Miegé's Laws of Wisby. 14. S. 1.

8. Any Pilot, Mate, or common Seaman, that does not understand his Place, or is not sufficiently qualified for it, shall be bound to restore to the Master what Money he has advanced him, and withal the Moiety of what has been agreed upon. Miegé's Laws of Wisby 15. S. 2.

9. All Mariners are forbidden to lie ashore in the Night without the Master's Leave, and that under the Penalty of 2 Deniers. They are also prohibited under the same Penalty, to go off in the Ship Boat by Night. Miegé's Laws of Wisby 15. S. 4.

10. The Mariners (or Seamen), that are to be paid out of a certain Proportion of the Freight, are obliged to attend the Ship, in Case the said Ship finds no Freight at the Place appointed, and that they must go further to find a Freight. But the Seamen that have a set Salary shall be considered according to Equity. Miegé's Laws of Wisby 18. S. 32.

11. The Ship having cast Anchor, the Seamen are free to go on Shore one after another, or two at once, and there they * may carry their Dinner, and a competent Proportion of Bread, but no Drink. However they ought not to make a long Stay there; For, if either the Ship or the Lading thereof, should receive any Damage by Reason of their Absence, they are bound to make it up. Miegé's Laws of Wisby 18. S. 33.

Miegé's Laws of Oleron S. S. 20. S. P. But if any of their Company be hurt for want of their Help,

they shall bear so much of the Charge of his Recovery as one of his Fellow Mariners, or the Master with those of the Table shall Judge or Arbitrate.—* S. P. Mal. Lex. Merc. 104. cap. 23.—S. P. Molloy. 242.

12. And, if any of the Men should chance to hurt himself, or get any Mischance in doing any Business relating to the Ship-service, the Merchant must be at the Charge of his Cure, and ought to indemnify him, upon the Testimony of the Master, Pilot, or Mariners. Miegé's Laws of Wisby 18. S. 33.

13. Mariners are not only to discharge and deliver Goods out of the Ship, but also, if no Porters nor Carriers be in those Parts, to carry the same themselves for such Hire as other Workmen should have had therefore. Mal. Lex Merc. 105. cap. 23.

(E) Privileged, or indulged. How.

1. IF a Mariner, being ashore about the Master's or the Ship's Business, happen to be wounded, the Ship shall be at the Charge of his Cure. Miegé's Laws of Wisby 16. S. 18.

Miegé's Laws of Oleron S. 6. S. P.—S. P. But if it be

occasioned by another on Ship-board, the Master may refund the Damage out of his Wages, but still remembering who gave the first Assault. Molloy. 242.

2. But if he went to Shore for his Pleasure, and there be wounded, the Master may put him away; And the said Mariner shall be bound to make Restitution to the Master, of what he shall have received from him, and pay him,

him moreover, *whatever he must give another to take his Place.* Miege's Laws of Wisby 16. S. 18.

* Or else hire a Woman to attend him; He shall likewise afford him such Diet as is

used in the Ship, and the same Quantity that was allowed him when he was in Health, and no more, unless it please the Master to allow him more; and if a *better Diet* be required, the Master shall not be bound to provide it for him, unless it be *at his own Costs* and Charges. In Case the Ship be ready for her Departure, she ought not to stay for the said sick Party Miege's Laws of Oleron 5. S. 7.—† S. P. Only deducting the Master's Charges, which he laid out upon him. Molloy. 243.

4. A Mariner may *keep* either *his Portage* in his own Hands, or put forth the same for Freight, and yet the Ship shall not stay upon the Lading of his Portage, so that in Case the Ship be fully laden before the Goods for his Portage be brought in, he shall only have the Freight of so much Goods. Mal. Lex Merc. 104, 105. cap. 23.

5. If a Mariner be *hired for a Simple Mariner*, and afterwards in the Voyage *finds Hiring to be a Pilot or a Master*, he may pass, restoring his former Hire; and so it is if he marry. Lex Merc. 105. cap. 23.

6. If it happen a *Ship to be prised for Debt*, or otherwise to be *forfeited*, yet the Mariners Hire is to be paid, and if the prosper, to receive their Pay in the same Money that the Freight is paid with. Mal. Lex Merc. 105. cap. 23.

S. P. Yet this is doubted if it be not on a sworn Debt, viz. a Judgment or Sentence, or a Penalty to the King. Molloy 243

7. A Mariner should neither be *arrested*, or *taken forth of a Ship making ready to sail*, for any Debt; but only his Hire, and as much other Goods, as he hath in the Ship, may be arrested for it according to the Value of the Debt, and the Master to be answerable for all; because the *Ship is compared to Man's Dwelling House*, which is *his sure Refuge* by the Law, except it be *for a sworn Debt*, or a *Penalty to the King* through some Crime. Mal. Lex Merc. 105. cap. 23.

(F) Punishable.

* S. P. if on Ship-board, unless he deems it at 5

1. **I**F any of the hired Mariners *strike the Master* first, he shall *pay an Hundred Sous*, or ** lose his Hand.* Miege's Laws of Oleron. 6. S. 12. Solz. Molloy. 244.—Ibid. 246. S. P.

2. *If in hoisting up of Wines they chance to leave open any of the Pipes*, or other Vessels, or that they fasten not the Ropes well at the ends of the Vessel, so that the *Vessel slips and falls*, and so is lost, or that falling on another Vessel both are lost; in these Cases, the *Master and Mariners are bound to make them good to the Merchants*, and the Merchants must pay the Freight of the said damaged or lost Wines; because themselves are to receive for them from the Master and Mariners according to the Value that the rest of the Wines shall be sold for; and the Owners of the Ship ought not to suffer hereby; because the Damage happened by Default of the Master and Mariners in not fastening the said Vessels of Wine. Miege's Laws of Oleron. 9. S. 26.

If a Mariner run away with his hire undeserved, he deserves the Gallows.

Mal. Lex. Merc. 105 cap. 23.

3. When a Mariner is *fled from his Master*, and is run away with the *Money he received from him*, if the said Mariner can be secured, his Trial shall be made; and upon the Evidence of two other Mariners, he shall be sentenced to be *hanged.* Miege's Laws of Wisby 20, 21. S. 61.

4. According to the Law of Oleron, Mariners owe all *due Obedience to the Master*, not only in dying from him in his wrath, so far as they can, but also in suffering; yet may they after one stroke defend themselves. Mal. Lex. Merc. 104. cap. 23.

5. In Case of *Rebellion of Mariners* against their Master, which is thought then to be done, *when the Master hath thrice lijed the Towel* from before any Mariner, and yet he submits not himself; then may he not only be commanded forth of the Ship at the first Land, but also, if he makes open strife and debate against the Master, he shall lose his half hire, with all the Goods he hath within Ship-board. Mal. Lex. Merc. 104. cap. 23.

S. P. Molloy, 242.—But if in this strife a Mariner useth any Armour or Weapons, then should

the rest of the Mariners bind him, imprison him, and present him to the Justice; so that if *any refuse to assist*, he shall lose his Hire and all Things else he hath within Ship-board; yea, in Case any Number of the Mariners would *conspire and force the Master to pass to any other Port than to the which he was freighted*, they may be accused criminally and punished as for a *capital Crime*. Mal. Lex. Merc 104. cap. 23.

6. Mariners, in a *strange Port*, should not leave the Ship without the *Master's Licence*, or *fastning her with 4 Ropes*, else the Loss falls upon them; they are also to attend the Ship until she be discharged and ballasted new, and the Tackle taken down; and if a Mariner, during the Time of her discharge and lading, *labour not with the rest of the Company, but goeth idle, and absents himself*, he shall pay a Fine to the rest of the Company pro rata; In a *strange Country* the one half of the Company at the least, ought to remain on Ship-board, and the rest who go on Land should keep *Secricty and abstain from suspected Places*, or else should be punished in Body and Purse, like as he who absents himself when the Ship is ready to Sail; yea if he *give out himself worthier than he is in his Calling*, he shall lose his Hire, half to the Admiral and the other half to the Master; but this especially ought to be executed against an unworthy Pilot. The Mariner also forfeits his Hire, if the *Ship breaks in any Part, and he help not with all his Diligence* to save the Goods. Mal. Lex. Merc. 104. cap. 23.

7. If some of the *Mariners* that hired themselves with the Master *go out of the Ship without the Master's Leave, and make themselves so Drunk as to occasion Wrangling and Fighting*, whereby some happen to be wounded; in such Case the Master is not bound to get them healed, or in any Thing to provide for them; on the Contrary, he shall be free to discharge them, and to turn them out of the Ship, both them and their Assistants; and if they come to reckon, they must make up whatever they remain owing to the Master. Mieg's Laws of Oleron 5. S. 6.

S. P. for such Accidents are not done in the Service of the Ship. Molloy 243.

8. An *Action* lies against a Mariner for any *wilful or negligent Fault* committed by him whereby the Master or Owners of the Ship are answerable to the Merchant. Molloy 245.

9. The Master may give moderate and due *Correction* to his Mariners and may justify the same at Common Law. Ibid. 246.

The Lieutenant of a Man of War

may give moderate Correction to a Seaman, but not wound him; For that is not moderate Correction; per Holt Ch. J. 12 Mod. 504. Pasch. 13 W. 3. Anon.

10. Seamen *impressed* ought not to be put into a Gaol; they should be kept in an Inn or other convenient Place till there be a competent Number of them to be conducted. 5 Eliz. 5. 27. makes it *Felony* for Seamen impressed in Time of War to *Desert*. Cumb. 245. Pasch. 6 W. & M. B. R. the King v. King & al.

Market.

See (E)—

* There is no Letter at Roll to this Division but for the more regularity I have put it as here, and what is (A) in Roll will

* (A) Market Overt [*as to altering the Property.*]

1. **I**F a Man sells a Jewel to a Goldsmith in a Shop in the Market which it not a Goldsmith's Shop, but another Shop which is not proper for this but for other Commodities, this Sale shall not alter the Property. Tr. 43 El. B. R. adjudged between Sir Jervas Clifton and Chaundler.

here be made (A. 2)——Mo. 624. S. C.——D. 99. b. Marg. pl. 66.

S. P. otherwise if it were in a Goldsmith's Shop, where Plate is usually

bought and sold. Mo. 360. Mich. 36 & 37 Eliz. the Bishop of Worcester's Case.——S. P. cited Mo. 625. as a Resolution at Newgate, Anno. 37 Eliz. the Bishop of Worcester's Case.——S. P. for rho' a Shop in London is a Market Overt every Day except Sundays and Holydays, yet it is only for buying such Goods as are agreeable to the Trade of the Shop where &c. Cro. J. 68. Pasch. 3 Jac. B. R. Taylor v. Chambers.——Cro. E. 454. Mich. 37 & 38 Eliz. Palmer v. Wolley.——5 Rep. 83. b. Hill. 38 Eliz. Case of Market Overt.——Het. 63. Mich. 3 Car. C. B. in Case of Panton v. Hassell.

2. **I**F Plate be sold in the Market in a Scrivener's Shop, this does not alter the Property; For this is not any proper Place for Men to inquire for such Thing, and the Laches or Inquiry is the Cause that the Owner is bound by it. Tr. 43 El. B. R. cited to be adjudged.

S. P. so where a Shop contains an Outer Room and an Inner

Room, the Sale in the inner Room does not alter the Property. Mo. 360. Mich. 36 & 37 Eliz. in the Bishop of Worcester's Case.——So where any of the Windows of the Shop are shut. Ibid.——D. 99. b. Marg. pl. 66. cites it resolved by all the Justices C. B. 9 Jac. Frogmer's Case.——Poph. 84. S. P.——5 Rep. 83. b. Case of Market Overt.——Het. 63. in Case of Panton v. Hassell.——* S. P. Mo. 625. in Case of Sir Jervas Clifton v. Chancellor.——Also it seemed to the Justices that tho' the Shop is by Custom a Market Overt, yet it is not to alter the Property of a Stranger, as Overt Market shall do. Ibid.

3. **I**F a Man sells Things in a proper Shop for it, yet if the Shop be * obscured with a Curtain at the Time of Sale, this does not alter the Property; For it is not any Shop Overt. Tr. 43 El. B. R. cited to be adjudged.

Sale in Market Overt in London ought to be in a Shop which is open

to the Street, and not in Chambers, or inner Rooms, otherwise the Property is not altered, per Anderson. Godb. 131. pl. 148. Hill. 29 Eliz. C. B. Anon.——It ought to be in the outer Part of the Shop, so that People that pass by may see it. D. 99. b. Marg. cites Pasch. 3 Jac. B. R. Taylor v. Chambers.

Lord Coke says that the Common Law did hold it for a Point of great Policy, and benevolent for the Commonwealth, that Fairs and Market Overt should be replenished and well furnished with all manner of Commodities vendible in Fairs and Markets for the necessary Sustainment and Use of the People; and to that End the Common Law did Ordain (to encourage Men thereunto) that all Sales and Contracts of any thing vendible in Fairs or Markets Overt should not only be good between the Parties, but should bind those that had Right thereunto. But this Rule hath many Exceptions——1st. It shall not bind the King for any of his Goods sold in Market Overt by any Person; but regularly the Sale by a Stranger in Market Overt binds an Infant, a Feme Covert, that hath Right, either in their own Right, or as Executors or Administrators, Idiots, Non Compos Mentis, Men by Sea and in Prison, that have Right to the same.——2^d. Prout pl. 3. and in Notis.——3^d. Prout pl. 2.——4th. It must be a Sale, and not a free Gift without any valuable Consideration. For Fairs and Markets were not instituted for Gifts, but for Sales; therefore Gift in this Act is to be intended of a Gift for valuable Consideration, and not a free Gift——5th. If the * Buyer doth know whose Goods they were, and that the Seller thereof hath at the most but a wrongful Possession, this shall not bind him that hath Right——6th. ** If they be sold by Covin between two of purpose to bar him that has Right, this bars not——7th. If a Sale be made of Goods by a Stranger in a Market Overt, whereby the Right of A. is bound, yet if the Seller acquir-

eth the Goods again, A may take them again, because he was the wrong doer, and he shall not take Advantage of his own wrong.—8th. There *must be Sale and Contract*; and therefore a Sale to a Man of his own Goods in Market Overt bindeth not; and likewise a Sale in Market Overt by an Infant or such tenderness of Age, as it may appear to the Buyer that he is within Age, or by a Feme Covert, if the Buyer know her to be a Feme Covert (unless for such Things as she usually trades for, or by the Consent of her Husband) binds not.—9th. The Contract must be *originally and wholly made in the Market Overt*, and not to have the Inception out of the Market, and the Consummation in the Market.—10th. By the Common Law the Property was altered (tho' some Opinions be to the Contrary) by Sale in Market Overt *albeit no Toll was paid* either in respect of the Freedom of the Fair or Market, where in no Toll at all was to be paid, or for that many were discharged of Payment of Toll, As the King, and some of his Subjects by Charter, and some by Tenure, as Ancient Demesne &c. where Toll of others was to be taken.—11th. The Sale must not be *in the Night*, but between the rising of the Sun and the going down of the same; For he that hath a Fair or Market, either by Grant or Prescription, hath Power to hold it per unum Diem seu duos, vel tres Dies &c. where (Dies) is taken for *Dies Solaris*; for if it should be taken for Dies Naturalis, then might the Sale be made at Midnight; and yet the Sale that is made in the Night is *good between the Parties*, but not to bind a Stranger that has Right.—12th. A. commits a *Retter* or Felony of the Goods of B. the Officer of the King doth seize the Goods (in lawful Manner) to the King's Use, B. pursues his Appeal freely, the King's Officer, or any other *sells the Goods in Market Overt*; B. pursues his Appeal against A. until he has convicted him of the Felony; the King shall make him Restitution of his Goods, notwithstanding the Sale in Market Overt, because of the *fresh* and diligent Suit and pursuit of Record, the Goods were so Protected thereby, and by the King's Seizure, that the Property of the same, being tanquam in Custodia legis, cannot be altered by Sale in Market Overt. 2 Inst. 713, 714.—And none of these 12 Exceptions are abrogated by any Act of Parliament, but yet remain in full Force. Ibid. 714.—* S. P. Br. Collusion, pl. 4. cites 33 H. 6. 5.—Br. Trespass, pl. 26. cites S. C.—Br. Property, pl. 6. cites S. C.—S. P. 2 And. 115. Arg. cites S. C.—5 Rep. 83.—S. P. Palm. 486. Arg.—** S. P. Br. Property, pl. 6. cites 33 H. 6. 5.—† S. P. for it cannot be good unless the Property be altered thereby, and that cannot be; for before the Sale, and at the Time of the Sale, the Property was in me, and then if it shall be altered by the Sale it ought to be altered in me, and that shall be impertinent; for then it should be altered out of me immediately in &c. Perk. S. 93.—† Jenk. 83. pl. 62.—|| S. P. Br. Property, pl. 39. cites 9 H. 6. 45.—Property of Goods is not altered by Sale in Market Overt, unless Toll be paid, per Pistor and Fortescue Ch. J. but Brook says Quare. Ibid. pl. 9. cites 35 H. 6. 29.

5. Selling Horses in Cheapside, or Cloth in Smithfield Market, does not alter the Property. Mo. 360. Mich. 36. & 37 Eliz. in Litch of Worcester's Cafe.

6. The Queen cannot grant to one, that his Shop shall be a Market overt to bind Strangers; because against the Law. Mo. 925. Mich. 42 & 43 Eliz. Sir J. Clifton v. Chancellor.

7. Seller in Market overt enters a false Name in the Toll Book; Per 2 Justices, this is no good Sale to bar the Plaintiff. Owen 27. Mich. 30 Eliz. Gibbs v. Batil.

and the Property altered, if there is no *Covin* in the Vendee; For the Misnomer is nothing to him when he buys it Bona Fide, and is not Consant of the tortious taking. Cro. E. 86. Hill 31 Eliz. B. R. Wikes v. Morefoot.—It is not good; per Cur. Le. 158 Mich. 31 Eliz. C. B. Gibb's Cafe.

8. In Cafe of Piracy, buying in a Market overt without Fraud would defend the Buyer. Hob. 79.

9. Custom of Sale in Market overt, where Toll ought to be paid does not take away Property, unless *Toll le paid*; but otherwise where Toll is not used to be paid. Jenk. 83. pl. 62.

10. Goods of Bankrupt remain liable to the Sale of Commissioners, notwithstanding Bankrupt sold them in Market overt; per Twilden J. Sid. 272. Trin. 17 Car. 2. B. R. in Cafe of Bailly v. Bunning.

11. Trover was brought of a Silver Cup against a Goldsmith in the Strand, and it appeared his Apprentice had bought it in the Shop; and per Omnes, Sale of Goods in a Shop in the Strand, or elsewhere out of the City of London, does not alter the Property. 12 Mod. 521. Pasch. 13 W. 3. Anon.

because he could not prove a Demand of the Master, but only of the Apprentice, he was Non-suited. The Reason why it alters Property in London is, because Sale in a Shop there is in Market overt. 12 Mod. 521.—and see Kelng. 48.

(A. 2) Market. Fair. * Clerk of the Market. The
 Fol. 123. Antiquity. [and his Power]. Of the Measures of
 England.

* He is to
 this Day cal-
 led Clericus
 Mercari
 Hospitii Re-
 gis; For of
 ancient time,
 there was a
 continual

Market kept at the Court Gate, where the King was better served with Viands for his Household than by Purveyors, the Subject better used, and the King at far less Charge in respect of the Multitude of Purveyors &c. And the Officer of the Market of the King's Household retaineth his Name still, altho' the good End thereof according to the first Institution ceaseth. 4 Inst. 273.

* S. P. And he
 keeps a Court
 and inquires
 of Weights
 and Mea-
 sures, whe-
 ther they be according to the King's Standard or no, and for that Purpose he makes Process to Sheriffs
 and Bailiffs to return Pannels before him &c. — 4 Inst. 273.

2. Statutum de Forma mittendi Extractas ad Scaccarium in Magna Charta 2. Parte 10. 49. b. Item. **We the Clerk of the Market and of Measures charged and commanded to * deliver the Extracts of that which touches his Office in the Form under-written.**

The King's
 Clerk of the
 Market is
 the King's Minister, and therefore he is within the Parview of this Statute. 4 Inst. 274. — But in
 8 R. 2. in open Parliament a Groat was allowed to him for Marking and Sealing of every Bushel, Two Pence for every half Bushel, and one Penny for every Peck, and so according to that Rate. 4 Inst. 274.
 — It was resolved by all the Judges of England, that no Fee was due to the Clerk of the Market for View and Examination only of Weights and Measures. Ibid. — And the Clerk of the Market cannot set any Price upon any Thing saleable in the Market; For that belongs not to Weights and Measures. Ibid. 275.

3. W. 1. 3 E. 1. cap. 26. Enacts that *No Sheriff or other Minister of the King shall take any Reward for doing his Office &c.*

4. The Clerk of the Market shall hold no Plea, but such as were holden in the Reign of E. 1. And at this Day there is no great Need of him; For the Justices of Assise, the Justicer of Oyer and Terminer, Justices of Peace, and the Sheriffs in their Tourns, and the Lords in their Leets, may and do inquire of false Weights and Measures. 4 Inst. 273.

(A. 3) Markets and Fairs, what they are.

1. A Fair (from Forum or Feriæ) is a great Sort of Market granted to any Town &c. for buying or selling, and for the more speedy and commodious Provision of such Things as the Subject needs. It is usually kept once or twice in the Year. A Mart (a Merce or Mercando) is a great Fair holden every Year. 3 R. S. L. 172. cites 2 Inst. 221.

* S. P. 2
 Inst. 426.

2. A Market (from Mercando, buying and selling) is less than a Fair, and granted to a Town &c. for the like Purposes, but chiefly for the Provision of such Victuals as the Subject wants. This is usually kept once or twice in the Week; so that * every Fair is a Market, but every Market is not a Fair. 3 R. S. L. 172.

(B) Fair.

(B) Fair. *Stallage.*

1. **I**f a Man has a Fair in a Place, those who have Houses next adjoining to the Fair cannot open their Shops to sell Commodities in the Fair, but Stallage is due for it; For they cannot take Benefit of the Fair without giving the Duties which appertain to him who has purchased it. *H. 15 Ja. B. R. in Newington Fair's Case in Cambridge, per Cur. But Doderidge was e contra at a Day before.*

2. The Lord of a Manor may prescribe to have the 8th Part of a Bushel of Corn in four Bushels which are brought to Market within the Manor, Nomine Tolonii for Stallage sold or not sold, and it is a good Prescription tho' it be to have it In Specie. *Cr. 43 El. B. R. per Curiam, Hickman's Case.*

3. The Stallage must be *certain*. *Arg. 2. Show. 266. cites 9 H. 6. 45. pl. 28.*

Tolnetum may well signify Stallage, as a general Word for such Duties and Payments
2 Lutw.
1519. Pasch.
or Trin. 12
W. 3. C. B.
Ennington
v. Taylor.

(B. 2) Stallage. *Who shall have it as Heir. Borough English.*

1. **S**tallage and Piccage is *incident to the Soile*. *Mo. 474. Mich. 39 & 40 Eliz. B. R. in Case of Heddy als. Hoddy v. Wheelhouse.*—And therefore if the King grants Fair or Market with Toll certain to one and his Heirs to be held within *Borough English Land*, and the Grantee dies, the Heir at Common Law shall have the Fair or Market, and the Toll. But the younger Son shall have Piccage and Stallage, with the Soil by the Custom. *Ibid.*

(C) Fair. *What Things Strangers may do.*

1. **I**f a Man has a Market in one Part of the Vill of D. the Inhabitants of the other Part of the Vill cannot erect new Houses, and there in their Houses and Stalls sell Merchandises; For this is to the Damage of the Market. *2 E. 2. admitted.*

2. Case lies for *Erecting* a Market to the Damage of the Plaintiff's Market, tho' the Place is seven Miles distant, and not on the same Day of the Week. *Vent. 98. Mich. 22 Car. 2. B. R. Sard v. Ford.*—*Lev. 296. S. C. by Name of Yard v. Ford.*—*2 Saund. 172. S. C.*

3. It was adjudged upon Demurrer, that the *Inhabitants of one Market Town may sell Goods in another Market Town*, and are not prohibited by the Stat. Ph. & M. which extends only to those who live in Country Towns, and come and sell their Goods in Market Towns. *2 Lev. 89. Trin. 25 Car. 2. B. R. Davis and Leving.*

4. *Quo Warranto* against several Bakers that came in and sold Bread at G. near the City of C. for selling there Extra Shopam, et absque aliquo Mercat. in loco aperto & tanquam Mercat. But resolved not good, because it is no Enchroachment without a Demand of Toll &c. and if it had been for keeping a Market, they would have disclaimed, and Judgment for the Defendants. *2 Show. 201. Pasch. 34 Car. 2. B. R. The King v. - - -*

(D) Fair.

1. **J**US Nundinarum a Senatu aut a Principe impetrandum est. *Ardui Decreta, Libro. 2. 133.*

Fol. 124.
Vid. (A)

(E) *What shall be Contract in Market-overt to change Property.*

* S. P. that the Property is not altered, unless the Course prescribed by the Statute 31 Eliz. 12. be observed, per 3 J. against one. 1 Jo. 164. Mich. 3 Car. B. R. Barker v. Redding.—D. 99. b. pl. 66.—† S. P. Per Gaudy J. Goldsb. 164.

1. **A** MAN * bargains out of the Market to have Goods for 10 l. and that the Buyer shall have Election to like or dis-like the next Day, and at the same Time gives 5 s. in Earnest, and the Day after he agrees to the Bargain, and pays the Toll; yet because it has † Relation to the first Contract, it does not change the Property. *Dy. 1 Ma. 99. 68.*

2. Every Factor of Common Right is to *sell for ready Money, but if he be a Factor in a Sort of a Dealing or Trade, where the Usage is for Factors to sell on Trust, there if he sells to a Person of good Credit at that Time, and he after becomes Insolvent, the Factor is discharg'd; but otherwise if it be to a Man notoriously dis-credited at the Time of the Sale. But if there be no such Usage, and he, upon the general Authority to sell, sells upon Trust, let the Vendee be ever so able, the Factor is only chargeable; For in that Case, the Factor having gone beyond his Authority, there is no Contract created between the Vendee and the Factor's Principal, and such Sale is a Conversion in the Factor; and if it be not in Market-overt, no Property is thereby altered, but Trover will also lie against Vendee. So likewise, if it be in a Market-overt, and Vendee knows the Factor to sell as Factor; per Holt Ch. J. at Guild-hall. 12 Mod. 514, 515. Pasch. 13 W. 3. Anon.*

See Franchises (B)

(F) *Fair. Forfeiture.* What Act or Thing shall be a Forfeiture.

* Orig. [Per tant.]

1. **W**HEN diverse Franchises are granted to one Man, and neither is Dependant upon the other; In such Case, tho' he misuse one Franchise, * yet by this the others shall not be forfeited, but only this Franchise which he has ill used. *22 Aff. 34.*

2. If all the Points of the Franchise depend upon one and the same Franchise, which comprehends several Articles; In such Case, if he misuse any of the Points, the entire Franchise shall be forfeited.

* Orig. (Pur- above) present) 3. If a Man has a Franchise, and uses it as he ought, and over and above * incroaches further upon the King; In this Case the Franchise, which he has well used, shall not be forfeited. *22 Aff. 34.*

4. As if a Man has a Market to hold every Week on a Friday, and he holds the Market the Friday, and also Monday; In this Case nothing shall be forfeited but that which he has incroach'd. *22 Aff. 34.*

5. But

5. But if a Man has a Fair to hold 2 Days in a Year, and he holds it three Days, he shall forfeit the whole. 22 Aff. 34.—21 E. 1. Liber Parliamentorum. 47. The Bishop of Winchester's Case, [that he] shall forfeit all the Fair for holding it beyond the Time limited.

6. If a Man has a Market to hold upon Wednesday, and he holds it of another Day, and not upon the Wednesday, the Franchise shall be forfeited. 22 Aff. 34.

7. An Abuser of the Toll is a Forfeiture of the Market. 2 Show. 265. cites Corporation of Maidenhead's Case.—Palm. 76, 77, 78.

8. Misuser of a Piepowder Court or Toll is a Forfeiture of the Market or Fair it self. 2 Show. 276. Hill. 34 & 35 Car. 2 B. R. Arg. so agreed by Counsel of both Sides in Case of Quo Warranto.

2 E. 3. 15. Prohibits the keeping a Fair longer than he ought on pain of being seised into the King's Hands till he have made Fine for so doing.

(F. 2) Fairs. Goods sold there, or the Value &c. of them forfeited in what Cases.

1. 5 E. 3 5. **I**F any Merchant sell any Ware or Merchandize at a Fair after the Time of the Fair ended, he shall forfeit double the Value of the Goods sold; one fourth Part thereof to the Prosecutor, and the rest to the King.

(F. 3) Proceedings, Pleadings, and Judgment. How.

1. **Q**UO Warranto for the King against A. B. to shew Quo Warranto he claim'd Market in T. in Prajudicium &c. The Writ was returnable in B. R. 15 Pasch. and the Defendant made Default, and at the Venire Facias he made Default likewise at Octab. Trin. And before all the Justices in the Exchequer Chamber, the Question was, if he shall forfeit his Market or not? And per Tremail J. he shall forfeit his Market; For the Statute wills, that if the Defendant does not come at the Venire Facias return'd, that it shall be done as shall be done in Eyre; and before the Justices in Eyre, if the Defendant does not come, the Franchise shall be seised into the Hands of the King *Nomine Districtionis*, and if the Party who ought to replevy the Franchise does not come during the Eyre in the same County, he shall forfeit his Franchise for ever; and so per Hervey in the Eyre of Kent. And therefore all this Term that the Venire Facias is returnable he may come and replevy his Franchise, but not after this Term; and Catesby and Littleton accordingly, that it shall be forfeited if he does not come during the Eyre. But they did not speak these Words (in the same Term) as Tremail said; but per Needham, in B. R. he shall not forfeit at any Time, but may replevy it; For tho' the Eyre determines, yet B. R. does not determine. But the others eontra; and if he does not come in the same Term, in which the Venire Facias is returnable, that the Liberty is forfeited. Brian said, that the Judgment shall be that the Market shall be seised into the Hands of the King, and this shall enure by Way of Extinguishment. As if I grant a Market to the King, which the King had granted to me, this is extinct. Br. Quo Warranto, pl. 11. cites 15 E. 4. 7.

2. If the Party had continued the Market by Tort, and not by Title, the Judgment shall be that the Market shall be ousted. Ibid. per Billing.

3. But if he had Title, as by Grant of the King or the like, the Judgment shall be that it shall be seised. Ibid.

4. And

4. *And in Writ of Nuisance for holding of a Market to the Nuisance of his Market, Judgment was given that the Market of the Defendant should be seised. Ibid.*

5. *But here it does not appear if the Defendant had held his Market by Right or by Wrong; therefore there is better Reason to give Judgment that the Market shall be seised; per Billing; and with this agreed the other Justices as to the Judgment. Ibid.*

6. *Quere, whether when Market is forfeited in Eyre and seised into the Hands of the King, the King shall hold it as a Market? For it is extinct; per Brian. Ibid.*

(G) Fairs. In what Place may or must be kept.

1. 13 E. 1. Stat. of **E**Naçts that Fairs and Markets shall not be kept in Church-Yards.

But if the King name a Place certain which may be not convenient for the Country, yet the Subjects can go to no other, and if they do, the Owner of the Soil where they meet is liable to an Action at the the Suit of the Grantee of the Market. Arg. 3 Mod. 127. Trin. 2 Jac. 2. B. R. in Cafe of the Company of Merchant Adventurers v. Rebow.

2. In the Cafe of Wey-hill Fair it was said per Jefferies Ch. J. That if the Fair belongs to Andover, they may choose whether they will keep it at any Place, and that may create another Question, whether they may not forfeit this Franchise by Disuser? But certainly, if the Place be not limited by the King's Grant, they may keep it where they please, or rather where they can most conveniently; and if it be so limited, they may keep it in what Part of such Place they will. 3 Mod. 108. Pasch. 2 Jac. 2. B. R. Dixon v. Robinfon.

3. In Cafe of the Company of Merchant Adventurers v. Rebow. 3 Mod. 127. Trin. 2 Jac. 2. B. R. in Cafe of the Company of Merchant Adventurers v. Rebow.

(H) Market. What Place shall be said the Market.

1. **I**N an Information upon the Stat. 5 & 6 E. 6. 14. of buying Seed-Grain, &c. It was held, that if Corn be in the Market, tho' the Contract be made in a House out of the Market, and deliver'd to the Vendee out of the Market, yet it is within the Statute. And per Anderfon, the Market shall be said the Place in the Town where it hath used to be kept, and not every Place in the Town. Godb. 131. pl. 148. Hill. 29 Eliz. in C. B. Anon.

2. If one buys in a Shop in London any Thing which appertains not to his Trade, as to buy Plate in a Mercer's or Draper's Shop, it is not a Market overt to alter the Property. So if the Sale be in a back Shop, or in another Place not open, no Property is alter'd; per Anderfon. Cro. E. 454. Mich. 37 & 38 Eliz. in Cafe of Palmer v. Wolley.

3. In Cafe of Toll to be paid for Things brought to Market the Vill shall be taken for the Market; per Powell, J. 2 Lutw. 1502. Hill. 12 W. 3. in Cafe of Kerby v. Whichelow.

(H. 2) What Things may be sold out of the Market.

1. **T**Rerspafs by the Prior of D. where he and his Predecessors Time out of Mind have had Market in D. such a Day, and the Correction of the Market, and that Butchers and others who sell Victuals shall sell

sell in the High Street upon the Stalls of the Plaintiff by him assign'd for them, for which the Plaintiff shall have one Penny a Day for every Stall, and that the Defendant sold in his House, by which the Plaintiff lost his Advantage of the Stalls, and Correction of the Victuals of the Defendant, being a Butcher &c. And admitted for a good Prescription. The Defendant prescrib'd that he and all Householders of D. have used to sell in their Houses, and the Opinion was that this is an ill Prescription; For he does not deny the Market of the Plaintiff, and also by this Mean the Plaintiff shall lose his Tell and Correction, and also Market shall be overt and not privy. Quære, if Householders may prescribe. Br. Prescription, pl. 98. cites 11 H. 6. 19.

For the Market must be in open Place where the Owner may have the Benefit of it. 3 R. S. L. 172. cites 4 Inst. 272. but I do not find it there.

2. And after the Defendant prescribed the Custom of the Vill to be, that every Burgefs seised of any House adjoining to the High Street may sell in his own House, and that he is a Burgefs, and was seised of a Houle adjoining to the said Street, and sold &c. Ibid.

(I) Grants or Patents for Fairs or Markets.

1. IF one has a Fair or Market, either by Prescription or by Letters Patents, and another obtains a Market to the Nuisance of the former Market, he shall not stay till he have avoided the Letters Patents of the later Market by Course of Law, but he may have an *Affise of Nuisance*. 2 Inst. 406.

See Nuisance (G)—Prærogative (T b) (C. d)—Ad quod Damnum.

2. Tho' the Words in the Grant of a Market be *Nisi sit ad Nocumentum seriarum Vicinarum*, these are put but for Example; For if it be *Ad aliquod Dampnum* either of the King or Subject in any other Thing, the Fair shall be revok'd. 2 Inst. 406. cites Palch. 33 E. 1. Prior of Tinmouth's Case.

3 Lev. 221 the King v. Butler

3. It was objected, that an *Ad quod Damnum* was not necessary upon Grant of a Market, but the Patent might be granted without it, and therefore if it be surreptitious it is not material. But the Judges resolv'd, that what is always done in Pleading is necessary to be done; but it may be dispensed with by *Non obstante*; because there the King takes upon him Notice, that it is not Ad Damnum &c. Yet if it be Ad Damnum, the Patent is void; For in all such Patents it is a *Condition imply'd*, that it is not Ad Damnum of the neighbouring Markets. 3 Lev. 222. Trin. 1 Jac. 2. C. B. the King v. Butler.

(I. 2) Of the Manner of holding and waruing a Fair.

1. 2 E. 3. 15. ENACTS that Every Lord at the Beginning of his Fair shall cry and publish how long it shall endure, on Pain to be grievously punished.

2. 5 E. 3. 5. Merchants after the Fair ended shall close their Shops and sell no Ware thereafter, in Pain to forfeit to the King the double Value of the Ware so sold, whereof the Prosecutor shall have a fourth Part.

(I. 3) On what Days.

1. 27 H. 6. 5. ENACTS that Fairs and Markets shall not be kept upon Ascension-day, Corpus Christi, Whitsunday, Trinity-Sunday, the Assumption of the Virgin Mary, All Saints, Good Friday, nor any Sundays, S f i (the

(the four Sundays in Harvest only excepted) in pain to forfeit the Wares so shewed to the Lord of the Franchise there.

Howbeit they may be kept within three Days next before or after the said Days Proclamation thereof being made beforehand, which is to be certified without Fine or Fee to the King, and such as have by special Grant sufficient Days before or after the said Feast may keep their full Number.

Sec (A) (I. 4) Of the Toll Book-keeper, and Property altered by Sale, in Market-overt or Fair.

1. 2 & 3 P. & E. Na^{ts} that the Owner, Farmer, Steward, Bailiff, or Chief M. cap. 7. s. 2. **E** Keeper, of every Fair and Market-overt, shall yearly appoint one certain Place, where Horses shall be used to be sold, in which Place there shall be, by the Keeper of the Fair or Market, appointed one or more to take Toll, and keep the Place from Ten before Noon until Sun-set, upon pain to forfeit 40s. and every Toll-gatherer shall, during the Fairs and Markets, take Toll for every such Horse &c. at the said Place betwixt the Hours of Ten in the Morning and Sun-set, and not at any other Time or Place; and shall have before him at the taking of the Toll the Parties to the Bargain of every such Horse &c. and also the Horse &c. sold, and shall then write in a Book the Names and dwelling-places of all the Parties, and the Colour with one Mark at least of every such Horse &c. on pain to forfeit 40s.

S. 3. The Toll-gatherer or Keeper of the Book shall within one Day after such Fair or Market deliver his Book to the Owner &c. of the Fair or Market, who shall then Cause a Note to be made of the Number of all Horses &c. sold there, and subscribe his Name, or set his Mark thereunto, upon pain to forfeit 40s. and also to answer the Party grieved.

S. 4. The Sale or Exchange in any Fair or Market-overt of any Horse &c. stolen shall not alter the Property, unless the same shall be in the Fair or Market openly Ridden, or kept one Hour at least betwixt Ten in the Morning and Sun-set, in the Place wherein Horses are used to be sold, and unless all the Parties shall come together, and bring the Horse to the open Place appointed for the Toll-taker &c. and there enter their Names and dwelling-places with the Colours, and one Mark at least, of the Horses &c. in the Toller's or Keeper's Book; and also pay him their Toll, if they ought to pay any; if not, then the Buyer to give 1d. for the Entry in the Book.

S. 5. If any Horse that is stolen be sold or exchanged in any Fair or Market, and not used according to this Statute, the Owner of such Horse may seize the said Horse, for have an Action of Detinue or Replevin for the same.

S. 6. The one half of all which Forfeitures to be to the King, and the other to him that will sue for the same before the Justices of Peace, or in any of the ordinary Courts of Record by Bill &c.

S. 7. The Justices of Peace shall have Authority in their Sessions to inquire, hear and determine all Offences against this Statute.

S. 8. Where Toll is not due, the Keeper of the Book shall take but 1d. upon every Contract for writing the Entry.

2. 31 Eliz. cap. 12. S. 2. Every Seller or Exchanger of an Horse &c. in a Fair or Market, being unknown to the Toll-taker or Book-keeper, shall procure one credible Person, that is well known unto him, to vouch the Sale of the same Horse; also the Names of the Buyer, Seller and Voucher, and the Price of the Horse shall be entered in the Toll Book, and a Note thereof delivered to the Buyer under the Toll-takers or Book-keepers Hand, for which the Buyer shall pay 2d. and every false Voucher, and the Toll-taker or Book-keeper, that suffers such Sale or Exchange to pass contrary to this Act, shall forfeit 5l. to be divided betwixt the Queen and the Prosecutor. And besides, the Sale of such Horse shall be void.

This Act is but an Act of Addition to the Common Law, and to the Act of 2 & 3 Ph & M. cap. 7. all standing in Force, and must be pursued. 2 Inst. 719.—This

Branch extends to all Sales of Horses in Market-overt, whether the Horse &c be stolen or not stolen. 2 Inst. 717.—In Trover of an Horse, a special Verdict was found that B. was possess'd of an Horse, and lost him, and that he was afterwards sold in Smithfield-Market by C. known to one J. S. unto D. to the Use of the Defendant, prout per Copiam Intrationis inde in Libro Tolreti usualiter capti & reservat. apparet. And they find further, that Nul tiel in rerum Natura at the Time of the Sale nec quod unquam fuit aliqua talis Persona in rerum Natura, as J. S. and that the Horse came to the Hands of the Defendant, and he converted him &c. But nothing was found as to the Horse being stole; and this Matter being objected, the Court conceived it to be a Case of great Consequence and Hardship, be the Resolution one way or other. For it is difficult for the Vendee to know the Vendor, and so it is for the Owner, who lost the Horse to prove it to be stolen, tho' it really be so. And therefore three Justices agreed that the Plaintiff have Judgment: For tho' the Preamble be of Horses stolen, yet the Purview is general. Palm. 485. Mich. 3 Car. B. R. Barker v. Redding.

S. 3. Justices of Peace in Sessions have Power to hear and determine those Offences.

S. 4. Notwithstanding such Sale and Voucher, as aforesaid, the right Owner or his Executors may redeem a stolen Horse, if they claim him within 6 Months after the Selling at the Parish or Corporation where he shall find him, and make Proof by two sufficient Witnesses, before the next Justices of Peace in the County, or before the Head-Officer of a Corporation, that the Horse was his, and re-pay to the Buyer such Price for the Horse as the same Buyer shall upon his own Oath before such Justice or Officer testify to have paid for him.

The Clause of Redemption in this Statute extends to no other but stolen Horses. Agreed by all the Justices. Palm. 489.

Mich 3 Car. B. R. in the Case of Barker v. Redding.

(I. 5) Who may go to Fairs or Markets to sell there.

1. 3 H. 7. 9. UPON an Ordinance made by the City of London to prohibit Citizens to carry their Wares to Fairs and Markets out of the City, this Act gives them Liberty, and makes that Ordinance void; and none shall trouble any Citizen for so doing in pain of 40 l. to be divided betwixt the King and the Prosecutor.

2. 1 & 2 Ph. & M. 7. Enacts that none dwelling in the Country out of a Corporation or Market-Town shall sell or cause to be sold by Retail any Wollen Cloth, Linnen Cloth, Haberdasher Wares, Mercery Wares, in any such Corporation or Market Town, or the Suburbs or Liberties thereof, (except in open Fairs) in pain to forfeit for every Time so offending 6s. 8d. and the whole Wares so sold, or offered to be sold; the one Moiety of which Forfeiture shall be to the King and Queen, and the other to the Seiser or Prosecutor.

3. Stat. 18 Eliz. cap. 21. Enacts that it shall be lawful for all Persons to buy and sell within the Borough of New Woodstock all Manner of Wools and Yarns upon the usual Markets and Fair Days, and the same to use to their best Advantage.

(K) Pleadings of Goods bought in Market-overt.

1. WHERE the Buyer justifies the Buying of a Horse in Market-overt to change the Property, he shall shew of whom he bought. Br. Count, pl. 78. cites 9 H. 6. 45.

2. In Trespas of Goods taken the Defendant said, that the City of London is an ancient City, in which there has been a Market time out of Mind, every Day in the Week for all Men to sell, and that A. was possessed of the Goods, and sold them at London before the Trespas for 10 l. by which he took them &c. The Plaintiff demurred, because he did not say whose the Market was, nor did he except the Lord's Day, on which Market cannot be by the Law of God, nor is it shewn what Toll was paid, and yet the Court held against the Plaintiff, by which he was Nonsuited; for a Market goes

* Br. Pleadings, pl. 127, cites S. C.— In Trover, the Defendant, as to part, pleaded That the City of London is an ancient City, with

and that with the Land, and therefore need not shew who is Owner, and herewith agrees *Liber Intractionum*. And see that Property may be altered there without paying *Toll*; for this is a *Duty to the Lord of the Market, and not a Property*. Br. *Trespais*, pl. 328. cites 12 E. 4. 8, 9.

Goods to be sold in every Part of the City in every open Shop every Day besides Sundays and Holidays betwixt Sun-rising and Sun-setting, so as one of the Contractors be a Freeman; and that he being a Freeman of the Company of Mercers such a Day, not being Sunday or Holiday, bought those Things of one H. C. for such a Sum in his open Shop, wherein he had a long Time used to buy such Wares, and so justifies the Conversion; And upon this Plea the Plaintiff demurred: And upon the first Motion at the Bar all the Court conceived that the Plea was not good; For the Custom is too general, that every Freeman might buy all Manner of Wares in every Shop &c. For then a Scrivener might buy Plate in his Shop, and the like &c. which is not reasonable. And here he being of the Mistry of Mercers, to buy Petticoats and Cloaks &c. it is not agreeable to his Trade. And Popham said, that it had been resolved, that such Custom being found by a special Verdict was unreasonable; wherefore it was adjudged for the Plaintiff. Cro. J. 63, 69. Pasch. 3 Jac. B. R. *Taylor v. Chambers*.

3. Where Defendant pleads, that he bought the Goods in a Market-overt, he out to shew *on what Day the Market was kept*, and that it was not kept at a Time when by the Patent it ought not to be kept. Sti. 113. Trin. 24 Car. *Marshall v. Porter*.

4. Trover for Goods, to which it was pleaded by Defendant that he had bought them in Market-overt. You must *prove the Sale in Market-overt, and at a convenient Time*. 12 Mod. 209. Mich. 11 W. 3. *Burch v. Scory*.

(L) Equity.

Vern. 84. S. 1. C. and P. **I**F a Trespasser of Goods sells them in Market-overt, the Owner's Title is barr'd; but *if they come to the Trespasser again*, he may seize them; per Finch C. 2 Chan. Cafes 126. Mich. 34 Car. 2. in Case of *Bovey v. Smith and Boney*.

Marriage.

(A) Marriage. *Contract of Marriage, what is, and how dissolved.*

1. **A** Marriage was had between two *Infra annos Nubiles* pursuant to a *Covenant between the several Parents*. At 14 Years the Husband disagreed. It was argued by Egerton, the Queen's Solicitor, that this Marriage, so far as it concerns the Covenant, is to be *considered according to the Reason of the Common Law*, and not according to the Rules and Grounds of the Canon or Civil Law, *not as a Marriage in Right, but as a Marriage in Possession*, and Marriage in Possession is *sufficient always in Personal Things and Causes*, especially *where the Possession of the Wife is in Question*; but where the Possession of the Husband is in Question, there Marriage in Right ought to be. Le. 53. Pasch. 29 Eliz. in Case of *Leigh v. Hammer*.

2. *Contract per Verba de futuro* is releasable. But *per Verba de presenti* is not; per Holt Ch. J. 2 Salk. 437. Pasch. 2 Annæ. B. R. *Jeffson v. Collins*.

(B) Contract

(B) Contract of Marriage *sentenced and how.*

1. **S**ententia contra Matrimonium nunquam transit in Rem judicatam. 7 Rep. 42. b. (43. b.) Kenn's Case.
2. If F. be divorce'd from her Baron Cauſa Præcon tractus made with another *per Verba de Præſenti*; immediately by the Sentence given in the Court, the Marriage ſhall be *conſummated* between the ſaid F. and firſt Baron *without any Rites* to be in *Facie Eccleſiæ*. Otherwiſe on Contract *Per Verba de futuro*. D. 105. b. 17. Marg. per Noy Attorney General in his Lent Reading. 1632.

Sid. 13. accordingly; but Twiſden contra.

(C) Actions relating to Contracts.

1. 29 Car. 2. **N**O Action ſhall be brought to charge any Perſon upon any Agreement made upon Conſideration of Marriage unleſs the Agreement upon which ſuch Action ſhall be brought, or ſome Memorandum or Note thereof ſhall be in writing and ſigned by the Party ſo to be charged therewith, or ſome other Perſon by him authorized.

See 3 Lev. 105. Philips v. Waller, where it is Reported to have been

reſolved that ſuch Promise is directly within the Words of this Statute, and not out of the Intent; becauſe it was in Conſideration, the one would marry him, the other would marry her; and ſo it is a Promise in Conſideration of Marriage — Skin. 54. S. C. Philips v. Waller in C. B. and held per Windham, Levins and Charleton to be within the Statute, and that it might be demurred to; but North Ch. J. being abſent, adjournatur.

In Action ſur Caſe upon mutual Promiſes of Marriage the Couſel for Defendant offered that it was within this Statute; but ruled e contra, per Jeffries Ch. J. Skin. 196. pl. 10. Anon.

2. *Assumpsit* &c. for that in Conſideration he had promiſed to marry the Defendant, ſhe had promiſed to marry the Plaintiff; after a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that this Action could not be brought *by the Man*, becauſe Marriage is no Advantage to him, but to the Woman, but non allocatur; For Marriage is a Conſideration on the Man's Side ſufficient to raiſe an Uſe, and Holt Ch. J. ſaid this Action is grounded on *mutual Promiſes*; For if the Woman's Promise ſhould not bind her, then it is but *Nudum pactum* on the Man's Side, and therefore it is Actionable either on both Sides, or on neither Side. 1 Salk. 24. Mich. 10 W. 3. B. R. Harrifon v. Cage.

In this Caſe the Plaintiff offered that he offered to marry her but ſhe reſuſed which in this Caſe was neceſſary to intitle the Plaintiff, no certain Time having been

agreed on for Marriage. Carth. 467. Harrifon v. Cage. — S. C. 12 Mod. 214. — S. P. Sid. 180. Hebden v. Rutter. — 1 Lev. 147. S. C.

3. A Prohibition was moved for to ſtay a Suit in the Spiritual Court upon a Contract of Marriage *per Verba de Præſenti* ſuggeſting, that in Effect the Contract was *per Verba de futuro*, for which, if not performed, the Party had Remedy at Common Law; Holt Ch. J. ſaid, that tho' it was *per Verba de Præſenti*, yet it was a matrimonial Matter, and the Spiritual Court had Jurisdiction, and this was the great Objection againſt Actions at Law when firſt brought up in theſe Caſes. But in answer to this it was held, that the Remedy in the Spiritual Court was waved by betaking himſelf to Damages for the Breach; and he ſaid, that where it is *per Verba de futuro*, which do not intimate an actual Marriage, it is releaſable and as it is ſo, the Party may admit the Breach and demand Satisfaction; a Prohibition was denied. 2 Salk. 437. Paſch. 2 Annæ B. R. Jeſſon v. Collins.

4. If a Man of full Age and a Female of 15 promiſe to intermarry, and afterwards ſhe marries another, an Action lies againſt him; For tho' ſuch

Marriage may be said to be voidable as to the Infant, yet it shall be binding on the Person of full Age, who shall be presumed to have acted with sufficient Caution; otherwise this Privilege allowed Infants of rescinding and breaking thro' their Contracts, which was intended as an Advantage to them, might turn greatly to their Prejudice. 3 New Abr. 574. cites Trin. 5 Geo. 2. Holt v. Ward.

See Trial
(B. f. 6)

(C. 2) Actions on Contracts, *Pleadings* and Evidence.

1. **A** Sumpfit, in Consideration that the Plaintiff promised to marry, the Defendant promised to marry him; it was proved upon Evidence that there was a *Promise*; but the *Defendant produced a Sentence in the Spiritual Court disaffirming the Contract*, and this was held good Counter-Evidence, and the Plaintiff was Nonfuit; cited per Holt Ch. J. as a Case which he remembered. 2 Salk. 438. in Case of *Jesson v. Collins*.
2. If a Man makes a Promise to marry a Woman, and was incapable to perform it *by Reason of Consanguinity, &c.* it would be there a void Promise, whereof she might discharge herself by giving the *special Matter in Evidence* on Non Assumpfit. 12 Mod. 214. *Harrison v. Cage & Ux.*

(D) *What is, or amounts to Marriage; and what shall be said Evidence.*

1. **B** ARON being about the *Age of 11 Years*, and the Woman of 16 Years, they contract Matrimony and after they procure it Legitimate Solemnizari between them, and after the Baron dies before the Age of 12 Years; per Cur. this is a lawful Marriage. Dal. 79. pl. 16. 14 Eliz.
2. Matrimony is not *till after Years of Consent*, but *Sponsalia* may be before. Arg. Mo. 742. Mich. 41 & 42 Eliz. *Sir Arthur George's Case*.
3. If *Ideot* contracts Matrimony it is good, and shall bind him. Sid. 112. Pasch. 15 Car. 2. in Cam. Scacc. by 3 J. in Case of *Manby v. Scott* cites it as adjudged 3 Jac. in Case of *Stiles v. West*.
4. 12 Car. 2. cap. 33. *All Marriages solemnized in any the King's Dominions since the 1st. of May 1642. before any Justice of Peace, or so reputed, or according to any Ordinance, or reputed Ordinance of both, or either Houses of Parliament, or of any Convention sitting at Westminster under the Name of a Parliament shall be of Effect as if solemnized according to the Rites used in the Church of England; and Issue upon Bastardy, or unlawfulness of Marriage, concerning such Marriages, shall be tried by Jury. Confirmed 13 Car. 2. cap. 11.*

2 Show. 300.
Weld v.
Chamber-

lain. S. P.—As where the Words are, viz. *I marry you, or you and I are Man and Wife*; and this is not releasable; but if per *Verba de futuro*, as *I will marry you, I Promise to marry you &c.* this is releasable. 2 Salk. 437. Pasch. 2 Annæ. B. R. *Jesson v. Collins*. —The Wife sued in the Spiritual Court for Alimony; the Case was that the Husband was an *Anabaptist*, and had a Licence from the Bishop to marry but married the Woman according to the Forms of their own Religion; and Holt said that by the Canon Law a Contract per *Verba de Præsentis* is a Marriage; and that so it is of a Contract per *Verba de futuro*, if the Contract be executed and he does take her, it is a Marriage, and they cannot punish for Fornication. 2 Salk. 438. Mich. 5 Annæ. B. R. *Wigmore's Case*.

6. *Entry of Names* of Persons as married in a *Church-book* is not Positive Evidence of the Marriage unless the *Identity of Persons* be proved, or that it be strengthened with Proof of *Cohabitation*, or allowance of Parties. MS. Tab. tit. Marriage cites 28. Jan. 1718. *Draycot v. Tabbot*.

(D. 2)

(D. 2) Good. In regard of the Person marrying generally without Consent or Licence.

1. 2 & 3 E. 6 21. **A**LL Laws, Canons, Constitutions, and Ordinances, which prohibit Marriage to Spiritual Persons, who by God's Law may marry, and all Pains and Forfeitures therein contained, shall be void.

Provided, that this Act shall not give Liberty to marry without asking in the Church, and other Ceremonies appointed by the Book of Common-Prayer.

Decrees and Divorces heretofore made, are saved.

2. 5 & 6 E. 6. 12. The Marriage of Priests and other Spiritual Persons shall be lawful, and their Children legitimate and inheritable; likewise they to be Tenants by the Curtesie, and their Wives dowable.

3. The 100 Canon is that no Children under the Age of 21 Years compleat shall Contract themselves, or marry without the Consent of their Parents, or of their Guardians and Governors, if their Parents be deceased.

(E) Good. In regard of the Person with whom. Degrees prohibited.

1. 32 Hen. 8. cap. 38. S. 2. **A**LL such Marriages as within the Church of England shall be contracted between lawful Persons (as all Persons be lawful that be not prohibited by God's Law to marry) being contract and solemnized in the Face of the Church, and Consummated with bodily Knowledge and Fruit of Children, shall be lawful and indissoluble, notwithstanding any Dispensation, Prescription, or other Thing. And * no Referection or Prohibition (God's Law except) shall impeach any Marriage without the Levitical Degrees. And no Person shall be admitted in Spiritual Courts to any Process contrary to this Act.

So much of this Act as is not repealed by 2 & 3 Edw. 6. cap. 23 is revived by 1 Eliz. cap. 1. — * The clear Sense of this Clause must be, that all Marri-

ages are lawful which are not prohibited within the Levitical Degrees, or otherwise by God's Law. So as the prohibiting of Marriages within the Levitical Degrees, and within God's Law, whereof the Levitical Degrees are a Part, is no more or less in Effect than to say, that all Marriages shall be lawful which God's Law does not Prohibit. per Vaughan Ch. J. Vaugh. 219 in Case of Harrison v. Barwell.

2. 2 & 3 Edw. 6. cap. 23. S. 2. As concerning Pre-contracts the Statute 32 Hen. 8. cap. 38. shall be repealed, and reduced to the State of the King's Ecclesiastical Laws.

3. A Man married the Relict of his great Uncle, viz. his Grandfather's Brother by the Mother's Side, and the Question was, whether this was a lawful Marriage by the Act of 32 H. 8. 38. And Vaughan Ch. J. who delivered the Opinion of all the Judges of England, held, that the Marriage was lawful by that Statute; and accordingly Judgment was given, that a Prohibition should go the Spiritual Court. Vaugh. 206 to 250. Trin. 20 Car. 2. C. B. Harrison v. Barwell.

2 Vent 9. to 22. Trin. 22 Car 2. C. B. S. C. that the Prohibition do stand, and no Consultation be granted.

4. It was moved for a Prohibition to the Spiritual Court, and the Suggestion was, that they proceeded there to excommunicate the Plaintiffs, for that the Plaintiff Heyward had married the other Plaintiff, who was the Daughter of the Sister of his first Wife, and it was granted; And the Defendant demurred on the Suggestion, because it appears that the Marriage was not lawful. Et adjournatur to be argued. Sid. 434. Heyward and Ux v. Foine.

5. Prohibition to the Dean of the Arches suggesting that Collet had settled his Lands on his Children by his Wife now living, and that the Suit in the Arches was for a Divorce, he having married his first Wife's Sister,

Sister, the Consequence whereof would be, to make his Children Bastards, and draw the Settlement of his Lands in Question; But at first the Prohibition was denied, because if it should be granted, then every incestuous Marriage might be sheltered under the like Pretence; And the Matter being proper to the Jurisdiction of the Spiritual Court shall be tried there, tho' a temporal Inheritance may in Consequence come in Question: But it appearing afterwards to the Court, that this Divorce was prosecuted by Contrivance, that Collett might have Power to dispose his Estate (for at the first Instance, he confessed his former Marriage with his Wife's Sister, upon which Confession the Court was ready to give Sentence, without any farther Evidence) The Court ordered a Trial at Common Law in a feigned Action, in which the Issue should be, whether Collett was ever married to his Wife's Sister, which being refused, a Prohibition was granted. Nelf. Abr. 1158, 1159. Marriage (A) pl. 18. cites T. Jones, 213. Collett's Case.

6. On a Motion for a Prohibition to the Court of the Bishop of Exon, for prosecuting J. S. for Incest in marrying the *Daughter of his Brother of the half Blood* it was resolved that no Prohibition should go; For the Court said, that tho' the Brothers were not of the whole Blood, yet were they Brothers, and therefore the Marriage incestuous. 3 New. Abr. 573. cites Mich. 30 Car. 2. C. B. Oxenham and Ux v. Gayre.

7. If the *Father marries the Mother, and the Son marries the Daughter*, this is lawful enough. 3 New. Abr. 573. cites it as agreed by the Court. Mich. 30 Car. 2. in the Case of Oxenham v. Gayre.

8. One married *his great Aunt's Husband's second Wife*; This was held by Divines and Civilians a good Marriage; For *Affinis mei Affinis non est mihi Affinis*. 3 New. Abr. 573. mentions it as cited by North Ch. J. in the Case of Oxenham and Ux v. Gayre as the Earl of Manchester's Case.

9. Prohibition was prayed to the Court of York to stay a Suit to dissolve a Marriage with his *first Wife's Daughter*, because not within the Levitical Degrees; And a Prohibition was granted Nisi &c. It was adjourned; but the Reporter says, he afterwards heard that a Consultation was granted. 2 Lev. 254. Trin. 31 Car. 2. B. R. Wortley v. Watkinson.

son v. Bergatron seems to be the S. C. though it was Pasch. 34 Car. 2. B. R. whereas this is Trin. 31 Car. 2. B. R. But there it is for marrying *his Sister's Daughter*, and that the Defendant prayed a Prohibition, because out of the Levitical Degrees; But denied by the whole Court; because it is a Matter of Ecclesiastical Consueance, and Divines know better how to expound the Law of Marriages than the common Lawyers; And though sometimes Prohibitions have been granted in Causes matrimonial, yet if it were now Res Integra they would not be granted. Raym. 464. — Where a Suit was for marrying *his first Wife's Sister*, a Prohibition was granted, to the Intent to have a Declaration thereupon, so that the Lawfulness of the Marriage might come in Debate. 3 Lev. 364. 5 W. & M. B. R. Honour v. Bradshaw. — But where a Suit was against the Plaintiff in the Ecclesiastical Court for Incest in marrying his *first Wife's Sister* a Prohibition was moved for, *supposing that the said second Wife was dead, and that by her he had a Son, to whom an Estate was descended, as Heir to his Mother*, and that notwithstanding he had pleaded this Matter, they went on to annul the Marriage, and bastardize the Issue. And per Cur. a Prohibition shall go as to annulling the Marriage, or bastardizing the Issue, but they may proceed to punish the Incest. 2 Salk. 548. Hill. 4 & 5 W. & M. B. R. Harris v. Hicks. — Upon the Question, whether the Husband *marrying the Wife's Sister after the Wife's Death* be such a Marriage as by the Statute of 32 H. 8. the temporal Courts may prohibit the impeaching, or drawing it into Question in the Spiritual Court in order to a Divorce or Separation of the Parties, Ld. Ch. J. Vaughan conceived that they could not. 1. Because this Marriage is expressly prohibited by the 18th of Leviticus, and then it must be within the Levitical Degrees. 2. If it were not so prohibited, yet it is not a Marriage without the Levitical Degrees, but within them, and therefore no Prohibition will lie for impeaching it; For Marriages not to be impeached must be without the Degrees, and for that some Marriages within the Degrees may be lawful. 3. That if this Marriage be without the Levitical Degrees, yet it is a Marriage prohibited by God's Law, and therefore to be impeached, notwithstanding the Statute of 32 H. 8. whose Words are, that *no Marriage (God's Law excepted) shall be impeached without the Levitical Degrees*. Per Vaughan Ch. J. in delivering the Opinion of the Court. Vaugh. 305. Trin. 25 Car. 2. C. B. Hill. v. Good.

10. Tho' the *Nephew cannot marry the Aunt*, because she is superior to her Husband in point of Parentage, and therefore the Marriage incongruous; Yet the *Uncle may marry the Niece*; Because where the Uncle marries

marries the Niece, he is superior to her both in point of Parentage and of matrimonial Government. cited per Twifden J. 2 Lev. 254. in Case of Wortly v. Watkinson, as resolved in Allington's Case.

11. Prohibition to the Ecclesiastical Court against a Man for marrying his *Sister's Bastard Daughter*; The Reasons offered were, that it is not within any of the Levitical Degrees, and that such only are under the Cognizance of the Spiritual Court; It is true, that Law forbids a Man to approach to any near of Kin to uncover her Nakedness, but that can never be intended of a Bastard, because she is of Kin to no Person whatsoever, and is Quasi nullius filia. But to this it was said on the other Side, that at the Time when the Levitical Law was established, there was no Difference amongst the Israelites between a Child born in Adultery, and in lawful Marriage; And therefore a Bastard was Proximus Sanguinis amongst them, and that they were the best Expositors of that Law; that it is morally as unlawful to marry a Bastard, as one born in Wedlock; and it is so also in Nature; For the Levitical Law was grounded upon a natural as well as on a politick Reason to enlarge their Kindred, and unite their Families; Therefore if a Bastard does not fall under the Prohibition that a Man Ad proximum sanguinis non accedat, a Mother may marry her Bastard Son; the Court inclined not to grant the Prohibition. Sed adjornatur. 5 Mod. 168. Hill. 7 W. 3. Haines v. Jescott.

12. Libel &c. against the Defendant, for marrying and cohabiting with his *Wife's Sister's Daughter*; It was suggested for a Prohibition, that this is not within the Levitical Degrees; for a Man may marry his Niece, tho' he cannot marry his Aunt, because of the *Superiority which she has over him*. But Holt Ch. J. asked, what Superiority is there by an Aunt over her Nephew? and asked what Ground there was for the Distinction, and said he could not see any Difference between the two Cases; And that this Case was within the Degrees of Affinity, and in the same Degree of Consanguinity there would have been no Doubt of it; For a Man cannot marry his own Sister's Daughter; And said, that he thought this Case had been settled, and that there was a Case in Point against them: But indeed, if this Marriage be not within the Levitical Degrees, the Spiritual Court is to be hindered from proceeding on a wrong Foundation. 5 Mod. 448. Mich. 11 W. 3. Clement v. Beard.

A Prohibition was denied. Comb. 356. Hill. 8 W. 3. S. C.

S. P. And a Prohibition was awarded because such Marriage is not prohibited by the Levitical Law. Mo. 90. Pasch. 33 Eliz. pl. 1266. Mann's Case. — Cro. E. 228. pl. 16. S. C. that though this was not prohibited

within the Levitical Degrees, yet because *Degrees more remote are forbidden*, they gave Sentence of Divorce; And he grounded his Prohibition upon the Statute of 32 H. 8. cap. 38. and a Consultation was prayed and granted, because the Prohibition is not to be, if it be not within the Levitical Degrees; And here it was general, and therefore not good. — 4 Le 16. S. C. reported according to Cro. E. 228. — Ld Ch. J. Vaughan takes Notice, that Co Litt 257. construes the Statute of 32 H. 8. 38. which declares, that all Persons may lawfully marry, who are not prohibited by God's Law to marry, to be the same as to say, that be not prohibited by the Levitical Degrees; By which he says, that Ld. Coke evidently makes all the Law of God, which prohibits Marriages to be the Levitical Degrees only. Whereas Vaughan says, he conceives clearly, that *there are other Laws of God prohibiting Marriages*; and if made, warranting their Dissolution; and so intended to be by this Statute of 32 H. 8. besides the Law of God in the Levitical Degrees. As 1. *Persons pre-contracted* to another are prohibited by God's Laws to marry against such Pre-contract 2. *Persons of natural Impotency* for Generation are prohibited to marry. 3. *Plurality of Wives or Husbands* is prohibited by God's Law, the first not being prohibited by the Levitical Degrees; And says, that Coke, in the End of his Comment upon this Statute, notwithstanding the Passage before in his Littleton, saith expressly, That Marriages with a Person pre-contracted or impotent could not have been questioned in order to a Divorce, by reason of this Statute, but because such Marriages are against God's Law; Yet they are all without the Levitical Degrees. This is the Reason of (*God's Law except*) for these Marriages may be impeached, though out of the Levitical Degrees; And this answers the Words (*or otherwise by holy Scripture*) in 28 H. 8. cap. 16. ulto. Vaugh. 220, 221. in Case of Harrison v. Burwell.

13. The 99th Canon is, That no Persons shall marry within the Degrees prohibited by the Laws of God, and *expressed in a Table set forth* by Authority in the Year of our Lord God 1563. And all Marriages so made and contracted shall be adjudged incestuous and unlawful, and consequently shall be dissolved as void from the Beginning, and the Parties so married shall by Course of Law be separated. And the aforesaid Table shall be in every Church publicly set up and fixed at the Charge of the Parish. Constitutions and Canons in 1603.

(E. 2) Good. In regard of the *Licence* and *Registering*, *Banns*, and *Place where*; And Punishment of marrying otherwise, what, and in what Cases.

Godolph. Rep. 466. cap. 33. S. 3. — So that the express Words of this Canon require, that no Clergyman shall marry any Persons but in the Parish Church where one of those Persons dwells. per Ld. C. Hardwick. Barn.

1. No Minister, upon pain of Suspension per Triennium ipso facto, shall celebrate Matrimony between any Persons without a Faculty or Licence granted by some of the Persons in these our Constitutions expressed, except the Banns of Matrimony have been first published three several Sundays or Holydays in the Time of divine Service in the Parish Churches and Chapels where the said Parties dwell, according to the Book of Common Prayer; Neither shall any Minister, upon the like Pain, under any Pretence whatsoever, join any Persons so licenced, in Marriage at any unreasonable Times, but only between the Hours of Eight and Twelve in the Forenoon, nor in any private Place, but either in the said Churches or Chapels where one of them dwelleth, and likewise in time of Divine Service, nor when Banns are thrice asked (and no Licence in that Respect necessary) before the Parents or Governors of the Parties to be married, being under the Age of twenty one, shall either personally, or by sufficient Testimony, signify to him their Consents given to the said Marriage. The 62d. Canon. Constitutions and Canons in 1603.

Chan. Rep. 408. Hill. 1741. cites this Canon, in the Case of Moor v. Moor. — By the Provincial Constitutions that Banns ought to be solemn Publications, that is, they ought to be thrice published in the parochial Churches where the contracting Parties and their Parents dwell, on three Sabbath Days, or three Festival Days, (allowing some interval of Time between each) at the time of Divine Service, when most of the Parishioners are assembled together, by the Parsons of the said Parishes respectively, or others in holy Orders, at such Times and Seasons wherein Solemnization of Marriage is not canonically prohibited, Glof. verb. Bannorum. Yet where three Festivals immediately succeed each other, such Publication in them made, holds good in Law. Prov. Const. de Spons. Glof. in Verb. a se distantibus: As also shall the Marriage itself, when once solemnized, albeit such Publication of Banns, as aforesaid, did not precede the same. Gl. in v. Solen. Edit. de cland' Despon' Godolph. Rep. Chap. 23. S. 2. and cites the Books before-mentioned.

2. The 63d. Canon is, That every Minister who shall hereafter celebrate Marriage betwixt any Persons contrary to our said Constitutions, or any part of them, under Colour of any peculiar Liberty or Privilege claimed to appertain to certain Churches or Chapels, shall be suspended per triennium by the Ordinary of the Place where the Offence shall be committed. And if any such Minister shall afterwards remove from the Place where he hath committed that Fault before he be suspended as is aforesaid, then shall the Bishop of the Diocese, or Ordinary of the Place, where he remaineth, upon Certificate under the Hand and Seal of the other Ordinary from whose Jurisdiction he removed, execute that Censure upon him. Constitutions and Canons in 1603.

3. The 101st. Canon is, That no Faculty or Licence shall be henceforth granted for Solemnization of Matrimony betwixt any Parties without thrice open publication of the Banns according to the Book of Common Prayer by any Person exercising any Ecclesiastical Jurisdiction, or claiming any Privilege in the right of their Churches; But the same shall be granted only by such as have Episcopal Authority, or the Committary for Faculties, Vicars general of the Archbishops, and Bishops Sede Plena, or Sede Vacante, the Guardian of the Spiritualities or Ordinaries exercising of right Episcopal Jurisdiction in their several Jurisdictions respectively, and unto such Persons only as be of good State and Quality, and that upon good Caution and Security taken. Constitutions and Canons in 1603.

This Canon likewise requires the same Thing with the

4. The 102 Canon is in these Words; The Security mentioned shall contain these Conditions, 1st. That at the Time of the granting every such Licence there is not any Impediment of Pre-contract, Consanguinity, Affinity, or other lawful Cause to hinder the said Marriage. 2dly. That

That there is not any Controversy or Suit depending in any Court before any Ecclesiastical Judge touching any Contract or Marriage of either of the said Parties with any other. 3dly. That they have obtained thereunto the exprefs Consent of their Parents, (if they be living) or otherwise of their Guardians or Governors. Lastly, That they shall celebrate the said Matrimony publickly in the Parish Church or Chapel where one of them dwelleth, and in no other Place, and that between the Hours of 8 and 12 in the Forenoon. Constitutions and Canons in 1603.

former, that the Marriage should be in the Parish Church which one of the Parties belong to, per Lord C. Hardwick Barn.Chan.

Rep. 409. Hill. 1741. Moor v. Moor.

5. The 103 Canon is in these Words; For the avoiding of all Fraud and Collusion in the obtaining of such Licences and Dispensations, we further constitute and appoint, that *before any Licence* for the Celebration of Matrimony, without Publication of Banns, *be had or granted, it shall appear to the Judge by the Oaths of two sufficient Witnesses*, one of them to be known either to the Judge himself, or to some other Person of good Reputation then present, and known likewise to the said Judge, *that the exprefs Consent of the Parents, or Parent, if one be dead, or Guardians or Guardian of the Parties, is thereunto had and obtained; And furthermore, that one of the Parties personally swear, that he believeth there is no let or impediment of Pre-contract, Kindred or Alliance, or of any other lawful Cause whatsoever, nor any Suit commenced in any Ecclesiastical Court, to bar or hinder the Proceeding of the said Matrimony, according to the Tenor of the aforesaid Licence.* Constitutions and Canons in 1603.

Cited by Ld C. Hardwick but said, that according to the Practice of making out Licences nothing of this is observed. That it is strange to consider that the Ecclesiastical Courts should get into a Prac-

tice so diametrically opposite to the exprefs Words of the Canons. That one would think this Practice of making out Licences contrary to the Canons, proceeded from a Notion that a Metropolitan might dispense with the Canons. It is true the King may, but the Metropolitan cannot; For which Reason when Dispensations of this Sort have been made by the Metropolitan, they have always been confirmed by the Crown. Barn.Chan. Rep. 410. in Case of Moor v. Moor.

6. The 104th. Canon is, That if both the Parties which are to marry, being in *Widowhood*, do seek a Faculty for the forbearing of Banns, then *the Clauses* before mentioned *requiring the Parents Consents may be omitted;* But the *Parishes* where they dwell both shall be expressed in the Licence, *as also the Parish* named where the Marriage shall be celebrated. And if any Commissary for Faculties, Vicars-general, or other the said Ordinaries shall offend in the Premises, or any part thereof, he shall for every time so offending be suspended from the Execution of his Office for the Space of six Months; and every such Licence or Dispensation shall be held void to all Effects and Purposes, as if there had never been any such granted; And the Parties marrying by Virtue thereof shall be subject to the Punishments which are appointed for clandestine Marriages. Constitutions and Canons in 1603.

7. 6 E 7 W. 3. cap. 6. S. 52. Enacts, that No Person shall be married at any Place pretending to be exempt from the Visitation of the Bishop without a Licence, except the Banns be published and certified, and every Parson, Vicar, and Curate, who shall marry any Persons contrary to the Meaning hereof, shall forfeit 100 l. to be recovered in any of his Majesty's Courts of Record, one Moiety to the King, and the other Moiety to the Informer, and shall for the second Offence be suspended ab Officio, & Beneficio for three Years.

8. 7 E 8 W. 3. cap. 35. S. 2. Every Parson, Vicar, or Curate, who shall marry any Persons in any Church or Chapel exempt or not exempt, or in any other Place whatsoever, without Publication of the Banns of Matrimony between the respective Persons according to Law, or without Licence for the said Marriages first had and obtained, shall for every such Offence forfeit the Sum of 100 l.

S. 3. Every Parson, Vicar, or Curate, who shall substitute, or knowingly permit any other Minister to marry any Persons in any Church or Chapel to such Parson &c. belonging, without Publication of Banns or Licences, shall forfeit 100 l. to be recovered in any of his Majesty's Courts of Record; one Moiety to his Majesty, and the other Moiety to him who shall sue for the same.

S. 4. Every Man married without Licence or publication of Banns shall forfeit 10 l. to be recovered with Costs as aforesaid by any Person who shall sue for the same; and every Sexton or Parish Clerk who shall knowingly assist at such Marriages shall forfeit 5 l. to be recovered with Costs as aforesaid by any Person who shall sue.

3. 10 Ann. cap. 19. S. 176. Every Parson, Vicar, or Curate, or other Person in holy Orders, who shall marry any Person without Publication of Banns, or without Licence from the proper Ordinary, shall forfeit 100 l. to be recovered with Costs in any of her Majesty's Courts of Record at Westminster; one Moiety to the Queen, and the other Moiety to him who shall sue for the same; and if such Offender be a Prisoner in any Prison (other than a County Gaol) and shall be convicted of such Offence by Action or Information, upon Oath made of such Imprisonment, before any Judge of her Majesty's Courts of Record at Westminster, and upon producing a Copy of the Record of such Conviction proved upon Oath, the Judge is required to grant his Warrant to the Keeper of the Gaol where such Offender is a Prisoner, to remove such Offender to the Gaol of the County; or if any Gaoler shall knowingly permit any Marriage to be solemnized in his Prison before publication of Banns, or Licence obtained, he shall forfeit 100 l. as aforesaid.

S. 177. Saving to all Archbishops, Bishops, and other Ordinaries &c. all Ecclesiastical Jurisdiction.

S. 178. The said Provision for Marriages shall not extend to Scotland.

(F) Good. Performed How; And by whom.

1. **S**olemnization of Marriage was not used in the Church before an Ordinance of Pope Innocent III. before which the Man came to the House where the Woman inhabited, and carried her with him to his House, and this was all the Ceremony. Mo. 170. by Goldingham Doctor of the Civil Law. Pasch. 23 Eliz. in Bunting's Case.

2. A Prohibition was prayed to the Ecclesiastical Court upon suggesting the Statute 1 W. & M. by which it is enacted, that all Marriages between Dissenters (taking the Oaths of Allegiance and Supremacy, and subscribing the Declaration mentioned in the Statute 30 Car. 2.) solemnized before Witnesses in the Face of their Congregation, and licensed according to that Statute, shall be good and valid in Law, and that no Person should be presented in the Ecclesiastical Court for Nonconformity to the Church of England in such Marriages; and that the Interpretation of all Statutes belong to the Common Law; that the Plaintiffs, being Dissenters, had taken the said Oaths, &c. and were married in the Face of their Congregation, in the presence of Witnesses, according to the Statute, and after Banns published according to the Discipline of the said Congregation, yet that the Defendant had libelled against them in the Ecclesiastical Court for Incontinence and Fornication, and compelled them to answer there, where they had pleaded all this Matter, which the Court there refused to admit; it was in another Term agreed that a Prohibition should go, and that the Plaintiff should declare upon it, so that the Law might be tried upon a Demurrer. 3 Lev. 376. Mich. 5 W. & M. B. R. Hutchinson and Ux. v. Brookbanke.

The Wife sued in the Spiritual Court for Alimony. In Fact the Husband was an Anabaptist, and had a Licence from the

3. A. had 3 Daughters, B. C and D.—B. married to F.—C. married to G. and D. married to one H. this D. left 180 l. in the Hands of F. and took his Bond payable to G. but for her Use, and died; afterwards H. her Husband administered, and F. and his Wife sued to repeal it suggesting, that D. and H. were never married, for they were *Sabbatarians*, and married by one of their own Ministers in a *Sabbatarian Congregation*, and that they used the Form of the Common Prayer except the Ring, and the Minister was a *Layman and not in Orders*; they lived together as Man and Wife as long as he lived, which was 7 Years. This Administration

was

was repealed, and a new Administration granted to B. which was affirmed upon an Appeal to the Delegates; For since the Husband demanded a Right due to him by the Ecclesiastical Law as Husband, he must prove himself a Husband according to that Law to entitle him; and tho' the Wife, who is the weaker Sex, and the Children of this Marriage, who are in no Fault, may entitle themselves to a temporal Right by such Marriage; yet the Husband, who is Actually in Fault, shall never entitle himself by the mere Reputation of a Marriage without Right. It was urged that this Marriage is not a meer Nullity, because by the Law of Nature the Contract is sufficient; and tho' the positive Law of Man ordains Marriage to be made by a Priest, yet that makes this Marriage irregular only, but not void, unless the positive Law of Man had gone on and expressly ordained it to be so; and a Case was cited out of Swinborne, where such Marriage was ruled void; and that an Act of Parliament was made to confirm the Marriages contracted during the Usurpation, and the constant Form of pleading Marriage is, *per Presbiterum sacris Ordinibus constitutum.* 1 Salk. 119. 9 Annæ. Coram Delegatis. Haydon v. Gould.

Bishop to marry, but married he in the Anabaptistical Way. Upon a Prohibition to the Spiritual Court of Peterborough. 2 Salk. 458. Wigmore's Case. — Such Marriages give no Title to the Privileges of Marriage legally Solemnized. R. S. L Vol. 4. 199. Heydon's Case.

5. The giving a Person away is not a Thing essential to a Marriage, but it is a Custom that is usually Practised. Barn. Rep. of Cases in Chan- 407. Hill. 1741. in Case of Moor v. Moor.

(F. 2) Marriage *de Facto*. Of what Force in Law as to others.

See Baron and Feme (F. 2) — Trespass (L. 2)

1. UPON a Marriage *de Jure* if the Husband be murdered before Dis- agreement the Wife shall have an Appeal of Murder and a Writ of Dower. Arg. Le. 53. cites 39 E. 3.

So where Appeal is brought of the Rape of his Wife al-

tho' she be his Wife but in Possession, and not in Right. Arg. Le. 53. in Case of Leigh v. Hanmer. — cites 11 H. 4. 13. by Hulls 168.

2. If the Wife be but of the Age of 9 Years she shall have her Dower. Le. 53, 54. cites 35 H. 6. per Littleton. — And yet Dower shall never accrue, but in Case of Marriage in Right; For there Never Accomplished in Marriage is a good Plea. Ibid. cites 12 R. 2. Dower 54.

3. Marriage *de Facto* is sufficient always in Personal Things and Causes, especially where the Possession of the Wife is in Question; but where the Possession of the Husband is in Question, there Marriage *de Jure* ought to be. Arg. 1 Le. 53. Pasch. 29 Eliz. in Case of Leigh v. Hanmer.

4. In a *Cui in Vita* by B. and C. his Wife the Tenant pleaded Never Accomplished in loyal Matrimony; the same is no Answer to the Wife; For she demands in her own Right; and if he who aliened was her Husband *de Facto*, the Wife could not have other Action; For Alliance does not lie because he was her Husband in Fact at the said Time in Possession. Arg. 1 Le. 53. in Case of Leigh v. Hanmer.

5. A Woman was libelled against in the Spiritual Court *Causa Jactitationis Maritagii*; she suggested for a Prohibition, that this Person was indicted for marrying her Contra formam Statuti, he having another Wife then living, and that he was thereupon convicted, and had Judgment to be burned in the Hand, so that being tried by a Jury and a Court which had Jurisdiction of the Cause, and the Marriage being found, she prayed a Prohibition; it was objected, that no Court but the Ecclesiastical Court can examine a Marriage; and Dr. Hedges a Civilian then in Court said, that Marriage or no Marriage never came in Question in their Court upon a Libel for Jactitation, unless the Party replies a lawful Marriage; and that

that the Spiritual Court ought not to be silenced by a Proof of a Marriage de Facto in a Temporal Court ; For all Marriages ought to be de Jure of which their Courts had the proper Jurisdiction ; and by the Opinion of 3 Judges a Prohibition was granted. 3 Mod. 164. Hill. 3 Jac. 2. B. R. Boyle v. Boyle.

(G) *Dissolved* for what Cause.

* Divorce a 1. **A** HERE are 2 kinds of Divorces, one * a *Vinculo matrimonii*, and the other † *A Mensa & Thoro*. Co. Litt. 235. a.

these, *Causa Præcontractus*, *Causa Metus*, *Causa Impotentia seu Frigiditatis*, *Causa Affinitatis*, *Causa Consanguinitatis* &c. and I read in an ancient Record *Coram Rege* Pat. 30 E. 1. *William de Chadworth's Case*, that he was divorced from his Wife, for that he did carnally know her Daughter before he married the Mother ; all which are Causes of Divorce preceding the Marriage. Co. Litt. 235. a.

† *A Mensa & Thoro*, as *Causa Adulterii*, which dissolveth not the Marriage a *Vinculo Matrimonii* ; For it is subsequent to the Marriage. Co. Litt. 235. a.

2. 32 H. 8. cap. 38. S. 2. *Ali such Marriages as are contracted between lawfull Persons (and all are hereby declared to be lawfull Persons who are not prohibited to marry by God's Law) being Solemnized in the Face of the Church and Consummated with Bodily Knowledge and Fruit of Children shall be lawfull and indissoluble, notwithstanding any Dispensation, Prescription, or other Thing. And no Reservation, or Prohibition, (God's Law except) shall impeach any Marriage without the Levitical Degrees; and no Person shall be admitted in the Spiritual Courts to any Process contrary to this Act.*

3. 2 & 3 Ed. 6. 23. S. 2. *So much of the Statute of 32 H. 8. 38. as makes a Marriage dissoluble which is Solemnized in the Face of the Church and Consummated with bodily Knowledge and Fruit of Children, notwithstanding a Pre-contract, is hereby repealed; and it is declared that where any Contract of Marriage is pretended, it shall be lawfull for the Ecclesiastical Judge to hear and determine the said Cause, and to give Sentence for Matrimony, or the Solemnization thereof, or for Co-habitation, and to inflict such Pain upon the Disobedient as he might have done before the said Statute; but by Sect. 4. all other Clauses and Things mentioned in the said Act of 32 H. 8. 38. are hereby confirmed.*

4. By 1 & 2 P. & M. cap. 8. S. 20. *The abovesaid Statutes of 32 H. 8. 38. and 2 & 3 Ed. 6. 23. are repealed.*

5. 1 Eliz. 1. *So much of 32 H. 8. 38. as was confirmed by the said Statute of 2 Ed. 6. 23. is hereby revived.*

6. 12 Car. 2. 33. *All Marriages solemnized in any the King's Dominions since of the 1st. of May 1642. before any Justice of Peace, or so reputed, or according to any Ordinance, or reputed Ordinance of both or either Houses of Parliament, or of any Convention sitting at Westminster under the Name of a Parliament shall be of effect as if solemnized according to the Rules used in the Church of England; and Issue upon Bastardy, or unlawfulness of Marriage concerning such Marriages, shall be tried by Jury.*

7. 13 Car. 2. 11. *The last mentioned Act for confirming Marriage solemnized by Justices of Peace is hereby confirmed.*

8. *The Legality of a Marriage shall never be agitated in Equity, especially after Sentence in the Spiritual Court, in a Cause of Jactitation of Marriage, altho' the Proceedings in the Spiritual Court were only Feint and Collusive.* MS. Tab. tit. Marriage, cites 1 April 1725. *Hatfield v. Hatfield.*

(G. 2) Dissolved by Disagreement. What shall be said to be, at what Time, and the Effect.

1. **I**N *Debt on a Bond* the Defendant pleaded, that the Wife had another Husband now living; the Plaintiffs replied, that the *Wife ad annos nobiles* disagreed to that Marriage, and upon Demurrer to the Replication, the *Question* was, *whether* the Agreement or *Disagreement* should be before *annos nobiles*, or what Time the Law appoints for it. But adjudged for the Plaintiff, because she cohabited with her second Husband always after Age of Consent. Moor 575. Trin. 41 Eliz. Warner and Ux v. Babington.

This Case was adjudged first in C. B. and affirmed in B. R. *ibid.*

(H) Of what the Marriage is a Countermand.

See Peoffment (P. 2)

1. **T**RESPASS of *Chasing in the Warren* was brought by J. and E. Dutchess of N. his Feme of Chasing Dum Uxor sola fuit; the Defendant said, that the Dutchess, when she was sole, gave Licence to the Defendant to chase there, when he pleased, for him and his Servants, by which he chased and killed 4 Hares and carry'd them away; and a good Plea, without shewing the Deed of Licence, and the Plaintiff travers'd the Licence. Quære, if Licence does not expire by the Inter-marriage? and if Licence to Hunt shall serve to kill and carry away? Nevertheless it seems clear by the Manner of the Pleading, that the Licence expired by the Inter-marriage. Br. Trespass 161. cites 22 H. 6. 52.

2. If a Sole Woman deliver an Escrow upon a certain Condition &c. and before the Performance takes Husband, yet if the Condition is afterwards performed, and the Escrow delivered as the Deed of the Woman, she shall be bound thereby; But some think otherwise; For they say, that by the Delivery of the Escrow by the Stranger, as the Deed of the Woman, then it began first to take Effect as her Deed, and shall not have Relation to the Time of the first Delivery made by the Woman, when she was sole; inasmuch that if the Party, to whom the Obligation is made, before the Conditions performed and before the last Delivery by the Stranger as the Deed of the Woman releases all Actions and Demands unto the Woman, and afterwards the Bailee delivers the Obligation to whom it was made as the Deed of the Woman, because the Condition is performed; the Obligee, notwithstanding this Release, shall have an Action of Debt upon this Obligation, which proves that the last Delivery shall not have Relation to the first Delivery; and at the Time of the last Delivery, and at the Time of the Condition performed, the Woman had a Husband. And all Obligations made by a married Woman &c. are void against her; and also it seems to them, that this marrying the Husband is a Countermand in Law. Perk. S. 140.

3. But notwithstanding these Reasons, it seems that she shall be bound by the Obligation; For at the Time of the first Bailment she was Sole, so that all Things done at that Time were good and lawful. Perk. S. 141.

4. And if a Sole Woman Covenants with me by Indenture, to pay me 10 l. at Easter 1640, and before that Day she takes Husband, and the Coverture continues between them until the Day on which the Covenant should be performed is past, she shall not therefore be discharged of the Covenant, because the Marriage could not be celebrated without her Assent. And he who is bound to do a Thing, or to suffer a Thing to be done, cannot discharge himself thereof by his own Act only, unless in special Cases. Perk. S. 141.

5. *And the Woman when she was Sole could not countermand the Bailment, as this Cafe is; becaufe the Obligee is as it were Party and Privy to the Bailment of the Obligation; inafmuch as he is to do and perform certain Conditions, which are annexed to the Bailment, and alfo is to take Advantage by the Performance of them &c. Tamen Quære, forafmuch as the Obligee was not Party to the Bailment, but the fame was made by the Woman only: But the Law had been clear with the Obligee, if the Bailment &c. had been made by the Woman and the Obligee jointly.* Perk. S. 141.

If a Woman gives a Warrant of Attorney, and then marries, you may file a

Bill and enter Judgment againft both by the Practice of the Court. Ruled upon Motion. Show. 91. Hill. 1 W. & M. Nightingale v. Adams.

6. *Warrant of Attorney was given to a Feme Sole to confefs a Judgment, and afterwards she married. The Court gave leave, notwithstanding the Marriage, to enter the Judgment. For the Authority being to the Husband's Advantage shall not be deen'd to be revok'd or countermanded.* 1 Salk. 117. Hill. 1 Annæ B. R. Anon.

7. *So if a Reversion be granted to a Feme Sole, and then she marries before Attornment, yet the Tenant may attorn afterwards.* 1 Salk. 117. in the Cafe above.

(I) Brocage Bonds &c.

1. **A** Bill entred into to procure a Marriage [was order'd to be] cancelled. Toth. 86. cites 10 Jac. Arundel v. Drew.

2. Bonds entred into for procuring a Marriage cancelled. Toth. 89. cites Feb 17. Jac. Arleiton v. Kent.

Cited Parl. Cafes 76. in Cafe of Hall v. Potter.

N. Ch. R. 129. S. C.

3. Bond for having procured a Marriage, according to a Promise before the Marriage, was decreed to be cancelled. 10 Car. 1. Chan. Rep. 87. Arundel v. Trevillian.

4. Marriage Brocage Bonds were feverally given both by the Man and Woman; the Man was a Broken Merchant and worth nothing, the Woman was worth 1200 l. The Man's Bond was decreed to be paid, but the Wife's to be delivered up. 21 Car. 2. 3 Ch. R. 31. Glanvill v. Jennings.

5. *Guardian of a young Woman made up an Account with one that courted, and after married her, and 800 l. being found due the Guardian gave Bond for fo much to the Suitor, and took back a Bond of 1400 l. Penalty conditioned to release all Accounts to him after the Marriage. Guardian paid the 800 l. to the Suitor after Marriage, who brought his Bill to be Relieved againft the Bond of 1400 l. and the Bill being brought in a short Time after Marriage. Ld. Keeper, (the Purfuit being fresh) ordered the Guardian to answer the Bill.* 2 Ch. Cafes 157. Mich. 35 Car. 2. Osborn v. Chapman.

2 Chan Cafes 1-6. S. C. in this Cafe the Man who gave the Bond was 60 Years of Age, but the Woman young.

6. Marriage Brocage Bond was decreed to be deliver'd up, it being effected without Consent of the young Woman's Parents who were living; And per Chancellor Jefferies, there is a material Difference where Parties are at their own Difpofal, and where their Parents are living, tho' in no Cafe they ought to be countenanc'd. Pasch. 2 Jac. 2. Vern. 412. Drury v. Hooke.

7. A. having a Son of a good Estate, contrives the Marriage of him with the Daughter of B. who paid no Fortune to A. but paid 2000 l. to the Mother, which was intended probably as a Consideration to the Mother of A.—Decreed that the Mother of A. should make good to A. as much of the 2000 l. as she was able, and C. to whom the Money was paid for

for A. to make good the Residue. Vern. 451. Pasch. 1687. Tooke v. Sir R. Atkins & al.

8. T. gave Bond to P. to pay him 500*l.* within three Months after he should be married to the Lady Ogle, a Widow of great Fortune and Honour &c. Debt was brought against T's Executors, and upon a Trial before Ld Ch. J. Holt, the Plaintiff had a Verdict. Afterwards a Bill in Chancery was brought by the Defendant suggesting that the Contract was void, it being for procuring the said Marriage, she being a Person of so great Honour and Fortune; and that nothing was done by P. but advising T. to apply himself to one Brett, who had a great Interest with the Lady, and some small Matter expended in entertaining T. and so no sufficient Consideration for this Bond; or if it was, yet such Contracts for procuring a Marriage are of dangerous Consequence, and several Precedents were produced, but in all those there appear'd some Circumventions; But the Defendant answered, that no such was used in this Case; that here was nothing but Advice; and that in this Case the Marriage was suitable in respect both of Birth and Fortune; and a Case was cited between **Foster** and **Ramsay**, tried before Holt Ch. J. where the Defendant promised the Plaintiff 50*l.* if he would procure Ramsay a Widow to marry him, and the Plaintiff recovered the 50*l.* in Damages, and there being no Fraud or Circumvention in the Case, no Doubt was made of the Legality of the Contract. And of that Opinion was the Ld Keeper in this Case, and upon a Re-hearing discharged an Order made by the Master of the Rolls to the contrary, and dismissed the Plaintiff's Bill. Whereupon upon an Appeal to the House of Lords, and Hearing the Cause there, all the Lords but three or four were of Opinion that all such Contracts are of dangerous Consequence, and the Decree of Dismission was reversed, and the Bond to be void. 3 Lev. 411. Hill 6 W. 3. C. B. Hall & al. v. Potter.

9. A Note was given for 50*l.* to a Maid Servant to use her Endeavours to procure such a Match. She marries one who knew nothing of the Consideration of the Note, and who married her on Account of the Note, so that he might be look'd upon as a Purchaser of this Note for a valuable Consideration, without Notice of the Reason for which this Note was given, and yet the Note was set aside. Arg. 10. Mod. 448. cites it as the Case of Goldsmith and Bunning.

S. P. and C. and 50 Guineas actually paid were ordered to be returned, per Wright K. Mich. 1700. 2 Vern. 392. Smith v.

Bruning.——Abr. Equ. Cases 89, 90. Goldsmith v. Bruning S. C.

10. Lease by Tenant in Tail, in Consideration of procuring a Match between Mr. Thynne and the Lady Ogle, was set aside at the Suit of the Remainderman. 2 Vern. 445. Mich. 1703. Striblehill v. Brett.

The Lease was mention'd to be in Consideration of 3600*l.* and

it was tried twice at Law, if the Marriage were the Consideration of the Lease; and Verdict both Times for the Lessee, and so the Bill was dismissed; but on Appeal, the Lords reversed the Decree, and set aside the Lease without regard to the Verdicts. Ch. Prec. 165. Tr. 1701. S. C.

11. B. had 1200*l.* left her by an Aunt.—C. courted B. and to get the Consent of A. B's Father.—C. gave A. a Bond to repay 200*l.* if the Wife dy'd without Issue, or the Issue dy'd before 18. Per Ld Cowper, it is in Nature of a Brocage Bond, and decreed it to be deliver'd up, and Defendant to refund what had been paid for Interest, but no Costs. 2 Vern. 388. Mich. 1707. Keat v. Allen.

Ch. Prec. 267. Mich. 1708. Anon. S. P. and seems to be S. C.

12. Wherever a Father or Mother or Guardian insist upon private Gain or Security for it, and obtains it of the intended Husband, it shall be set aside, and such Contracts with the Father &c. are of the same Nature with Brocage Bonds &c. but of more mischievous Consequence; and it is now a settled Rule, that if the Father on the Marriage of his Son take a Bond of the Son, that the Son shall pay the Father so much &c. it is void, being done by Coercion while he is under the Awe of his Father;

S. C. cited Arg 10 Mod. 447 — Hob. 10 Griesly v. Lother. contra.—A. had M. an only Daughter, his Heir ap-

Parent, to whom J. S. per *Ld C. Cowper.* 1 *Salk.* 158. 9 *Ann.* *Duke Hamilton v. Ld Mohun.* made Suit, and he apply'd him'self to E. Mother of M. for her Assent and Recommendation, and on those Terms promised E. 90*l.* which she comply'd with; then A died. The Marriage was had, and E. agreed, and in Action for the 90*l.* Judgment was given for her per three Justices, contra *Winch. Mo.* 857. *Gretley v. Luther*—*Hob* 10. *S. C.*—Where one of the Executors and Guardians demanded of J. S. who apply'd for Leave to court the Testator's Daughter, that in Case he married her, he and she would sign his Accounts, and covenant not to ravel back into them, and after the Marriage was had, and they sign'd the Accounts pursuant to the Bond, and afterwards sign'd several other Accounts to which the Bond did not extend, The Guardian and J. S. both died, and upon a *Bill brought by the Representative of J. S. the Husband against the Representative of the Executor after near 20 Years,* to open an Account, the Court refused to give Relief after such Length of Time, and so many Accounts stated. *Sel. Chan. Cases in Ld King's Time.* 34 *Trin.* 11 *Geo.* 1. *Western v. Cartwright.*

* *Wms Rep.* 13. On the Marriage of the Daughter the Mother insists on a Bond from the Husband to give a Release within * two Years after the Marriage. This is in the Nature of Brocage Bonds, and decreed to be set aside. 2 *Vern.* 652. *Pafch.* 1710. *Duke Hamilton v. Ld Mohun.*

Entering into the Bond was done with great Deliberation, and tho' there had been no Concealment of Matters to be accounted for, yet Lord Chancellor thought it ought to be set aside; For the asking it is as much as to say, You shall not have my Daughter unless you will release all Accounts. *Wms's Rep.* 119, 120. *Pafch.* 1710. *S. C.*

And tho' such Release, had it been given after Marriage by the Husband to the Guardian, of all Accounts might be good; it would be so, because it must then be presumed to be given freely, yet such Presumption cannot be here; For the Duke might reasonably apprehend, that the refusing the Covenant to release would have lost him the Lady. By *Ld Chancellor.* *Ibid.* 120, 121.

(K) Portions on Condition. In what Case the Breach forfeits the Portion.

1. THREE Hundred Pounds was given to the Plaintiff's Wife by her Father's Will upon Condition not to marry without Consent of her Friends. And upon Refusal to pay the Money the Court ordered it. *Toth.* 226. [false pag'd] 36 *Eliz.* *Yelverton v. Newport.*

2. In Case of a Devise to the Heir at Law on Condition not to marry without Consent of such Persons Notice must be given; because she may take the Estate as Heir at Law without any Notice of the Condition. 8 *Skin. Rep.* 89. *Frances's Case.*

S. C. cited *Cart.* 172.—*2 Lutw.* 812. *128. S. C.*—*Skin.* cited and *S. P.* adjudged. *Mich.* 35 *Car.* 2. *B. R.* *Mattoon v. Fitzgerald.*—3 *Mod.* 28. *S. C.*—2 *Show.* 315. *S. C.*—*But* otherwise it is in Case of a Stranger. *Vent.* 199. *Fry v. Porter.*—*Mod.* 86. 300. *S. C.*—2 *Lev.* 21. *S. C.*—*Raym.* 236.—2 *Ch. R.* 26. 21 *Car.* 2. *S. C.*

3. A. and M. had E. a Daughter, and who was Heir Apparent to A.—*J. S.* courted E. and promised M. the Mother to give her 90*l.* for her Assent and furtherance of the Match. M. consented accordingly. A. died. The Marriage took Effect, and the Mother agreed. The Question was, if the Agreement was sufficient Consideration for an Action upon the Case? and *Hobart* and two Justices thought that it was; but *Winch.* contra. *Mo.* 857. *Hill.* 11 *Jac.* *C. B.* *Gretley v. Luther.* it was pleaded in Bar that she did not marry with Consent of the Mother, and yet she had Sentence for her Legacy. Cited per *Winch. J.* *Mo.* 857. pl. 1176. as *Pigott's Case.*

4. Conveyance of Lands to A. in Trust to raise out of the Profits, and pay to M. 4000*l.* at her Age of 21, or when with the Consent of her Father she should be married; and if she died before such Age or Marriage, then 1000*l.* of the said Portion to be paid to N. and the other 3000*l.* to O.—*B. made Courtship* to M. and the Father of M. agreed to give 4000*l.* as her Fortune, and a Settlement of 800*l.* to be made by the Father of B. But while the Deeds were preparing, B. and M. marry'd without the Knowledge of

S. C. cited by the Master of the Rolls. *Sel. Chan. Cases* in *Ld Talbot's Time.* 216. in Case of *Hervey v. Ashton.*

of their Fathers, but the Father of M. not afterwards disagreeing nor disliking the said Marriage, it shall be deemed a *Marriage with Consent* of her Father. 1 Chan. Rep. 1. 1 Car. 1. Farmer v. Compton.

5. Legacy of 100 l. to a Daughter, and afterwards 100 l. more is devised by a marginal Note to her (*if she behaves herself dutifully to her Mother*) the Daughter marries without Consent of her Mother; yet the 100 l. decreed to her. Chan. Rep. 121. 13 Car. 1. Vintner v. Pix. Toth. 227. S. C. but not decreed.

6. A Portion of 400 l. was left to be paid at 21 or Marriage, so as she married with the Assent of the Trustees, and her Mother and eldest Brother. She brought a Bill for the Portion. The Defendant insisted that the Plaintiff was about marrying without the Assent aforesaid, and refused Payment, and offered divers Reasons against it. But the Court declar'd it just and reasonable, that the said 400 l. with Damages should be paid to the * Defendant. Chan. Rep. 121. 13 Car. 1. Norwood v. Norwood.

—The Case is thus reported there, without saying that she was 21. And the Word * (Defendant) at the End should be (Plaintiff).

7. Devise to his Daughter in Tail on Condition to have Fee if she marry one of his true Surname; the Testator's true Surname was Mills, and she married one Mill, who was as often called Mills as Mill; This was no Performance. Sti. 389. Olive v. Tong.

8. A. conveyed Lands to Trustees in Trust for his only Daughter and Heir for 21 Years for her Maintenance and to raise a Portion; and if she marry P. or any other, in the Life of A. with A's Consent, then in Trust for her during the Residue of the Term. She did not marry P. but married F. S. whom A. disliked, but after some time A. was content with it, and cohabited with them, and then died. Resolved, that A. might agree to the Marriage at any time during his Life, and therefore in as much as he agreed after, tho' he disagreed at first, it seems it is good; and held, that tho' he disagreed at first, he might agree after. Quære tamen if the Agreement relates to this Purpose, because by the Disagreement the Estate was devested. Sid. 133, 134. Pasch. 15 Car. 2. B. R. Prodgers v. Langham.

9. 8000 l. was given to M. provided she married with Consent of A. and if not, then she should have but 100 l. a Year. She married J. S. without A's Consent. On a Bill by J. S. and M. for the 8000 l. the Defendant pleaded as above; But the Court over-ruled it. And Ld. Chancellor, assisted with Hyde Ch. J. and Hale Ch. B. declared this Proviso to be in Terrorem only to make the Person careful, and that it would not defeat the Portion. But it was said, that if the Portion had been limited over, it had been otherwise, and in this Case the Wife was not unequally married. Chan. Cases 22. Trin. 15 Car. 2. Bellasis v. Ermin.

10. A Trust for raising Money for a Feme sole, if she marry with Consent of the Trustees, and if not, then for such as the Trustees shall name, or else to themselves, shall enure to the Administrator of the Feme Sole, tho' she marries without such Consent. Mich. 16 Car. 2. 1 Chan. Cases 58. Fleming v. Walgrave. Cited 2 Vern 573. by Ld. Keeper, in Case of Cregg v. Wilton.

—S. C. cited by the Master of the Rolls. Sel. Ch. Cases in Ld. Talbot's Time, 216. in Case of Hervey v. Ashton.

11. A. bequeathed to H. his Daughter 500 l. to be paid at 21 or Marriage, and made M. his Wife and B. his Son Executors; And by a subsequent Clause in his Will declared, that it should be in the Power of his Executors to order and dispose of the 500 l. according to their Discretion to the Use of the rest of the Children, unless she marry by Advice and Consent of the Overseers of his Will, or the greater Part of them. And in the Will was a Memorandum, that if she married without such Consent, she should have but 250 l. and the other Children to have the rest. H. insisted that there was no Devise over. The Court, on reading the Proofs touching the Approbation of the major Part, and their Consent to the Plaintiff's Marriage, decreed the Defendants to pay the 500 l. and Damages Chan. Rep. 23. 20 Car. 2. Wiseman v. Foster. A. devised to H. his Daughter 5000 l. provided she marry with Consent of his Executors; But if she marry without such Consent, 850 l. to be abated out of the 5000 l. She married

J. S.

J. S. but before the Marriage the *Executors consented upon this Condition, viz. that J. S. make a Settlement, of 400 l. a Year upon H. for her Life, and after upon their Issue; But before such Settlement made they married.* Upon a Bill against J. S. for the 850 l. he offered on Payment of the 3000 l. to make such Settlement; and said that Conveyances for that Purpose had been long ready, and waited only the Assignment of a Mortgage, (by which the 3000 l. was secured) to execute the same. The Court dismissed the Bill as to the 850 l. and held, that it appeared that this was a Marriage had with Consent of the Executors. Fin Rep. 234. Mich. 27 Car. 2. *Bostock v. Ireton.*—— So where a Bequest was of 3000 l. but if she married without such Consent, *her Leg. was to cease, and she to have but 500 l. and made the Defendant Executor, and residuary Legatee;* Yet the Court decreed her the whole with Interest from the Marriage, and principally for the same Reason, viz that it was not expressly devised over but to fall into the Surplus. 2 Vern, 293. Trin. 1693. *Garret v. Pritty*—— But where a Citizen and Freeman of London devised two thirds of his legatory Part to his Daughter; But if she married without the Consent of her Mother, then her Brother to have 500 l. of what he had so devised to his Daughter, and the Daughter married without the Mother's Consent; The Court held this not a Clause in Terrorem only; But the 500 l. was well devised over; and an Interest vested in the Brother, who in this Case must be looked upon as a Person the Testator considered and had in his Thoughts as to what Provision he was to have, and what Benefit to take by his Will as well as the Daughter. 2 Vern. 357. Trin. 1698. *Stratton v. Grymes.*

S. C. cited by the Master of the Rolls. Sel. Chan Cases in Ld. Falbor's Time, 216. in the Case of *Ferber v. Aston*, but said, that it is no way applicable to that Case, this Case of *Fry v. Porter* being a Condition annexed to a legal Estate; and that of *Ferber v. Aston* being an equitable Interest only.

12. A. by Will devised an Estate to his Wife for Life, and after her Decease to E. his Granddaughter and the Heirs of her Body begotten; Provided that if she marry without the Consent of his Wife, or the major part of his Trustees &c. then he wills all the Premises to his Grandson G. and his Heirs for ever. E. at about 14 married without such Consent. It was decreed at the Rolls, that this was only in Terrorem, and that E. and the Heirs of her Body, should hold and enjoy against the Defendant. But afterwards upon Appeal the Lord Keeper assented with Ld. Ch. J. Keeling, and Vaughan, and Ld. Ch. B. Hale, dismissed the Bill. And it was said by Ld. Ch. B. Hale, that tho' in the civil Law, in Case of a mere Personalty, such Limitation over is void; yet this is a Devise of Lands, which is not governed by that Law; And that Estates governable by the Law of this Kingdom, without Relation to another Form, ought not to be influenced by another Law; And Ld. Keeper thought, that Equity ought not to interpose in this Case. Chan Cases 138. to 144. Mich. 21 Car. 2. *Fry v. Porter.*

But where B. knew of the Courtship, it being in his own House, and to his Son by a former Wife, and did not contradict it, or do any thing in it; per Ld. Cowper it was a tacit Consent, and a Fraud in B. and decreed the Portion. 2 Vern. 580. Hill. 1706. *Mesgrett v. Mesgrett.*

13. 1500 l. was left for a Portion; but if she marry without Consent, then 500 l. to such Person as B. and C. her Father and Mother, or the Survivor, should direct; they appoint it to themselves and Survivor. C. dies; the Daughter marries without Consent; the 500 l. is to go to B. though B. was the Person that was to give the Consent. 2 Chan. Rep. 25 Car. 2. 95. *Sutton v. Jewke.*

14. A. by Will appointed, that his personal Estate (except what was particularly bequeathed to others) should be to the Use of his Daughter L. for her Portion and Maintenance, and that she should have the Interest thereof during the time she continued sole and unmarried; But if she marry without the Consent of his Executors, or the major part of them, then she should have only the present Interest of her Portion during her Life for her Maintenance; And if she die unmarried, then her Portion, and the Interest thereof to go to T. T. the Testator's youngest Son; And made C. D. and E. Executors in Trust, leaving a personal Estate of 6000 l. L. married the Plaintiff without Consent of the Executors; and upon a Bill by the Plaintiff and L. the Court decreed the Defendants to Account, and the Money received by the Plaintiff L. or her Husband, to be brought into the Account and discounted by them; and the master to certify what remains due from the Defendants, and the same to be secured for L. and such Children as she shall have, and the Husband not to meddle with it, or have any Power to dispose thereof, without making a suitable Provision for her and them, which the Master is to see done, and the Interest

in the mean time to be received by the Plaintiffs for the Support and Maintenance of L. and her Children. Fin. R. 145. Mich. 26 Car. 2. Ship-ton & Ux. v. Hampson & al.

15. A Legacy given to a Woman upon Condition *not to marry J. D.* or not to marry *without Consent of J. S.* is only In Terrorem if *not devised over*, and tho' she marry without Consent it does not avoid the Legacy. Per Ld. Nottingham. Mich. 1681. Vern. 20. Jervois v. Duke.

Such Devise over must be to some particular Persons, and it is not suffi-

cient to say it shall go to the Bulk of his personal Estate. Mich. 1691. N. Ch. R. 100. Earl of Salisbury v. Bennet.—Yet where the Legacy was 100 l. and *abridged to 50 l.* and no more on such Condition, and Testator gave the Residue of his personal Estate to Defendants; This is more than a Clause in Terrorem, and Defendants shall have the 50 l. on Disobedience. Abr. Equ. Cases 112. Mich. 1699. Amos v. Horner.—S. C. cited by the Master of the Rolls. Sel. Chan. Cases in Ld. Talbot's time. 215. who said, that indeed that Case is contrary to former Determinations, but that no Resolution was there taken, but it went off for want of Parties, and never came on again.

All these Cases making such Conditions to be only in Terrorem are now over-ruled, and decreed contra per Ld. Hardwick, assisted by Lee and Willes Ch. J. Trin. Term. 1738. in Case of Harvey v. Aston.

16. A. had two Daughters B. and C. and bequeathed to each of them 20,000 l. provided, that if they, or either of them *marry before the Age of 16, or without the Consent of such Persons*, that they should lose 10,000 l. of the Portion, and that the 10,000 l. should go to his other Children; The Lord Salisbury married one of the Daughters under the Age of 16, but with the Consent of all the Parties; It was urg'd, that it being with Consent it might be at any Age; But my Lord Keeper North was of Opinion, that both Parts must be observed. 2 Vent. 365. Pasch. 36 Car. 2. in Canc. The Ld. Salisbury's Case.

Skin. 285. S. C. by the Name of Ld. Salisbury v. Bennet. and reports, that the Payment was to be made at their respective Ages of 25, or Days

of Marriage, so as such Marriage be not before 16. and so as it be with the Consent of D. E. and F. and if either marry otherwise, then such Daughter shall have only 10,000 l. without saying what shall become of the other 10,000 l. and then devises his Estate to his two Daughters after Debts and Legacies paid. C. married under 16, but with Consent of the Trustees. Upon Proof that Testator had in his Life-time made Overtures of marrying her to the same Person, and there being no express Devise over, but only that in such Case 10,000 l. was directed to go to the Bulk of A's personal Estate, and which was ordered to be laid out in Lands, the whole Portion was decreed Hé.

17. Clause in a Deed was, that in Case his Daughter should live to attain the Age of 16, and should refuse to marry J. S. then J. S. to have 20,000 l. out of his personal Estate, and after there is another Clause, viz. and if it shall happen that the said intended Marriage shall not be had till after she is 16, then he, upon such Marriage had, settles his Estate real and personal upon J. S. and his intended Wife for their Lives &c. A Marriage was had before 16; and after 16, and before 17, the Wife died. Jefferies C. decreed an Account of the Profits, of the real Estate received by the Trustees in the Wife's Life-time to be made to J. S. as Administrator of the Wife, and that the Words of the Settlement did in no sort imply that the Daughter and J. S. might not marry before 16. Vern. 338. Mich. 1685. D. of Southampton v. Cranmer & al. Executors of Sir H. Wood.

18. Lands are settled upon a Daughter, provided she marry with her Father's Consent; She marries a first Husband with his Consent, and a second Husband without his Consent; this is no Breach of the Proviso. 2 Chan. Rep. 363. 1 Jac. 2. Fenwick v. Smallwood.

19. A. devised to Trustees and their Heirs upon Trust to employ the Profits for the first three Years to certain Uses, and after that the Trustees should stand seised in Trust for his Niece H. W. for her Life, in Case she shall within three Years after his Decease be lawfully married to Fr. Ld. G. and in such Case Remainder to the Issue Male begotten on her Body by the said Ld. G. But if there be no such Issue, or in Case such Marriage shall not take Effect within three Years, then in Trust for J. S. for Life, Remainder to his first &c. Son in Tail, and for want of such Issue to W. R. for Life &c. Soon after the making the Will a Codicil was added providing that a Marriage Infra Annos Nubiles should not be sufficient,

3 Chan. Cases 129 S. C. —1 Salk. 231. S. C. decreed accordingly; But says it was reversed on Appeal to the House of Lords —12 Mod 185.

says there was no Determination, but that it was ended by Compromise.—So is 2 Vern. 344. S. C.—cannot be valued. 12 Mod. 182. Hill. 9 W. 3. Bertie v. Ld. Falkland. S. C. cited by the Master of the Rolls Sel. Chan. Cases in Ld. Talbot's time, 216. Mich. 1736. in Case of *Hervey v. Ashton*. And his Honour said, that this Case was not applicable to that; nor would it be an Authority almost in any Case from the Peculiarity of its Circumstances.

20. But Ld. Sommers said, that if the Ld. Falkland the Remainderman had done any unfair Act to hinder the Marriage, he being to have Advantage by it, Equity might have relieved. 12 Mod. 184. Hill. 9 W. 3. S. C.

21. The Uncle by Lease and Release settles Land to the Use of himself for Life, Remainder to A. Remainder to A's 1, 2, 3, and 4th Sons in Tail. Remainder to B. in like Manner, with Power of Revocation, and a Proviso, if A. marry without the Consent of the Uncle during his Life, and after his Death of J. S. &c. then the Uses limited to A. and his Sons to cease, and then to be to the Use of B.—A. married without Consent, having no Notice of the Conveyance or Proviso. But the Uncle, (who knew not of the Marriage) entertained him kindly and gave Legacies to A. by his Will and died. B. disturbs A. because of the Forfeiture; and dismis'd to Law. But the Chancellor asked, If it were a Limitation of a Trust, or of an Use? And being of an Use the Ld. Chancellor said, Then it is at Law. 2 Chan. Cases 109. Trin. 34 Car. 2. Booth v. Booth.

Ch. Prec. 226. S. C.—S. C. and the particular Reason cited by the Master of the Rolls. Sel. Chan. Cases in Ld. Talbot's Time, 216. in Case of *Hervey v. Ashton*.—Fin. R. 62 Hill 25 Car. 2. Needham v. Vernon and Booth. In which Case the Portions were payable at Marriage with Consent, but the Daughters were advanced in Years.

22. A. devised Portions to his Daughters without saying any time for the Payment, provided that they marry with Consent of B. and if any marry without, her Portion to go over. Bill by Daughters for their Portions. Per Wright K. it is a Condition subsequent, and the Portions are vested, yet the Court cannot relieve against a Forfeiture, because of the Devise over. Decreed the Portions to be paid but on Security, to refund in Case the Condition should be broken. 2 Vern. 452. Mich. 1702. *Ashton v. Ashton*.

23. A. devised Part of his Real Estate to his Heir charged with Payment of 2500 l. to M. his Daughter, and other Part charged with Payment of his Debts. The Portion was to be paid at 21, or Marriage; provided if she marry in her Mother's Life without her Consent, then 500 l. to cease, and to be applied towards Payment of his Debts charged upon the other Lands. The Daughter after 21 marries without Consent. Ld. Harcourt held, that this in Effect is no Devise over; For here appears to be no Creditors concerned that are in Danger of losing their Debts, and that the Daughter was intitled to the Whole by her attaining 21 unmarried, and decreed the whole 2500 l. to be raised, and the Husband to make a Settlement, and till then the Money to be brought before the Master. Ch. Prec. 348. Mich. 1712. *King v. Withers*.

which he said, it was an Express Authority, but that he could not agree to what was there said, that Trust-Money to arise out of Lands must have the same Construction that the Lands themselves would.

24. A. by his Will bequeath'd to his Granddaughter an Annuity of 10 l. for Life, and afterwards by a Codicil declared, that if she should marry with the good Liking of his Trustees, she should have 150 l. in lieu of the Annuity, and the Annuity to cease. She married one worth nothing, and without Consent of any of the Trustees. Ld. Cowper decreed, that she should

not

not have the 150*l.* saying, that here was a Provision either way, and where the *Provision is in the alternative*, and there is a Condition Precedent to the Gift of the Portion, (*viz.*) If the marries with Consent &c. and that is not perform'd, and the Child *is still provided for*, tho' not with the greater Portion, Equity does not relieve. Wms's Rep. 284. Mich. 1715. Giller v. Wray.

25. Lands devised in Trust, that his Daughter M. shall receive the Rents till her Marriage or Decease, and in Case she marry *with Consent of the Trustees*, then to convey the Premises to M. and her Heirs. But if she dy'd unmarried or marry'd without Consent, then to convey to other Utes. M. afterwards marry'd *with Consent of her Father, who settles Part of the Land on M. and her Husband*, and dies. The Settlement is *no Revocation* of the Will as to the other Lands to the Daughter, and by her marrying with Consent of the Father in his Life-time the *Condition is dispensed with*; per Cowper C. 2 Vern. 720. Mich. 1716. Clerke v. Berkley.

26. A. had three Daughters B. C. and D. *an Amour being carried on in the Life of A. between J. S. and B.* the same was much disliked by A. and he declar'd, if B. married J. S. he would not give her a Groat. Thereupon J. S. discontinued his Suit. Afterwards A. by Will devised all his Real and Personal Estate to his Executors in Trust, to pay B. 35*l.* a Year for her Maintenance and no more, and to C. so much &c. *And if B. marry with Consent of my Executors, then I devise to her 1000*l.* in Part of her Portion, to be paid at 21 or Marriage, which shall first happen, and at the End of 3 Years such and such Mesuages to be to B. for Life without Impeachment of Waste, Remainder to her first &c. Son in Tail, Remainder to Daughters &c. paying to his Wife 70*l.* a Year for her Life.* And he devis'd in the like Manner to his other 2 Daughters, only that in the Devise to C. nothing is said relating to her marrying with Consent, but in the Devise to D. immediately after the Devise of 1000*l.* and before the Devise of the Houses it is said, *viz.* If she marry with Consent of &c. I give her all such and such Mesuages &c. (being others than those given to the other Sisters) and concluded with giving the Overplus, *which he doubted not but such there would be, to his said three Daughters to be equally divided between them.* A. died, and then J. S. renew'd his Addresses to B. The Executors expressed their dislike and sent Notice thereof in Writing, and also of A's Will, and the Danger she run, and that they could not consent by Reason of A's dislike in his Life-time. This Cause came on in the Dutchy Court, before Lechmere Chancellor, assisted by Ld. Ch. J. King and Dormer J. and the two first held the Fortune not forfeited by the Marriage without Consent, but the other e Contra. The Reasons against the Forfeiture were, 1. The Looseness of the Expressions and the want of Coherency, from the Omission of such Condition as to C. and the Place of its Insertion as to D. 2. There is *no Devise over*, or any further Notice taken of it. Nor will the Devise of the Overplus carry it. And that the Want of a Devise over made it to be only *in Terrorem*. Ch. Prec. 562. Pasch. 1721. Semphill v. Bayly.

27. A Legacy was given by Will to M. S. on Condition that she marry *with Consent of both the Executors*; Upon a proper Match proposed *one consented, but the other was obstinate and would not*, which being laid before the Court, and the Dissent of the Executors appearing to be without just Cause, the want of such Consent was supplied; cited per the Master of the Rolls. Trin. 1731. in the Case of Peyton v. Bury. 2 Wms's Rep. 628.

28. A. by Settlement after Marriage created a Term of 1000 Years in Trust by Mortgage or Sale to raise 2000*l.* for each of the Daughters Portions, provided they marry *with their Mother's Consent*; and if either die before Marriage *with such Consent, her Portion to cease and the Premises to be discharged*; and if raised, then to be paid to the Person to whom the Premises should belong; And afterwards by Will created another Trust-Term to augment their Fortunes 2000*l.* a-piece more, but subject to the like Condition, as in the Settlement, and gave the Residue over and above the 2000*l.* a-piece

to his Wife ; And by a Codicil created another Trust-Term, for the better raising of his Daughters Portions. A. died, leaving two Daughters, J. and K. — J. after Age of 21 married R. S. and K. before 21 married W. R. and both without the Mother's Consent. They and their Husbands brought a Bill for their Portions. The Master of the Rolls took Notice of the Clause declaring that if any die before Marriage with such Consent her Portion should cease, which was insisted upon by the Counsel to be a sufficient Disposition of it ; But he said, that surely this was not a good Disposition within the Meaning of those Cases, that allow a Limitation over to be good ; For *this is not to take Place upon Marriage without Consent, but upon dying before Marriage with such Consent, and is no more than providing for Daughters dying unmarried ; he taking it all along, that if they married they would do it with Consent ;* that here does not appear to be any Person in the Testator's View, to whom these Fortunes should go over, as in other Cases where those Limitations over are allowed ; That tho' these Portions are charged upon Land, yet there being *no Distinction between Conditions annexed to Money charg'd upon Land, and such as are to arise out of the Personal Estate,* and Portions by Will being due by the Ecclesiastical Law notwithstanding such Condition as this annexed to them, Portions by Settlement, (tho' under the like Conditions) are likewise due by the Law and Rules of this Court ; and therefore thought the Plaintiffs the Daughters well intitled to their Portions ; And so order'd the Husband of the one to make Proposals before the Master as to settling his Wife's Fortune ; and that the Fortune of the other should be paid to her, her Husband being dead. Sel. Chan. Cases in Ld. Talbot's Time. 212. Mich. 10 Geo. 2. *Hervey v. Ashton.*

29. Where the Marriage is to be with Consent of Trustees, the Consent of one only is sufficient ; per Wills Ch. J. in Canc. Trin. 1738. in Case of *Harvey v. Aston.*

30. Conditions against marrying generally are void in Law ; as where a Legacy of 500 l. is given to a Woman, if she doth not marry, and only 300 l. if she doth marry ; afterwards she married, yet she shall have the 500 l. because the Condition annexed to that Legacy was void. Nels. Abr. 1162. Marriage (E) pl. 1.

31. All Conditions against the Liberty of Marriage are unlawful ; But if the Conditions are only such, as whereby Marriage is not absolutely prohibited, but only in Part restrained, as in respect of Time, Place or Person, then such Conditions are not utterly to be rejected. Thus an Executor or a Legatary made on some Condition against the Liberty of Marriage, may, notwithstanding the Nonperformance of such Condition, obtain the Executorship or Legacy ; yea if the Testator make one Executor, or give him a Legacy upon Condition, *that he marry with the Consent,* and according to the good Liking or Appointment of some other Person, this Condition is unlawful. Inasmuch, that if such Executor or Legatary marry contrary to such Restraint or Condition, he shall notwithstanding be admitted to the Executorship, and receive the Legacy, as if no such Condition had been express'd ; (Quære, whether he be not obliged to ask his Consent, tho' not to follow it ;) For the Law rejects all Conditions made against Marriage, or that are Impediments to Marriage ; notwithstanding which an Executorship may be assumed, or a Legacy demanded, as if no such Condition had been made. Yet an Annuity bequeath'd by a Man to his Wife for so many Years, if she shall remain after his Death a Widow and unmarried, is good. Godolph. Orph. Leg. 45. cap. 15. S. 1.

if I bequeath
20 l. to E. F.
so as she
marry with
the good Liking
and Consent
of A. B.
she must
marry, o-

32. Notwithstanding what has been said, the Condition holds good, if the Testator makes one his Executor, or give him a Legacy, *if he marry not without the Counsel or Advice of another Person ;* so that the Testator giving him a Legacy, if he marry with the Counsel or Advice of another Person, he is excluded from the Legacy, if he marry without such Counsel or Advice ; yet in this Case he is *not bound to follow such Counsel or Advice, but only to request the same.* Again, although the Condition

of marrying with the Consent of another is void, so as the Party on whom such Condition is imposed, may obtain the Legacy without such Consent, yet marry he must, or he cannot obtain the Legacy; For altho' the Condition of such Consent be unlawful, yet must he marry before he can pretend to the Legacy, because that Part of the Condition is not unlawful. Godolph. Orph. Leg. 46. cap. 15. S. 2.

yea she shall have the Legacy, tho' she marry not only without his Consent, but also tho' A. B. be altogether unacquainted therewith, or knowing thereof should contradict it, unless it be appointed in the Will expressly, that in Case she marry without such Consent, the said Legacy of 20 l. shall be and enure to such or such pious Uses specially mentioned in the said Will Godolph. Orph. Leg. 381. cap. 17. S. 2. — But if I bequeath 100 l. to A. B. so as she marry with the Advice of C. D. In this Case A. B. shall not have the said Legacy, unless she require or desire the Advice of C. D. albeit she be not obliged to follow his Advice therein, yet she is obliged to ask his Advice, or she cannot have the said Legacy. The Reason of the Difference in this Case from the former is, that in the former there may be a total Impediment to Marriage itself; in this it is otherwise. But if C. D. be dead, whereby the Condition is rendered impossible; in such Case it is as if it were performed; provided that C. D. were dead before his Advice could well be asked or required. Godolph. Orph. Leg. 381. cap. 17. S. 3.

33. Altho' a Condition directly contrary to Marriage annexed to a Legacy in a Will is a void Condition for that very Reason, yet the Civil, or rather the Canon Law doth distinguish in this Point between a Virgin and a Widow, and says, that such Conditions against Marriage (as to a Virgin) are void; but allows them as to Widows, especially if the Legacy be given by a Husband to his own Wife, or by a Son to his Mother. Godolph. Orph. Leg. 382. cap. 17. S. 9.

(K. 2) Conditions annexed to Portions determined.

1. **A.** Bequeathed the Residue of his Personal Estate to J. S. provided she marry with Consent of B. and C. his Executors, (who were but Executors in Trust,) and if J. S. marry otherwise, then he devised over the Residuum to J. N. Afterwards B. died, and then J. S. without C's Consent, married to a common Mariner. The Master of the Rolls decreed, that J. N. had no Title to the Residuum; For that this was a Condition subsequent, and this Consent directed to be had, being like a bare Authority, and so different from that which is coupled with an Interest, could not survive without express Words for that Purpose, and thinking the Bill brought by J. N. for the Residue frivolous he dismissed it with Costs. Trin. 1731. 2 Wms's Rep. (626) Peyton v. Bury.

(L) Settlements by Agreements before Marriage. What is a good Performance. In Regard of the Manner.

1. **B**OND condition'd, that after his Marriage, and having a Son by his Wife, he would convey Lands in Tail to such Son to enjoy. A Feoffment to a Stranger to such Use is not sufficient, but the Infant must be made a Party to the Conveyance, and there ought to be a Deed to prove his Estate, and means to prove the Uses limited. Cro. E. 825. Pasch. 43 Eliz. C. B. Stutfield v. Somers.

2. Infant upon his Marriage promises to make a Settlement when he comes of Age on his Wife and her Issue; a Settlement made 3 or 4 Years after his Age of 21 and not directly pursuant to the said Promise shall not be presumed to be made in Performance of the said Promise, without direct Proof. 2 Lev. 147. Mich. 27 Car. 2. B. R. Lavender v. Blackstone.

3. A. on his Son B.'s Marriage covenants to settle a Jointure on the Wife and her Issue, but no Provision for B. is made during his Life. A. has part of the Portion, and the Wife dies without Issue; The Question was whether B. is intitled to any Estate in Lands? Ld. North advised them to end the Matter by Compromise, Mich. 1683. Vern. 198. West v. Ld. Delaware and Cutler.

(M) Settlements. Performance good. In regard of the Matter.

So Note, a Trust by Deed interpreted to be satisfied by Lands of a bad Title, tho' the Deed of Trust be of an Indefeasible Title on Proof of Discourse, and mentioning that the Meaning was to settle Delinquent's Lands, and the Feme Covert was bound by the Agreement of the Husband. Ibid.

1. A Term was convey'd upon Trust to be void upon purchasing and settling on the Husband for Life, and after upon his Wife for Life, with Remainder over, an Estate of an Indefeasible Title, and not Tithes &c. and this Trust was declared by Deed indented. The Husband desired, and accepted of Lands part of a Delinquent's Estate forfeited in Lieu and Satisfaction of what was to be done. The Delinquent, on the King's Restoration entered. Decreed by Finch C. that the Trustees surrender the Lease to the Purchaser of the Lands which were aliened by the Husband. Chan. Cases. 298. Trin. 29 Car. 2. Boynton v. Sir Robert Sprignall.

Vern. 217.
S. C.

2. By Articles before Marriage a Settlement was to be made of 700*l.* a Year; and after, but during the Wife's Infancy, a Particular of Lands was given to and accepted by the Wife's Father as of 700*l.* a Year, but they were only 500*l.* a Year. Decreed to be made up 700*l.* a Year; but had it been a parol Agreement only, or the Value proved deficient by Accident afterwards, no Relief would have been given. Skin. 158. Hill. 35 & 36 Car. 2. Speake v. Bedley.

3. Marriage Articles were to lay out 1000*l.* in a Purchase of Land to be settled on Husband and Wife for their Lives, Remainder to the Issue of the Marriage, Remainder to the Husband in Fee; Husband lays out the 1000*l.* in the Purchase of a Great House and Gardens and Farm, which would let but at 25*l.* par Ann. It is a good Performance of the Articles, the Father of the Plaintiff having viewed the Estate before the Purchase was made. Vern. 345. Mich. 1685. Tunbridge v. Teather.

(N) Settlements after Marriage without Articles, or Agreement precedent. Good in what Cases.

1. IF the Feme joins in a Fine and so bars herself of her Dower, this may make a Settlement made on her after Marriage to be a good Consideration, which otherwise would be merely Voluntary against Creditors or Purchasers; otherwise if she did not join in the Fine, and so remained Dowable. 2 Lev. 147. Mich. 27 Car. 2. B. R. Lavender v. Blackstone.

2. A. seised in Fee of a Manor makes a Mine-adventuring Agreement with B. C. and D. who after much Labour and Expence made some good Discoveries. Before this Agreement A. had made a Settlement of his said Manor on his Wife and Son with Power to charge it with 3000*l.* for younger Childrens Portions, but this was purely a voluntary Settlement. A. dies and the Widow and Son would hinder the working, and set aside the Agreement by insisting on the Settlement. The Partners brought a Bill for

for relief, the Court took Time to consider of it, but inclined to decree for the Plaintiffs for Execution of the Agreement against the voluntary Settlement. 2 Vern. 326 Mich. 1695. Shaw v. Standish.

3. A second Marriage Settlement is recited to be in Consideration that the Wife had parted with the former Settlement, which appeared to be made after Marriage but was recited to be made in Consideration of a Marriage Portion secured, but no Proof of any previous Agreement for such Settlement, yet the Court presumed it; and so the second not voluntary against Bond Creditors. Mich. 1699. Ch. Prec. 101. Anon.

4. J. S. made a Settlement on his eldest Son for Life, with Remainder to his first and other Sons in Tail, Remainder over, with Power for his Son to appoint any of the Lands not exceeding 100 l. per Ann. to any Wife he should afterwards marry for a Jointure, (the Father being under an Apprehension that he was then married to a Woman which the Father disliked, and had no Intention his Son should provide for her;) the Father died, and the Son married her, (tho' there was strong presumptive Proof that he was married to her before) and after Marriage appointed certain Lands to Trustees in Trust for her for a Jointure, and covenants, that if they were not of 100 l. per Ann. Value, upon request made to him any Time during his Life he would make them up so much out of other Lands in his Power. He lived several Years and no Complaint was made that the Lands were not of that Value, nor request to make it up, and died without Issue. On a Bill brought by the Widow to have the Jointure made up 100 l. my Lord Keeper said, that a Provision for a Wife or Children was not to be considered as a voluntary Covenant, and therefore decreed the Difficiency to be made up, notwithstanding the Circumstances of the Case, and her neglect for not requesting it during Coverture. For the Laches of a Feme cannot be imputed to her. Abr. Equ. Cases 222. Hill. 1701. Fothergill v. Fothergill.

5. A. married an Orphan of the City of London, and upon payment of the Portion by the Chamberlain covenanted with him and J. S. to levy a Fine of Lands to the Use of himself for Life, then to his Wife for Life for a Jointure, Remainder to the Heirs Male of their two Bodies, Remainder to his own right Heirs; A. died without levying a Fine leaving B a Son and M. a Daughter; the Wife died; B. became indebted and covenanted with his Creditors to levy a Fine, and devised the Lands to them and died without Issue; Lord Harcourt and after Lord Cowper decreed the Lands to the Daughter. Ch. Prec. 425. Mich. 1715. White v. Thornborough. G Equ. R.
107. S. C.

6. Tho' a Settlement be executed after Marriage, yet if the Portion be paid at the same time, it cannot be looked upon to be voluntary, but will be as effectual as a Settlement made before Marriage; And so it has always been held; Arg. and decreed accordingly, first by Ld. Harcourt, and after by Ld. Cowper. Ch. Prec. 426. Mich. 1715. White v. Thornborough.

7. The Husband, after Marriage, in Consideration of an additional Portion of 100 l. paid by his Wife's Mother, (a Receipt whereof was indorsed on the Deed) settled Lands of 100 l. a Year upon himself for Life, Remainder to his first and other Sons &c. And the Husband's Mother, who had an Interest in the Land, joined with him in the Conveyance. The Husband 13 Years after mortgages this Estate with usual Covenants, and dies. Mortgagee brought a Bill to foreclose. Ld. Chancellor thought it would be very hard to call this a fraudulent Settlement, it being in Consideration of a Marriage had, and of an additional Provision of 100 l. and cannot be called voluntary against a Creditor lending Money 13 Years after. That the Indorsement was plain Proof that 100 l. was paid, and tho' for the Consideration of 100 l. a Year, yet in Marriage Settlements Things are not to be construed so strictly, there being room for Bounty; and every Man is bound to provide for his Wife and Family. Besides that, the Estate that moved from the Husband's Mother (Defendant's Grandmother) may make him to be considered, in some Respect,

as a Purchaser of the Limitations to her Grand-children. Sel. Chan. Cases in Ld. Talbot's Time. 64. Hill. 1734. Jones v. Marth.

Creditor.

(O) Settlements after Marriage. *By Agreement before Marriage. Good as to Creditors &c.*

1. **S**ettlement in pursuance of Articles precedent to the Marriage has not the least Colour of *Fraud* whereby a *Purchaser* may avoid it, and if there had been but a *verbal Agreement* for such a Settlement it would have served the Turn. Vent. 194. Pasch. 24 Car. 2. B. R. Sir Ralph Bovey's Case.

The Executor of the Father sued the Bond against the Wife as Administratrix to her Husband; decreed that this Bond be

2. A. on the Marriage of M. his Daughter to B. agrees to give 500*l.* Portion and B. gives 3000*l.* Bond to A. to settle 1500*l.* on M. and her Heirs in Money, Lands, or otherwise within a Month, but died without settling it. 300*l.* of the 500*l.* was only paid, and the other 200*l.* was lodged in M's Lawyers Hands; Judgment was had upon the 3000*l.* Bond and was pleaded in Bar of other Debts, and decreed accordingly that she be first Satisfied her 1500*l.* out of the Estate of B. 2 Ch. R. 103. 26 Car. 2. Hodkin v. Blackman.

paid Prior to other Debts, but the Administratrix to discover Assets and Account, and that Money part of the Portion remaining in a Trustees Hands be brought into the Account, and that Assets remaining after the 1500*l.* paid shall go to satisfy other Debts. Fin. R. 232. Trin. 27 Car. 2. S. C.

3. A. indebted 700*l.* agrees on Marriage to settle his Lands of 100*l.* per Ann. on himself for Life, then to the Wife for her Jointure, Remainder upon the Issue in Tail; the Lands were decreed to be sold to pay the 700*l.* and the Surplus of the Money to be laid out and settled on the Wife and the Issue, without any Provision for the Husband; but reversed by Lord North. Vern. 203. Mich. 1683. Carpenter v. Bennet.

(P) Marriage Agreements *unperformed. Decreed.*

The Case was, the Father agreed to give an additional Portion, the Marriage is had, and then the Father pretends the Marriage was against his Consent, and dies, and leaves his Estate to a Nephew; yet the Agreement was decreed. 2 Ch. R. 92 Harmer v. Brook—Fin. R. 185. Mich. 16 Car. 2. S. C.

1. **M**arriage Agreement (after a Trial at Law) was decreed to be made good. 2 Chan. Rep. 92. 25 Car. 2. Harmer v. Brook.

Abr. Eq. Cases 63. pl. 5

2. The Baron before Marriage *articled with the Feme to make a Settlement of certain Lands before the Marriage should be solemnized upon him and her (the now Plaintiff) and the Heirs of his Body by the Plaintiff.* But they intermarried before the Settlement made; then the Baron died; and on a Bill by the Widow for an Execution of the Articles, it was decreed against the Heir at Law of the Baron, tho' Objected that marrying before the Execution of the Settlement was a Waiver of the Articles and the Benefit of them, and the being the only Party with whom they were made, her Marriage with the other Party before Performance was a Release in Law. 2 Vent. 343. Mich. 30 Car. 2. Haymer v. Haymer.

3. A. being Tenant in Tail with Power to make a Jointure, in Consideration of 3000*l.* paid, covenants to settle 300*l.* per Ann. but no particular Lands mentioned, out of which the 300*l.* per Ann. should be made up; Afterwards A. dies, no Settlement made, so that A. executed not his Power; The Question was if A. dying before any Execution, the Court should decree it? Lord Chancellor inclined strongly for the Widow in regard of

of the Consideration, and because A. had Power by the Will to have done it. See 2 Chan. Cafes 28, 29. Pasch. 32 Car. 2. and Pasch. 34. 87. *Hele v. Hele.*

4. *T. G.* in 1653 being seised of certain Lands in Fee of the Value of 14*l.* per Ann. and there being a Marriage in Treaty between the Plaintiff (the Brother of *T.*) and *A. W.* he the said *T.* did make a Writing sealed and delivered by him, which was to this Purpose, viz. that *if the Marriage takes Effect between my Brother and A. W. she being worth 160*l.* I do promise, that if I die without Issue, to give my Lands in &c. to my Brother and his Heirs, or to leave him 80*l.* in Money, and for the true Performance of this, I bind myself, my Heirs, Executors and Administrators. After which the Brother (the now Plaintiff) and the said *A. W.* did intermarry, and she was worth 160*l.* but *T. G.* did afterwards marry and, having no Issue, he did settle the Lands upon his Wife for Life, the Remainder to his own Right Heirs, (this was a Jointure settled before Marriage) and did afterwards devise the Land to her in Fee, and died without Issue; his Wife afterwards devised it to the Defendant's Wife in Fee; and now the Plaintiff exhibited his Bill to have the Land conveyed according to the Agreement above. But for the Defendant's it was much insisted upon, that this being to settle the Lands, in Case *T.* should die without Issue, it should not be regarded in this Court; For the Execution of a Trust of a Remainder, or Reversion in Fee upon an Estate Tail, shall not be compelled, because it is subject to be destroyed by the Tenant in Tail, as here *T.* might have done in Case he had made a Settlement according to the Import of that Writing, who therefore could not have been compelled himself to have executed this Agreement; but the Lord Chancellor Finch decreed the Land for the Plaintiff, because it was proved that the Marriage with the Plaintiff's Wife was in Expectation of the Performance of this Agreement; and he was obliged to have left the Land to the Plaintiff if he had had no Issue. 2 Vent. 353. Mich. 33 Car. 2. *Goylmer v. Paddiston.**

5. Agreement on Marriage was to settle 500*l.* per Ann. Jointure; Lands were settled but they were worth only 400*l.* per Ann. Decreed per *Jeffries C.* 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 offer'd to settle 500*l.* per Ann. and after took Notice that the Jointure settled was not of that Value, and talked of making it up so much; but no Covenant or Agreement was proved, whereby he bound himself to make a Jointure of that Value, and the Portion was not equivalent; but the Husband was trusted to draw the Settlement. Vern. 17. Mich. 1681. *Benfon v. Bellais.*

6. *A.* on his Marriage with *D.* for the settling a Jointure on the said *D.* in full of all Jointures, Dowers, and Thirds, which she might claim out of his real and personal Estate, conveyed Lands to the Use of himself for Life, and after to the said *D.* for Life in full of all Jointures &c. with this Proviso, That *if she claim any Part of the personal Estate by the Custom of the Province of York, then the Estate to be to other Uses*; she is bound by the said Settlement, and ought not to claim any Part of the personal Estate; per *Finch Lord Chancellor*; revertit by *Lord North*; but confirmed by *Jeffries Lord Chancellor.* 2 Chan. Rep. 252. 34 Car. 2. *Benfon v. Bellais.*

7. *A.* Covenants on Marriage of *B.* his eldest Son to the Daughter of *J. S.* with whom 4000*l.* was to be paid to *A.* as a Portion, to settle Lands on *B.* and his Wife for their Lives, with Remainder to the first &c. Son in Tail Male successively, Remainder in Fee to the Son. *A.* brings a Bill to be relieved against the Articles as gained by Surprise, and that it was intended to limit the Remainder to *C.* a second Son of *A.* on failure of Issue Male of *B.* and charged only with Portions for Daughters, and prayed the Court to direct the Settlement to be made so; sed non Allocatur, per *Ld. North.* Vern. R. 320. Pasch. 1685. *Seymour v. Fotherly.*

8. *A.* on Marriage of *B.* his Son covenants to settle Lands to the Use of *B.* for Life, then to the Wife for Life, Remainder to the Heirs Male of *B.* The Practice is contrary. New

Abr. Equ.
Cases 595.
Marg

the Body of B.—A. dies and makes B. Executor, B. dies and makes a second Wife Executrix; Grandson brings a Bill to have Satisfaction on the Executrix on the Covenant, or that he might sue it in the Trustees Names; but the Bill was dismissed, the Plaintiff's Father being Tenant in Tail, and *might have barred the Plaintiff if a Settlement had been made.* Vern. 480. Mich. 1687. Sir William Cann v. Lady Cann.

9. The Father on a Treaty of Marriage between B. and M. his Daughter articles with B. to give M. 3000 l. and B. was to make a Settlement. The Father makes his Will *in the Interim and devises all his Estate to Trustees to the Use of his Daughter for Life, Remainder over.*—B. having Notice of this Will, marries M. and makes a Settlement pursuant to the *Articles with the Father*; per Ld. C. Cowper B. is intitled to the 3000 l. tho' he had Notice of the Will. 2 Vern. 660. Trin. 1710. Trafford and Ux. v. Sir R. Ashton.

10. The Husband gave Bond to the Wife's Father before Marriage to settle certain Copyhold Lands; and upon a Bill to compel a Surrender, the same was decreed, and in a stricter Manner than the Bond specified, and that till the Surrender the Lands should be held and enjoyed according to the Uses. G. Equ. R. 114. Pasch. 1 Geo. 1. Nandike v. Wilkes.

11. A. by Marriage Articles covenanted to settle the Manor of Dale on his intended Wife, or to leave her 1000 l. within three Months after his Death. By this Agreement A. has all his Life-time to do the one or the other, and the Wife cannot compel him to do either; nor can she by Bill, or otherwise compel him to give further, or better Security for Payment of this 1000 l. For she had the Security, which she at first agreed to take, and the Court cannot better it against her own Agreement. See Wms's Rep. 460, 461. Trin. 1718. Bosvil v. Brander.

12. A. had M. a Daughter but no present Estate or Certainty of any future one, and was highly under his Father's Displeasure, whose eldest Son he was, and who had a very considerable Estate. A. encouraged B. to court M. and before Marriage gave a Bond to B. of 5000 l. Penalty reciting the intended Marriage, and A's Agreement to assure one third Part of all such real Estate as should come to him on his Father's decease to B. for Life, Remainder to M. for Life, Remainder to the Heirs of the Body of M. by the said B. Remainder to the Right Heirs of A. And the Condition was to do it within three Months after his Father's Death. Soon after the Father died Intestate, by which a great real Estate came to A. Lord C. Macclesfield decreed an Execution of the Agreement, and would not admit the Payment of the 5000 l. Penalty as a Satisfaction, but varied the Limitations, directing that they should be to B. and M. for their Lives, Remainder to their first &c. Son in Tail Male, Remainder to their Daughters in Tail General, Remainder to A. in Fee, and that A. account for the *Mesne Profits from the end of three Months after the Father's Death*, and be Examined upon Interrogatories touching the real and personal Estate, and to produce all Books, Papers, and Writings upon Oath, and pay Costs. 2 Wms's Rep. 191. Mich. 1723. Hobson v. Trevor.

(Q) Agreements unperformed, decreed after the Death of Husband or Wife.

The Original is so,
Quere the
Meaning.

1. **B.** Covenants to levy a Fine to P. of Lands given in Marriage with his Daughter at a Day; by Negligence of Payment the Daughter being dead, P. passed away the Land to Purchasers, but B. was ordered to an Estate of 100 Marks. Toth. 109, 110. cites Hill. 15 Jac.

And tho' the
Husband is
dead also;

2. By Marriage Articles the Husband agreed to settle a Leasehold on the Wife, which he did, and was to have 1000 l. which was to be laid out in Land, and settled on them and the Issue, Remainder in Fee to the Husband;

Husband ; the Agreement was decreed to be performed by the Father of the Wife as to the Payment of her Portion, tho' the *Wife is dead without Issue*. Fin. R. 244. Hill. 28 Car. 2. Bacon v. Clerk.

and the Husband being to add an Equal Sum to the Portion

to be laid out in Land and settled on the Husband and Wife in Tail, and nothing the Fee; the whole Money was decreed to the Heir of the Husband. 2 Vern. 20. Pasch. 1687. Knight v. Atkins.

3. A. the Father on the Marriage of B. his Son with M. articed with C. the Father of M. in Consideration of 6000 l. to be charged on Lands, being the Portion of M. *such particular Lands should be settled on M. in Jointure*, and on the Issue of the Marriage. After the Marriage M. died *without Issue*, and her Portion not paid, and *the Lands not settled* to secure the 6000 l. nor was the Jointure made or could be made had M. been still living, because A. had *disabled himself to make the Jointure by having conveyed away Part of the Lands*, so that C. thought himself not bound to pay the 6000 l. Decreed the 6000 l. with Interest, or in Default, the Lands agreed by the Articles to stand as a Security for the Payment thereof, to be possessed by the Plaintiff till paid, and the *Disability of A. was not B. the Plaintiff's fault, because A. had given Security*, that it should be done if M. had lived. Fin. R. 261. Trin. 28 Car. 2. Hollis v. Carr and Temple & al.

4. A. on the Marriage of B. his Son with M. an Orphan of the City of London *conveyed Lands &c. to the Use of B. for Life, Remainder to M. for Life for her Provision, Remainder to the first &c. Son in Tail &c.* But afterwards, before the Marriage, *M. being a City Orphan A. and B. applied to the Court of Aldermen for a Licence*, and thereupon an Entry was made of their Consent, *provided the Common Serjeant approve of the Settlement, which A. engaged to make Satisfactory if it were not so already, and B. being required engaged to take up his Freedom within a Year, and A. engaged that B. should do so.* The Marriage took effect and many Years after B. died leaving M. his Widow and several Children. Lord C. Macclesfield decreed the personal Estate of B. to be liable to the Custom of London, and that he should be taken as a Freeman of London, he having for a valuable Consideration agreed to become such ; and he held that the agreeing to take up the Freedom of the City, was the same as if he had agreed that his personal Estate at his Death should go according to the Custom ; and that such Agreement being entered among the other Proceedings and Orders of the Court of Aldermen is become Matter of Record, as much as a Fine would be if levied there, and this shall be deemed as Part of the Marriage Agreement, and which could not be waved, or released without Breach of Trust by the Court of Aldermen at whose Instance as (Political) Guardians of the Infant it was made. Wms's Rep. 710. to 722. Trin. 1721. 25 August, Frederick v. Frederick.

(R) Agreements unperformed. Decreed after the Death of both.

1. A Settlement covenanted by Marriage Articles to be made by the Great Grandfather on the Grandfather, who after died leaving Issue, was decreed to be made accordingly *on the Issue and the Widow for her Jointure*. 3 Ch. R. 29. Mich. 21 Car. 2. Norcliff v. Worseyley.—And the Great Grandfather having *conveyed away the Land*, another Bill was brought by the Father (the Issue) against the Great Grandfather and his second Son John, and 18 February 1651. it was decreed that the Conveyance be made according to the Covenant and that they should *Account for the Profits* to the Father. Ibid. 30.

2. A.

Mich. 1682.
Vern. R. 64.
in Case of
Gilling v.
Lee.

2. A. on Marriage of B. his Son with C. covenants for himself Executors and Administrators, but omits (Heirs) to settle 150*l.* per Ann. Lands on B. and C. and the Issue of the Marriage, but dies before Settlement made; B. enters on the Lands as Heir and C. being dead marries D. and settled Part of the Lands on D. his second Wife, and devised the Residue to his Son by the second Wife charged with Portions for younger Children. Bill is brought by the Son of the first Marriage to have 150*l.* per Ann. of the Lands, whereof A. died seised, settled according to the Articles. Per Ld Wright tho' no Lands particularly were mentioned, yet he thought the Covenant a Lien on the Land whereof A. died seised, unless he had purchased and settled other Lands within the Time limited and which were not settled on the second Wife, who came in as a Purchaser without Notice. 2 Vern. 482. Hill. 1704. Roundell v. Breary.

(S) Agreements. Decreed. *How. Where there is a Failure on one Side.*

1. A Freeman of London agreed to settle his Wife's Portion and his own Estate on her and her Children. The Father of the Wife refused to pay the Portion, because he had another Wife then living, who by the Custom of London would have a Share in his Estate. Decreed that the Wife's Portion and his own Estate shall be settled so that his first Wife have no Benefit thereof. Fin. R. 429. Mich. 31 Car. 2. Butler v. Harrison and Lamb.

2. A. on Marriage of B his Son with C. a Widow covenants in Consideration of 2600*l.* to settle such Lands. 1000*l.* of the Money could not be had, being settled on the former Marriage, so that it must come to her Issue upon any other Marriage. A. refused to settle. Master of the Rolls decreed the Articles to be perform'd within six Months, or delivered up to be cancelled. On Appeal, Ld Keeper held, that A. could not be compelled to settle without the Portion; but that B. the Son was bound to pay it, being a Party to the Articles, as well as bound by the Wife's Covenant while sole to pay 2600*l.* and decreed B. to make good the 1000*l.* 2 Vern. 448. Mich. 1703. Baskerville v. Baskerville and Gore.

Master of the Rolls said, he could decree only a proportionable Settlement for the 1600*l.* or else for the 2600*l.* if paid within six Months. Chan. Prec. 187. Hill. 1701. S. C.

[It seems by the Application of this Case, and the Remark on it by the Counsel that cited it (viz.) that this Case not only fully proves the Right of the Heir, but likewise that he shall not lose that Right thro' any Acci-

3. A Feme being possessed of 200*l.* her Husband before Marriage covenanted to join so much to her 200*l.* as would purchase 30*l.* a Year, to be settled on them two and the Heirs of their Bodies, Remainder to the Husband in Fee. And until the Settlement made, the 200*l.* to be taken as Part of her separate Estate; and if no Settlement be made during the Husband's Life, and she should survive, then to remain to her; but if he survived, then to go to her Brothers and Sisters. The Marriage took Effect in 1688. They had Issue a Daughter. In 1711. the Wife died living the Husband, no Purchase having been made. The Daughter brought a Bill against her Mother's Brother and Sister, and the Money was decreed to her, tho' it had not been laid out within the Time provided by the Articles, the Court looking upon the Purchase as completed. Cited Arg. Sel. Chan. Cases in Ld Talbot's Time, 83. as decreed 13 July, 1713. Kentish v. Newman.

dents preventing the Execution of Agreements within the Time prefix'd) that a Time was limited for making the Purchase, and also that the Husband was dead at the Time of the Bill filed by the Daughter, tho' the same be not so stated.]

(T) Agreements.

(T) Agreements decreed. How. *Where there is a Waiver of a former Agreement.*

1. **A** Marriage Agreement was under Hand and Seal, whereby the Woman's Debts which were 300*l.* were to be paid by the intended Husband, and she was to have the Power to dispose of 200*l.* by Will; and she agreed to settle her Estate (being a Lease for three Lives) on the Man and his Heirs, in Case she died without Issue. But afterwards, before the Marriage, she refused to marry unless the Deed was delivered back. Whereupon a Writing was delivered back, but not the Settlement, and the Husband told the Person that the Woman should have any Thing so she would marry him. They marry'd, and the Wife died without Issue. Upon this Waiver of the Agreement, tho' the Deed was not cancelled, the Estate was decreed to the Heir at Law of the Wife against the Husband. 2 Chan. Cases 40. Hill. 32 & 33 Car. 2. Balch v. Tucker.

(U) Agreements unperform'd. *What shall be said a Satisfaction.*

1. **A.** On the Marriage of B. his Son with M. settled some Lands, and covenanted to purchase and settle other Lands of the Value of 50*l.* a Year to the Use of B. for Life, Remainder to M. for Life, Remainder to the Heirs Male of the Body of B. A. died, leaving a considerable personal Estate, and made B. Executor (the 50*l.* a Year Lands not being purchased.) B. levied a Fine, and thereby barred the Entail of the settled Lands. M. died, leaving Issue C. a Son, and afterwards B. married N. a second Wife, by whom he had Issue D. a Son, and B. devised his Estate to D. and made N. Executrix, and gave C. 200*l.* a Year Annuity for Life on Condition to release his Executrix of all Demands. C. brought a Bill against N. praying Satisfaction of the Covenant, or that he might sue it in the Trustees Names. But it was insisted, that this was a Covenant broken in the Time of B. who was thereby intitled to the Damages thereon, and that C's. Bill was, that B. as Executor had retained a Satisfaction for the Non Performance out of A's personal Estate. And because B. as Tenant in Tail, (had the Settlement been actually made) might have barred the Estate the next Day Ld Chancellor dismissed that Part of the Bill. Mich. 1687. Vern. 480. Cann (Sir William) v. Cann.

2. Articles on Marriage to make such a Settlement on the Wife was decreed after the Husband's Death to be performed, tho' the Husband made a better Provision for her than if he had perform'd the Covenants in the Marriage Indenture. Fin. R. 388. Tr. 30 Car. 2. Marlow v. Maxie, Chaplin & al.

3. A. on Marriage covenants to purchase and settle Lands of 200*l.* per Ann. on his Wife for a Jointure, and to the first &c. Sons in Tail. He purchases, but does not settle, and he dying, the Lands descend to the Son. Son brings Bill for Performance. Per Ld Cowper The Lands descended ought to be deemed a Satisfaction of the Covenant, and decreed accordingly. 2 Vern. 558. Tr. 1706. Wilcocks and Wilcocks.

4. A. covenants to leave his Wife 650*l.* A. dies intestate leaving 2000*l.* personal Estate; Per Master of the Rolls She is well satisfy'd her 650*l.* by having a Moiety of the 2000*l.* by the Statute of Distributions, and she shall not come in first as a Creditor for 650*l.* and also for a Moiety of the Surplus. 2 Vern. 709. Hill. 1715. Blandy v. Widmore.

S. C. cited
Arg. 2
Wms's Rep.
615 — 1
Wms's Rep.
325. Arg.—
2 Vern. 710.
Arg. in Case
of Blandy v.
Widmore.

Abr. Equ. Cases 391. S. C.—At the Request of his Trustees. *Gilb. Law of Uses* 314. S. C.—And the Trustees died without making any Request. *Ibid.* 315.—S. C. *Wms's Rep.* 622. to 634. Pasch. 1720. In Canc. and was afterwards affirmed in the House of Lords.

5. A. on Marriage with B. *covenants* in Consideration of Marriage, and of his Affection to his intended Wife, * *within two Years* to convey to Trustees and their Heirs as Counsel shall advise, all his Lands, To the Use of himself for Life without Impeachment of Wast, then to his Wife for Life, and after her Decease, to the Use of the Heirs Male of the said A. on the Body of the said Wife to be begotten, and to the Heirs Male of such Heirs Male lawfully issuing, Remainder to the right Heirs of A. And in the mean Time *covenanted to stand seised* of the Premises to such Uses as are therein before declared. They had several Sons and Daughters, and afterwards A. *levy'd a Fine* of the Premises to bar the eldest Son. A. and his Wife both died, no further Settlement was made pursuant to the Marriage Articles. Decreed that the eldest Son was not barred by the Fine, and that the Articles should be carry'd into Execution, and the Covenant to stand seised was not a final Settlement, and that A. was to be only Tenant for Life as appears by the Words (without Impeachment of Wast) and the Limitation (to the Heirs Male of such Heirs Male). And that tho' a much greater Estate descended to the Eldest Son as Heir at Law, it should not be deemed a Satisfaction. 9 Mod. 161. 1719. In Dom. Proc. *Trevor v. Trevor.*

6. On a Treaty of Marriage the Father agreed to give his Daughter 3000*l.* but before the Marriage the Father died leaving a Will and 2000*l.* Legacy to his Daughter. Afterwards they marry. The Husband receives the 2000*l.* Legacy. He cannot oblige the Executor to pay the other 1000*l.* as upon the Marriage Agreement after he has accepted of the 2000*l.* as a Legacy, but should rather have sued for the 3000*l.* on the Agreement. 9 Mod. 31. Pasch. 8 Geo. 1. *Ayloff v. Tracy.*

Ibid. in a Note there it is said, that this Decree was affirmed on Appeal to the Lord Chancellor. 1732.

7. A Man on Marriage gave a Bond either to settle 100*l.* a Year within four Months on his Wife for Life, or that his Heirs, Executors &c. should pay her 2000*l.* in four Months after his Death. He made his Will, and devised Lands of 88*l.* a Year to his loving Wife and her Heirs, and died within four Months after the Marriage. But the Master of the Rolls held, that as Money and Land are Things of a different Nature, the one shall not be taken in Satisfaction of the other. And he took Notice of the Words (Loving Wife) which are Words of Affection; and said, as to the Husband's Election to make such Settlement within four Months, but dying within the Time, tho' it expired afterwards, yet where on Death of Testator Matters are for some Time in Confusion, nothing is more usual than for the Court to enlarge the Time, or to relieve against any Lapse thereof; And therefore decreed the Executors to pay the incurring Profits of the 100*l.* a Year from the Death of the Husband, and settle upon her the 100*l.* a Year, they not being bound to pay the 2000*l.* to her; but the 88*l.* a Year devised shall not be taken as Part of the 100*l.* a Year agreed to be settled. 2 *Wms's Rep.* 613. 616. 617. Trin. 1731. *Eastwood v. Vinke and Styles.*

(W) Agreements unperformed. Decreed, upon what Evidence, upon 29 Car. 2. 3.

1. **P**roposals in Writing being sent to the Friends of the Woman by an Uncle of the Man's, tho' no Answer was return'd, yet the Man being admitted to be a Suitor, and the Marriage ensuing, this in Equity was held to amount to an Agreement executed, and ought to be performed on all Sides. *Fin. R.* 146. Mich. 26 Car. 2. *Parker v. Serjeant.*

Case on a Parol Promise in Consider-

2. 29 Car. 2. cap. 3. S. 4. Enacts that From and after the 24. June. 1677. No Action shall be brought to charge the Defendant on any Agreement or Consideration of Marriage, unless such Agreement, or some Note thereof, be

in Writing, and sign'd by the Party to be charged or some other by him authoris'd. tion of Marriage to pay in his Life.

Time, or leave at his Death 2000*l.* after which Promise, and before the Testator's Death the Statute of Frauds was made. Per Cur. the Statute extends not to this Promise, but only to such as should be made for the future, and it would be very mischievous to annul all Promises made by Parol before that Time. 2 Show. 16. Trin. 30 Car. 2. B. R. Helmore and Shuter.——Vent. 331. Gilmore v. Shuter S. C.——2 Jo. 108. S. C.——2 Lev. 227.

A. wrote a Letter signifying his Assent to the Marriage of his Daughter with J. S. and that he would give her 1500*l.* and afterwards by another Letter upon a further Treaty he went back from the Proposals of his Letter, and at some Time after declared he would agree to what was proposed in his first Letter. This was held a sufficient Promise in Writing within the 29 Car. 2. of Frauds and Perjuries, and that the last Declaration had set the Terms in the first Letter up again. 2 Vent. 361. Pasch. 35 Car. 2. Bird v. Bloffe.——Skin 142. Mich. 35 Car. 2. Anon. seems to be S. C.

3. On a Treaty of Marriage the Father of the Woman agrees by Letter to a third Person, to give so much with his Daughter in Marriage; this is binding and out of the Statute of Frauds. Vern. 110. Mich. 1682. 201. Mich. 1683. Moor v. Hart. 2 Chan. R. 284. S. C.— cited Arg. Ch. Prec. 380. as affirmed in

Dom. Proc.——But where there were after Treaties and Proposals, and the Parties differing, the Agreement broke off. The Court inclin'd to dismiss the Bill. 2 Vern. 34. Hill. 1688. Coke v. Mafcall——Hill. 1690. the same Cause came on again, when it appear'd that the Agreement had been reduc'd to Writing, and was read to the Parties, and that Defendant proposed to meet another Time to execute, tho' it never was done, but that Defendant forwarded the Match, and * assisted in it; and the Plaintiff offering to perform the Agreement on his Part, decreed per Commissioners, that the Agreement be perform'd as it was drawn. 2 Vern. 200. Coke v. Mafcall.——* S. P. in Case of *Bawdes v. Amhurst*. Ch. Prec. 402. Pasch. 1715. and S. C. cited there.

4. Letters did pass between A. and B. concerning the Marriage of A's Son with B's Daughter; in one of the Letters B. promised if A. would marry his Son to B's Daughter, to give with her to A's Son 1500*l.* worth of Land, which A. utterly refused, and wrote that he would no further trouble him about that Affair till he was in a Condition to give 1500*l.* in ready Money. Afterwards B. by Letter offered to make his Daughter worth 1500*l.* in present Money, and to give her 500*l.* more at his Death, if she please him, and promises by Word of Mouth that he will do it. A's Son marries the Daughter, and brings a Bill against B. for the Money; and the Question was, whether this was within the Statute of Frauds and Perjuries; For it was objected, that the Letters were by Way of Proposal, and that the Treaty was at an End by A's saying that he would trouble himself no more &c. But Ld North decreed it a good Promise within the Statute. Skin. 142. Mich. 35 Car. 2. Anon.

5. A. by Letter under his Hand promised 1000*l.* with his Niece, but in the same Letter dissuaded her from marrying with the Plaintiff, yet was afterwards present at the Marriage and gave her in Marriage. The Court would not decree the Payment of the 1000*l.* but left the Plaintiff to recover it at Law if he could. 2 Vern. 202. Hill. 1690. Douglass v. Vincent.

6. A. upon his intended Marriage with B. who had Lands in Fee, and Monies out upon Securities, in Consideration of the said Marriage and Portion agreed to settle certain Lands for a Jointure, and gave a Bond for Performance with a special Condition reciting this Agreement. They intermarried and A. dy'd without making the Jointure, but during his Life enjoy'd B's Land, and altered the Securities to himself. No Agreement appeared besides the Bond. Somers C. held, that this Bond is a sufficient Evidence of such Agreement in Writing, and decreed the Settlement to be made accordingly, and if Defendant refused to do it within 6 Weeks, then he should pay Costs. N. Ch. R. 207. Pasch. 1692. Holtham v. Ryland. Abr. Equ. Cases 18. S. C.

7. A. by Letter writ by his Direction said he would give 1500*l.* Portion with his Daughter.—A. was privy to the Marriage after had, and seem'd to approve thereof. Daughter dies, Baron administers.—A. was decreed to pay the 1500*l.* as his Daughters Portion in Marriage with the Plaintiff, and this Decree affirmed in Dom. Proc. 2 Vern. 322. Mich. 1694. Wankford v. Fotherly.

S. C. cited
per Ld. Cow-
per. Ch. Prec.
449.

8. On a Treaty of Marriage between A. and B's Daughter an *Agreement in Writing* was made and sign'd by A. and delivered to B. to be sign'd by him, but not done; and his Objections not being to any material Part of the Agreement, but *permitting the Courtship*, and the Marriage taking Effect, and not declaring his Dislike till ask'd for Payment of the Portion, and permitting the young Couple to live with him the Master of the Rolls decreed the Agreement and Payment of the Portion. 2 Vern. 373. Hill. 1699. Halfpenny v. Ballet.

9 The Defendant's Son made his *Addresses to the Plaintiff's Daughter*, and the Plaintiff desiring to know what the Father could settle on him, he told him that his Father had an Estate of 60 l. per Annum, that he was in a good Trade and would take him in Partner; and said he would satisfy him more particularly by going to his Father, who lived at some Distance off; and accordingly went, and on his Return told him, that he would settle the Estate on him, and take him in Partner; Upon which the Plaintiff agreed to settle a Leasehold Estate on him of 2 or 300 l. per Annum, but desired the Son to acquaint his Father of it by Letter, who did, and the Father in his Answer expressed his good-liking of the Match, and said, he would comply with every Thing he told his Son. On the Marriage Day the Woman fell sick of the Small-Pox, and the same Day the Son went to his Fathers, where he fell sick likewise of the Small-Pox, but in his Sickness was prevailed on to make a Will, and devise the Leasehold Estate to his Father, and died; the Wife recovering, her Father and the pray a Reconveyance of the Leasehold Estate, or that the Agreement might be performed in Specie, and a Discovery of the Letter wrote by the Son, and insisted that the Letter and Answer brought the Agreement out of the Statute of Frauds; but the Defendant denying that he knew the Contents of the Letter, tho' he owned he received such a one, and that he had burnt it as Waste Paper, my Ld. Chancellor, (tho' he said it was a Case of great Compassion) doubted whether he could relieve the Plaintiffs, saying, it was only executed according to the Statute by one Party, and what the Defendant told his Son might be very uncertain, who perhaps might have magnified Matters in order to enhance his Father in Law's good Esteem of him; but he gave the Parties Time to see if they could agree the Matter. Abr. Equ. Cases 20. pl. 7. Hill. 1710. Hall v. Butler.

Ch. Prec.
402. S. C.

10. The Father of the Woman and the intended Husband made *Proposals of Portion and Settlement*, and Minutes were taken down by the Counsel, who presently gave them to his Clerk to draw a Settlement accordingly. Next Day the Father fell sick and dy'd suddenly after. The Marriage was consummated the next Morning. On a Bill for a specifick Performance, Ld. Chancellor held it within the Statute of Frauds, and said he knew no Case where an Agreement, tho' wrote by the Party himself, should bind, if not sign'd or in part executed by him, and that those Preparatory Heads might have received several Alterations or Additions, or the Agreement might have been entirely broken off, upon some further Inquiry as to the Persons Circumstances. And the whole Bar agreed to it, and also, that if the Marriage had been upon the Foot of this Writing, and the Father had been privy and consenting to it, that he should afterwards have been obliged to execute his Part thereof. Pasch. 1715. Abr. Equ. Cases 21. Bawdes v. Amherst.

11. A. upon his Marriage with M. promised, that she should enjoy all her own Estate to her separate Use, and agreed to execute Writings to that Purpose, and instructed Counsel to draw them; but at the Time of Marriage, the Writings not being perfected, A. desired this might be no Delay, and engaged upon his Honour, she should have the same Advantage as if in Writing and executed. After the Marriage M. wrote to A. upon this, and A. in Answer wrote, that he was always willing she should enjoy it, and that it should be at her Command. A. pleaded the Statute of Frauds. To which it was answered, that this was executed by the Intermarriage, and that the Letter after Marriage was Evidence of the Agreement, and so brought it out of the Statute. But it was Replied, That it was wrong to call the Marriage

Marriage an Execution of the Promise, when till the Marriage it was not within the Statute, which makes the Promise in Consideration of Marriage void, and so it would be quite frustrating the Statute; which the Court approved. And Ld. C. Parker said, that in Cases of Fraud Equity will relieve even against the Words of the Statute, that the Expressions in the Letter were general, but had it recited or mentioned the former Agreement, and Performance thereof, it had been Material; But as this Case is circumstanced, his Lordship allowed the Plea. Pasch. 1720. Wms's Rep. 618. Montague (Viscountess) v. Sir Geo. Maxwell.

12. A Letter from the Father to his Daughter intimated that he had agreed to give the Plaintiff her intended Husband 3000 l. Portion; but before the Marriage the Father died, and a Legacy of 2000 l. long Time before the Treaty of Marriage bequeathed by the Father's Will was paid to the Husband, and accepted by him as the Portion with his Wife, she never having shown him the said Letter, nor had any Settlement made her. The Husband not being supposed to have married in Confidence of the Letter, which he knew nothing of before. Ld. C. Parker dismiss'd his Bill. Trin. 1722. 2 Wms's Rep. 165. Ayliff v. Tracy.

(X) Agreements Decreed. How; As to the Limitations &c. See Settlement (A)
to be made upon.

1. **A.** Before Marriage covenants in Consideration of that and 2000 l. Portion to settle all his Freehold Estate on himself and Wife for a Jointure, Remainder to the first &c. Sons in Tail, Remainder to the Daughters in Tail, Remainder to himself in Fee, with Power of Revocation by the Wife's Father. A. died without making any Settlement, leaving his Wife and no Son, but 2 Daughters. He by Will gives 2000 l. to the Daughters, and if either died before 21 or Marriage, the Survivor to have the Whole, and devised all his Lands to his Wife in Fee, and gives the Surplus of his Personal Estate to her, and makes her Executrix. It was decreed that a Settlement be made with Power of Revocation by the Wife's Father, but would not decree the Legacies to be a Satisfaction of the Settlement, but that the same should be put out Subject to the Contingencies in the Will, per Ld. Wright Ch. Prec. 175. Mich. 1701. Jaggard v. Jaggard.

2. A Marriage Contract was made in France between two French People as to Wife's Portion, how it should go in Case of the Husband's surviving, by which Part was to go according to the Custom of Paris, and a certain Sum in a different Manner. The Agreement was decreed, per Ld. Wright, as to the Sum stipulated only, but on Appeal to the Lords, the whole Contract was decreed. Ch. Prec. 207. Mich. 1702. Feaubert v. Turit.

3. If Marriage Articles are for Settlement of an Estate on the Husband and the Heirs Male of his Body, yet when they come into this Court for a Specifick Execution, the Court models the Settlement so, as to make it effectual, and will give the Husband but an Estate for Life; per Cowper C. Ch. Prec. 448. Mich. 1716. Arg. Ch. Prec. 422 Mich. 1715. per Cowper C. Arg.—Per Parker C. 10 Mod. 437. Trin. 5 Geo. 1. in Trevor's Case.—S. P. admitted per Cowper C. Pasch. 1711. 2 Vern. 671. in Case of Baile v. Coleman.

4. If the Marriage Articles are for a Settlement to be to the Husband for Life, and to the Wife for Life, and then to the first and other Sons and the Heirs Male of their Bodies &c. Chancery would decree a Limitation to Trustees to preserve the Remainders; Or if by Fine or otherwise they are destroy'd before they take Place, this Court would set them up again. And if a defective Settlement in any Particular had been made, a Second

must be made till the Uses therein are well and truly raised, and till then the Covenant subsists; per Ld. Chanc. Abr. Equ. Cases 391. Trin. 1719: Trevor v. Trevor.

See Settlement.

(Y) Agreements decreed. How; Upon Limitations contained in the Covenant.

A like Decree was made in the House of Lords, as cited per the Attorney General, and agreed per Ld. Cowper. Ch. Prec. 422.—S. P. cited per Ld.

1. IF a Bill be brought to carry Marriage Articles into Execution in the Life-time of all the Parties, and in the Articles is a Covenant to levy a Fine *the Use of A. the Husband for Life, Remainder to the Use of M. the intended Wife for Life, Remainder to the Heirs Males of A. Remainder to A's Right Heirs.* Chancery would decree the Limitation to be *to the first Son, and the Heirs Males of his Body &c. Remainder to Daughters and the Heirs of their Bodies, Remainder to the Heirs of the Body of A.* Per Ld. Cowper Ch. Prec. 428. Mich. 1715. White v. Thornborough.

Cowper. Mich. 1716. Ch. Prec. 448. in Case of Brown v. Barkham.

2. A. gave 1500 l. Portion in Marriage to B. with M. his Daughter, and it was agreed by Articles to which A. was Party, *that the 1500 l. and 1000 l. of B's should be vested in a Purchase of Land within one Year after the Marriage, and be settled to the Use of B. for Life, Remainder to M. for Life, Remainder to the first &c. Sons of the Marriage successively in Tail Male, Remainder to Trustees for 1000 Years to raise Portions for Daughters, if no Son, viz. if but one Daughter 1000 l. &c. Proviso, that if before the Money laid out in the Purchase B. and M. or either of them should die leaving Issue only one Daughter, then that Daughter should have the whole 2500 l.* And farther covenanted, that if M. died before him, he would leave after his Death to the Issue of the Marriage 1500 l. more than what was settled. M. died leaving E. a Daughter only, who after by Corruption of a Servant married J. S. a Person of no Estate, (without B's Consent) and who within a Year became a Bankrupt. B. made no Purchase within the Year, and now brought his Bill for Relief against the Lapse, and that E. might have no more than if the Purchase had been made in M's Life-time. And by Consent of A. a Decree was made accordingly, without giving E. (still an Infant) Day to shew Cause. Afterwards J. S. and E. brought a Bill to set aside this Decree, and to claim the whole 2500 l. But Ld. C. Macclesfield refused to do so, and ordered, that (B. being dead) the 1500 l. and Interest since B's Death should be brought before the Master, and the Interest thereof be applied for Maintenance of E. and her Child, with Liberty to her or Child to apply if J. S. should die. Mich. 1721. Wms's Rep. 734. Richmond v. Tayleur.

See (E. a) S. C. cited in Case of Legg v. Goldwire. — This Case was cited in the Exchequer. Trin. 1729. 2 Wms's Rep. 539, 540. in the Case of **Dobrel v. Price**, and said there to have been

3. Marriage Articles were enter'd into for settling Lands *to the Use of B. the Husband for Life without Waste, Remainder to M. the Wife for Life, Remainder to the Heirs Male of the Body of B. by M. Remainder to the Heirs of the Body of B. by any other Wife, Remainder to the Heirs Female of the Body of B. by the said M. Remainder over; with Power to B. to make Leases for 3 Lives, and to make a Jointure.*—Afterwards and before the Marriage a Settlement was made and mentioned to be *in Pursuance and Performance of the Articles*, and thereby the Lands were limited to B. for Life without Waste, and with Power to make Leases, Remainder to the first &c. Son of the Marriage in Tail Male, Remainder to the first &c. Son of B. by any other Wife in Tail Male successively, *Remainder to the Heirs of the Body of the said B. by the said M. Remainder over.* There were no Trustees for supporting contingent Remainders. They had Issue only one Daughter, who died leaving 2 Daughters. B. having an Estate Tail,

by

by Virtue of this Limitation suffered a Recovery, and sold Part of the Lands and devised the Residue, and died. The Grandaughters brought a Bill in the Exchequer against the Executors of B. to rectify the Mistake in the Settlement in limiting an Estate Tail to B. instead of limiting it in strict Settlement as by the Articles ought to have been done. The Articles were made in December 1685. The Settlement in March 1685. The Sale of the Lands in 1698; and the Will in December 1722. The Defendant pleaded the Settlement of 1685, the common Recovery, the Will of B. and the *long Enjoyment*, but the same was over-ruled by Ld. Ch. B. Gilbert, and the other Barons unanimously. But after, on hearing the Cause, Ld. Ch. B. Pengelly and the Barons dismissed the Bill, but without Costs, Decemb. 1726. But on Appeal to the Lords this Dismission was Reversed, Feb. 1727, and the Premises not sold were decreed to be convey'd to the Grandaughters and the Heirs Female of their Bodies as Tenants in Common with cross Remainders to them in Tail Female, and the Devisee to account for the Profits, and the Executor to account for the Purchase Money received by B. for the Lands by him sold, and to pay Interest for the same, and the Writings to be brought into the Court of Exchequer, and Possession to be delivered to the Appellants; But the *Principal Monies arising by the said Sale, to be laid out in Lands to be settled to the same Uses, as the Lands unsold were decreed to be conveyed.* 2 Wms's Rep. 349. to 356. Trin. 1726. West v. Errisley.

reversed in the House of Lords But the Court said, that if there should be any difference between that and the Principal Case, there might be Reason to lay hold of it; and that there was this Diversity, viz. that in the Case of West v. Errisley, no Portion was provided for the Daughters of the first Marriage, whereas in the Case of Powell v.

Price Portions were secured in all Events to such Daughters. And in West and Errisley's Case after the Limitation in the Articles to the Heirs Male of the Body of the Husband and Wife with Remainders to the Heirs Male of the Body of the Husband by any Wife came the Remainder to the Heirs Female of the Body of the Husband by the first Wife &c. so that the Daughters were more immediately in View and Contemplation of the Parties than in the Case of Powell and Price, in which Case the Limitations were, after the Heirs Male of the Body of the Husband by the first Marriage, Remainder to the Heirs Male of the Body of the Husband, by any other Wife, Remainder to the Heirs of the Body of the Husband, with a Clause that if the Husband should die, leaving only Daughters by the first Wife, then such Daughters should have 4000 l. secured to them on the same Part of the Estate; and after the first Wife died, leaving Issue only one Daughter. The Husband married a second Wife and settled the Estate in Tail Male &c. and died, leaving Sons by such second Wife, and it was decreed, that the Daughter of the first Marriage was not intitled by the Limitation in the first Marriage Articles to the Heirs of the Body of the Husband to the Lands in Question.

(Z) Settlements. Construction. How much.

A. Covenants that Lands settled for a Jointure are 400 l. per Annum, This has Relation to the Time of the Settlement, and not to the Death of A. Per Ld. North Vern. 217. Hill. 1683. Speke v. Speke.
 2. Lands on Marriage were conveyed on Trust that after the Death of the Husband the Wife should receive the Rents of the Lands as they were then let. The Husband made Leafes at an advanced Rent; The advanced Rents shall go to the Heir at Law. 9 Mod. 32. Trin. 9 Geo. 1. Lawly v. Lawly.

(A. a) Promises. Construction. How much.

Infant upon his Marriage promises to make a Settlement when he comes of Age on his Wife and her Issue. This was agreed to be a good Consideration to avoid a Charge of Fraud, tho' Infants are not bound in Law to perform such Promises. 2 Lev. 147. Mich. 27 Car. 2. B. R. Lavender v. Blackstone.

2. Twif-

2. Twifden J. said, it had been adjudged, that if a Man promise to give half his Estate to his Daughter in Marriage, that the Lands as well as the Goods are included. 3 Mod. 46. Trin. 32 Car. 2. B. R. in Case of Reeves v. Winnington.

(B. a) Lien. Where the Covenant is a Lien on the Land.

A Conveyance to another set aside where he had Notice of such Agreement made by his Father on his Daughter's Marriage. Ibid. 449. Trin. 32 Car. 2. Brown v. Stebbing.

1. J. S. in Consideration of the Marriage of M. his Niece with A. and of a Settlement on M. by A. agrees by Deed Poll to permit all his Lands in W. and Lancashire to descend to his Niece if he died without Issue, with Power to charge the same with 500 l. and no more.—He devised away 2000 l. and part of the Lands in W. and Lancashire were intailed by an Ancestor of the Uncle. Decreed the Agreement to bind all the Lands but those intail'd and chargeable only with 500 l. Fin. R. 405. Hill. 31 Car. 2. Otway v. Braithwaite and Sandys.

2. A. purchased Lands held in Borough English, and having two Sons, B. the eldest, and C. the youngest, gave the Lands to B. which otherwise had descended to C.—B. on Marriage with M. covenanted before the Marriage to convey &c. the Lands in Trust for B. and M. for their Lives, and to the Heirs of their two Bodies, Remainder to the Heirs of the Survivor. B. died without Issue. Decreed the Heir of C. to perform the Covenant. Fin. R. 374. Trin. 30 Car. 2. Ironmonger v. Ironmonger.

But where A. covenanted to settle 800 l. per Annum, and named no Lands in particular, it was held, that the Lands were bound, and that even against a Purchaser, and that if he had afterwards acknowledged any Statute or Judgment, yet this Covenant should be looked upon as a Prior Incumbrance, and was so decreed. Arg. Vern. 64. in Case of Girling v. Lee.

3. A. on B's Marriage with M. settles Land on M. for a Jointure, and in the Settlement A. covenants that the Lands were 800 l. per Annum, and if they fell short his other Estate should be liable to supply the Defect.—A. mortgaged his other Estate, and was otherwise indebted, and by Will charg'd the other Lands with Payment of his Debts; And decreed according to the Will without Regard to the Covenant for making good the Jointure. Vern. 63. Mich. 1682. Girling v. Lee.

4. A. on a Treaty of Marriage with M. his Daughter to B. promises to give B. 1500 l. in Land. either at D. or E. or the same Sum in Money out of the Monies to be raised by Sale of D. or E. Decreed per North K. that A. pay B. the 1500 l. and that the Lands at D. and E. should stand charg'd with the Payment of it, and that B. should settle 300 l. per Annum on M. Vern. 201. Mich. 1683. Moor v. Hart.

9 Mod. 16. S. P. cited in Lady Coventry's Case. — Where the Power in a like Case was no farther executed

5. A. Tenant in Tail (with Power to make a Jointure) in Consideration of Marriage and 3000 l. articles to make a Jointure, and dies without Issue, and without making the Jointure; the Wife dies, and her Executrix brings a Bill for an Account of the Profits of the Land articted to be settled. Jefferies C. dismissed the Bill, and said there was great Difference between a defective Execution of a Power, and where the Power was not executed at all. Mich. 1686. Vern. 406. Elliot v. Hele.

than by a Deed drawn and ingrossed, and the Particulars inserted, it was decreed, that the Articles were a Lien, and that the Wife should have the very Lands in the Deed mentioned settled upon her, Mich. 9 Geo. 9 Mod. 20. Lady Coventry's Case.—But had it not been for the Articles, the Statute of Frauds would have stood in the Way against the Draught. Ibid. 19.

6. A. on his Marriage with B. agreed and gave Bonds to settle particular Lands on the Wife and the Issue of the Marriage, and afterwards aliens part of those Lands. A. dies. Finch C. decreed the Jointress to have the Deficiency of her Jointure made good out of the Inheritance of the Lands remaining unfold. But Jeffries C. reverted that Decree; For the Jointress and Children are equally Purchasers, and they must bear the Loss in Proportion. Vern. 440. Hill. 1686. Carpenter v. Carpenter.

7. A. upon his Marriage with M. covenanted to settle his Lands in R. and also Lands that should be of the Value of 60 l. a Year upon M. for Life. Afterwards A. by Will charges all his real and personal Estate with payment of his Debts, and died indebted. Ld. C. Parker held the Marriage Articles to be a specific Lien as to the Lands in R. and that A. was only a Trustee, and that those Lands are not to be affected by any of the Bond Debts during M's Life. But as to the Lands of 60 l. a Year, M. is to come in only as a Specialty-Creditor with the others, and the Master to value her Estate for Life at so many Years purchase, and then she to come in as a Creditor for so much Money. But there being two Years Arrears of the 60 l. a Year due at the hearing of the Cause his Lordship ordered, that she come in as a Creditor for those two Years besides the Value of her Estate for Life, that being a Debt actually due to her, and must be paid, she having run the Hazard of her Life in the mean time, which had it dropped, there must have been no Valuation. Wms's Rep. 429. Pasch. 1718. Freemout v. Dedire.—And it was said to have been so ruled in Ld. Harcourt's time, in one Berisford's Case.

8. A. had Power to limit a Jointure of 1000 l. a Year, and covenants to settle 1000 l. per Annum upon Marriage. The Conveyance is made according to a Particular that was supposed to be of that Value, but proved only 600 l. per Annum. Upon a Bill against the Remainder-man to have the Jointure completed it was decreed per Ld. Wright accordingly. Arg. Pasch. 8 Geo. 1. 10 Mod. 479. cites Ld. Clifford v. Earl of Burlington.

It was decreed to be made up 1000 l. per Annum, against the Issue in Tail, though not privy to the Marriage

Treaty, or guilty of any Fraud. Trin. 1700. 2 Vern. 379. S. C.—G. Equ. R. 167. S. C. cited.—S. C. cited Arg. 2 Wms's Rep. 229. in Case of Lady Coventry v. Ld. Coventry.—S. C. cited by the Master of the Rolls. Hill. 1731. 2 Wms's Rep. 600. in Case of Evelyn v. Evelyn; and says that this Decree was against the Issue in Tail, and so Relief was given to a Purchaser against a Purchaser, but that this however is to be looked upon as a Family Case, where it might be thought severe not to make good a Jointure to a Lady who brought a considerable Fortune, and the Decree made probably on a faint Defence; Besides, it does not appear to have been thought a right Decree, or even sufficiently approved of by the Reporter himself, at least it is to be considered that there was a Covenant, and also an Intention to execute it, and cited 2 Vern. 379.

9. A. had Power to settle Lands of 500 l. a Year for a Jointure on a Wife, and on his Marriage with M. he covenanted that he would, pursuant to the Power given him by the Family Settlement or otherwise, settle Lands of 500 l. a Year, but died without doing it. It was contended that M. ought to resort to the personal Estate, there being no particular Lands covenanted to be settled, and the Covenant was to settle Lands of 500 l. a Year pursuant to the Covenant or otherwise; Cited by the Master of the Rolls as the Case of Lady Coventry v. Lord Coventry and that it was decreed by Ld. C. Macclesfield assisted by the Judges, that this Covenant bound the Land, and that the Words (or otherwise) were intended in Favour of the Jointress for her further Security in Case the Power should fail or prove deficient; And if so, they were not to be made Use of to her Prejudice. 2 Wms's Rep. 438. Hill. 1727. in Case of Edwards v. Freeman.

10. A. on his Marriage covenants to levy a Fine of his Freehold, and to surrender his Copyhold to the Use of himself and his Wife for their Lives, Remainder to the Heirs Male of their Bodies, Remainder to the Heirs of their Bodies, Remainder to his own right Heirs. A. dies leaving a Son and a Daughter before any Fine levied or Surrender made. The Son borrows

G Equ. R. 107. S. C. Ch. Prec 425. S. C.

Money of B. and for Security covenants to levy a Fine and Surrender to B. and his Heirs, and declare the Uses, and dies without Issue. Decreed by Harcourt C. that the Settlement might be in a stricter Manner than barely in the Words of the Deed, when the Deed (which he looked upon in the Nature of Articles) was to be carried into Execution in a Court of Equity, and that a Remainder might be expressly limited to the Daughters of the Marriage so as a Fine by the Son could not bar it, and decreed both Freehold and Copyhold to the Daughter. But on Re-hearing Cowper C. declared, the *Deed is to be considered* not as Articles, but as a defective Settlement, and the Uses not to be altered or varied, and that a Court of Equity will look upon it as if a Fine had been levied, and then the Daughter could not have been barred without a Fine, and she is to be considered as Heir of the Body of her Father, and the *Limitation* in the Deed (*to the Heirs of their Bodies*) could be inserted for no other Purpose but to carry the Estate to the Daughters of the Marriage, it being before limited to the Heirs Male, and therefore confirmed the Decree as to the Freehold; but there being no Custom within the Manor for suffering a Recovery, a Surrender would have barred the Copyhold if it had been settled, and so varied the Decree, and dismissed the Bill as to the Copyhold. Mich. 1715. 2 Vern. 702. White v. Thornburgh.

11. A. Tenant for Life, with Power to make a Jointure of 100 l. a Year for every 1000 l. which any Wife should bring as a Marriage Portion. The Jointure to be for the Wife's Life, and to take Effect from the Death of the Husband. A. on his Marriage with M. with whom he was to receive 8000 l. Portion, covenanted to settle 800 l. a Year within a Month after the Marriage, and also to make an additional Jointure of 100 l. a Year for every 1000 l. he should receive, or be intitled to by Virtue of M's Father's or Mother's Will, and so in Proportion for any less Sum than 1000 l. The 800 l. a Year was settled, and 150 l. a Year more for 1500 l. more received by A. And if A. had received any further Sum for which he had made no Jointure, the Remainder-man after A's Death is compellable to make a proportionable Jointure. But where a further Portion is uncertain, and depends upon a Contingency at the Death of A. so as in Truth no further Portion is brought to A. Ld. C. King thought M. not intitled to any further Jointure, nor the Creditors of A. to such further contingent Portion in Case the same should be afterwards recovered; and decreed, that she keep such Overplus to herself, without any additional Jointure, the Remainder-man not being bound or affected by A's Covenant for making a Jointure any further than the original Power warrants, which was to settle 100 l. a Year for every 1000 l. which any Wife should bring to her Husband. 2 Wms's. Rep. (648) Mich. 1731. Holt v. Holt.

(C. a) Covenants. Lien. On the personal Estate.

1. **A.** On Marriage of B. his Son with M. who brought a considerable Portion, agreed to settle and assign to B. all his Estate and Interest in such Lands, and to leave him all such Goods of which he should be possessed at the time of his Death. A. died, and by Will bequeathed 30 l. to J. S. his Daughter; J. S. sues for the Legacy; and alleges Assets, besides what is claimed by the Articles. An Account was decreed of A's Estate not included in the Articles, and if B. had Assets then to pay the Legacy. Fin. R. 125. Mich. 26 Car. 2. Mablety v. Baker.

2 Ch. Rep.
92. 25 Car. 2.
S C.

2. A. on the Marriage of B. his Daughter and Heir with C. agrees to pay 500 l. at Christmas, and to convey to C. and his Heirs a House in H. and at his Death to give his Daughter all his real and personal Estate whatsoever.

foever, except 50 or 100 l. and articles for Performance. Afterwards A. devises away all his *personal Estate* to J. S. Decreed that the Executors, during the Minority of J. S. be Executors in Trust for B. and C. except as to 1000 l. for J. S. Fin. R. 183. Mich. 26 Car. 2. Harmore v. Brooke.

3. A. on Marriage with M. by articles in Consideration of 6000 l. Portion mentioned as received by him with M. an Infant, covenanted with B. and C. Trustees, that *if he and his Wife lived seven Years, then in three Months afterwards to lay out 10,000 l. in a Purchase, and settle it on himself for Life, and on M. for a Jointure &c. and if he died before a Settlement made, to leave her 10,000 l. and confessed a Judgment to B. and C. for Performance of Covenants.* 1500 l. part of the 6000 l. was laid out in purchasing an Annuity in the Exchequer in the Name of C. and he gave a Declaration of Trust to A. that his Name was used in Trust for A. his Executors and Administrators. J. S. lent A. 1000 l. on his assigning the Annuity and depositing the Tallies and Orders with him. J. S. brought a Bill to compel C. to assign the Trust for securing his 1000 l. But on a cross Bill M. insisted, that the *Annuity purchased in C's Name was to be as a Pledge till the Marriage Agreement performed,* and that the Tallies &c. were deposited in C's Hands for that Purpose, but that A. persuaded her to take them out of his Hands as not safe there, and M. having so done, A. afterwards took them out of her Cabinet, and delivered them to J. S. The Counsel for J. S. insisted on the Statute of Frauds, and that a parol Agreement could not be tacked to a written Agreement. But Cowper C. dismissed the Bill of J. S. and decreed the 100 l. a Year to M. her Husband being broke, and said that tho' parol Agreements are bound by the Statute, and that Agreements are not to be *part parol and part in Writing,* yet a *Deposit or collateral Security* is not within the Purview of the Statute; and said that M. who was married in her Infancy, and her Trustees who had made an improvident Agreement in Writing, did well afterwards upon recollection to get that Deposit for Performance of the Agreement. 2 Vern. 617. Mich. 1708. Hales v. Vanderchem.

4. The Father-in-law agrees to make up the Fortune 4000 l. of which 2500 l. is paid on the Marriage, and *four Years afterwards enters into Bond for the other 1500 l. without any Application of the Husband or Wife,* he being then very ill and dying of that Illness soon after, but kept the Bond himself, and which was found with his Will after his Death, but was shewn before to them with his Will. Ld. Harcourt held that this Bond could *not be tacked to the parol Agreement* to make it Evidence in Writing of that Agreement, or as a Performance of it, because of the Distance of Time, and from the Circumstances took it only as a Legacy and voluntary against Creditors. Ch. Prec. 370. Trin. 1713. Loeffes v. Lewen.

5. A. on his Marriage with M. gave a *Note signifying his Consent, that as to 200 l. part of the Wife's Portion, the Wife should have the same.* It was held by the Master of the Rolls, that the 200 l. was specifically bound thereby, so that, the Husband afterwards becoming a Bankrupt, the Feme was relieved against the Assignees as to this 200 l. Wms's Rep. 458, 461. Trin. 1718. Bovvil v. Brander.

(D. a) Portions to be paid, or Settlements to be made on Condition Precedent.

1. **A.** On Marriage of M. his Daughter to B. among other Securities gave a *Bond* to the Father of B. to pay 1000 l. *within seven Years* after the Marriage, and *after a Jointure of 600 l. per Annum* should be settled on her. B. devises this 1000 l. to J. S. who brings his Bill, and suggests that a Jointure of 600 l. per Annum was made, and that it was accepted by some subsequent Agreement. Defendant pleads, that the

the Father of B. died within seven Years after the Marriage and Date of the Bond, and had *not made a Jointure* of 600 l. per Annum according to the Condition of the said Bond; that the 1000 l. was *not payable but on a Condition*, which Condition was never performed; And as to the Demand of the 1000 l. and a Discovery of Assets demurred; For that if any thing be due they ought to sue the Bond *at Law*, and not first come here. Decreed, that as to so much of the *Plea and Demurrer* as relates to the Agreement, and Settlement, and Acceptance of the Jointure, so as to intitle the Plaintiff to a Duty and Demand of the 1000 l. in Equity, the same should not be allowed. And as to so much as seeks a Discovery of Assets and personal Estate to satisfy the 1000 l. the Defendant's further Answer was respited till the Hearing of the Cause. Fin. R. 178. Mich. 26 Car. 2. Glascock v. Brownwell.

On Re-hearing Ld. North confirmed the Decree with this Variation, that A. should either * pay the Money, or that the Complainant should hold the Land absolutely for his Life.

2. Land by Marriage Articles was charged with 4000 l. Portion, provided *if B. the Husband did not settle on M. his Wife 400 l. per Annum within two Years*, then B. should have only Interest paid him for the 4000 l. after the Rate of 50 s. per Cent during his Life, and after his Decease the Lands should go to M. and the Heirs of her Body, with a *Power of Redemption to A. and his Heirs*. A. dies; *M. dies within the two Years*, the 400 l. *per Annum not settled*. B. prayed Relief, and to have the 4000 l. Finch C. asked if they prayed Relief against the Person, or endeavoured to charge the Land? If they went against the Land, they must take it *Secundum formam Chartæ*; and in this Case there being no *personal Covenant* the Bill was dismissed. Vern. 68. Mich. 1682. Vermuden v. Read.

Vern. 167. Pasch. 1683. Vermuden v. Read. — * *Quere* if it should not be, (pay Interest for the Money at 50 s. per Cent. or that &c.) it being recited introductory to the Decree, that the Defendant had Power to retain the 4000 l. paying such Interest.

Fin. R. 98. Hill. 25 Car. 2. Cheke v. Ld. Lisle.

3. A. by Marriage Articles was to have 4000 l. Portion with M. his Wife, viz. 1500 l. paid in Hand, and 2500 l. more *if he made a Settlement within three Years*; *M. died within two Months* after the Marriage, the Settlement not made. A. brought his Bill but was dismissed. Vern. 69. Mich. 1682. cited as the Case of Colonel Cheek v. Ld.

2 Vern. 448. Mich. 1703. S. C.

4. Upon a Marriage of the Plaintiff's Son the Father was *not to make any Settlement till the Portion paid*, which by the Articles was to be done by a certain time; but the same not being done the Master of the Rolls would not decree the Father to *account for the Rents, and take the Portion with Interest from that time*, the Portion being far short of the Lands to be settled. Ch. Prec. 187. Hill. 1701. Baskervill v. Gore.

5. Where there were Articles before Marriage, by which the *Baron was to disincumber his Estate within 6 Months, (within which time she died) and for every 100 l. to settle 10 l. a Year*, tho' the Estate was but 70 l. a Year, and the Fortune secured on Land was 1250 l. yet Ld. Harcourt decreed the 1250 l. (the Husband and Wife being dead) to the Administrator of the Husband, he being a Purchaser by the Agreement, and having *made some Progress in discharging the Estate*. Ch. Prec. 312. Pasch. 1711. Meredith v. Wynn.

6. A. gave B. a *Note of Hand to pay B. 200 l. within two Years upon Condition B. married M. A's Daughter, and settled 600 l. upon her* for a Jointure &c. The Marriage took Effect, and there was issue a Daughter, but *M. and Daughter died before the two Years expired, and before a Settlement made*. B. in a Bill insisted he had been looking out for Purchases to lay out the 600 l. and was only prevented by the Act of God. Defendant insisted it was a Condition precedent, and if any Damagewas, he might have his Action at Law, and that the Plaintiff was not bound to lay out the 600 l. and therefore there were no mutual Remedies. Per Cur. It was in B's Power to have intitled himself to the 200 l. when he pleased, by laying out the 600 l. which not being done the Bill was dismissed, but without Costs. G. Equ. R. 188. Hill. 12 Geo. 1. Powel v. Pillet.

(E. a) *Settlement. Variance between Agreements, Articles, and Settlements.*

1. **H**usband before Marriage agreed to give Security to settle 150 l. *per Annum* in Jointure, Remainder to the *Issue Male*; Provided *if no such Issue*, then *besides her own Lands* (which were valued at 3000 l.) to leave 2000 l. for Daughters, and for Performance gave *Recognizance* of 5000 l. After Marriage, by a *new Agreement*, the Lands of the Wife were settled on Husband and Wife, and the Heirs of the Survivor; and the Lands of the Husband were, on Default of Issue M. settled on the Daughters. They had Issue only one Daughter, and died. Decreed, that the Daughter was to have in the whole 5000 l. so that the Mother's Lands which descended to her being worth 3000 l. she was to have 2000 l. out of her Father's Estate; so that if the Lands of Inheritance settled by the Father *fell short* of 2000 l. more, it should be made up out of a Leasehold Estate of the Husband, and then the Recognizance to be delivered up. Fin. R. 91. Hill. 25 Car. 2. Burges v. Burges.

2. Articles on Marriage were for settling 300 l. *per Annum*, but the Husband died before the Settlement made, but in Compassion to the Family she *agreed when a Widow to accept less*, viz. 100 l. *per Annum*; But afterwards she would have gone off from the Agreement, but the Court decreed a Performance. Fin. R. 128. Mich. 26 Car. 2. Norcliff v. Worfeley.

3. A Bond was made to Trustees before Marriage to settle Lands, whereof the Obligor was seized, *to them and their Heirs* within two Months. After the two Months the Baron, in Consideration of the Love which he bore to his Wife, and other Considerations, *covenanted with one of the Trustees to stand seized* to the Use of himself for Life, and after to the Wife for Life, and after to the first and tenth Sons, and their Heirs Male, and after *to his own right Heirs*. They had a Son, who died without Issue; then the Husband died without other Issue. The Wife died, leaving a Son by another Husband, who claimed as Heir to his Mother. But the Defendant demurred, because the Conveyance by Covenant to stand seized ought to be intended a Performance of the Bond; that the Plaintiff is a mere Stranger to the Baron; that the Obligee and Executors of the Baron should have been made Parties; and no Title in Equity appears in the Bill. The Demurrer was allowed; but the Plaintiff to be at Liberty to amend his Bill, or bring a new Bill on the said Marriage Agreement. 3 Ch. R. 50. Bagg v. Folter.

4. A Marriage Settlement is made in pursuance of Articles, and there is a Covenant in the Articles, that the Lands *are of such a yearly Value*, but in the Settlement it is *omitted*, yet the Jointress may resort back to the Covenant which is still subsisting; Per Ld. North. Vern. 218. Hill. 1683. Speake v. Speake.

All *parol Agreements* before Marriage are resolved into the Jointure Settlement.

Per Ld. Jeffries. Vern. 369. Hill. 1685. Bellasis v. Benson.—See Skin. 158. Speke v. Pedley.

5. Marriage Settlement imported to be in pursuance of an *Agreement*. At the Hearing there was strong Proof by three or four *Witnesses* that this Deed was not drawn according to the Agreement, but that the Agreement was for settling Lands of a far greater Value, and to *other Uses*. A *Trial was directed* by Ld Nottingham to try what was the Agreement, and the Deed to be left out of the Case, and not given in Evidence. On a Bill of Review Ld North reversed the Decree, saying, it was a strange Order to take away a Man's Evidence, and then send him to Law. Vern. 246. Trin. 1684. Bechinal v. Bechinal.

6. If a *Bond* before Marriage is only for a *Jointure*, and the *Settlement* goes farther, and entails the Land upon the Children of the Marriage; As to the *Jointure* the *Settlement* may be good, and yet *fraudulent* as to the *Remainder*, in Respect of a *Purchaser*; per *Ld North*. Vern. 286. Hill. 36 & 37 Car. 2. in Case of *Jafon v. Jervis*.

See 2 Vern. 702. *White v. Thornburgh*—6-1. *Baile v. Coleman*.

7. Marriage Articles were worded so as to convey an *Estate Tail* to the *Baron*; but upon Suggestion by the *Father*, that an *Estate for Life* only was intended, and for that Purpose a Clause was therein to restrain *Walt*, it was decreed, per *Master of the Rolls*, that an *Estate for Life* only should be conveyed. 2 Vern. 13. Mich. 1686. *Griffith v. Buckle*.

8. *Election reserved* by Marriage Articles, that if a *Settlement* was not made in the *Husband's Life* of 400*l.* per Ann. the *Wife* might have 3000*l.* in Money, or 400*l.* per Ann. for *Life*, *Remainder* to the *Issue* &c. was set aside in Favour of *Creditors*, and the 400*l.* per Ann. decreed to be settled, tho' the *Wife* elected to have the 3000*l.* and so the *Children* insisted to have the 400*l.* per Ann. 2 Vern. 605. Hill. 1707. *Hancock v. Hancock*.

**Wms's Rep.* 123. *S. C.* says, that the *Remainder* in the *Settlement* was to the *Heirs of the Body of the Husband on the Body of the Wife to be begotten*. The *Wife* died, leaving a *Son*. The

9. By Marriage Settlement the Limitation of the *Remainder* was to the **Heirs of their two Bodies*, and by the Articles (after the *Estate for Life* to the *Husband*) it was agreed to be to the *Wife for Life*, and then to the *Heirs of the Body of the Wife by the Husband*. The *Settlement* is mentioned to be according to and in Performance of the Articles. But it not appearing that the Parties intended to vary from the Articles, and it seeming to be only an Accident, and it appearing by Proof that a strict *Settlement* was intended, and the Articles agreeing with the Intentions of the Persons, which the *Settlement* does not, *Cowper C.* decreed the *Land* to go according to the Articles, tho' the *Settlement* was made before *Marriage*. 2 Vern. 658. Tr. 1710. *Honour v. Honour*.

Father mortgaged the *Lands* for 500*l.* having got the *Son*, without any Consideration, to join in a *Fine*; and in the *Deed of Uses* the *Fee Simple* and *Equity of Redemption* were limited to the *Father*. The *Son* brought a *Bill* to compel the *Father* to re-settle the *Premises* on the *Son* after his *Death*, and the *Settlement* to be made agreeable to the Articles; *Ld Cowper* decreed the *Father* and his second *Wife* to join in a *Conveyance* accordingly. But the *Son* having join'd in the *Mortgage*, the *Court* would not set that aside, but ordered the *Father* to keep down the *Interest* during his *Life*; and because he insisted on taking Advantage of this *Mistake*, it was ordered that he make the *Conveyance* at his own Charge, and pay *Costs*. *Ibid.* 123. to 125.

Ibid. 131. cites *Watson's Case*, where the *Settlement* controlled the Articles in the same Point. And that where

10. By Marriage Articles the eldest *Son* was to be *Tenant in Tail*, proviso that the *Father* might sell the *Lands* by the Consent of the *Trustees*, and purchase other *Lands*, and settle the same to the like *Uses*. He sold those *Lands*, and purchased other, but by the *Settlement* of them, he made the eldest *Son* only *Tenant for Life*, and held good, and that the eldest *Son*, when he came into Possession could not incur those *Lands*. 9 Mod. 128. Hill. 11 Geo. 1. *Reeves v. Reeves*.

by the Articles he was to have Power to settle 1000*l.* per Ann. which by the *Settlement* was made only 600*l.* he was bound down to the 600*l.* and was forced to get an *Act of Parliament* to enlarge it to 1000*l.* per Ann. which he obtain'd; but it left his *Estate* in Possession, and all the *Remainders* over to continue as by the *Settlement*. *Ibid.*—Cites a like Point *Ibid.* as decreed by *Cowper C.* in Case of *Burton v. Hastings*.—*S. C.* cited *Gilb. Law of Uses* 354.

11. Upon a *Bill* to supply the defective Execution of an Agreement made by the *Father* of the *Plaintiffs*, whereby the *Estate* was to be settled on the *Plaintiffs* severally for *Life*, *Remainder* to their first and other *Sons successively in Tail*, a *Decree* was obtained accordingly, and it was refer'd to the *Master* to settle a *Conveyance*. See *Abr. Equ. Cases* 2. in pl. 7. Mich. 1727. *Finch* and *Ld Winchelsea*.

13. Where Articles are entered into before *Marriage*, and the *Settlement* is made after *Marriage* different from those Articles; As if by the Articles the *Estate* was to be in strict *Settlement*, and by the *Settlement* the *Husband* is made *Tenant in Tail*, whereby he has it in his Power to bar the *Issue*, this *Court* will set up the Articles against the *Settlement*. But where

where *both Articles and Settlement are previous to the Marriage*, at a Time when all Parties are at Liberty, the Settlement differing from the Articles will be *taken as a new Agreement* between them, and will *controul the Articles*. And tho' in the Case of * *West v. Errisley*, Mich. 1726. * See (Y) S. in the Court of Exchequer, and in the House of Lords in 1727. the Articles were made to controul the Settlement made before Marriage, yet that Resolution no Ways contradicts the general Rule; For in that Case the Settlement was *expressly mentioned to be made in Pursuance and Performance of the Marriage Articles*, whereby the *Intent appear'd to be still the same as it was at the making the Articles*. Cases in Chan. in Ld Talbot's Time. 20. cited in a N. B. there, as said by Ld Chan. Talbot. Novemb. 10. 1736. Legg v. Goldwire.

(F. a) Settlements. Broke into by Decree.

1. **B**OND was given after Marriage to secure 400*l.* Part of the Wife's Portion, as follows, viz. To pay the Interest to the Husband and Wife for their Lives, and after the Death of the Survivor to pay the Principal to the Children equally, or as the Husband should appoint, in Case there were no Children. The Husband being grown very poor *prayed to have 200 l. to purchase an Office*, and the *Wife consenting* thereto upon a private Examination in Court the same was decreed. Fin. R. 365. Trin. 30 Car. 2. Brudnell & Orme v. Price.

2. By a Settlement on Marriage 1500*l.* was *be laid out in Lands*, and settled on Husband and Wife, and then on the Issue; But the Wife's Father, who had the 1500*l.* being his Daughter's Portion, in his Hands, did at the Importunity of his Daughter and Son in Law let them have the Money to imploy in Trade. And on a Bill by the Father against the Son in Law, Daughter, and Trustees, to be indemnified because of the Deed, and the Coverture of the Daughter by which her Consent would not bind her, and all Parties being before the Court, and consenting that the Plaintiff (the Father) be discharged, and the Deed cancelled, it was decreed accordingly. Fin. Rep. 448. Trin. 32 Car. 2. 1680. Donning v. Le-need, and Ux, & al.

But where upon Marriage Lands were settled in strict Settlement, and a Bill was brought by the Husband and Wife, suggesting that they had *been married 12 Years, and never had any*

Issue, and having contracted Debts, and praying that they might be enabled to sell Part of the Estate for Payment of Debts, and the Trustee by Answer confessed the same, and likewise that he believed they never would have any Issue, and submitted to do as the Court should direct, he being indemnified, and tho' it was insisted, that the Court in such Cases had decreed a Sale for Payment of Debts, and cited the Case of *Digby v. Cornwallis*, and also Sir *John Tuston's* Case as Precedents, and urged that Necessity creates a Natural Equity, yet Ld North declar'd, he did not see how he could make such a Decree; For he had known where People had been married near 20 Years without Issue, and afterwards had Children. But at the Plaintiff's Importunity he gave Time till Mich. Term to attend him with Precedents. Vern. 181. Trin. 1685. *Davies v. Weld & al* ——— 2 Ch. Cases 144. S. C. says, That the Wife's Portion was not paid, and that by that and other Occasions, the Husband was in Debt 4000*l.* that the Estate settled was alleged to be 600*l.* a Year and that the Bill was against the Remainder-man for Life [it seems this is meant the Trustee for Life of the Husband to preserve the contingent Remainders] to join in Sale of some Part, and that the Father and Mother [Quere, if it should not be (Husband and Wife)] were eaten out with great Debts, and driven to great Want: And Precedents were cited where it had been done. But Ld North said, he could not justify to decree a Breach of Trust; and that if it had been done, it might be where Recompence was made; and at last ordered Precedents to be looked into. ——— Where the Husband before the Settlement had mortgaged the same Lands to one, and confessed a Judgment to another, and six Years after the Settlement made, having no Issue, he entered into Articles for Sale thereof, and the Vendee brought a Bill for a specifick Execution, and that the Trustees might join, it was insisted for the Plaintiff, that the *Settlement being only of an Equity of Redemption*, the Mortgagee was not bound by it, but might not only enter, but foreclose, which would bind tho' Issue should be born afterwards; and that the Husband and Wife not being able to redeem a Sale was absolutely necessary, or otherwise the Redemption would be lost to Husband and Wife, and also to the Issue if any should be. And the Master of the Rolls decreed the Trustees to join in Sale, and the Trustees to be indemnified, the Settlement being only of an Equity of Redemption, and the Wife being in Court, and examining

whether she freely consented or Not to the Sale. 2 Vern. 323. Mich. 1693. Platt v. Sprig & al.
 —S. C. cited per Cur. 2 Wms's Rep. 616, 617. Mich. 1732. in Case of Mansell v. Mansell.

See (F. 2) pl. 2. 4. (G. a) Pleadings. *How the Marriage is to be pleaded.*

He should have pleaded No Marriage in Fact. Show. 50 S. C.

1. **I**N Debt on Bond the Defendant pleaded *Ne unques accouple in loyal Matrimony*; the Plaintiff demurred, and had Judgment; For it 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. Trin. 1 W. & M. B. R. Alleyn and Ux v. Grey.

2. The constant Form of Pleading Marriage is, that it was *Per Prof-biterum sacris Ordinibus constitutum*. 1 Salk. 120. 9 Annæ. Heydon v. Gould.

3. A Bond was given by the Defendant to a young Woman in the Penalty of 1000*l.* reciting that she had agreed to marry him, and *conditioned that he would marry her* according to the Rites and Ceremonies of the Church of England *within a Twelvemonth, or else pay the Sum of 500*l.** The Defendant not having married her, and having got the Bond out of her Possession and destroy'd it, she brought her Bill in the Court of Chancery (which after her Death was revived by her Representative) praying a Satisfaction for the 500*l.* At the Hearing the chief Matter insisted upon on the Part of the Defendant was, that the Plaintiff in her Bill had *not averr'd, that she herself was ready and willing to have married the Defendant*, that the Marriage was not in his Power alone, but her Consent was necessary; and that wherever the Act of the Obligee is necessary to the Performance of the Condition, a Readiness on his Side must be shewn. But the Court held, the Plaintiff's Bill was sufficient without such Averment, and that the Case must be considered as if an Action at Law had been brought upon this Bond. Now at Law the Plaintiff need not have averred that she was ready and willing, but it would be *incumbent on the Defendant to shew the contrary* as an Excuse for his Nonperformance: viz. That he was ready and offered, and requested her, but she refused; For he must not only have shewn a Readiness on his Part, but a Refusal on hers: Besides, in all Cases of Contracts the Nature of the Thing is to be consider'd, and from the Modesty of the Woman's Sex, the Law presumes that *the Request is to arise on the Part of the Man, unless the Agreement is to the contrary*. Accordingly the Court decreed the 500*l.* to the Representative with Costs, and Interest from the Time of filing the original Bill. Hill. Vacation 1738. Atkins v. Farr.

(H. a) *Forcible Marriage. The Offence thereof.*

This Statute stands upon a Preamble and a Purview. The Preamble is where Women &c. having Substance &c. for the Lucre of such Substance are oftentimes

1. 3 H 7. cap. 2. **W**HERE Women, as well Maidens as Widows and Wives, having Substances, some in Goods movable, and some in Lands and Tenements, and some being Heirs apparent unto their Ancestors, for the Lucre of such Substances be oftentimes taken by Misdoers contrary to their Will, and after married to such Misdoers, or to other by their Assent, or defiled to the great Displeasure of God, and contrary to the King's Laws, and Disparagement of the said Women, and utter Heaviness and Discomfort of their Friends, and to the evil Example of all other: It is therefore ordained, established and enacted by our Sovereign Lord the King, by the Advice of the Lords Spiritual and Temporal, and the Commons in the said Parliament assembled, and by Authority of the same, That what Person or Persons

*Persons from henceforth, that taketh any Woman (so) against her Will unlawfully, that is to say, Maid, Widow, or Wife, that such taking, procuring, and abetting to the same, and also receiving wittingly the same Woman so taken against her Will, and knowing the same, be Felony: And that such Mis-doers, Takers, and Procurators to the same, and Receivers, knowing the said Offence in Form aforesaid, be henceforth reputed and adjudged as * Principal Felons; Provided alway, that this Act extends not to any Person taking any Woman only claiming her as his Ward or Bond Woman.*

taken by Mis-doers contrary to their Will, and after are married or defiled, so that these 3 Words in the Preamble are ob-

servable, viz. 1. Be taken. 2. Be married 3. Be defiled. The Purview is, that what Person &c. taketh any Woman (So) against her Will unlawfully &c. such taking, procuring and abetting &c. and also receiving &c. and knowing the same shall be Felony; and that such Mis-doers &c. shall be reputed &c. as principal Felons. So that it is *not said* in the Purview (*so taken, married, or defiled*) but only (*so taken against their Will.*) And upon this, great Question was mov'd, 4 & 5 P. & M. in the Star-Chamber, viz. Whether the *Eloignement against her Will, without Marriage or carnal Copulation* (which is intended by the Word defiled) be Felony or no? And the Opinion of Brook, and some other of the Justices was, that it was; but Saunders Ch. J. was against it. 12 Rep. 20. in the Case of Stealing of Women.—But it was afterwards resolv'd, That if a Feme be taken against her Will by Rioters, and solicited and threatened to marry, but does not, this is not Felony by this Statute. But if she had been married, or defiled, it had been Felony by that Statute, and not otherwise; For tho' the Body of the Law says, that such taking shall be Felony, yet the *Intention of the Act is expounded* by the said taking with Force, and after they are married or defiled; and this was the Mischiefe which the Statute intended to prevent; Per all the Justices assembled at Serjeant's Inn. Hill. 26 Eliz. And 115. pl. 160.—S. C. cited per Periam Ch. B. 12 Rep. 20. And that the Purview ought to pursue the Mischiefe. And 2dly, This Word (*so*) hath Reference to the Preamble, and all the Mischiefe contained in it.—S. P. Sav. 59. pl. 127. Patch. 25 Eliz. Anon.

S. C. cited Hob. 182, 183. in Case of Bruton v. Morris.—S. C. cited Cro. C. 485, 486. in Lady Fulwood's Case.

Upon Consideration of this Statute it was resolv'd by Coke Ch. J. Yelverton, Williams, Snig and others, That whereas it is provided that what Person soever, who takes a Person against her Will &c. Altho' the Body of the Act extends to taking only, yet in respect of this Word (*so*) it hath Relation to the Preamble (to such Person as is describ'd in the Preamble, viz. *Having Substance*); it was agreed by all, that if *she hath nothing, nor is Heir apparent*, it is out of the Statute; For the Statute would not have been so curious in describing the Person, and all in vain. 2dly, The Word (*so*) relates to the Quality and Event of the taking mentioned in the Preamble, viz. *To be married or defiled*; For if she be not married or defiled it is not such a taking (*so*) viz. So married, or so defiled; and it is not reasonable, that (*so*) should have Relation to the taking, which is more remote, and not to the Marriage or Defiling which is nearer. Quod fuit concessum. 12 Rep. 99. Trin. 10 Jac. Baker v. Hall.—S. C. cited Hutt. 3. Trin. 15 Jac. And there, upon divers Assemblies of all the Judges, it was observed, that the Body of the Act seems to be General, viz. He that shall take any Woman so against her Will. And it was said to be a great Inconvenience to make it Felony to take an Heir apparent of a poor Man, or to take a poor Woman which hath but a very small Portion, and of mean Parentage, and (as was said) of a Woman in a Red Petticoat, and yet not be so to take the Daughter of an Earl or of some other Great Man. But it was resolv'd, that the *Body of the Act is incorporated to the Preamble*; For it had been adjudged, that taking a Woman with Intent to marry or deflower her &c. is not Felony without the doing it, and this rests upon the Preamble, and then shall have Relation to such Woman before nam'd, viz. Maid, Widow, or Wife, having Substance, and to an Heir apparent, and to no other. Hutt. 2 3.—Hob. 182. pl. 219. seems to be S. C. by the Name of Bruton v. Morris & al.—S. C. cited Cro. C. 425. in Lady Fulwood's Case.

* Note, by the express Purview of the Act the *Accessory both before and after* is made Principal &c. But by a Construction of the Common Law, they that receive the Misdoers, and not the Women, are *Accessories*; For this Act makes the Receivers of the Women the Principals. 12 Rep. 21. The Case of stealing of Women.—S. P. 12 Rep. 99. Trin. 10 Jac. in Case of Baker v. Hall.—; Inst. 61. cap. 12. S. P.—S. P. Dal. 22. pl. 3; 3 & 4 P. & M.—S. P. Hawk. Pl. C. 110 cap. 42 S. 8. because the Words are *receiving wittingly the same Woman so taken &c.* But he says it seems clearly, That they are Accessories after the Offence, according to the known Rules of Common Law ——— The being married in the Presence of a Person not Party to the forcible taking or consenting thereto was held not to be an Offence within the Statute. Cro. C. 488. 489. Mich. 13 Car. B. R. Lady Fulwood's Case ——— Hawk. Pl. C. 110. cap. 42. S. 9.

2. A. B. and C. were indicted in Surry, for that E. was a Maid, who had a Portion of 1300 l. and they Violenter et Felonice assaulted her at S. in Com. S. and her there took away by Force and against her Will on the 23d. August &c. and the same Day and Year the said A. married her at S. by the Abetment and Procurement of the said B. and C. The Evidence was, that she was taken in Middlesex with Swords drawn, and carried into Surry and married there, and tho' divers Witnesses offered to prove, that she said she was willing to marry him, and appointed a Taylor to make her a Gown, and was found in Bed with him. All the Court (absente Berkley) held this taking in Middlesex a continuing Force, and a forcing were

Hob 183 at the End of the Case of Bruton v. Morris, adds a Quere, If the Taking, and the Lands, and the Marrying or Defiling were forcible in several

Counties? For (he says) it is Felony compos'd of all those Things, as Murder is of the Stroke and Death. — Cro. C. 485, 486. cites S. P. as in And. 115. but it is mistaken there for Hob. 183. — Serjeant Hawkins says, the Offender may be indicted and found Guilty in the County where the Marriage &c. is, because the continuing of the Force there amounts to a Forcible Taking within the Statute. Hawk. Pl. C. 110. cap. 42. S. 10. — 2 Hawk. Pl. C. 221. cap. 25. S. 38.

Forcible Caption in Surry, and an Offence within the Statute. And tho' her not knowing what she did, by Reason of the Fear she was under at the Time of the Marriage, might avoid the Marriage, yet it was such a Marriage as was an Offence within the Statute. But because it did not appear that C. was Party to the Forcible taking or consenting thereto, it was not an Offence in her within the Statute. And the Court being full resolv'd that Judgment be given, which Jones J. pronounc'd, and said that the Statute is not obsolete, as had been objected, and as to the Pretence that E. was married with her Consent, and so not within the Statute, that the *taking* being unlawful, and *against her Will*, tho' the *Marriage was with her Will*, yet was Felony within the Statute, and this was agreed by all. And all held, that tho' this was not a Marriage De Jure, because she was in such Fear (as she affirm'd upon her Oath) that she knew not what she said or did, yet it is a Marriage De Facto, and is Felony within the Statute; wherefore Judgment was given that they should be hang'd. Cro. C. 482. 484. 488. 492. Mich 13 Car. B. R. Lady Fulwood and Bowen's Case.

3. A young Woman of 14 Years of Age and 5000l. Fortune was *inveigled into Hyde Park by one Mrs. B. a Confederate with J. S. to take the Air in a Coach*, and being in the Park the Coachman drove away from the Company, when J. S. who came to the Coachside in a Mask, perswaded B. to quit the Coach and pulled out A's Maid; then J. S. got into the Coach detaining A. therein till the Coachman carried them to his Lodgings in the Strand, where the next Morning he prevailed upon her to marry him, after having threaten'd to carry her beyond Sea if she refused, but was apprehended the same Day in the same House. The Court seriatim delivered their Opinions, that she was to be admitted a Witness notwithstanding she was a Wife de facto. That this was one *continuing Force upon her* from the beginning to the Marriage, so that whatever was done while she was under that Violence was not to be respected; and it was held, that the Evidence was clear as to all the Points of the Statute. 1st. That the taking was by Force. 2d. That the Woman had substance according to the Statute. 3d. That Marriage ensued, tho' it did not appear that she was deflowered; and being found Guilty, Judgment was given and he was hanged. Vent. 243. Trin. 25 Car. 2. B. R. John Brown's Case.

4. Pending a Suit in the Spiritual Court *Causa Jactitationis maritagii* the Woman exhibited an *Indictment also* in B. R. against all the Witnesses who might prove the Marriage, and it was for a *Conspiracy by Force and Arms to carry her away against her Will &c.* This Indictment was brought that the Parties might be convicted upon the Oath of the Woman, and so disabled to be Witnesses in the Ecclesiastical Court to prove the Marriage, which by this Means might be avoided; and therefore Serjeant Pemberton moved to stay Proceedings upon the Indictment until the Suit in the Spiritual Court was determined; this was opposed by Serjeant Termaine and the King's Council, as not practicable to stay Proceedings in the King's Cause for any Matter depending in a private Court, especially in this Case where the Indictment was for a Force in taking and carrying away of a Woman, and marrying her against her Consent, and so a Thing collateral to the Suit in the other Court; neither was this Suit for delay, for the Defendant had indicted two of the Witnesses against him for Perjury; the Court would not stay the Proceedings upon the Indictment, but it was tried at the Bar, and the Woman being produced as a Witness it was objected against her that she ought not to be allowed to give her Evidence, because there was a Marriage proved in the Spiritual Court; and where the Consequence of the Evidence will redound to the Benefit of the Witness he is always rejected; Curia, Brown was executed for stealing

Mrs.

Mrs. Ramsley, and she was allowed to be a Witness in that Case. And in **Fulwood's** Case upon the Statute of H. 7. the Woman was allowed to be a Witness; and so she was in this Case. 4 Mod. 8. Hill. 2 W. & M. in B. R. the King and Queen v. Fezas.

5. Several were Indicted upon the Statute of 3 H. 7. 2. against stealing of Women &c. the *Indictment* did set forth the *Womans Age*, that she was an *Heirefs* to J. S. was worth in Goods and Chattles so much, and so much in Land of *Inheritance*; that she was a *Virgin*. And upon Evidence, the Case appeared to be thus: B. personating a *Country Lady*, though in truth a Woman of the Town, took a Lodging in the House where A. lodged and after some Time introduced S. into the House as her Brother, where he frequently had the Conversation of the said A. In the mean Time B. used to magnify her pretended Brother's Merit and Goodness, in so much that the said A. had likewise declared her liking of S. and wished he would marry her. But to get her abroad without any of her Friends B. deluded her Aunt and her to go with her to Church; and against the Time got *Bailiffs* to take out a Writ against A. and her Aunt, and so they way-layed and arrested them, and conveyed them from Westminster, where they lived, first to the Garter-Tavern in Drury Lane, and there separated the Aunt and her, and carried her to Holborn to the Vine-Tavern, where S. came as her Bail, and there married her, continuing under the Arrest; B. telling her that if she did not marry S. she must go to Newgate. And S. and B. were found guilty; For the Court delivered it to the Jury for Law, that tho' the said A. might have a Fancy for the Man, yet because she was not Privy to the Contrivance of coming out to him, and knew not beforehand, or consented so to come to him, and being married whilst she continued under that Restraint and Violence, tho' perhaps she consented to the Marriage, yet the said Fact was a Crime within the Statute; For here was a forcible taking away, and her subsequent Consent whilst under the Restraint could not be looked upon but an Effect of the continuing Force; and that tho' S. had known nothing of the first Force, yet he knowing her to be under it, and marrying while he knew her to be under it, made him approve of the first Force, and to partake of it so as to be guilty. Note, upon this Statute, all Aiders and Assisters are Principals; and Note, the Man was hanged: Hartly and Spurr the Bailiffs were acquitted, Far. 101, 102. Mich. 1 Annæ. in B. R. the Queen v. Swanfon, Baynton, Hartley and Spurr.

6. Serjeant Hawkins says the following Points (among others before mentioned) have been resolved. 1st. That the *Indictment* must expressly set forth, both that the Woman taken away had Lands or Goods, or was *Heir apparent*, and also that she was married or defiled; because no other Case is within the Preamble of the Statute to which the enacting Clause clearly refers; for it does not say, That what Person &c. taketh any Woman against her Will, but what Person that taketh any Woman so against her Will. 2d. That the *Indictment* ought also to alledge, that the taking was for *Lucre*, because the Words of the Preamble are so; but that it needs not set forth, that it was with an Intention to marry or defile the Party, because the Words of the Statute neither require such an Intention, nor does the want thereof any way lessen the Injury. 3d. That it is no manner of Excuse, that the Woman at first was taken away with her own Consent, because if she afterwards refuse to continue with the Offender, and be forced against her Will, she may from that Time as properly be said to be taken against her Will, as if she had never given any Consent at all; for till the Force was put upon her, she was in her own Power. 4th. That it is not material whether a Woman so taken away be at last married, or defiled, with her own Consent or not, if she were under the Force at the Time, because the Offender is in both Cases equally within the Words of the Statute, and shall not be construed to be out of the meaning of it for having prevailed over the weakness of a Woman, whom by so base Means he got into his Power. Hawk. Pl. C. 109, 110. cap. 42. S. 4, 5, 6, 7.

7. 39 *Fliz.* 9. S. 1. He that taketh away a Woman against her Will (having Lands or Goods, or being Heir apparent to her Ancestor) contrary to the 3 H. 7. 2. or being arraigned for such Offence, stands mute, answers not directly, or challengeth above 20, shall not have the Benefit of Clergy.

S. 2. The same Law against Procurers and Accessories before such Offence committed.

8. 4 & 5 P. & M. cap. 8. S. 4. If any Person shall Contract Matrimony with a Maid, or Woman-Child under the Age of 16 Years without the Consent of her Father, if living, and if he be dead, without the Consent of the Mother, or other Guardian of such Child, he shall suffer 5 Years Imprisonment, and have a Fine imposed upon him, one Moiety whereof shall go to the Crown, and the other to the Party grieved.

S. 6. And if any Maid or Woman-child above the Age of 12 Years and under 16 do agree to marry such Person without the Consent of her Parents or Guardians as aforesaid, then the next of Kin to her, to whom her Lands should descend, or come after her Decease, shall from the Time of such Agreement hold and enjoy all such Lands, Tenements, and Hereditaments, as the same Woman-child had in Possession, Reversion or Remainder, during her Life, and after her Death the said Lands &c. shall descend and come to such Person as they should have done before the making of this Act, other than to him only who did so Contract Matrimony.

For more of Marriage in General, see *Baron and Feme, Divorce,* and other proper Titles.

Marshal and * Marshalsea.

* Court of Marshalsea, (*Curia Palatii*) is a Court of Record to hear and determine Causes between the Servants of the King's Household and others within the Verge; and hath Jurisdiction of all Matters within the Verge of the Court, and

(A) Of the Office of Marshal, and Grants of it.

1. **T**HE Court of Marshalsea is of as great Antiquity † as any Court, as appears by L. 5. E. 4. fo. 129. where it is said to be one of the ancientest Courts of this Realm. It follows the Person of the King, be he within or out of the Realm; For being in France, in alieno Regno, he did Justice there upon an Offender within the Verge; but yet its Dignity is short of that of B. R. the first is only a peculiar and private Liberty, but B. R. is a Court for the Common Law, and for General Matters; the first as mentioned in *Articuli super Chartas* cap. 3. is of Things done *inter Gens de Hostle le Roy*, the other is *inter Gens de Peuple*; per *Crooke Justice*. Buls. 207. 208. Trin. 10 Jac. B. R. in *Casé of Cox v. Gray*. wherein both Parties are the King's Servants; and this is the original Jurisdiction of the Court of Marshalsea: But the *Curia Palatii*, erected by King Charles I. by Letters Patent, in the 6th. Year of his Reign, and made a Court of Record, hath Power to try all personal Actions, as Debt, Trespasse, Slander, Trover, Action on the Case &c. between Party and Party, the Liberty whereof extends 12 Miles about *W. Vitehall*; which Jurisdiction hath since been confirmed by King Charles the II. And the Judges of this Court are the Steward of the King's Household, and Knight Marshal for the Time being, and the Steward of the Court, or his Deputy, being always a Lawyer. *Crompt. Jurisd.* 102. *Kitch.* 199. &c. 2. *Inft.* 548. This Court is kept once a Week in *Southwark*: And the Proceedings here are either by *Capias* or *Attachment*, which is to be served on the Defendant by one of the Knight Marshal's Men, who takes Bond with Sureties for his Appearance at the next Court; upon which Appearance he must give Bail, to answer the Condemnation of the Court; and the next Court after the Bail is taken, the Plaintiff is to declare, and set forth the Cause of his Action, and afterwards proceed to Issue and Trial by a Jury, according to the Custom of the Common Law Courts. If a Cause is Considerable, it is usually removed into B. R. or C. B. by an *Habeas Corpus cum causa*; otherwise Causes are here brought to Trial in 4 or 5 Court-Days. *Practis. Solic.* 409, 410. This Marshalsea is that of the Household, not the King's Marshalsea which belongs to the King's Bench. *Jac. Law Dict. Verbo* Court of Marshalsea cites the aforesaid Books.— † 10 Rep. 79. b. *Arg.* cites 4 H. 6. S. b. and *Diversiv of Courts* tit. Marshalsea and *Fleta* lib. 2. cap. 2 and *Britton*. cap. 1.—*Williams J.* held that it was a Court by Prescription Buls. 225.—But *Fleming Ch. J.* Contra,

Contra; because every Prescription implies a Grant, whereas this Court was not instituted by Grant but was *de Communi Jure* as all other Courts of Justice are, and this *Pro Necessitate*; and so of B. R. and C. B. they have not their Commencement by Prescription or Patent, but *de Communi Jure*, and so of the Marshalsea; For as long as there is a King so long of absolute Necessity there must be a Court of Marshalsea; For it is very Necessary for the King to be always attended by his Servants, and if they shall be drawn by Suits into other Courts, he will then lose their Service during such Time. *Buls. 211.*—This Court hath its Foundation from the Common Law of England. 4 *Inft.* 130. cap. 18.—It was held in *Aula Regis*, and no Writ was necessary for Actions brought there, nor was any Privilege allowable. *Fleta. 66. lib. 2. cap. 2.*

2. The Duke of Norfolk came into B. R. and T. B. with him, and shewed that he had admitted J. B. to the Office of Marshal for Life, and that J. B. had forfeited the Office to him granted, and that he had admitted T. B. and upon great Examination of the Defaults of J. B. and finding them, the Court admitted T. B. and swore him into the Office, and inrolled his Letters Patents, and entred of Record that J. B. was first admitted Officer with Letter Patents of the Duke. *Br. Forfeiture de terres, pl. 27. cites 39 H. 6. 32.*

3. And to see that the Duke was Officer in Fee, and granted it to J. B. for Life, therefore see that it may be granted over, and that the Letters of the Duke were inrolled of Record before them at the Prayer of the Duke by his Attorney, and how after the Duke came into Court ut supra, and prayed ut supra, and that the said J. B. was solemnly demanded to come and attend at his Office in the Court, and did not come, but that N. came as his Deputy by the Patent ut supra, and the Examination of J. B. of his Prisoners escaped, and that he said as to some, that he did not know where they were, and as to some he said nothing, and as to some he said that he would make Grace to the Parties, and so they entred all the Matter from the beginning to the end, and admitted T. B. and swore him, saving to the said J. B. his Action, Title and Interest, which may come by Reason of the said Office and Grant, and so J. B. was put out and T. B. admitted &c. *Br. Forfeiture de terres, pl. 27. cites 39 H. 6. 32.*

The Queen granted to George Earl of Shrewsbury, Anno 15 of her Reign, the Office of Earl Marshal of England, and now came the said Earl and prayed, that J. S. one of his Servants to whom he had granted the Office of Marshal of the King's Bench might be admitted to it, because the same is an Office inci-

dent to his Office and in his Power to grant, and that Knowles, to whom the Queen had granted the said Office of Marshal of the King's Bench by the Attainder of North be removed; and a President was shewn 14 & 15 Eliz. betwixt Gawdey and Uerney, where it was agreed, that the said Office was a several Office from the said great Office, and not incident to it; and as to the Case of 39 H. 6. 33, 34 the Truth is, the said Office of Marshal of the King's Bench was granted expressly by the Duke by express Words, and so he had it not as incident to his Office of Marshal of England; on the other side, there were three Presidents shewed, first in the Time of E. 2. that the Office of the Marshal of the King's Bench was appendant to the said Office of Marshal of England. Secondly, 8 R. 2. when the said great Office was in the King, he granted the said Office of Marshal of the King's Bench, but 20 R. 2. both Offices were rejoined as they were before in ancient Time; and there were also shewed Letters Patents of 4 E. 4. and 19 H. 8. by which it appeared, that the said inferior Office had Time out of Mind been part of the great Office; and it was moved, that when the said great Office is in the King's Hands, and the King grants the said under Office, if now this Office be not severed from the great Office for ever. *Per Wray*, it is no Severance, for the Chief Office is an Office of Dignity which may remain in the King, but this under Office is an Office of Necessity, and the King himself cannot execute it, by which of necessity he ought to grant it. 1 *Lc.* 320, 321. *Trin.* 31 *Eliz.* B. R. *Anon.*

4. No Marshal of B. R. can sit there as Officer of the Court till he be first admitted by the Court. *Cumb. 3. Mich. 1 Jac. 2. B. R. Anon.*

5. The Right of the Office is in the King only; per *Wright.* *Cumb. 3. Mich. 1 Jac. 2. B. R. Anon.*

11. The Marthal is an Officer who is to give a due Attendance upon the Court, and to take into his Custody, and safely to keep, all such Prisoners as shall be committed to his Custody by the Court, upon any Account whatsoever. *L. P. R. 192.*

7. The Marthal of the Marshalsea of this Court, is intended to be always present in Court while the Court is sitting; For it is his Office to be always attending upon the Court to execute his Office in relation to the Court upon all Occasions that may fall out sitting the Court; and he is fineable for his Absence, and his Non-attendance is a forfeiture of his Office. *L. P. R. 192, 193. cites Hill. 21 & 22 Car. 2. in B. R.*

8. 8 & 9 W. 3. cap. 27. S. 10. Enacts that after the 24th. of June 1697. all Conveyances, Grants, and Mortgages of the Inheritance of the Prisons of the

* So it is in Cay's Abr. tit. Prisons;

but in Keble's Statutes at large, and in Wingates Abr. it is 26

the King's Bench and Fleet, and of the Prison-Houses, Lands, Tenements, and Hereditaments thereto belonging, and all Leases thereof, and the respective Titles of the said Marshal and Warden, or of them in whom the Inheritance of the said Prisons and Premises now are, and all Trusts and Declarations of Trusts thereto relating, shall be enrolled (viz.) that of the Marshal in the King's Bench, and that of Warden in the Court of Common Pleas within 6 Months after executing such Conveyances, Grants, Leases, or Deeds of Trust as aforesaid, or they shall be void.

9. The Earl Marshal of England was by his Office Marshal of the King's Bench as appears by the Book of H. 6. and so continued to the Time of King James I. when this Office was derived out of it; so that the Marshal of the King is the Marshal of B. R. and no body else can be understood; the other is *Marescallus Hospitii*, and never spoken of without that Addition; per Holt Ch. J. and Powell J. 2 Salk. 439. Mich. 1 Annæ. B. R. in Case of Snow v. Firebrass.

10. The Office of Chamberlain of the King's Bench-Prison is inseparably incident to the Office of Marshal, and therefore a Grant of the Office of Marshal with a Reservation of the Office of Chamberlain is void; per Holt Ch. J. Mich. 3 Ann. B. R. 2 Salk. 439.

(A. 2) Jurisdiction of the Court, and what Matters are triable there, and Pleadings.

Croke J. said, that this Statute was made *ad Emendationem Status Populi &c. quod de cetero Ordinatum est.* Bulf. 208. Trin. 10 Jac.

1. *Artic super Chart.* 28 E. 1. cap. 3. **T**HE Stewards and Marshals of the King's House, shall not hold Plea of Freehold, Debr, * Covenant or Contract, but only of † Trespass done in the House or Verge, or of Contracts and Covenants when both Parties are of the House, and the Plea of Trespass shall be determined ‡ before the King's Departure from the Verge where the Trespass was committed; and therefore the Plea thereof shall be speedy *de die in diem*: and if the Plea cannot be determined in Time, the Plaintiff shall (in such Case) have recourse to the Common Law.

in Case of Cox v. Gray.—But Ibid. 211. Fleming Ch. J. said, that this Statute had left their Jurisdiction more uncertain than before, and that it is *so doubtfully penn'd that the Books very much differ in the reciting of it*, and in this they are faulty; That this Statute is as a *Labyrinth*; within this Kingdom there are many Companies and Societies, and therefore the Law creates a Court for every Jurisdiction. That the Court of B. R. and C. B. were formerly Itinerant and Attendant upon the King, as the Marshalsea is now, and tho' B. R. be in Certo loco now, yet if the King so command, it is Itinerant, and may put down all Commissions of Oyer and Terminer, but not the Jurisdiction of the Court of Marshalsea; and this was the Reason, that ** *no Writ of Error lay at Common Law to reverse a Judgment given in the Marshalsea, till the Statute 5 E. 3. cap. 2.* tho' it lay then to reverse Judgments given in all other Courts, as in Ireland, Calice &c. For the Marshalsea had no Court above it. The Title of the Court is *Aula Hospitii Domini Regis*, and not *Intra Virgam*.—And Ibid. 212 says, the Scope and Purport is to limit their Jurisdictions, so as before this Statute there was a Mischief, which it intended to redress; but it is so doubtfully penn'd as never was the like, and the whole Construction of this Statute, does chiefly rest upon the Place where the true Comma ought to be, and upon the true Relation of the Words to couple all together.—** No Writ of Error lay, but in Parliament. 10 Rep. 79. b. Arg. in the Case of the Marshalsea.—The Title of this Statute is,—Of the Estates [Authority] of Stewards, and of Marshals, and of Pleas, which they ought [Devoient] to hold, [or according to Rastall, may hold] and how. 2 Inst. 547, 548. And from the Word [Devoient] observes, that this Act restores and confines this Court to its Right and Just Jurisdiction, and that it hence appears to be in Affirmance of the Common Law, and purposely made to relieve the Subject against the Usurpations and Incroachments of the Steward and Marshal; and tho' the Words are general, they are to be understood, of the Steward of the Court of Marshalsea of the Household, and not of the Steward of the King's Household. And the Marshal is to be understood, of the Marshal of the Household, and so the Marshalsea is to be understood of the Household, and not of the King's Marshalsea; For that belongs to the King's Bench.—10 Rep. 74. b.—*Vid. pl. 2, 3, 4, 5.—† Action upon this Statute, because the Defendant impleaded the Plaintiff in the Marshalsea for Trespass, where neither the one nor the other was of the King's Household. And it was agreed by the Justices, that for *Trespass done within the Verge*, the one or the other ought to be of the Marshalsea [Household], and the pleading to the Action in the Marshalsea is no *Esopple* to the Party to say after that he was [not] of the King's Household, at the Time &c. Br. Action sur le Statute, pl. 35. cites 10 H. 6. 13.—The Letter of the Statute, as to Trespass within the Verge, and the Practice is contrary to this Case Ibid. Marg.—And Br. Jurisdiction, pl. 97. S. C. Brook says, that he wonders

wonders at it ; For that it seems otherwise by the Words of the Statute ; and the Answer of the Plaintiff to the Action of the Defendant in the Marshalsea is no Estoppel in the Court [C. B.] to say, that he was not de Hostel del Roy at the Time of the Action &c.—And Br. Action sur le Statute, pl. 38. after rehearsing Part of this Statute, he says, and so see of *Trespas done within the Verge*, as above the Action lies there between whomsoever, tho' they are not in the King's House.—In *Trespas* one of the Parties ought to be of the Household, and if one be it is good ; Per Fleming Ch. J. Bull. 212, 213. Trin. 10 Jac. Cox v. Gray.—Fleming Ch. J. says, that the only Book to be relied upon is this Case of 10 H. 6. 13. it being a Case upon the Statute, and that the Law is there truly taken, that if none of the Parties are of the King's Household, the same is not to be tried there ; For if he owes no Attendance there he shall not be subject to their Jurisdiction. Bull. 213. in Case of Cox v. Gray.—Nota, that in this Case the 3 Judges, viz. Croke, Williams and Yelverton did agree clearly, that in all Actions in the Marshalsea both Parties ought to be of the Household, or else the Matter is out of their Jurisdiction. But in this Point Fleming Ch. J. differed from them ; For he agreed that in Debt, Covenant and Contract Both Parties ought to be of the Household, but in Trespas it is sufficient if one only be, and that in such Case they have good Jurisdiction of the Cause. Quod Nota. Bull. 213, 214. in Case of Cox v. Gray.—2 Inst. 548. S. P.—S. P. 2 Inst. 548.—Contrary of Debt and Covenant, and therefore Quere of Action upon the Case there between Strangers upon Assumpsit ; for it seems that this is a Contract. Br. Action sur le Statute, pl. 38. cites Lib. Div. Cur.—If an Action be on the Case in Nature of Debt &c. in the Marshalsea, it shall hold Plea thereof ; per Fleming Ch. J. Bull. 212. Trin. 10 Jac. in Case of Cox v. Gray.

Tho' the Act speaks of Trespas generally, yet it is intendible only of Trespas *Vi & Armis*, as of Battery, or taking away Goods, but not of *Square Clausum fregit*, nor of Trespas and Ejectment, nor of Trespas upon the Case, nor of *Detinue*, nor of any other Personal Action, nor of any real or mixt Action, notwithstanding the general Words of the Statute 33 H. 8. For particular Jurisdictions derogating from the Jurisdiction of the general Courts of the Common Law are ever taken strictly. 2 Inst. 548.—It extends only to *Trespas simpliciter*, and not *Trespas secundum Quid*, and so not to Action on the Case upon Trover and Conversion, as was adjudged in *Gray's Case*, for which Reason a Judgment there given was revers'd. 10 Rep. 76. a.—Bull. 207. Trin. 10 Jac. Cox v. Gray.—6 Rep. 20. b. Pasch. 38 Eliz. B. R. Michelborn's Case.—The Steward and Marshal had 2 Authorities, a general and a Particular ; And by Force of their first and General Authority, they might have held all Manner of Pleas of the Crown, and of Common Pleas, as well Real and Mixt as Personal, as appears by divers ancient Precepts of Summons, which they us'd to direct to the Sheriff &c. to cause to come before them all Pleas &c. Resolv'd 10 Rep. 71. a. b. in the Case of the Marshalsea.—But as to their particular Authority before the said Act, as Judges of the Marshalsea of the King's Household, they, as Judges of this Court, had no Jurisdiction but of Pleas of the Crown, and of 3 particular Common Pleas, viz. Debt, Covenant and Trespas *Vi & Armis*, &c. as in 2 Inst. 548. Resolv'd 10 Rep. 72. a.—The General Authority was at Will only ; But the other was for Life. 10 Rep. 72. a.

Error of a Judgment in an Action upon the Case upon a Trover in the Marshalsea, the Trover and Conversion being supposed at Southwark within the Verge, and adjudged for the Plaintiff. The Error assigned was, because none of the Parties were del Hostel le Roigne, nor living within the Verge. And it was thereupon demurred : It was moved, that for this Cause the Judgment was erroneous ; For that Court cannot hold Pleas betwixt Strangers ; and in Proof thereof was cited a Precedent. Hill. 1 Ed. 4. Rot. 47. and the Book of Entries, 2 S. 10 H. 6. 13. 7 H. 6. 31. Popham and Fenner held, that the Action well lay ; For the Statute of Articuli super Chartas, cap. 3. which shews that Trespas shall not be brought there, nor Action betwixt others than of the Hostel of the King, is intended of Trespas for Land, and not of such Personal Actions. And there be many Precedents, that in all Times such Personal Actions have been there brought and allowed. But Gaudy doubted thereof. But they all held, that if the Action be not determinable there, the Judgment is void ; yet Error lies thereof. Sed adjournatur. Cro. E. 502. Pasch. 32 Eliz. Rot. 432 Baptist v. Michelbourn.—6 Rep. 20. b. Pasch. 38 Eliz. B. R. Michelbourn's Case says, it was afterwards resolv'd, that Judgment should be revers'd, but inspecto Recordo non intratur.—In this Case was cited the Case of *Read v. Purchase*. Mich. 32 H. 6. B. R. of Trespas brought in the Marshalsea, and in Error thereof brought, no Error was assigned, but only that none of the Parties were of the King's Household, and for that Error the Judgment was revers'd. 6 Rep. 20. b. and that with this accords 10 H. 6. 13. 7 H. 6. 30. b. 19 E. 4. 8. b. 20 E. 4. 16. b. 22 E. 4. 31.—S. C. of *Read v. Purchase*, cited by Croke J. Buls. 208. in Case of *Cox v. Gray*, and he said, that the Case of *Michelbourn* was *Terminus terminantibus* the very Case, the same Action, and the same Error assign'd with that of *Cox v. Gray*, and that the Judgment in *Michelbourn's* Case was resolv'd to be revers'd, but the Reversal not entered on the Record.—10 Rep. 77. b. says that *Michelbourn's* Case was adjudged.

‡ This is not to be understood of the King's going out of the Bounds of the Verge for his Recreation, as to Hunt, and without any purpose to tarry, abide, or make his Repose in such Place, his Council and Household still continuing where they were ; For this is no removing within this Statute. But when he goes in Progress and his Household goes with him, this is a Removing within this Act. 2 Inst. 548.

*The * Steward shall from henceforth take no Consuance of Debt or other Things but of the People of the same House, nor shall hold Plea by Obligation made at the Distress of the said Stewards or Marshals : And if any thing be done contrary to this Act, it shall be holden void.*

* Tho' the Steward and Marshal are both Judges, yet in this last Branch

the Steward only is nam'd, because he only was the Man of Law, and therefore had the Direction of the Court. 10 Rep. 75. a.

In an Action upon this Statute, the Defendant pleaded *Nul tiel Record*. Br. Action sur le Stat. pl. 15. cites 7 H. 6. 30.—S. P. Br. Record, pl. 192 cites 7 H. 6. 33. Bar. Candish objected that it is no

Plea; For the Steward is in a Manner Party, and it is not Reason that he should certify it; but it shall be tried by Averment; but durst not demur, but *said that Such Record, and sued to have the Record.*

Hence it appears, that by the Common Law the Coroner of the County could not intermeddle within the Verge, but the Coroner of the Verge, and that if he took an Indictment of the Death of a Man, it was not allowable in Law, and so it is if the

Coroner of the King's House take an Indictment of the Death of Man out of the Verge, it is void, & Coram non Judice. And if an Indictment of the Death of a Man, being slain out of the Verge, be taken before the Coroner of the King's House and the Coroner of the County, and so entered of Record, it is not sufficient, because the Coroner of the King's House joined with him, who had no Authority. 2 Inst. 550

* And yet the Felony was not dispunishable; For at this Time it might, after the Remove of the King, be inquired of in the King's Bench, if the Bench sat in that County, or before Justices of Oyer and Terminer &c. or if the Coroner of the Verge had taken an Indictment, tho' the King went out of the Verge, yet the Indictment ought to be removed into the King's Bench, for that is the Center wherunto all Records of that Nature do fall, and there the Office might be heard and determined; But this Act was made for more speedy Proceeding, for being removed into the King's Bench there ought to be 15 Days &c. And if a Murder had been committed with the Verge, and the King had removed before any Indictment taken by the Coroner of the Verge, the Coroner of the County might have inquired of the same at Common Law. Ne Maleficia remanent impunita. 2 Inst. 550.

† Of Felonies done within the Verge, the Jurisdiction of the Steward or Marshal extends but to certain ones only, and those again limited to certain particular Persons. For of ancient Time they had † general Authority as Justices in Eyre and as Vice-gerents of the Chief Justices of England within the Verge, and then they held Plea of all Felonies within the Verge, but that Power is now vanish'd. 2 Inst. 549. — This general Authority vanish'd by this Statute. 10 Rep. 73. b. — † 10 Rep. 71. a.

The whole Court agreed, that this Court cannot hold Plea of *Covenants and Contracts*, unless both Parties are of the Household, and that all the Matters whereof they can hold Plea are Trespasses, Covenants and Contracts of the Household and within the Verge. Brownl. 200. in Case of Hall and Stanley.

2. The Marshalsea shall not hold Plea of *Contracts*, unless as well the Plaintiff as the Defendant be of the King's House; for if it be otherwise the Defendant may plead it to the Jurisdiction &c. Br. Action sur le Statute, pl. 38. cites Lib. Div. Cur.

3. And if the Plaintiff removes out of the King's Service pending the Plea, the Defendant may plead it, and shall abate the Jurisdiction and the Plea. Br. Action sur le Statute, pl. 38. cites Lib. Div. Cur.

If the Plaintiff be discharged of his Service in the Household, his Action is gone; per Fleming Ch. J. Buls. 213. in Case of Cox v. Gray.

S. P. Per Fleming Ch. J. Buls. 213. 4. Contrary if the Defendant removes out of the King's Service. Br. Action sur le Statute, pl. 38. ut sup.

5. In Debt upon Recovery of Damages before the Marshal in Action of Covenant before the Marshal it is a good Plea, that none of the Parties were of the King's Household at the Time &c. For the Statute de Articuli super Chartas, cap. 3. wills as above, and therefore it is Coram non Judice if it be otherwise. Br. Action sur le Statute, pl. 49. cites 6 R. 2.

6. 5 E. 3. 2. Pars inde. S. 11. and 10 E. 3. Stat. 2. cap. 2. Inquests before Steward and the Marshal of the King's House shall be taken by Men of the Country thereabouts, and not by Men of the King's House, except it be in *Contracts*, *Covenants*, or *Trespases*, when both Parties are

If it be of a Thing done within the Verge, the

are of the same House; and in the House. And Error before the Steward shall be redress'd before the King in his Place.

Jury shall be of the County ad-

joining; But if of a Matter done within the Household, then the Jury shall be of the Household; If of a Matter where one is of the House and the other not, the Trial shall be of two Counties; and for the Proximity of the County, if one of the Household be sic'd for a Trespass done within the Verge, the Jury shall be of the Verge, but of those within the Household. Per Fleming Ch. J. Buls. 213. in Case of Cox v. Gray.

7. 10 E. 3. Stat. 2. cap. 3. Where a Man will complain of Errors before the Steward and Marshal, he shall have a Writ to cause the Record to come before the King in his Place, and there the Error shall be redressed.

8. 9 R. 2. cap. 5. Priests and others of the Holy Church taken in the Marshalsea shall pay such Fees as Lay People pay and no more.

9. 13 R. 2 Stat. 1. cap. 3. The Jurisdiction of the Steward and Marshal of the King's House shall extend no farther than 12 Miles from the King's Lodging.

This was in Affirmance of the Common Law. 2 Inst. 548, 549

10. 2 H. 4 cap. 23. S. 1. The Fees of the Marshal of the King's House shall be as in Times past and no more, viz. for him that cometh in by Capius 4d. and if he be bailed 2d. more; of the Defendant in Trespas, that findeth Bail to answer the Suit 2d. for every Commitment by Judgment 4d. for every one delivered of Felony, and of a Felon bailed by the Court, 4d. And if the Marshal or his Officers take more, they shall lose their Offices, and pay treble Damages to the Party grieved; and the Party grieved shall have his Suit before the Steward of the same Court.

S. 2. Here a Server of Bills shall take no more than 1d. for every Mile distant from the Court to the Place where he doth his Office; but when he serves a Venire Facias, or a Distringas, he shall have the Double. If such an Officer takes more he shall be imprisoned, make a Fine to the King at the Discretion of the Steward, and be from thenceforth forejudged the Court.

11. 15 H. 6. cap. 1. In a Suit commenced before the Steward and Marshal of the King's House the Defendant shall not be stopped to plead, that the Plaintiff or he are not of the King's House; but his Averment thereof shall be received notwithstanding any Record of the same Court to be produced to the contrary.

And in such Case where one of the Parties is not of the Household, and they

proceed, all is *Coram non Judice*. Per Fleming Ch. J. Buls. 213. in Case of

Cox v. Gray.

12. 33 H 8. cap. 12. Enacts, That all the Treasons, Misprijions of Treasons, Murders, Manlaughters, Bloodbeds, and other malicious Strikings, by Reason whereof Blood is or shall be shed, which shall be done in any of the King's Palaces or Houses &c. shall be inquired, tried, heard and determined, before the Lord Steward of the King's Household for the Time being, or in his Absence, before the Treasurer and Comptroller, and Steward of the Marshalsea, or any two of them, whereof the Steward to be one.

So that these great Officers and Counsellors of State, the Lord Steward, Treasurer and Controller, have no Ju-

isdiction in these Criminal Causes, but only within the Circuit of the King's Palace or House. And it is to be observed, that this Court of the Marshalsea of the King's House was, as Books speak, of ancient Time instituted for those of the King's House; but they have incroached beyond their true Jurisdiction; And Stanford says, that the Steward and Marshal before this Act might have heard and determined all Felonies &c. perpetrated within the King's Palace or House. 2 Inst. 549

A Robbery was committed in a Town within the Verge, and this appeared to the Court, yet the same was inquired of, heard and determined in B. R. and so it may be before Justices of Oyer and Terminer, and Justices of Peace, because their Jurisdiction is general thro' the whole County; but of an Offence within the King's Palace, it shall be heard and determined according to this Act; upon which Act this is observable; that if a Man strike in the King's Palace, where his Royal Person is Resident, unless Blood be shed, he loseth not his Hand. 2 Inst. 549.

13. It was observed, that every Act made concerning the Marshalsea either restrains or explains their Jurisdiction, and no Act adds any Thing to it. 10 Rep. 76. a. in the Case of the Marshalsea.

14. The Title of their Court in Criminal Cases, as Steward and Marshal of the Court of Marshalsea of the King's Household, was *Placita Crone*

10 Rep. -1. a. 73. a.

Aule Hoſpiti Domini Regis Coram Senefchallo & Mareſchallo, and always confined to Felonies done within the Circuit of the King's Houſehold, the Bounds whereof are made certain by the Statute 33 H. 8. cap. 12. 2 Inſt. 545.

F. N. B. 241. 15. *Aſſions* ought to be attached there *where the Court is reſiant*; Per Fleming Ch. J. Buſ. 213. in Caſe of Cox v. Gray.

(B) S. P.— But though the Plea be lawfully begun before the Steward and Marſhal of the King's Houſe within the Verge, and before the Plea ended the King removes; Now by this the Plea is thereby diſcontinued, and then the Party muſt commence his Action at the Common Law, and not within the Verge; and if he does, the Party grieved ſhall have his Writ. F. N. B. 241. (D)

See the Arguments of Doderidge and Hutton Serjeants, on the Demurrer. 2 Brownl. 124

16. In *false Imprifonment* the Defendant as to all the Trefpaſs except the Battery, and Imprifonment, and keeping in Priſon, pleaded Not Guilty; And as to that, pleaded that the Marſhals Court is an ancient Court, and ſo juſtifies, *becauſe the Plaintiff was the Pledge of T. C. to the Defendant in an Action of Trefpaſs upon the Caſe in a general Indubitatus Aſſumpſit, and thereupon a Judgment againſt C. and thereupon a Capias awarded, and a Non Inventus returned; and then a Capias againſt the Pledge [now Plaintiff] according to the Cuſtom, by Virtue whereof the Plaintiff was taken and detained, and traverses, that he was guilty &c of any imprifoning the Plaintiff before ſuch a Day, and avers that they are the ſame Perſons. The Plaintiff replied, that neither of the Parties in the ſaid Action, at the Time of exhibiting the Bill, was of the King's Houſehold &c. The Defendant demurred, and the Plaintiff had Judgment. Brownl. 199. Paſch. 9 Jac. Rot. 2289. Hall v. Stanley.*

* S. P. 8 Mod. 307. Mich. 11 Geo. 1. in Caſe of the King v. Roberts.

17. A Prohibition was prayed to the Marſhalſea, becauſe they reſuſed to admit a Plea that neither of the Parties were de Hoſpiti Regis. Per Holt Ch. J. this is not the Court mentioned in my Lord Coke's Caſe of the Marſhalſea. If the Caufe of Action ariſe within twelve Miles of London, this Court holds Plea, tho' the Parties are not de Hoſpiti Regis; The Plea is frivolous, and we will not interpoſe. (But Trin. 11 W. 3. B. R. an Action of * Debt was brought in the Marſhalſea on a Judgment in B. R. and a Prohibition was granted.) 2 Salk. 439. Mich. 10 W. 3. B. R. Anon.

18. The Plaintiff declared in the Marſhal's Court upon an *Inſimul Computaſſet infra Jurisdictionem* &c. and had Judgment; It was objected that the Account doth not alter the Duty; for that may ariſe in York and that no other Conſideration being laid to intitle the Court to any Jurisdiction, the Judgment ought not to ſtand; but it was adjudged, that the Account was ſufficient to give the Court Jurisdiction. 8 Mod. 77. Paſch. 8 Geo. 1723. Spackman v. Huſſey.

S. P. 2 Salk. 439. Mich. 10 W. 3. B. R. Anon.

19. A. the Defendant was indicted and acquitted in B. R. and afterwards brought an Action in the Marſhalſea againſt the Proſecutor for a malicious Proſecution. A Motion was made to ſtop the Proceedings there, becauſe B. R. being poſſeſſed of the principal Caufe may better judge whether the Proſecution was malicious or not. It was inſiſted, that Debt lies in the Marſhalſea, or any other Court, upon Judgments in the Courts of Weſtmiſter. Beſides, the Plaintiff hath Bail below in this Action, and there is a Cuſtom in the Marſhalſea, that the Attorney ſhall answer for ſuch Bail as he takes, ſo that if the Proceedings ſhould be ſtaid, the Plaintiff would loſe that Benefit which he hath below againſt the Attorney, the Bail being really worth nothing. And per Cur. upon giving Bail here as below, and likewise giving good Bail, the Action muſt be ſtaid. 8 Mod. 307. Mich. 11 Geo. 1. 1725. the King v. Roberts.

(B) Matters between the Marshal and the Prisoners.

1. **I**T was moved that Plaintiff had brought Escape against Sir J. L. the Marshal, and had got Judgment and Execution, but Sir J. L. not attending the Court as he ought, Plaintiff could not take him upon the Execution; and if he were present, he doubted if he might take him, for fear the *taking him* would be an *Escape of the Prisoners* committed to him, and therefore prayed that Sir J. Lenthall might be put out of his Place of Marshal, that so he might take him in Execution. Per Glyn Ch. J. this is very mischievous, let Sir J. shew Cause Friday next why he should not pay the Money. Sty. 475. Mich. 1655. B. R. Plummer v. Sir John Lenthall.

2. Marshal may take a *Bond to be a true Prisoner*, but not to receive or take any thing of Advantage to himself, and if he did, the Bond was void at Common Law. Per Holt Ch. J. says it was so adjudged in the Case of Lenthall v. Cooke. 2 Salk. 438. Mich. 9 W. 3. B. R. Anon.

3. A *Scire Facias* was brought against the Bail, and a *Breach assigned* in this, that the Defendant had not rendered himself *Prisonæ Mar' Marefc'h' Domini Regis*; Mr. King objected, that it was not good, without going on and saying, *coram ipso Rege existentis*; for the King has another Marshal, viz. the Marshal of the Household. 2 Salk. 439. Mich. 1 Ann. B. R. Snow v. Firebrafs.

(C) Matters between the Marshal and the Plaintiffs.

1. **I**T was agreed, that if a Man occupies the Office of Marshal, be it by Right or by Wrong, he shall be charged to the King and to the People, as Marshal, of Escapes. Br. Forfeiture de terre. pl. 27. cites 39 H. 6. 32.

2. Payment to the Marshal is no *Discharge* to the Plaintiff at whose Suit Defendant was in Execution, and the Defendant may have Remedy against the Marshal to recover his Money again. Per two Justices against one. 2 Mod. 214. Pasch. 29 Car. 2. B. R. Taylor v. Baker. 2 Jo. 97. S. C.

3. 8 E 9 W. 3. cap. 27. S. 2. Every Person obtaining Judgment in any *Action of Escape against the Marshal or Warden, or their Deputies, shall have not only the Remedies already by Law allowed, but the Judges of the Courts where such Judgment shall be obtained (upon Oath made by the Persons obtaining such Judgment, that the same was obtained without Fraud or Co-win, and that the Debt of the Prisoner making such Escape was a true and real Debt and unsatisfied) shall, upon Motion, sequester the Profits of the Office of Marshal and Warden, or so much thereof as they shall think fit, and apply the same towards Satisfaction of the Debt due from the Prisoner who escaped, together with all Costs and Damages recovered.* The Marshal having suffered an Escape, there was a Judgment against him for 18000 l. and a Motion was made in the Creditor's Behalf to sequester

the Profits of the King's Bench Prison towards Payment of the said Debt; But this was opposed by the Assignees of Boulter's Mortgage, (mentioned in the Act Inf. S. 19.) because there was yet due to them 14000 l. for Principal and Interest, and that if the Plaintiff would discharge the Debt, he might take the Profits of the Prison to satisfy his Debt. Whereupon it was moved, that an Account might be taken of what was due on that Mortgage at the time that Act was made; For it extends to no further Sum than what was then due, and what Profits were received by the Assignees, or might have been received by them without wilful Default, And the same was granted accordingly. 8 Mod. 350. Pasch. 11 Geo. 1. 1-26. Wilson v. Machin.

S. 3. If the Marshal or Warden, or their Deputies, sue forth any Writ of Error in any Action of Escape, such Marshal or Warden &c. shall put in special Bail.

S. 4. If any Marshal &c. shall take any Reward or Security to permit any Escape, and shall be convicted, the said Marshal &c. shall forfeit 500 l. and his Office, and be for ever incapable of executing such Office.

S. 8. If the Marshal &c. shall, after one Day's Notice in Writing, refuse to show any Prisoner in Execution to the Creditor at whose Suit such Prisoner was charged, or to his Attorney, such Refusal shall be adjudged an Escape.

S. 9. If any Person desiring to charge any Person with any Action or Execution shall desire to be informed by the Marshal &c. whether such Person be a Prisoner in his Custody or not, the said Marshal &c. shall give a Note thereof to the Person requesting or his Attorney upon Demand at his Office; or in Default thereof shall forfeit 50 l. and if such Marshal &c. give a Note that such Person is an actual Prisoner in his Custody, such Note shall be sufficient Evidence that such Person was a Prisoner.

S. 11. Office of Marshal and Warden of the King's Bench and Fleet shall be executed by those who have the Inheritance of the said Prisons, or by their Deputies, for whom the Marshal and Warden to be answerable &c. and the Profits and Inheritances of the said several Offices shall be sequestered, seized, or extended to make Satisfaction for such Forfeitures, Escapes and Misdemeanors respectively, as if permitted, suffered, or committed by the Person or Persons themselves, or either of them, in whom the respective Inheritances of the said Prisons shall then be.

S. 16. The Penalties in this Act not particularly disposed of shall go one half to his Majesty, and the other half to him that will sue for the same.

S. 19. Nothing in this Act shall lessen any Security for Money made out of the Office of Marshal of King's Bench by William Lenthall Esq; to Sir John Cutler, or to Edmund * Boulter Esq; Executor of Sir John Cutler, or to subject the said Office, or the Persons in whom the same shall be vested, to any of the Forfeitures in this Act contained, other than such as they are liable to before, until such Money be paid.

* See the Note on pl. 3

Master and Servant.

(A) Master and Servant. With respect to others. Master chargeable for what Act of Servant.

D. 161. pl. 45. Trin. 4 & 5 Ph. & M.

1. KING E. 6. sold a Quantity of Lead to Renagre, and appointed the Ld. North, who was then Chancellor of his Court of Augmentations, to take Bond for Payment of the Money. The Ld. North appointed one Benger, who was his Clerk, to take the Bond, which was done, who delivered it to the Lord, and he delivered it back again to his Clerk, in order to send it to the Clerk of the Court of Augmentations. Benger suppressed this Bond; and it was the Opinion of all the Judges of England, that the Lord North was chargeable to the King, because the Possession of the Bond by his Servant, and by his Order, was his own Possession. 3 Mod. 323. cites Dy. 161.

D. 258. b. pl. 38. Pasch. 7 Eliz.

2. So where an Officer of the Customs made a Deputy, who concealed the Duties, and the Master, being ignorant of the Concealment, certified the Customs of that part of the Revenue into the Exchequer upon Oath, he was

was adjudged to be answerable for this Concealment of his Servant. 3 Mod. 323. per Cur. in Case of Bofon v. Sandford cites Dy. 238. b.

3. So where the *Lessor* was bound that the *Lesseé* should quietly enjoy, and it was found that his *Servant* by his *Command*, and he being present, entered, this was held to be a Breach of the Condition; For the Master was the principal Trespassor. 3 Mod. 323. ut sup. cites 4 Le. 123.

4 Le. 123.
pl. 249.
Mich. 31
Eliz. C. B.
Seaman v.
Browning.

(A. 2) Master and Servant, with respect to others. Master chargeable for what Debts contracted by Servant.

1. **T**HE Bailiff known pawns an Ox for Corn which comes to the Master's Use, and agreed, that if he does not pay so much for the Corn such a Day, that the Pawnee should keep the Ox. The Master cannot re-take the Ox if the Money is not paid. Arg. Pl. C. 11. b. cites 27 Aff. pl. 5.

2. If Buyer, Surveyor, or Clerk of the Market buys Stuff to the Use of the King, Debt lies not against him, by award; but shall Sue to the King, for he is Debtor; but it was agreed that if he receives Money of the King after upon his Account for this Debt, then he is Debtor; quere, inasmuch as he was not Debtor at first; nevertheless it seems that Action of Account lies against him. Br. Contract &c. pl. 40. cites 11 H. 4. 29.

So it seems where my Servant is authorized to buy Stuff to my Use. Br. Contract &c. pl. 40.

3. In Debt if a Man sends his Servant to buy certain Goods, or his Factor, or Attorney to buy Merchandize for him, and he buys &c. the Master shall be charged, tho' the Goods never come to his Hands and tho' the Master has no Notice of it; and the Master cannot countermand it without Notice given to the * Servant, Attorney or Factor; per Pigot and Fairfax. Br. Contract &c. pl. 24. cites 8 E. 4. 11.

* So it is in all the Editions, but the Year Book is only Notice given &c.) and says not to whom.

4. If a Purveyor, Factor, or Servant makes Contract for fat Beasts for a certain Sum of Money, and gives a Note of the Receipt of the Beasts to the Use of the Sovereign, or Master, and also by the same Bill obliges himself for the Payment at a Day certain, but does not seal the Bill; this is no such Contract as will charge the Purveyor or Servant by Action of Debt counting upon a Buying, but Action upon the Case will serve in this Case upon an Assumpsit. D. 230. b. pl. 56. Trin. 6 Eliz. Alford v. Eglesfield.

5. The Master delivered Money to his Servant to provide Victuals; the Servant buys them in his Master's Name, but did not pay for them; an Action was brought against the Master, who would have waged his Law, but the Court held he could not safely do it, because the Victuals came to his Use, and therefore he is chargeable, and must take his Remedy against his Servant. Brownl. 64. Pasch. 11 Jac. Sir H. Dockwray's Case.

But if a Master forbids a Tradesman to deliver any Wares unless his Servant pays for them, in

such Case, if the Tradesman delivers Wares, the Master may safely wage his Law. Brownl. 64. cites it as adjudged in Sir Henry Compton's Case.

6. Contract of Servant may enure to the disadvantage of the Master, and it may enure to his Advantage; but in both Cases Master must agree; per two J. 2 Roll. R. 270. Hill. 20 Jac. B. R. Trufwell v. Middleton. — And it must be pleaded specially. Ibid.

7. If my Bailiff of my Manor buy Cattel to stock my Ground, I shall be chargeable in an Action of Debt; and if my Bailiff sell Corn or Cattel, I shall have an Action of Debt for the Money; For whatsoever comes within the Compa's of the Servant's Service, I shall be chargeable with, and likewise shall have Advantage of the same; per Doderidge J. Godb. 361. Trin. 21 Jac. B. R. in Case of Seigneur v. Walmer.

K k k k

3. If

The Case was, the Defendant *trusted* his Servant to

buy Provisions and paid every Saturday-Night upon the Servant's Note; Per Cur. the Defendant is to be charged; For he was Debtor all the Week long; *But* if he had always given Money *beforehand* for the Week, it had been otherwise; and Judgment for the Plaintiff, Nisi. Ibid. 650. April 25. S. C.

8. If I give my Servant Money and he buyes on Trust, I shall not answer for what he buyes on Trust; but if I send sometimes on Trust, or pay Scores, I shall answer; per Wild J. 3 Keb. 625. Pasch. 28 Car. 2. B. R. April 17. Southby v. Wiseman.

9. A Merchant in the Country has a Factor in London, and sends up to his Factor to buy several Goods to send to his Correspondent beyond Sea; the Factor buys Goods of several Persons, and then becomes insolvent, and Actions are brought against this Merchant for those Goods; and the Jury found a Verdict for the Defendant upon this Diversity, viz. where the Merchant orders his Factor to buy Goods of any particular Person, there the Merchant is Debtor, and not the Factor; but where he gives a general Order to buy Goods, there the Factor is Debtor, and not the Merchant; Buckley's Case when Pemberton was Ch. J. upon a Trial at Nisi Prius in London by a Jury of Merchants. 2 L. P. R. 194.

10. If a Servant usually employ'd to pawn Goods for his Master, or to borrow Money for him, borrows of me, or pawns his Master's Goods to me for Money, I shall maintain Debt against the Master thereupon; per Holt Ch. J. 12 Mod. 564. Mich. 13 W. 3. at Nisi Prius.

So where a Servant usually buys for his Master upon Tick, and takes up

11. Master used to give his Servant Money every Saturday to defray the Charges of the foregoing Week; the Servant kept the Money; yet by Holt Ch. J. the Master is liable. 3 Salk. 234. Sir Robert Weyland's Case.

Things in his Master's Name but for his own Use, the Master is liable; but not where the Master usually gives him ready Money; per Holt. 3 Salk. 234. Pasch. 9 W. 3. B. R. Boulton v. Arleidon.—Cumb. 451. S. P.—Show. 95. Anon. S. P.—But where the Master gives the Servant Money to buy Goods for him, and he converts it to his own Use, and buys the Goods upon Tick, yet the Master is liable; so as the Goods come to the Master's Use, otherwise not. 3 Salk. 234.—Cumb. 451. Boulton v. Hilleiden S. P. per Holt Ch. J. cites it as Sir Robert Wiseman's Case.—2 Vern. 643. Speering v. Degrave, Galway & al. S. P.

But where he is not allowed or accustomed to deliver out

12. A Note under the Hand of Apprentice shall bind his Master where he is allowed to deliver out Notes, tho' the Money is never applied to the Master's Use. 3 Salk. 235.

Notes, there his Note shall not bind the Master, unless the Money is applied to the Master's Use; per Holt. 3 Salk. 235. in Case of Boulton v. Arleidon.—Or the Master consents afterwards. Cumb. 450. Boulton v. Hilleiden.

(B) Master chargeable for what Damage done by the Servant.

1. IF I command my Servant to disseise J. S. and he disseises him with Force, I shall be attainted of the Felony; Otherwise where the Assent is only Subsequent. Arg. 2 Roll. R. 27. cites 2 H. 7. 17.

But if the Servant abuses the Distress, the Servant himself shall answer for it.

2. If the Lord distrains his Tenant by his Servant, and the Master converts the Distress to his own Use, the Master shall be punished and the Servant not; and if the Servants converts the Distress to his own Use, he shall be punished and not the Master; because the Commandment of the Master was lawful. Kelw. 89. b. pl. 12. Hill. 22 H. 7.

Arg. Hard. 31.—Where a Servant takes a Sheep for an Amerciament and the Master agrees he is equally liable to Trespass as the Servant, and both are liable. Clayt. 5. cites 9 Car. 1. Water's Case.

3. If I have a Servant who is my Merchant and he goes to the Fair with an unsound Horse, or other Merchandizes, and sells them, the Vendee can have

no Action against me; but per Martin, if I command him to sell the Horse to any particular Person in certain, it seems otherwise. Arg. Bridgm. 128. cites Doctor and Student 138.

4. Where a Master sends his Servant to do an *unlawful Act, he shall answer for him if he mistakes in doing the Act; but where he sends him to do a lawful Act, there, if he mistakes, the Master shall not answer; per Popham Ch. J. Mo. 776. Pasch. 3 Jac. Waltham v. Mulgar.

As where Owner of a Ship fitted her out to Sea with Letters of Marque, to

take the Goods of the Spaniards, who were then Enemies to the Queen; and the Sailors against his Direction took a French Ship, the French then being in Alliance with us; and thereupon they sued in the Court of Admiralty, for Restitution of their Goods. Moor. 776. Pasch. 3 Jac. Waltham Mulgar.—* S. P. Mo. 786. Mich. 4 Jac. Lady Russell v. Earl of Nottingham.—S. P. Poph. 143. Arg. cites 11 E. 4. 6.—2 Roll. R. 27. Arg. S. P.

5. A. and B. affirming themselves to be Servants to the Deputy Aulneger unpacked a Parcel of Drapery belonging to J. S. pretending to search for certain Stuffs called New Drapery, and laid it in the Dirt, whereby the Goods became Unsaleable. It was agreed that if they as Servants to the Deputy without his Precedent Appointment do seize the Plaintiff's Goods, and their Master approves the Seizure, tho' they without his Consent abuse the Goods, yet their Master is a Trespassor ab Initio. And tho' the first Seizure be admitted lawful, yet the Abusing makes the original Seizure wrongful, and Trespass lies; and tho' the Master did not appoint or was Privy to the Abuse, yet he shall answer Damages. Lane. 90. Hill. 8 Jac. in the Exchequer. Gibson's Case.

6. Servant driving unruly Horses in Lincoln's-Inn Fields to break them for the Coach hurt a Man passing by, and Case is brought against Master (tho' absent) and Servant, and held good; For it shall be intended that the Master sent the Servant to train the Horses. 2 Lev. 172. Trin. 28 Car. 2. B. R. Michel v. Allestree.

Vent. 295. S. C. but no mention is made there of the Master.

7. If I command my Servants to do a lawful Act, as in this Case to pull down a little Wooden House (wherein the Plaintiff was and would not come out, and which was carried upon Wheels into the Land to trick the Defendant out of Possession) and bid them take Care they hurt not the Plaintiff; but in doing this my Servants wound the Plaintiff; in Trespass of Assault and wounding I may plead Not Guilty, and give this in Evidence; for that I was not Guilty of the wounding, and the pulling down the House was a lawful Act; per three J. Skin. 228. Hill. 36 & 37 Car. 2. B. R. Kington v. Booth.

8. The Reason why a Principal shall Answer for his Deputy is, because as he as Principal has Power to put him in, so he has Power to put him out, without shewing any Cause; and that, tho' he had expressly given him an Estate for Life in the Deputation; per Holt Ch. J. 12 Mod. 488, 489. and cites Hob. 13. and Mo. 856. 39 H. 6. 34.

9. Tho' I am not bound by the Act of a Stranger in any Case, yet if my Servant doth any Thing prejudicial to another it shall bind me, where it may be presumed he acts by my Authority being about my Business; per Holt Ch. J. Cumb. 459. Mich. 9 W. 3. B. R. in Case of Turbervill v. Stamp.

10. No Master is chargable with the Acts of his Servant but when he *acts in Execution of the Authority given by his Master, and then the Act of the Servant is the Act of the Master. 1 Salk. 282. Mich. 10 W. 3. Middleton v. Fowler.

So that the Master of a Stage Coach is not chargeable for Goods lost

by the Driver, unless the Master takes a Price for the Carriage of the Goods. 1 Salk. 282.—* Bridgm 128. Arg. S. P. and Judgment accordingly, in Case of Southern v. How.—Brownl. 176. Hinde v. Wainman S. P.

11. In an Action on the Case for a Deceit the Plaintiff set forth, that he bought several Parcels of Silk for Silk, whereas it was another kind of Silk; and that the Defendant well knowing this Deceit sold it him for Silk. On Trial it appeared that there was no actual Deceit in the Defendant who was the Merchant, but that it was in his Factor beyond

Sea; and the Doubt was, if this Deceit could charge the Merchant? and Holt Ch. J. was of Opinion, that the *Merchant* was answerable for the Deceit of his Factor, tho' not Criminaliter, yet Civiliter; For seeing somebody must be a Loser by this Deceit, it is more Reason that he who employs and puts a Trust and Confidence in the Deceiver should be a Loser than a Stranger; and thereupon the Plaintiff had a Verdict. 1 Salk. 289. Coram Holt Ch. J. at Nisi Prius. *Hern v. Nichols*.

* *As if my Servant contrary to my Will chase my* † *Cattle into another's Soil, I shall not be punished; otherwise it is where my Cattle escape into another's Soil. Br. Trespass pl. 435. cites 13 H. 7. 15.—S. P. For he does this of his own Wrong without any such Warrant from me. Arg. Poph. 143. cites S. C.—For by the Voluntary putting in of the Beasts there without my assent he gains a special Property for the Time, and to this Purpose they are his Beasts. See Trespass (Q) pl. 1. cites 12 H. 7. Kell. 3. b.—† S. P. Arg. Hard. 31.—So if he takes Toll where none is due. Ibid. cites 44 E. 3. 20.—Or sets a Dog on to bite a Man. Ibid. cites 13 H. 7. 15. D. 29. a.*

(C) Master. *Who shall be said a Master to be chargeable.*

1. **B**ailiffs of a Sheriff served an Execution in Breach of an Injunction, and finding Money hid in the House carried it away; the Plaintiff at Law was ordered to make Satisfaction; per Lord North in Affirmance of an Order by Lord Nottingham. Vern. 207. Mich. 1683. *Childerns v. Saxby*.

3 Mod. 321.
S. C.—Show
102. S. C. & P.

2. *Whoever employs another* is answerable for him, and undertakes for his Care to all that make Use of him. 2 Salk. 440. Mich. 1 W. & M. B. R. in Case of *Bofon v. Sandford*.

(D) Master. *Bound by what Acts, or Consent of Servant.*

Br. Contract
&c. pl. 21.
cites S. C.—
And if he
pledges the

1. **W**HERE a Bailiff known, and who has used to sell his Master's Beasts at Market, sells a Horse of his Masters without special Warrant, this is a good Sale. Br. Trespass, pl. 245. cites 27 Aff. 5.

Beasts of his Master for Corn which comes to the Use of his Master, this is good; and Trespass does not lie for the Master, nor can he retake them; and because he retook, therefore the other recovered against the Master by Writ of Trespass. Br. Trespass, pl. 245. cites 27 Aff. 5.—Br. Contract &c. pl. 21. cites S. C.—Br. Pledges pl. 16. cites S. C.

So where the
Servant
promiseth for
the Master,
that the Mas-

2. An Assumpsit of the Servant by the Appointment of the Master, shall bind the Master, and is his Assumpsit. Godb. 361. Trin. 21 Jac. B. R. *Seignior v. Wolmer*.—cites 27 Aff.

ter shall forbear to sue &c. and shall by such a Day deliver to the Defendant the Obligation, &c. and the Defendant promised to pay the Money at such a Day; and the Master having Notice thereof agreeth to it, it is now the Promise of the Master ab initio, for it is included in his Authority that he should agree, compound &c. and he hath Power to make a Promise; per Doderidge J. Godb. 361. Trin. 21 Jac. B. R. in Case of *Seignior v. Wolmer*.

Br. Contract
&c. pl. 38.
cites S. C.
but Brooke
makes a

3. If a Servant of a Mercer, Draper, Taverner, and such like, who have Authority to sell those Goods of his Masters, gives me Silk, Cloth, or Wine, it is good; for he has Authority to sell. Br. Trespass, pl. 295. cites 2 E. 4. 4.

quere and says, Authority to sell is no Authority to give.—Contrary of the Gift of another Servant who is not appointed to sell. Br. Trespass, pl. 295. cites 2 E. 4. 4.—* *As a Shepherd* &c. Br. Contract &c. pl. 38. cites S. C.

4. An *Ejectment* brought for the Manor of P. It was held per Cur. that the *Consent of the Servant* in the Absence of him that is possessed of the Term, shall not oust his Master of the Possession; because the Servant has no Interest in the Land. Brownl. 133. Pasch. 7. Jac. Mason v. Stretcher.

5. If a Servant *sellets a Horse with Warranty* it is the Sale and Contract of the Master, but it is the Warranty of the Servant, unless the Master giveth him Authority to warrant it; For a Warranty is void which is not made and annexed to the Contract, but there it is the Warranty of the Servant, and the Contract of the Master; but if the Master do *agree unto it after, it shall be said that he did agree to it ab Initio; per Doderidge J. Godb. 361. Trin. 21 Jac. B. R. in Case of Seignior v. Wolmer.

S. P. and because it is the Warranty of the Servant it is not good, per Doderidge and Haughton J. 2 Roll. 270. in Case of

Truswell v. Middleton, cites 11 E. 4. — * As where a Servant doth a *disseisin* to the Use of his Master, the Master not knowing of it, and then the Servant makes a Lease for Years, and then the Master agrees, the Master shall not avoid the Lease for Years; for now he is in by Reason of his Agreement, ab Initio; per Doderidge J. Godb. 361. Trin. 21 Jac. B. R. in Case of Seignior v. Wolmer.

6. Debtor of the Master promises the Servant, if he will discharge the Debt due to the Master, that he will expend double the Sum for the Benefit of the Servant (the Plaintiff); adjudged an illegal Consideration; For a Servant cannot discharge a Debt due to the Master. 2 Lev. 161. Hill 27 & 28 Car. 2. B. R. Harvey v. Gibbons.

7. A. sent his Servant to receive a 50 l. Note of B. — B. went with the Servant to C's Shop, who indorsed off 50 l. from a Note B. had upon him, and gave A's Servant a Note of 50 l. upon D. a Goldsmith. The next Day the Servant carried the Note to D. — D. refused Payment, and that Day broke. Upon this the Note was sent back to C. who refused Payment; whereupon the Action was brought. It was held per Cur. 1. That this was Money *received by C. And 2. That the Act of a Servant shall not bind his Master unless he acts by Authority of his Master; And therefore if a Master sends his Servant to receive Money, and the Servant instead of Money takes a Bill, and the Master, as soon as told thereof, disagrees, he is not bound by this Payment. But Acquiescence, or any small Matter, will be Proof of the Master's Consent; and that will make the Act of the Servant the Act of the Master. 2 Salk. 442. Hill. 2 Annæ. B. R. Ward v. Evans.

6 Mod 36. Mich. 2 Ann. B. R. S. C. — * C. became a Receiver to the Use of A. 11 Mod. 72. Pasch 5 Ann. B. R. in Case of Thorold v. Smith.

8. J. S. being indebted to A. in 100 l. A. sent his Servant to receive the Money, who takes a Note of a Goldsmith upon J. S. and gives a Receipt for the Money; J. S. breaks within a Week after; It was insisted, that the Servant had no Authority to receive any thing but Money, and consequently could not discharge the Debt upon receiving the Bill; and of this Opinion Holt Ch. J. and Powel J. seemed to be, but that if the Servant had at other times received Bills for his Master, it would be an Authority to this Purpose; but that this was proper Matter of Evidence, being the constant Practice of the World, and that upon A's asking his Servant what was done, and he telling him he had received such a Note, it is a strong Presumption that A. approved of it, or else that he would have sent it back again. And Holt at another Day proposed a new Trial, whether the Servant had Power to receive a Bill and give a Receipt? And this was agreed to; And he said, that in this Case the Receipt of a Servant that has Power, is the Receipt of the Master. 11 Mod. 71. Pasch. 5 Ann. and ibid. 87. Trin. 5 Ann. B. R. Sir Cha. Thorold v. Smith.

S. C. Holt's Rep 462, 465. reported, not as out of any other Book.

9. A. sent his Servant (who had been used to transact Affairs of that Nature for him) on Saturday Morning with a Note drawn on C. with Orders to get from C. either Bank-Bills or Money and turn them into Exchequer Notes; But the Servant having other Business of his Master's, and to save the going to C. goes to B. and gets of him a Bank Bill for C's Note, and invested it in Exchequer Notes, which he brought to A, not letting him know but that he had gone to C. Upon the Monday following C. failed; The Question was, whether B. or A. should bear the Loss? Parker Ch. J. who tried the Cause was first of Opinion that the Loss should fall upon B. because the Servant acted directly contrary to his Master's Orders; and B. by

In this Case were cited the Case of Ward v. Evans, and Hanky v. Watts, and of Thorold v. Smith; and this main Difference was observed between

them, that in these Cases nothing came to the Master's Use as in this Case the Notes did; And that in some of those Cases there was a prior Debt, which there was not in the present Case.

And the Case of *Wenk and Clayton* was also cited, where the Act of a Servant, though out of Place bound his Master by Reason of the former Credit given him in his Master's Service, the other not knowing that he was discharged. *Ibid.* 110, 111.—For a Servant by transacting Affairs for his Master derives a general Authority and Credit from him, which cannot be determined for a Time by any particular Orders or Instructions; For none but the Master and Servant can be privy to them, and so there could be no dealing with any but the Master. 10 Mod. 110. Mich. 11 Ann. B. R. in Case of *Nickson v. Brohan*.

10. An Owner of Land was bound by the Agreement of his Bailiff for inclosing a Common, he having acquiesced for 30 Years. *M.S. Tab. cites March 1720. Tufson v. Wentworth.*

(E) What Act of the Servant shall be said the Act of the Master.

1. **D**elivery by the Servant, by the Order and in the Presence of the Master, of Money &c. to another Person is the Delivery of the Master, and not of the Servant; Per two Justices against one, and one doubting. *Cro. J. 614. Trin. 40 Eliz. B. R. Hewer v. Bartholemew.*

2. Upon Evidence the Case was thus; A. had three several Clofes, 1st. Arable, 2d. Pasture, 3d. Meadow; B. pretends a Right to all, and enters, and makes a Lease of all to try the Title. The Servants of A. with Carts about their Master's Business enter into one of the Clofes; and by the Court that is an Ejectment of all, altho' there be not any Proof of the Command by their Master. *Noy. 77. Trin. 22 Jac. B. R. Cally v. Filh.*

3. A Servant had Power to draw Bills of Exchange in his Master's Name, and after is turned out of the Service; Per *Holt*, if he draws a Bill in so little time after, that the World cannot take Notice of his being out of Service, or if he were a long time out of his Service, but that kept so secret that the World cannot take Notice of it, the Bill in those Cases shall bind the Master. 12 Mod. 346. Mich. 11 W. 3. v. *Harrison*.

4. Mr. Mildmay Agent to the York Buildings Company, residing in Scotland, drew a Bill of Exchange in Favour of J. S. on their Cashier in London, which Bill run thus: To *J. B. Cashier* to the honourable Governor and Assistants of the York Buildings Company at their House in Winchester Street. Sir, pray pay to *J. S. or his Order* 200 l. and place it to the Account of the Company for Value received as per Advice by your humble Servant Charles Mildmay. The Letter of Advice referred to was directed to the Governor and Company informing them of the Draught he had made upon Mr. J. B. in Favour of J. S. (but it did not appear to be the usual Method of drawing Bills on the Company; *J. B. accepted the Bill generally, viz. accepted by J. B.* And if this Acceptance should charge him in his own Right, was the Question? which was saved for the Judgment of the Court, after a Verdict at Nisi Prius for the Plaintiff; and it was resolved it should. 3 New. Abr. 563. cites Mich. 7 Geo. 2. in B. R. *Thomas v. Bishop.*

(F) Servant

(F) *Servant. Chargeable in what Cases of Contract by him.*

1. **S**ervant retains one to work for his Master in Husbandry ; Debt does not lie against the Servant upon this Retainer. Arg. 2 Roll. 77. cites 3 E. 4.

2. So if one retain a Carpenter for his Master, to build a House for him, Debt lies not against the Servant ; For the Retainer was for his Master, and it is in Law the Retainer of his Master. Ibid. cites 9 Rep. 8.

But if he had retained him (and says not for his Master) to build

a House for his Master, there Debt lies against the Servant ; For the Retainer was general ; Per Haughton J. Quod fuit Concellum ; And he thinks, if the Record of *Stimpton's Case* was seen, that the Retainer was general. 2 Koll. R. 77. Hill. 16 Jac. B. R. in *Case of Woodhoule v. Bradford*.

3. Master sends his Servant to a Shop to buy Goods, and he buys for his Master, and makes not the Contract in his own Name. Per Richardfon Ch. J. and not denied, that the Master shall be charged and not the Servant. Litt. R. 374. Trin. 7 Car. C. B. Anon. cites 11 E. 4. 6.

Het. 168. S. C. ——— If the Servant does not expressly promise

Payment, and the Goods come to the Master's Use. D. 230. b. Marg cites Mich 6 Jac. B. R. *Goodbaylie's Case*.

4. If a Master always gives his Servant Money to buy his Markets with, it is good Evidence to discharge the Master in an Action brought against him for Goods taken upon Trust by that Servant. Per Glyn Ch. J. Trial per Pais 181. Mich. 1658. at Guildhall, Sir Thomas Rouse's Case.

5. B. a Servant was prevailed upon to bespeak Things for his Master at A's Shop, which he did accordingly, and took up Things of A. for his own Use also ; What A. sold on the Master's Account was regularly paid, except once at last, but what B. bought on his own Account was not accounted for in four Years, and the Accounts were kept separate as to what was for the Master, and what for B. and what Monies had been paid as for the Master's Goods were always paid out of a particular Fund. The Court seemed to think that a Servant's bespeaking or fetching Goods without any particular Promise of paying for them, does not render him liable to pay for them. Trevor said it was a Case of great Consequence, but of very little Doubt, but because of the Noise and Discourse that had been made about it, they ordered a Master to state it on the Books, Answers, Proofs, and Pleadings, and then they would give Direction for how much Execution should be taken out upon the Judgment which had been obtained against B. at Law for the whole, and against which he came hither for Relief. Trin. 1692. Ch. Prec. 45. *Graham v. Stamper*.

Abr. Equ. Cases 338, 339. S. C. ——— The Case was, that A. had recovered at Law in an Indebitatus Assumpsit for the Goods, against which B. brought a Bill to be relieved, surmising that it was for Goods sold to B. as he was Mas-

ter of the Buck Hounds to King James II. and that the Goods were for the King's Servants ; And that it was the King's Debt and not B's, and what he asked was in Relation to his Office, and not as a private Person ; and that A. was to expect his Money from the King, and not from B. The Defendant pleaded the Verdict and Judgment &c. and demurred, which was over-ruled, and A. ordered to answer 2 Vern. 146. Trin. 1692. *Graham v. Stamper*.

(G) Servant. Chargeable for what *Damage done by him.*

1. **I**N Debt upon *Bond* against Executors, conditioned for *quiet Enjoyment* of Lands sold by the Testator to the Plaintiff; the Breach assigned was, That the Testator had entered and cut down five Trees, upon which they were at Issue, and the Jury found, that the Testator's *Servant by his Command* entered and cut &c. *in his said Master's Presence*. The Court held, that the Condition was broken, and that the Master was the principal Trespasser. Le. 157. pl. 223. and 4 Le. 123. pl. 299. S. C. Mich. 31 Eliz. C. B. Seaman v. Browning.

2. A Servant takes Sheep by Command of his Master, (who supposed he had a Property in them) and puts them into his Master's Grounds, and J. S. claiming a Property in them also demanded the Sheep of the Servant, and upon his Refusal to deliver them, J. S. brought Trover against the Servant. As to this it was resolv'd, that the Action will not lie against the Servant; For it being in Obedience to his Master's Commands, the Servant shall be excus'd, tho' the Master had no Title. And Scroggs J. said, that this Rule will extend to all Cases, where the Master's *Command is not to do an apparent Wrong*. For if the Master's Case depended upon a Title, be it true or not, it is enough to excuse the Servant; and it would be mischievous, if the Servant upon all Occasions must be satisfied of his Master's Right and Title before he obey his Commands. 2 Mod. 242. Trin. 29 Car. 2. C. B. Mires v. Solebay.

3. The *Warrant* of no Man, not even of the King himself, can excuse the doing an *illegal Act*; For tho' the Commanders are Trespassers, so also are the Persons that do the Fact. 3 Lev. 352. Arg. in Case of Sands v. Child.

As if a Bailiff, who has a Warrant from the Sheriff to execute a Writ, suffer his Prisoner by Neglect to escape, the Sheriff shall be charged for it, and not the Bailiff; but if the Bailiff turn the Prisoner loose, the Action may be brought against the Bailiff himself, for then he is a kind of a Wrong-doer or Rescuer, and it will lie against any other that will rescue in like Manner; and for this Diversity cites 1 Le. 146. Cro. 175. 143. 41 Ed. 3. 12. 1 Roll 78. which is not well reported, but the Inference may be well made from it. Per Holt Ch. J. 12 Mod. 488. and cited the above Books.

4. A Servant or Deputy, quatenus such, cannot be charged for *Neglect*, but the Principal only shall be charged for it; but for a *Misfeasance*, an Action will lie against a Servant or Deputy, but not quatenus a Deputy or Servant, but *as a wrong Doer*; per Holt Ch. J. 12 Mod. 488. Pasch. 13 W. 3. in Case of Lane v. Cotton.

5. A *Sea Captain in the African Company's Service* seized a Ship trading on the Coast of Guinea. She was condemned as Prize, and her Cargo accounted for to the Company. 19 Years afterwards a Freighter brought Trover against the Executor of the Captain, and recovered 2500*l.* Damages. The Executor brought a Bill against the Freighter and the Company, but was dismissed as to the Freighter, because the Executor might have defended himself at Law; But the Company was decreed to *indemnify the Executor, and the Freighter to prosecute the Decree in the Executor's Name*. And tho' the Captain had received 700*l.* for his Service from the Company, yet the Executor was *not to refund* or abate, that being only a *Gratuity to him*, he acting only as their Servant or Agent, and the Quantum of the Damage must be the same as was recovered against the Executor at Law, because they might have defended the Trial. Trin. 1703. Ch. Prec. 221. Langdon Executor of Dickinson v. the African Company and Dockwray.

(H) *What*

(H) *What is lawful to be done by the one for the other.*

See Maintenance. (K) (L).

1. **A** Servant may justify in Defence of his Master. But he cannot justify a Battery in Defence of the Goods of his Master; Per Powel J. 2 Lutw. 1483. Hill. 11 W. 3. Shingleton v. Smith.

Master cannot justify Battery in Defence of his Servant, tho' Roll. R. 137.

Servant may in Defence of his Master. Arg. 2

(I) *Compellible to serve. Who. And who shall be said Labourers within the Statute.*

1. **I**N false Imprisonment the Defendant justified, because the Plaintiff was vagrant, and J. N. complained for Want of a Servant, and he required him to serve, and he would not, by which he put him into the Stocks &c. and the Plaintiff said, that he had a House and two Acres of Land and Chattels, five Sheep, 10 Cows &c. to the Value of 20 l. to be occupied, Judgment &c. and the Defendant said that he had only one Cow, and no Land, and so not sufficient to be occupied, and the other that he had sufficient Chattles to be occupied, Prist, and the others e contra. Br. Laborers, pl. 14. cites 47 E. 3. 18.

2. Treipafs upon the Statute of Labourers against a Chaplain, because he covenanted to be the Plaintiff's Steward and Chaplain Parochial of such a Church, and departed &c. And as to being Steward it was adjudged that it well lay; contrary of being a Chaplain Parochial; For this is not a common Labourer or Artificer, but it is a Servant of God, and therefore of this he was discharged, Quod nota. Br. Laborers, pl. 16. cites 50 E. 3. 13.

S. P. Br. Laborers, pl. 10. cites 46 E. 3. 14. — Action upon the Statute of Labourers does not lie against a

Chaplain; per Cur. For it is intended that he has wherewithal to live upon, and is not always disposed to celebrate divine Service. Ibid. pl. 47. cites 10. H. 6. 8.

3. If a Carpenter be retained to make a House, Action upon the Statute of Labourers lies against him if he does not do it; For he is an Artificer. Br. Laborers, pl. 3. cites 2 H. 4. 3.

4. Action was brought upon the Statute of Labourers against a little Girl of the Age of 10 Years upon Retainer and Departure, and the Plaintiff counted against her; and the Defendant said, that she is not of the Age of 10 Years, Judgment &c. And because it appeared to the Court by Inspection, that she was not of the Age to make a Covenant, therefore the Writ abated by Award; For per Rickhill, she is not of Age to bind herself by Covenant ante Annos Nubiles, viz. 12 Years; quod Nota. Br. Laborers, pl. 19. cites 2 H. 4. 18.

5. Action upon the Statute of Labourers Anno 23 E. 3. 1. which is, That whoever is able in Eody ought to serve; and per Hank, An Infant of 12 Years retained ought to serve, and yet Issue was taken if the Infant was of the Age of 12 Years only at the Time of his Departure out of Service or not; quod nota. Br. Laborers, pl. 20. cites 7 H. 4. 5.

Infant or Feme of the Age of 12 Years shall be bound by their Covenant to serve

in Husbandry. Br. Laborers, pl. 51. cites F. N. B. fol 168. — S. P. But where an Infant of 12 Years old was sued upon the Statute he was discharged of the Action; yet per Hankford, a Writ lies against a Stranger that takes him. Ha. F. N. B. [168] (D) in the Notes (b) cites 2 H. 4. 18.

6. Receiver taking 40 s. per Ann. brought Action thereof; the Defendant

dant demurr'd, because it is more than is given by the Statute of Labourers, Et non Allocatur; the Reason is, because it is out of the Statute, as it seems. Br. Laborers, pl. 50. cites 11 H. 6. 10.

And if a Man be retained in Service, and goes wandering abroad out of his Service, another Man may compel him to serve him &c. because he is out of Service. F. N. B. [168.] (C).

But if a Carpenter, Taylor, Shoemaker, or such like Artificer will be retained in Service, and departs, Action lies of the Departure, tho' they shall not be compelled to serve; For the first Article of the Statute of Labourers compells Servants of Husbandry to serve, and the 2d Article is, that if any retained in Service depart, Action shall lie of the Departure. Br. Laborers, pl. 36. cites 38 H. 6. 14.

F. N. B. [168] (A) and see the Writ there to that Purpose.—* S. P. and may command the Gaoler to fet him at Liberty without any other Writ. F. N. B. (B)

9. A Servant shall be compelled to serve in Summer in the Place where he served in the Winter before, and * Lords of Vills, and Justices of Peace may command Vagrants to Prison who will not serve. Br. Laborers, pl. 51. cites F. N. B. 168.

10. He, who has not sufficient Lands of his own to Occupy, shall be compelled to serve. F. N. B. [168.] (I)

11. Baron and Feme shall be bound by their Covenant to serve. Br. Laborers, pl. 51. cites F. N. B. fol. 168.

So of a Chaplain, Carpenter &c. Ibid.—But the Count ought to be Special.

12. A Gentleman by his Covenant shall be bound to serve, tho' he were not compellable. And an Action will lie against them for departing from their Service, by Reason of the Covenant. F. N. B. [168.] (E)

Ibid. in the Notes there (c) cites 11 H. 4. 35.

13. By 5 Eliz. cap. 4. S. 4. Every Person unmarried, or under the Age of 30 Years tho' married, having been brought up in any of the Arts mentioned in this Act by the Space of 3 Years, and not worth in Lands 40 s. per Ann. or in Goods 10 l. and so allowed under the Hands and Seals of two Justices of Peace, the head Officer, or two discreet Burgesses of the Place where the Party so brought up hath lived by the Space of one whole Year, not already retained in Husbandry, the Arts aforesaid, or any other Art or Mystery, or in any Service upon request of any Person using the same Art, shall not refuse to serve for the Wages limited by the Statute; and being so retained, shall not depart from his or their Service without one Quarters warning before two lawful Witnesses, or some lawful Cause to be proved before one Justice of Peace, or head Officer, in pain of Imprisonment without Bail; but upon Submission to perform the Service, they shall be enlarged without Fees; which Commitment and Inlargement two Justices of Peace, the head Officer, or two Burgesses as aforesaid, unto whom Complaint shall be made, have Power to command, as in their Discretions upon due Proof shall be thought fit.

S. 7. Every Person between the Age of 12 and 60 not already retained in any Service, nor employed about Husbandry, Mines, Glass, Coal, Fishing, Sailing, Provision of Grain or Meal for London, nor Gentlemen born, nor Scholar in any University or School, nor worth 40 s. per Ann. in Lands, or 10 l. in Goods, nor having a Father, Mother or other Ancestor (whose Heir he is) worth 10 l. per Ann. in Lands, or 40 l. in Goods, shall be compelled to serve in Husbandry, and shall not depart that Service, otherwise than as is before limited, upon pain above expressed.

S. 24. *Every unmarried Woman, fit to serve, being above 12 Years old, and under 40, shall by two Justices of Peace, a chief Officer, or two Burgesses, be compellable to serve for convenient Time and Wages, in pain of Imprisonment.*

(I. 2) *Retainer.* What within the Statute.

1. **R**etainer for one Year and so from Year to Year taking for his Salary as in the Statute is a good Retainer; and if he serves for 8 Years upon such Retainer he shall have Action for his Salary, and he cannot depart without reasonable Warning. Br. Laborers, pl. 36. cites 38 H. 6. 14. *But where he is retained for one Year and continues for 8 or 10 Years, now the first*

Retainer shall serve for all, and is only one Retainer, and is within the Case of the Statute for all the Years. Ibid.

2. Retainer for 40 Days, or to serve at all Times when required, is no Retainer according to the Statute, but a Covenant, if it be by Deed; and without Deed it is void. F. N. B. [168.] (F)

3. If a Man retains one and says not for how long he shall serve him, he shall serve him for a Year; For that is a Retainer according to the Statute. F. N. B. [168.] (H) cites 9 H. 6. 7. 11 H. 4. 44. 41 E. 3. 13. 27 E. 3. 22. *Co. Litt. 42. b.—Br. Laborers, pl. 51. cites S.C.*

4. If one who is not to have any Servant retains another to serve him &c. the Retainer is void. F. N. B. [168.] (H)

5. A Retainer for two or three Years is good. F. N. B. [168.] (K) *Ibid. In the Notes there* (d) says it is doubted, if a Retainer for more than a Year be within the Statute, and cites 29 E. 3. 27.

6. A Retainer by the Wife is not within the Statute. F. N. B. [168.] (Q)

(K) *Inter se.* Power of the Master over the Servant.

1. **W**HERE a Man has a Ward or * Servant retained who departs from him, he cannot take them and bring them back by Force, nor put his Hands upon them to bring them back, but he may require them &c. and if they refuse he shall have his Action; per Cur. Br. Trespafs, pl. 225. cites 38 H. 6. 25. ** I cannot take him out of his Service without Request made or seizing him. Br.*

Laborers, pl. 29. cites 21 H. 6. 9.—Br. Action sur le Cafe, pl. 55. cites S. C.—Br. Notice, pl. 4. cites S. C.—If the Servant be drawn away, the Master may re-apprehend him, and keep him in sight of him. F. N. B. [168.] (P)

2. In Trespafs it was doubted if the Master may strike his Apprentice by way of Correction, or shall be put to Writ of Covenant; quære of Correction of other Servants within Age. Br. Trespafs, pl. 349. cites 21 E. 4. 6. *A Man may beat his Apprentice for an Offence as well in the*

Vill where he is Apprentice as in another Vill, and may beat him twice for one and the same Offence; for it may be that the first beating is not sufficient for the Offence; per Fairfax J. but Spilman e contra. Ibid. pl. 355. cites 21 E. 4. 53.

3. A Man may keep his Servant from going to a Conventicle, or an Alehouse; per two J. 2 Mod. 167. Hill. 28 & 29 Car. 2. C. B. Anon.

4. A Steward had Writings and Evidences, and also a considerable Sum of Money in his Trunk, which his Lord seized upon Pretence of the Steward's being much Indebted to him; but the Court ordered all to be restored; For tho' the Defendant might be greatly Indebted to his Lord, yet

yet he cannot levy his own Debt by seizing violently the Goods of his Steward. Vern. 32, 33. Hill. 1688. Countess of Plymouth v. Bladon.

5. A Man may surely justify the *detaining of his Servant that is taking away his Goods*; per Cur. 2 Vern. 33. in Case of Countess of Plymouth v. Bladon.

(L) *Discharge of Servant &c. from his Service. How, and what amounts to it, or shall be good Cause of Departure.*

1. **T**HE Master cannot discharge his Servant within the Time, unless he has agreed to it; no more than the Servant can depart without the Agreement of the Master. Br. Labourers, pl. 27. cites 19 H. 6. 30.

Put a Servant may be discharged by Parol; As where the

2. Discharge of an *Apprentice by Parol* is not good; For he cannot be an Apprentice but by Writing, and therefore the Discharge ought to be by Writing. Br. Labourers, pl. 30. cites 21 H. 6. 33.

3. *Battery by the Master*, or Licence of the Master, are good Causes for the Servant to depart. Br. Labourers, pl. 51. cites F. N. B. 168. So of Battery by the Master's Wife. F. N. B. [168] (Q) — Br. Labourers, pl. 51. S. P.

4. *Keeping a Servant from Meat and Drink* is good Cause of Departure from his Service. F. N. B. [168] (L). cites 39 E. 3. 22. and 6 E. 4. 2. S. P.

5. If a *Feme Servant marries*, yet it seems that she ought to serve. F. N. B. [168]. (N).

(a) says, see Contra, per Cur. 11 H. 4. 13. that it is not lawful to take her during the Espousals, and also cites 46 E. 3. Bar. 214. 7 R. 2. Trespass 206.

6. If *Husband and Wife are retain'd in Service during their Marriage*, &c. an Action lies against them if they depart from their Service. F. N. B. [168] (O) cites 46 E. 3. Bar. 214.

7. If a Man retains a Servant by 40 Days, and another retains him for a Year within the 40 Days, the first Retainer is by this discharged. Br. Labourers, pl. 51. cites F. N. B. 168. Because the first Retainer was not according to the Statute. F. N. B. [168] (F).

(M) *Inter se. Actions by the Master against the Servant, for neglecting or refusing to do his Service &c.*

1. **I**F one retain a Servant for a Year, and commands him to do his Business, and he refuse, 'tis a good Plea in Action of Debt for his Salary for the Master to say that he required him to do his Business, and he refused; per Hales J. Mo. 10. pl. 36. Trin. 3 E. 6. Anon.

2. If a *special Servant*, as a Baily or a Steward, misbehave himself in a Thing which belongs to his Charge; without any special Trust, an Action *sur Case* lies. But a *general Servant* is to do and execute all lawful Commands, and against this general Servant, if his Master commands him to do such a Thing, and he doth it not, an Action on the Case lieth, but yet

yet this is with this Diversity, Scilicet, if the *Master commands him to do what is conveniently in his Power*, or otherwise not; and therefore if I command my Servant to pay 100*l.* at York, and give him no Money to Hire a Horse, an Action lies not for his not doing this Command, but if I furnish him with Ability to do it, and he does it not, an Action well lies against him; per Tanfield Ch. B. Lane 67. Trin. 7 Jac. in Case of Levifon v. Kirk.

3. In Case by a Carrier against his Servant for *losing Goods &c.* Exception was taken that this Action lies not, except it appear that the Carrier had received Damage by being sued; For this Action lies only in respect of the Damage the Master sustained, and cited Cro. El. 53. 461. Cro. Car. 187. Contra. 'Twas further objected, that if this Action lies, the Defendant might be twice charged, i. e. by the Master and by the Owner. But Holt Ch. J. Contra, unless there be an *actual Conversion*; For the Owner of the Goods has an Action against the Servant only in Case of a Conversion. And the Master has a special Property and may maintain Trover; and the Master is liable to the Owner, by Reason he was intrusted by him. Besides there ought to be a *Negligence shown in the Servant*, to make him liable to this Action; for this amounts only to a *Bailment* of Goods, where if Thieves break in and Steal them, he shall not answer for it. And Judgment Nisi within three Days. 11 Mod. 135. Trin. 6 Ann. B.R. Savage v. Walthew.

(M. 2) Inter se. Actions by the Master against the Servant for *defrauding or stealing* from him.

1. IF Butler or Shepard steal Sheep or Plate, this was Felony at Common Law. But if one deliver a Thing to his Servant to *Bail over*, and he elloign it, this is not Felony, because he has *special Property* on which he may maintain Trespafs on the taking out of his Possession. Mo. 248. pl. 392.

The Servant of a Mercer &c. has neither general nor special Property in

the Goods, and he shall have no Action of Trespafs if they are taken away; but if he take them Trespafs lies against him, and if he embezel them 'tis Felony; per Anderson Ch. J. Goldsb. 72. Snagg v. Blofs.—Ow. 52. Mich. 29 & 30 Eliz. Blofs v. Holman.

2. 21 H. 8. cap. 7. S. 1. Enacts that, *Servants to whom Jewels, Money or Goods by their Masters shall be delivered to keep, and withdrawing with the said Jewels &c. to the Intent to steal the same, or embezzling the same with a Purpose to steal, to the Value of 40 s. shall be Guilty of Felony.*

Made perpetual, by 5 Eliz. cap. 2.

S. 2. *Provided that this Act extend not to any Apprentice, or any Person within the Age of 18 Years.*

3. If a Servant is employed by his Master to *sell Goods in his Shop*, and the Servant carries them away and converts them to his own Use, Trespafs *Vi & Armis lies for the Master against him; per Cur. For he has not any Interest, Possession or other Thing in them, and therefore if he intermeddles with them in any other Manner, than by uttering of them by Sale, according to the Authority to him committed, he is a Trespasfor; For he hath not any Authority to carry the Wares out of the Shop unfold; but *all his Authority is within the Shop.* 1 Le. 87, 88. Mich. 29 & 30 Eliz. C. B. Gloffe v. Hayman.

S. P. For he had the Possession of them as Servant, and that was the Possession of the Master. And Anderson said, that in all Cases where the

Servant has neither a general or special Property, Trespafs lies; But that it is otherwise of a Bailee. Mo. 248. pl. 392. Mich. 29 Eliz. Anon. but seems to be S. C.— * Where a Servants runs away with Goods committed to his Trust above 40 s. the Indictment is Vi & Armis, tho' properly it cannot be said so because they were in his Custody. Cro. Car. 378. per Cro. J. Arg. Mich. 10 Car B. R.

4. *Trover and Conversion* by the Master against the Servant for 40l. received for Goods of the Master's by the Servant; it was objected that Trover will not lie for Money; But Judgment for the Plaintiff; Because the Possession of the Servant was the *Possession* of the Master, and when the Servant converts this to his own Use, by this the Master *loses the Property*, and is also a Conversion in the Servant. *Ow. 131. 43 Eliz. Hall v. Wood.*—*S. P. Cro. E. 638. * Holiday v. Hicks.*—*Ibid. 661.* Judgment reversed, because Trover lies not for Money, unless it be in a Bag.

* *Ow. 131.*
S. C. cited as
adjudged.

As where
Case was
brought
by a Master
against his
Servant, in
which he de-
clared, that
by a Charter
Party, he cov-

anted to sail from England to India, and that he nor any of his Servants should bring from thence any Callico &c. that he retained the Defendant in his Service for this Voyage, and acquainted him with his said Covenants and Bonds for Performance, and that he intending to make the Plaintiff forfeit &c. did falso and fraudulent bring from India to England in the said Ship certain Callicoes; after Verdict for the Plaintiff it was mov'd in Arrest of Judgment, but the Court gave Judgment for the Plaintiff, for the Reasons aforesaid Sid. 298. Mich. 18 Car. 2. B. R. Hufley v. Pufy.

6. A Servant or Journeyman employed to sell Goods and receive Money for his Master's Use sells a considerable Quantity, and receives 160 Guineas for his Master, and goes away with 150 at the Time of his Discharge, and lays the 10 in a private Place in the Chamber where he lay, and after being discharged his Master's House and Service, he in the Night time breaks open the House and takes the 10 Guineas so hid; Upon a special Verdict this was held no Burglary; For that the taking the Money was not Felony; For tho' in Right it was his Master's Money, yet it was his in Possession; and the first Original Act is no Felony; and if he had laid it under Ground in the Garden, and afterwards come and took it away, this would have been no Felony; per Wright, Herbert, Atkins, Powell and Holt, &c. *Show. 53.* Arg. cited as so held at Easter Sessions 1687.

(N) *Statutes.* Of the Old Statutes, and 5 El. 4. And *Actions What and How; At Common Law and by Statute.*

* Debt was brought against a Bailiff upon this Statute; The Plaintiff counted that he required A. and J. who were within 40 Years, and able, and they refused to serve him, by which they were arrested by the Constable of the

1. 34 E. 3. cap. 9. **I**t is accorded in this present Parliament, that the Statute of Labourers of old Times made shall stand in all Points except the Pecuniar Peine, which from henceforth is accorded, that the Labourers shall not be punished by Fine and Ransome. And it is assented, that the said Statute shall be enforced in Punishment of Labourers in the Form following, that is to say, that the Lords of Towns may take and imprison them by 15 Days if they will not justify themselves; And then to send them to the next Gaol, there to abide till they will justify them by the form of the Statute, and that the Sheriff, Faylor, or other * Minister shall not let them to Mainprize nor Bail, and if he do, he shall pay to the King 10l. and to the Party 100 s. nor that the Sheriff, Faylor or other Minister, shall take any Fee nor Porterage of Prison, nor at his Entering, nor at his going out upon the same Pain. And that as well Carpenters and Mafons be comprised of this Ordinance as all other Labourers, Servants and Artificers. And that the Carpenters and Mafons take from henceforth Wages by the Day, and not by the Week, nor in other Manner. And that the chief Masters of Carpenters and Mafons

Masons take 4d. by the Day, and the others 3d. or 2d. according as they be worth. And that all Alliances and Covins of Masons and Carpenters, and Congregations, Chapters, Ordinances, and others betwixt them made, or to be made, shall be from henceforth void and wholly annulled, so that every Mason and Carpenter, of what Condition he be, shall be compelled by his Master to whom he serveth, to do every Work that to him pertaineth to do, or of Free Stone or of Rough Stone. And also every Carpenter in his Degree. But it shall be lawful to every Lord or other, to make Bargain, and Covenant of their Work in gros with such Labourers and Artificers, when please them, so that they perform such Works well and lawfully according to the Bargain or Covenant with them thereof made.

Vill and delivered to the Defendant, Bailiff of the Will, who suffered them to go, by which Action accrued; and per Knivet Ch. J. the Statute is intended of Minister of

the King; and because the Plaintiff has not counted that the Defendant is Bailiff of the King, therefore Ill; For a Bailiff of a Lord of a Manor, and who to him shall render Account, cannot serve Process &c. and yet the Defendant passed over, and said that the Countable did not deliver them; Pritt, and the other c contra. Br. Labourers, pl. 34. cites 39 E. 3. 16.

2. 34 E. 3. cap. 10. Item, of Labourers and Artificers, that absent them out of their Services in another Town or another County, the Party shall have the Suit before the Justices, and that the Sheriff take him at the first Day, as is contained in the Statute, if he be found, and do of him Execution as afore is said, and if he return, that he is not found, he shall have an Exigent at the first Day, and the same Pursue till he be outlawed, and after the Outlawry a Writ of the same Justices shall be sent to every Sheriff of England, that the Party will sue to take him, and to send him to the Sheriff of the County where he is outlawed, and when he shall be there brought, he shall have there Imprisonment till he will justify himself, and have made gree to the Party, and nevertheless for the Falsity he shall be burnt in the Forehead with an Iron made and formed to this Letter F. in Token of Falsity, if the Party grieved the same will sue. But this pain of Burning shall be put in Respite till Saint Michael next ensuing, and then not executed, unless it be by the Advice of the Justices. And the Iron shall abide in the Custody of the Sheriff. And that the Sheriff and some Bailiff of the Franckise be attending to the Plaintiff to put this Ordinance in Execution upon the Pain aforesaid. And that no Labourer, Servant, nor Artificer shall take no Manner of Wages the Festival Days.

3. 34 E. 3. cap. 11. Item, if any Labourer, Servant or Artificer, absent himself in any City or Borough, and the Party Plaintiff come to the Mayor and Bailiffs, and require Delivery of his Servant, they shall make him Delivery without delay. And if they refuse to do the same, the Party shall have his Suit against the Mayor and Bailiffs before the Justices of Labourers. And if they be thereof attainted, they shall pay to the King 10l. and to the Party 100s.

4. Action upon the Statute of Labourers does not lie against two for Departure &c. For he shall have several Actions. Br. Laborers, pl. 12. cites 47 E. 3. 16.

S P. For the Retainer of one is not the Retainer of the

other; nor is the Departure of the one the Departure of the other. Br. Joinder in Action, pl. 15. cites S. C.

5. If a Labourer be retained to serve for Term of Life, he shall not have Action of Debt against the Executors of his Master without Deed; For the Statute does not compel him to serve in such Form; Contra if he had been retained for one Year. Br. Laborers, pl. 44. cites 2 H. 4. 15.

8. In Trespas it was agreed, that at Common Law, if a Man had taken my Servant from me, Trespas lay Vi & Armis; But if he had procured the Servant to depart, which he did accordingly, and he retained him, or if he had departed of his own Head, and another had retained him knowing of the first Retainer, Action lay not at the Common Law Vi & Armis, but it lay upon the Case, upon the Departure by Procurement, and in the 3d Case where he departs without Procurement, and was retain'd, Case did

Br. Action sur le Cafe, pl. 38. cites 11 H. 4 25

did not lie at the Common Law, and therefore was the Statute of Labourers made, which gave Action in those Cases, *Quod nota bene inde*. Br. Laborers, pl. 21. cites 11 H. 4. 21, 22.

* It should be 33. pl. 60.

7. *General Writ upon the Statute of Labourers, and special Count against a Carpenter for [undertaking the] making of a House, which he did not make; and awarded good by the special Count.* Br. General Brief, pl. 5. cites 11 H. 4. * 32.

8. *In Debt the Plaintiff counted, that he was retained to be Receiver to the Plaintiff for 7 Years for 40s. a Year &c. and the Defendant demanded Judgment, because the Wages are more than is comprised in the Statute of Labourers, et non allocatur; by which he pleaded Departure before any Wages due, et non allocatur; For tho' he departs yet he may receive and pay; For he is not like to another Servant; by which he said, that before any Wages due, he agreed with the Plaintiff for 10s. and discharged him, to which Discharge the Plaintiff agreed; which was admitted for a good Plea.* Br. Dette, pl. 185. cites 11 H. 6. 10.

Br. Action sur le Cafe, pl. 55. cites S. C.

9. *If a Man serves me at his Will, and another beats him, by which I lose his Service, I shall have Action upon the Cafe; per Newton Ch. J. and others.* Br. Laborers, pl. 29. cites 21 H. 6. 9.

10. *If a Man be retained with me for a Year to serve me at any Time as I shall require him, this is a Covenant, and of this I shall not have Action upon the Statute of Labourers; per Newton, to which Fulthorp, Ascue and Portington agreed.* Br. Laborers, pl. 31. cites 22 H. 6. 30.

11. *5 El. 4 S. 3. So much of all Statutes made, and every Branch thereof as touch or concern the Hiring, Keeping, Departing, Working, Wages, or Order of Servants, Workmen, Artificers, Apprentices and Labourers, or any of them, and the Penalties and Forfeitures concerning the same, are repealed; Howbeit the said Statutes, and every Branch and Matter therein contained, not repealed by this Act, shall remain in force.*

S. 8. *None shall put away his Servant before the End of his Term without a Quarters warning or some lawful Cause to be proved by two sufficient Witnesses before the Justices of Oyer and Terminer, Justices of Assise, Justices of Peace in Sessions, a Head Officer, or two discreet Aldermen or Burgesses, in pain of 40s.*

S. 10. *No Servant, having served in one City or Town, shall get to serve in another without a Testimonial, viz. in a Town Corporate under the Seals of the Town, and two Householders there; and in the Country under the Seals of the Constable or Constables and two Householders there; which Testimonial shall be made and delivered to the Party, and also Registered by the Minister of the Place where the Servant dwelt, for which the Minister is to have 2d.*

The Form of the Testimonial is this: Memorandum, that A. B. Servant to C. D. of F. in the County of E. Husbandman or Taylor &c. in the said County, is licensed to depart from his said Master, and is at his Liberty to serve elsewhere according to the Statute in that Case made and provided, In Witnesses &c.

S. 11. *The Servant which sheweth not such a Testimonial to the Chief Officer in a Corporation, or to the Minister, or some Officer in any other Place where he is to dwell, shall suffer Imprisonment till he procure one, and if he procure not one within 21 Days after his Imprisonment, or shew a false one, he shall be punished by whipping, as a Vagabond: and the Master that retains a Servant without such a Testimonial shall forfeit 5l.*

S. 12. *Those that Work by the Day or Week, shall continue at Work, betwixt the middle of March and the middle of September, from 5 in the Morning till betwixt 7 and 8 at Night, except 2 Hours allowed for Breakfast, Dinner, and Drinking, and half an Hour from the midst of May to the middle of August for Sleeping; and all the Rest of the Year from Twilight to Twilight, except an Hour and a half allowed for Breakfast and Dinner; in pain to have one Penny defalked out of their Wages for every Hours absence.*

S. 14. None that takes Work by the Great shall leave the same before it be quite finished, except for not Payment of his Wages, the Queen's Service, Licence of the Work-master, or other lawful Cause, in pain to suffer one Month's Imprisonment without Bail, and to forfeit 5 l. to the Party grieved, besides his Costs and Damages to be recovered at the Common Law for the Loss sustained.

S. 20. Every Retainer, Promise, Gift or Payment of Wages, or other Thing contrary to the true Meaning of this Act, and every Writing and Bond to be made for that Purpose, shall be void.

S. 21. If any Servant or other shall be convicted before 2 Justices of Peace, or a chief Officer as aforesaid, by his own Confession, or the Testimony of two honest Men, to have assaulted his Master, Mistress, Dame or Overseer, he shall suffer one Years Imprisonment, or less if the Justice or Chief Officer shall think fit; and if the Party shall be thought to deserve a more severe Punishment, then to receive such open Punishment, (Life and Member excepted) as the Justices in Sessions, or the Chief Officer and four of the discreetest Men in the Corporation shall think convenient.

S. 22. Artificers shall work in Hay-time and Harvest in pain of Imprisonment in the Stocks two Days and one Night, which the Constable shall inflict upon them in pain of 40 s.

S. 23. It shall be lawful for Labourers (other then such as are retained in Service according to this Statute) to go to other Shires to work in Hay-time and Harvest, so that they bring with them a Testimonial under the Hand of one Justice of Peace, or Chief Officer, testifying that they have not sufficient Work in the Place where they lived the Winter before; for which Testimonial they shall only pay a Penny.

(O) Actions by the Master on Account of the Servant.

See (S) pl. 1.
—Actions
(B. c)—
Trespas.

1. IF a Man retains another's Servant not knowing that he was in the other's Service, he shall not be punished for so doing, if he do not retain after Notice of his first Service. F. N. B. [168] (C).

Note, If it be in the * same County, he must take Notice of the

first Retainer at his Peril; But he is not punishable if he be found Vagrant in another County. 17 E. 4. 7. 18 E. 4. 5. except he procure his Departure; and if so, he is punishable by the Statute; but if one retains a Servant, who has left his Master within the Term, or if one procures a Servant to depart within his Term, and after retains him, so that he has Notice, yet he is not punishable at Common Law, de Serviente abducto. 11 H. 4. 24. adjudged; sed Quare, and 9 E. 4. 32. seems contra. And if one takes my Servant out of my Service, against my Will, tho' it be with the Servants good Will, yet a general Writ of Trespas lies. F. N. B. 390 (C) In the Notes there (a) cites the above Cases.

* It was moved by Finch, If I retain the Servant of another Man in the same County where I and his Master inhabit, this is not justifiable, tho' in verity I had not Notice of that, and this according to the exprefs Book of the 19 Ed. 3. 47. Hobert said the Book may not be Law, for it is a hard Matter to make me take Notice of every Servant which is retained in the same County, and yet perchance if this Retainer be upon the Statute of Labourers at the Sessions this is notorious, and I ought to take Notice of that at my Peril, but it is otherwise of a private Retainer; For tho' it is within the same County, yet being a private Matter of Fact, the Law will not compel me to take Notice of that at my Peril, otherwise if this be Matter of Record, 2 H. 4. 64. and Hobert and Winch seemed to agree. Winch 51. Mich. 20 Jac. C. B. Anon. cites the above Cases.

2. If a Man takes an Infant or other out of another's Service, he shall be punish'd, altho' the Infant or other was not retained. F. N. B. [168]. (D)—And altho' the Infant was but 10 Years old, at which Age an Action lies not against the Infant upon the Statute. Ibid. in the Notes there (b).

3. If a Servant, who was never lawfully retained (as where he was an Infant under 10 Years old) departs, there an Action does not lie against him who shall afterwards retain him. Contra, if he be taken with Force &c. tho' he found the Infant Vagrant and retained him. F. N. B. [168] in the Notes there (c) cites it as a good Diversity taken by Finchden. 38 E. 3. 5. and says, see 12 H. 8. 10. &c.

O o o o

4. A.

Cro. J. 223. Trin. 7 Jac. S. C. by Name of Tracy v. Udal; but that the Action was brought by the Master, and held well enough, per Cur. For the Deccit and Abuse is to the Master, and the Loss only to him.

4. *A. forged a Letter in the Name of B. the Master of C. fallly for 100l. to be delivered to A. which Sum of his Matter's C. had in his Custody, and A. seals this Letter as with the Seal of the said Master; C. having received the said Letter by A. caused it to be read; upon which C. delivered the said 100l. to A. (whereas in Truth B. never wrote such a Letter, but A. forged it). C. the Servant brought an Action upon this Matter. It was adjudged for him, and affirmed in Error, altho' in the Name of the Servant. Jenk. 315. pl. 1. cites 7 Jac. Tracy's Case.*

Either the Master or the Servant may have Action; per Jones and Doderidge J. Lat. 127. Trin. 1 Car. 1. in Case of Drope v. Thaire.

5. In Action brought by the Master upon his *Servant's* being *robbed of his Money in an Inn* it was adjudg'd well brought by the Master, and affirm'd in the Exchequer Chamber. Cro. J. 224. Trin. 7 Jac. B. R. *Biddle v. Morris.*

6. If a Man's *Servants are so threatned* as to their Lives and Limbs, and with Loss of their Goods by Law-Suits by another Person that they *leave his Service*, and he can get no other to live with him, because of such Menaces, so that his Business cannot be carried on, an Action lies. 2 Roll. R. 162. Pasch. 13 Jac. B. R. *Garrot v. Taylor.*

Le. 240. S. P. But no Judgment. Adams v. Bafield.— Tho' he was not hired according to the Stat. 5 Eliz. Clayt. 116. Eastburn's Case.—But the Master must *set forth his Contract* with the Servant. Arg. 8 Mod. 116. Hill. 9 Geo.

7. Case lies for the Master against one that *retains his Servant departed without Licence* within the Time agreed for, and this without Inticement, he having Notice that he was the hired Servant of another. 2 Lev. 63. Trin. 24 Car. 2. B. R. *Fawcett v. Beares and Ux.*

Bridg. 48. S. P. Arg. 8. Action lies not for the Master, unless he has *lost the Service of his Servant.* 2 Lutw. 1497. Hill. 12 W. 3. C. B. *Randle v. Dean.*

(O. 2) Actions by Master for Work done, and Things acquired by Servant.

The Count was *Capiendo pro Salario suo pro quolibet Die 2 s. &c.* It was objected, that if it were the Retainer of the Servant by the Command and Appointment of the Master, he ought to have shewn that he retain'd the Master, and not the Servant; For then he ought to have counted accordingly, that he retained the Master, who by himself or Servant should work &c. And of that Opinion was all the Court, and (absente Lea) Judgment was reversed. Cro. J. 653. S. C. by the Name of *Trefwell v. Middleton.*

1. **I**N Debt the Plaintiff counted, *That B. retained his Servant to make Cases and Chairs paying 2 s. a Day, and that his Servant had made Cases &c. for five Days, and so Action accrued for 10 s.* Defendant pleaded *Non debet*; and Judgment was given for the Plaintiff. It was assigned for Error, that, as this Case is, Debt lay not for the Master, because it may be, that he *never consented to this Retainer, and the Servant never intended to contract for his Master*, and cited F. N. B. 513. And for this and another Exception, Judgment was reversed. 2 Roll. R. 269. Hill. 20 Jac. B. R. *Trufwell v. Middleton.*

As if a Bailiff contracts for Goods to stock his Master's Land, the Count should be upon the Special Matter with an *Averment, that the Master agreed to it, and that they came to the Use of the Master*; so where it is to the Master's Advantage, as where another charges himself

2. The Contract of the Servant may enure to the Advantage or Disadvantage of the Master; but in both Cases, the *Master ought to agree, and this ought to be pleaded specially*; per Doderidge and Haughton J. 2 Roll. R. 270. Hill. 20 Jac. B. R. in Case of *Trufwell v. Middleton.*

self to the Servant for the Use of the Master, the Count ought to be special; per Doderidge and Haughton J. 2 Roll. R. 270. in Case of Trufwell v. Middleton.

3. If the Master of one Ship takes a Servant that belongs to the Master of another Ship; whatever Wages he receives from the King upon his Account shall be to the Use of his first Master, being acquired by the Labour and Industry of the Servant. Cumb. 450. Trin. 9 W. 3. B. R. Curtis v. Bridges.

4. Trover lies for the Master for a Ticket or other Writing intitling his Apprentice to Money earned by him during the Apprenticeship; but where the Trover was against the Executor of the Apprentice for a Ticket given out after Death of Apprentice for Money earned by him during the Apprenticeship, the Action is not maintainable, because it never was in the Apprentice's Possession; but if Executor after receives the Money, Master may have Assumpsit for so much Money received to his Use; Per Holt Ch. J. 12 Mod. 415. Trin. 12 W. 3. Anon.

5. Quicquid acquiritur Servo acquiritur Domino. Co. Litt. 117. a.

(O. 3) Action by the Master for Goods sold by, or Promises made to the Servant.

1. AN Assumpsit to the Servant for the Master is good to the Master. And an Assumpsit by Appointment of the Master of the Servant shall bind the Master, and is his Assumpsit; per Doderidge J. Godb. 360. Seignior v. Wolmer.

2. If my Bailly sells Corn or Cattle, I shall have an Action of Debt for the Money; per Doderidge J. Godb. 361. Trin. 21 Jac. B. R. in Case of Seignior v. Wolmer.

(P) Actions. By Servant against others on Account of the Master's Goods.

1. IF a Servant lodges in an Inn having Goods of his Master with him, which are there stolen from him; either the Master or the Servant may have an Action; per Jones and Doderidge J. Lat. 127. Trin. 1 Car. in Case of Drope v. Thaire.

2. Servant may have Action for Goods taken from his Possession, and declare as for Bona sua, because of the Possession; per Holt Ch. J. Show. 154. 155. Pasch. 2 W. & M. in Case of Knight v. Cole.

As where the Servant is robbed of Goods part his Master's

and Part his own. Brownl. 155. Trin. 8 Jac. Needham v. Stoke Inhabitants.

(Q) Actions, by others against the Master or Servant.

See (B).

1. ONE sent his Servant to sell a counterfeit Bezoar's Stone for a Bezoar's Stone, and the Servant knew the Deceit; Action on the Case lies against the Servant. Arg. 2 Roll. R. 28. cites 3 Jac. B. R. Lopez's Case.

2. No

2. No Action will lie against a *Servant* for doing a Thing in Obedience to his Master's Command, where it is not an *apparent* Wrong; For if the Master's Command depends upon a Title, be it true or not, it is enough to excuse the Servant; And otherwise it would be a mischievous Thing, if the Servant upon all Occasions must be satisfied with his Master's Title and Right before he obey his Command, and it is very requisite that he should be satisfied if an Action should lie against him for what he doth in Obedience to his Master; per Scroggs J. 2 Mod. 244. Trin. 29 Car. 2. C. B. in Case of Mires v. Solebay.

3. A *Servant* was sued solely for a *tortious Act* done by the Command of his Master. 3 Lev. 352. Patch. 5 W. & M. C. B. Sands v. Child.

But if a Conversion be to the Use of the Master, the Action

4. If a *Carrier's Servant* loses Goods, the *Owner* has an Action against the Servant only in Case of *Conversion*. 11 Mod. 135. Trin. 6 Annæ B. R. Savage v. Walthew.

ought not to be brought against the Servant, but it ought to be brought against the Master; per Cur. 2 Mod. 245. Trin. 29 Car. 2. C. B. Anon.

(R) Pleadings in Actions on the Statute.

1. ACTION upon the Statute against A. of B. because he had *esloign'd T. N. his Servant and Apprentice* out of his Service at L. and the Defendant said that the Plaintiff pending this Writ had brought Writ of *Ravishment of Ward* directed to the Sheriff of L. supposing that he had ravished this same Servant out of his Ward, returnable *Crautino Animarum* last past, to which Writ he has appeared, Judgment if to this Writ he shall be received; and Sharde awarded this a good Plea, and gave him a Day to bring in the Record; quod nota bene; therefore it seems that this is the more high Writ; for in *Ravishment of Ward* he may recover the Body of the Infant, but in this Action only Damages. Br. Action sur le Statute, pl. 19. cites 27. Aff. 21.

S. C. per Cur. and the Reason seems to be because the Statute is General Br. Count. pl. 84. cites S. C. — Br. Laborers, pl. 45. cites S. C. and 1 H. 6. 1.

2. Action upon the Statute of Labourers; Paston counted and would have *rehearsed the Statute*; but per Preston he need not; by which he counted that he was his Servant retained, and departed &c. quod nota. Br. Action sur le Statute, pl. 12. cites 5 H. 5. 11.

3. *Trespass* upon the Statute of Labourers, against the Servant who departed &c. he said that he was his *Apprentice*, Judgment of the Writ &c. and per Cur. it is no Plea if he does not *traverse that he was not his Servant*. Br. Traverse per &c. pl. 10. cites 9 H. 6. 7. 8.

4. Where a Man Counts in Debt upon a *Retainer in Service* for 8 Years to serve in all Occupations taking 20 s. per Ann. and that he served for 8 Years and for 8 l. Arrear Action accrued; this is a good Count by the Statute, per Cur. and yet *Retainer* for 8 Years is not good by the Statute, but ought to be retained for one Year, or for a Year and so from Year to Year, but because he said that he retained him for 8 Years, taking 20 s. per Ann. it is intended that he was retained for one Year for 20 s. and continued in Service for 8 Years, and therefore the Count is good; per Cur. quod nota. Br. Count. pl. 56. cites 38 H. 6. 13.

S. P. and it is a good Plea in Bar that the Defendant found the Servant Vagrant in another Coun-

5. In an Action upon the Statute of Labourers, if the Plaintiff does not count in what Place he took his Servant the Writ shall abate; and it appears often that there is no other Judgment for Default in the Count, but that the Plaintiff *Nihil capiat per Breve*; for Default in the Count the Writ shall abate, and he shall not make a new Count. Br. Brief. pl. 488. cites 17 E. 4. 7.

ty out of all Service, and not any Merchant nor having Land, by which he retained him to serve him for a Year, absque hoc that he retained him in London, prout &c. and a good Plea, per Cur. for he is not bound to take Notice of a Thing in a foreign County. Contra, if both the Retainers are in one and the same County. Br. Action sur le Statute, pl. 33. cites 17 E. 4. 7.——S. P. Br. Traverse per &c. pl. 250. cites S. C.

(S) Pleadings in Actions by the Master against others in re- See Trespafs.
 spect of the Servant.

1. Trespafs upon the Statute of Labourers of taking of his Servant out of his Possession, the Defendant said that the Servant is an Infant under 10 Years of Age, and because the Plaintiff could not deny it, he took nothing by his Writ. Br. Laborers, pl. 24. cites 38 E. 3. 5.

2. Trespafs upon the Statute of Labourers, for that the Plaintiff offered the Defendant who was a Vagrant to have him in his Service, and he refused; the Defendant said that at the Time &c. he was retained with R. G. the Plaintiff said that R. G. is a Boy and has not Land sufficient to have a Servant; and the Issue was taken upon the Sufficiency generally, without mentioning more of the Land, the Reason seems to be inasmuch as several are sufficient to have Servants who have not any Land. Br. Laborers, pl. 25. cites 38 E. 3. 12.

3. Action upon the Statute of Labourers against A. the Servant, and R. who detained him, and A. was of the Age of 5 Years, and therefore per Finch, the Action does not lie against him; For his Covenant is void, by Reason of his tender Age, and therefore it does not lie against R. who accepted him; For he is Accessary; quære inde. Br. Laborers, pl. 6. cites 41 E. 3. 17.

4. If the Master avows one way and the Servant another, the Avowry of the Master shall be taken; per Coke Ch. J. 3 Buls. 111. cites 49 E. 3. 25.

5. If I have a Feme sole in Service, and a Man takes her to Wife, he may well do it, but it is not lawful for him to take her out of my Service. Br. Laborers, pl. 18 cites 2 H. 4. 13. per tot. Cur.

6. Trespafs of taking R. his Servant, and carrying him to L. the Defendant said that he had espoused the Mother of the Servant, and he found him Vagrant at Dale in the County of S. and the Servant came with him to his House, and was there by one Day &c. absque hoc that he is Guilty of carrying him to L. and per Brian this is no Plea, but Not Guilty; but Chock held the Plea good, because Affinity was between the Servant and the Defendant; and otherwise not; and the best Opinion of the Court was that it is a good Plea. Br. Laborers, pl. 33. cites 6 H. 4. 32.

And per Moyle if your Servant comes to labour with me you shall not have Action, Contra if I procure him to come, and so a Difference where he takes or procures the Servant, and where he comes of his own Head; quod nota. Ibid.

7. In Trespafs of taking his Servant it is a good Plea that the Defendant is a Schoolmaster, and the Father of the Servant brought him to the Defendant to instruct him &c. and he is not bound to take Notice that he was in Service. Br. Laborers, pl. 33. cites 6 H. 4. 32. per Fairfax.

And per Litt. in Trespafs of a Servant &c. it is a good Plea that he is a

common Surgeon, and the Servant had broke his Thigh, so that he could not go, and came to him to be cured. Ibid.——And per Moyle if your Servant comes to me, and prays me to take him into Service, and I take him, I am not bound to take Notice of the former Retainer Ibid.——And if a Servant comes to me and prays me for the Honour of God to harbour him, I may well do and justify it, for it is an Act of Charity. Ibid.

8. In Trespafs of taking his Servant; if the Defendant says that he was retained with him before that he was retained with the Plaintiff, there the Plaintiff ought to reply, that such a Day he was retained with him, before which Day he was not retained with the Defendant, and otherwise the Re-

plication is not good without exprelling the Day. Br. Replication, pl. 49. cites 3 H. 6. 28.

9. In Action upon the Statute of Labourers of taking his Apprentice, or in Trespafs of it, the Defendant may plead that the Covenant is void, in as much as he went to Husbandry till 12 Years, or that his Father or Mother cannot expend 20 s. Land of Franktenement, and this he shall conclude to the Action, and not in Bar. Br. Laborers, pl. 26. cites 8 H. 6. 28.

10. Trespafs upon the Statute of Labourers of taking a Servant retained; the Defendant said that the Servant made the Covenant by Durefs, and was within Age, and the Defendant has 20 l. Land, and the Servant is his Herr apparent; Per Babb. if your Son makes Covenant to serve me, this is good tho' you have 100 l. Land; and as to the Age, if he be of the Age of Discretion, and makes Covenant to serve in Husbandry, this shall bind him, and so the Durefs is only material; quod fuit Concessum. And per Martin, a Man may be lawfully imprisoned if he will not serve his Covenant. But per Babb. this shall be by the King's Officers, and not by the Party; and a Man may retain the Herr, who is in his Ward, but not imprison him. Quære. Br. Laborers, pl. 43. cites 9 H. 6. 10.

And if a Man be retained by one Year, and after is vagrant, and will not serve accordingly, there if another requires him to serve,

he ought to obey it, and yet shall be charged to the former Master; per Martin; Quære. Ibid.—And in this Action if he says that he is retained with J. N. by the Year absque hoc that he is out of any Service, it is doubted if the Plea be good; For he is not out of Service if he works by the Day. Quære. ibid.

——* Orig. (neft usual Journey.)

12. If an Infant of 7 or 8 Years old makes a Covenant to serve me, he may depart at his Pleasure; But if he serves me, and J. S. beats him, I shall have Action upon my Case for Loss of his Service. Br. Laborers, pl. 29. cites 21 H. 6. 9.

13. Trespafs by E. against W. for that he Vi & Armis took from him N. his Apprentice, and did not declare when the Retainer was, nor how many Years he should be Apprentice; and yet the Count was awarded good; for he is not to recover the Apprentice by this Action, but only Damages. Br. Trespafs, pl. 144. cites 21 H. 6. 31.

14. In Trespafs Quare N. Apprenticium suum cepit & abduxit, it is no Plea, that after the Apprenticeship and before the taking the Plaintiff discharged the Apprentice at D. in the County of N. For an Apprentice cannot be but by Writing; and therefore a Discharge by Parol is not good; by Judgment. Br. Barre, pl. 28. cites 21 H. 6. 31.

S. P. Br. Trespafs, pl. 144. cites 21 H. 6. 31.

But in Trespafs upon the Statute of Labourers Mention shall be made of a Retainer, and the Retainer is traversable. Nota. Ibid.

15. In Trespafs Quare Servientem suum cepit &c. if he declares that he was his Apprentice the Writ shall abate; For it should be Quare Apprenticium suum cepit &c. Br. Laborers, pl. 30. cites 21 H. 6. 33.

16. In Trespafs of taking his Servant out of his Possession, the Writ nor the Count do not make mention of any Retainer but Quod J. N. servientem suum in Servizio suo existentem cepit & abduxit; For he may be a Servant at Will. Br. Labores, pl. 31, cites 22 H. 6. 30.

17. Action upon the Statute of Labourers, where the Plaintiff retained J. in his Service, and he departed and came to the Defendant, who admitted him into Service; And by the Opinion of the Court the Plaintiff ought to allege Day and Place where the Admission was made. Quod nota. Br. Laborers, pl. 32. cites 22 H. 6. 58.

18. Trespafs of *taking and carrying away his Apprentice*, the Defendant *alleged* certainly how the Defendant *such a Year, Day, and Place before*, retained the Servant to be his Servant for 6 Years in the Art of a *Sawyer, taking Victuals, Drink, Vesture, and Education for his Labour, and after he departed and became the Apprentice of the Plaintiff, and the Defendant the Day of the Trespafs &c. came to him, and required him to go with him to serve him, and tendered his Hand to him, and he took him by the Hand and went with him, which is the same taking, Judgment &c. and the Plaintiff demurred in Law. *Quære Causam*; It seems because the Defendant did not give Notice to the Plaintiff before the taking. Br. Labourers, pl. 4. cites 28 H. 6. 11. and 49 E. 3.

*Orig. (See-
verie) and
in the other
Book (Scy-
verie.)

19. In Case for Deceit the Count was, that B. W. was the Plaintiff's Servant in Comit. Derby. and had 65 l. of the Plaintiff's in his Custody; That the Defendant intending to deceive the Plaintiff of the said 65 l. *Quandam Literam in the Plaintiff's Name procured to be written, and directed it to the Plaintiff's said Servant, and counterfeited the Name of the Plaintiff thereto, and sealed it quali with the said Plaintiff's Seal, and caused it to be delivered to the said B. W. affirming it to be the Plaintiff's Letter, and that he was sent therewith unto him by the Plaintiff*; Whereupon he caused the same to be read, and upon reading thereof understanding Quod in eadem litera continebatur, that the Plaintiff had appointed the said B. W. to pay and deliver to the Defendant the said 65 l. to the Use of one T. B. to whom it was supposed by the said Letter that he was indebted, and affirmed, That he was Servant to the said T. B. and that he was to receive the said 65 l. for his Master, By reason whereof the said B. W. giving Credit unto him, *payed and delivered unto him the Money*; ubi revera the Letter was counterfeited, and he never sent the Defendant, nor was indebted in any such Sum &c. The Defendant pleads Not Guilty, and found against him. It was moved in Arrest of Judgment; 1. That this Supplication *Quandam Literam scribi fecit*, where it ought to be *Literas* (for it is not possible that one Letter might comprehend it) was not good. 2dly, That this Action lies for the Servant and not for the Master. 3dly, That it was *not shewn what was contained in the Letter*; For it is *only*, that the said Servant intelligebat *what was therein written*, and that might be his Misconstruction. But all the Court after several Motions held it to be well enough; For the Deceit and Abuse is to the Master, and the Loss only to him; Wherefore the Action well lies for him; Also although it is not precisely set down what was in the Letter, but that intelligebat such Matter was contained therein, which is uncertain, Yet because the Deceit is alleged to be in the Delivery of the counterfeited Letter, and affirming that he was Servant of T. B. and sent by the Plaintiff to receive such a Sum, as due by him to the said T. B. (all which was false, and all which being Deceit) upon the whole Matter the Action well lies, and was adjudged for the Plaintiff. And afterwards a Writ of Error being thereof brought, and all these Matters assigned for Error, the Judgment notwithstanding was affirmed. Cro. J. 223. Trin. 7 Jac. B. R. Tracy v. Veal.

20. Trespafs by the Master for an *Assault on his Servant by giving him a Box on the Year*; After a Verdict for the Plaintiff it was moved in Arrest of Judgment, that the Declaration was ill; for the Plaintiff had *not alleged per quod Servitium Amisit*, and for this Cause the Judgment was stayed. Nels. Abr. 1169. Master and Servant (C) pl. 6. cites 1 Bull. 163. Trin. 9 Jac. [But it is not there.]

21. In Trespafs *Quare Vi & Armis* one such being his Servant *Cepit & Abduxit* at D. in Essex; the Defendant *pleaded* that he was a *Vagrant in the same County*, and he *not having Notice that he was Servant to another retained him* and then Finch moved that the Plaintiff had charged the Defendant with his Servant by *Cepit & Abduxit*, and the Defendant excused himself, and never traversed *Cepit & Abduxit* and cited 11 H. 4. per Hut-

ton and Hobert, the receiving and the entertaining of a Servant may not be said to be Vi & Armis. Winch: 5t. Mich. 20 Jac. C. B. Anon.

(T) Pleadings in Actions by others against Master and Servant, or one of them.

1. **I**F my Bailiff buys Sheep &c. to my Use, I shall be charged, and shall not shew that the Bailiff had Warrant, or that they came to my Use. Br. Contract &c. pl. 41. cites 2 R. 2.

Contra if they buy it to my Use at the Time of the Bargain;

2. But if my Wife or Servant buys Stuff, which comes to my Use I shall not be charged; per Newton. Br. Contract &c. pl. 41. cites 20 H. 6. 22.

per Newton. Br. Contract &c. pl. 41. cites 20 H. 6. 22.

3. In Action upon the Statute of Labourers against the Master and Servant the Plaintiff may count one and the same Count against both; per Cur. and shall not be drove to two Counts. Br. Laborers, pl. 2. cites 9 H. 6. 7.

4. If the Servant does not bind himself to Payment by express Promise, he is not any ways chargeable if it comes to the Use of the Master; and the Servant ought to plead that it came to his Master's Use. D. 230. b. Marg. pl. 56. cites Mich. 6 Jac. B. R. Goodbaylie's Case.

* The proper Plea in such Case is Not Guilty; per Powel J. quod non fuit Negatum.

5. In Trespass for Battery of his Servants * per quod Servitium amisit; the Defendant said, that he only thrust away the Servants &c. Coke said if this Plea be true, he might have pleaded Not Guilty well enough; For this cannot be loss of Service. 1 Roll. R. 393, 394. Trin. 14 Jac. B. R. Norris v. Baker.

2 Lutw. 1497. Hill. 12 W. 3. C. B. in Case of Randal v. Dean.

(U) Pleadings in Actions between the Master and Servant.

1. **A** Man declared of Retainer in Husbandry for 8 Years, and no Exception was taken to the Retainer, tho' it was for 8 Years; quod nota. Br. Laborers, pl. 36. cites 38 E. 3. 22.

* Orig. (Pisener) but in the Year Book it is (Poison)

2. Trespass upon the Statute of Labourers, for that the Defendant was in his Service, and departed within the Term; the Defendant said, that he made Covenant with him to be his Apprentice in the Art of a * Fishmonger, and he would not teach him the Mystery, but beat him, by which he could not stay with him; Judgment &c. And it was agreed that this Action does not lie of an Apprentice; by which the Plaintiff said, that [he was] his Servant and not his Apprentice, pritt; and it was held double, the Apprentice and the Battery, but he replied upon the Apprentice; and so see that Battery is Cause of Departure. Br. Laborers, pl. 35. cites 39 E. 3. 22.

Where the Plaintiff supposed the Defendant to be his Servant, and the Defendant said that he was his Apprentice, Judgment of

3. Writ upon the Statute of Labourers, because the Plaintiff had retained the Defendant in Office of Salary for 6 Years, and the other said that he was his Apprentice and not his Servant retained, Pritt; and a good Answer. Kirton said, he counted of a Retainer for 6 Years where the Statute does not give Action but upon Retainer for one Year; and Fencor demanded Judgment, because he counted that he departed the first Year &c. Br. Laborers, pl. 8. cites 45 E. 3. 13.

the Writ, because he might have Writ of Covenant; this is no Plea per Cur without traverse that he was his Servant. Br. Laborers, pl. 2. cites 9 H. 6. 7.

4. In Action upon the Statute of Labourers, the Defendant said that he never was retained in his Service, without answering to the Covenant to serve; quod nota; For it seems that all is one. Br. Laborers, pl. 9. cites 46 E. 3. 4. In Trespass upon the Statute of Labourers in Retainer in his Service and departing before the end of the Term it is no Plea that he was never in his Service, but shall Answer to the retaining, by award; For by the Retainer he is in his Service immediately by the Law, tho' he does not come into his Service in Fact. Br. Laborers, pl. 11. cites 47 E. 3. 14 & 41 E. 3. 20.

5. Writ upon the Statute of Labourers was against a Servant for Departure, who said that the Plaintiff retained him to serve for 6 Weeks and after for a Year if it pleased him, and if not then to depart, by which he departed as lawfully he might. Hank said, if I make a Covenant with one to serve me, he shall come into my Service for one whole Year; but per Hill, yet he has well pleaded; For Condition is no Plea upon a Request to serve; but upon the Retainer and Departure, it is a good Plea that the Retainer was upon Condition; quod nota; by which the Plaintiff took Averment that he covenanted to serve him for one whole Year without Condition, Prit &c. Br. Laborers, pl. 23. cites 11 H. 4. 42.

6. It was agreed Arguendo in Trespass upon the Case of the not making of a Mill, that if a Man retains a Labourer to serve him according to the Form of the Statute, the Labourer shall have Action for his Salary, tho' no Salary be mentioned upon the Retainer. Br. Laborers, pl. 1. cites 3 H. 6. 23. But Contra in Retainer to make a Mill &c. For the one is certain by the Statute and the other not; note a Difference. Ibid.

7. Action upon the Statute of Labourers, that he retained the Defendant in the Office of Labourer. The Defendant said that he retained him to collect his Rent, absque hoc, that he retained him in Office of Labourer, and a good Issue per Cur. For the Statute is only of those who may be required to serve as Labourers, and this a Collector of Rent is not; For it seems that it is not reasonable that the Man shall be compelled to be accountable. Br. Laborers, pl. 28. cites 19 H. 6. 53.

8. Where a Man counts that he retained his Servant to serve him in his House, this is sufficient tho' he does not say in what Office, as Servant of Husbandry, Cook, Butler, Groom &c. per Cur. Br. Laborers, pl. 29. cites 21 H. 6. 9.

9. If an Infant be retained to serve, and Action upon the Statute of Labourers is brought against him, it is a good Plea that he is an Infant; per Paston; but per Markham, this is where he is under 14 Years; but per Paston all is one; Brooke says, it seems that the Law is with Markham; For the Statute is, Potens in Corpore. Br. Laborers, pl. 30. cites 21 H. 6. 33.

10. Note that he who is not able in Body, nor 5 Years old, and he who has Lands and Tenements, and Gentleman, Cook, Butler, Chaplain, Yeoman &c. who shall not be compelled by the Statute to be retained in Husbandry, yet if they are retained in Husbandry the Master in Debt for his Salary shall not wage his Law; because they are retained in Husbandry; Contra if they are retained in their Degrees; and in Debt for such Salary it is a good Plea for the Defendant that he did not retain the Plaintiff in Husbandry, and it is not Negativa pregnans; For he shall not be compelled to say Quod non retinuit Generally; For it may be that he retained him in other Service, and not in Husbandry; but Non retinuit modo & forma, is a good Plea; For this shall be referred to the Declaration by these Words, Modo & forma. Br. Laborers, pl. 46. cites 38 H. 6. 22.

11. If a Servant departs the Master may retake him and retain him in spite of his Teeth, but cannot imprison him. Br. Laborers, pl. 51. cites F. N. B. 168.

12. In Account by the Master against the Servant for Money received, the Servant charges, that Part of the Money was stole by Persons unknown out of the Master's Warhouse; per Cur. shewing he was robbed is giving an Account. Vent. 121. Pasch. 23 Car. 2. B. R. Vere v. Smith. Cumb. 311. S. P. obiter.

(U. 2) Pleadings. Between Master and Artificers &c.

1. **A**ction upon the Statute of Labourers; the *Defendant* said, that he has 15 Acres of Land, for which he ought to do 20 Days Work by the Year, to the Bishop of D. at his Manor of W. and had the Day that the Plaintiff required him to serve, Judgment &c. And the *Plaintiff* said, that he had only six Acres, for which he shall do only six Days Work, which may be done in one Week, Judgment &c. Upon which the Defendant demurr'd; And it was awarded that the Plaintiff take nothing by his Writ; the Reason seems to be inasmuch as if he shall be retained with another, it is not lawful for him to depart from him to do the six Days Work, nor any other Work, and so [has] sufficient Cause to be occupied, and therefore not liable by the Statute; quod Nota. Br. Laborers, pl. 5. cites 40 E. 3. 39.

* Orig. (Broderer).
—By which he said, that he was retained with him ‡ by the Day at a certain Rate, absque hoc, that he was retained a Year, Prift; and the others econtra. Br. Laborers, pl. 15. cites 47 E. 3. 22. —‡ Orig. (per Journeys, per Taxe) but the Year Book is (per Journe a la foith & a la foith per Tax a lour Agreement).

2. Action upon the Statute of Labourers against one who was retain'd in the Office of an * Embroiderer for half a Year, and departed within the Term. Hamm. demanded Judgment of the Writ, for the Statute regards only Servants and Laborers, and not Artificers; et non Allocatur. Br. Laborers, pl. 15. cites 47 E. 3. 22.

3. Action upon the Statute of Labourers, because he departed out of his Service; the *Defendant* said, he was retained with him in the Office of Carpenter to make a House, and he came to him to do his Service, and he discharged him, Judgment; and because he made special Count, the *General Writ* was good, notwithstanding that Carpenter is an Artificer, and not a Labourer; quod nota, by which the Plaintiff said, that he did not discharge him, Prift; and the others econtra. Br. Laborers, pl. 22. cites 11 H. 4. 32.

(W) Pleadings by the Servant against others.

But it was said, that the Servant cannot plead the Command of his Master in
1. **S**ervant shall not be ousted of the Advantage which the Law gives him by Pleading *his Master's Command*. Per Cur. 2 Mod. 68. Hill. 27 & 28 Car. 2. C. B. Wine v. Rider & al. Bar of a Trespass. 2 Mod. 244. Trin. 29 Car. 2. in Case of Mires v. Solebay.

(X) Trial, where.

1. **A**ction was brought upon the Statute of Labourers in the County where the Covenant was made, whereas the Departure was in another County, and yet well; For the Covenant is issuable as well as the Departure, and the Action lies of Departure if he was retained to be Servant, tho' he was never actually in the Service of the Plaintiff; quod nota. Br. Laborers, pl. 7. cites 41 E. 3. 20.

[For more of Master and Servant in General, See *Apprentice*, and other proper Titles.]

(A) * Master

(A) * Master in Chancery.

1. **M**asters of the Chancery are exempt from the Procurator of the Clergy in the Time of Parliament. Br. Privilege, p. 56. cites F. N. B.

Realm) for the making all Manner of Writs which issued thence, among whom the Clerici de Prima Forma (the Masters) were a principal Part. P. R. C. 237.

In ancient Days they were sometimes created by the King's Letters Patents; but by *Baggot's Case*. 9 E. 4. 5. [b. pl. 20. per Pigot], it should seem this was at that Time wore out of Use, and they were made by the Election of the Court, and swearing them. P. R. C. 236.

Besides the Master of the Rolls, the Chief, there are Eleven other Masters of Chancery: These Eleven are from Time to Time, upon Death or Surrender, appointed by the respective Ld Chancellors for the Time being. P. R. C. 236.

It is said, the Lord Keeper Egerton ordered that there should be a Memorandum of their Admittance made on the close Rolls of the petty Bag. P. R. C. 236.

Their Office seems originally to have been partly to fit as Assistants with the Chancellor; and still two or three of them by Turns sit with him at Westminster in Term-Time, and two at a Time when he sits out of Term; and two of them fit with his Honour the Master, at the Rolls. P. R. C. 236.

The other Part of their Office was to form Writs as Occasion required; as, where in some Case the Writ was already given, which did not exactly suit another particular Case falling under the same Reason with the former, they used to frame a new Writ according to the Statute of Westminster, 2: ca. 24. which enacts, Quotiescung; evenerit in Cancellaria, quod in uno Casu reperitur Breve, & in Confimili Casu cadente sub eodem Jure simili indigente Remedio non reperitur, concordant Clerici de Cancellaria in Brevi faciendo &c. P. R. C. 236, 237.

2. A Judge, sitting in the Absence of Ld North, being about to make a Decree, the Masters present stood up and oppos'd, they being of Opinion against the Judge; upon which the Cause was continu'd in the Paper. Vern. 265. Mich. 1684. Merret v. Eastwick.

3. Where Money is to be put out on Security to be allow'd by a Master, and the Security proves defective, he is not chargeable unless there had been either Bribery or Corruption. 2 Vern. 90. Mich. 1688. Comer v. Hollingshed & al.

Person appointed by the Court of Chancery to do all Things relating to the Delivery of the Suitors Money &c into the Bank, and taking them out, and keeping Accounts with the Bank, as by the Orders in the said Act mentioned are directed to be done by the Masters and Usher; which Officer shall be called the Accountant General of the Court of Chancery, and an Account shall be kept in his Name with the Bank of England on the Behalf of the Suitors in such Manner as is directed by the said Orders with Respect to the Masters &c. and by S. 3. The Accountant General shall stand in the Place of the Masters and Usher; and by S. 4. All Mortgages, Tallies, Orders, Stocks, Annuities, and other transferrable Securities, shall, if appointed to be taken in the Name of any Officer of the Court, be taken in the Name of the Accountant General.

4. At this Day a Recognizance acknowledged before a Master, and certified under his Hand, is of that Authority, that it is a Matter of Record; and as effectual as if it had been acknowledged in open Court. Also all Deeds or Indentures, which are to be acknowledged in Chancery, must be acknowledged before some one of them. P. R. C. 238.

5. Answers and Affidavits are sworn before one of them, and by him sign'd. P. R. C. 238.

6. By an Act of Parliament 18 Car. 2. not printed, there is one publick Office to be kept by them, and no more, as near to the Rolls as conveniently may be; in which the Masters, some or one of them, shall constantly attend for the administering Oaths, Caption of Deeds, and Recognizances, and the Dispatch of all Matters incident to their Office, (References upon Accounts and insufficient Answers only excepted) from seven in the

* Polidore, Virgil says, That William the Conqueror instituted a College or Society of Clerks in this Court (then the Officina Justitiae of the

But now by the 12 Geo. 1. cap. 32. S. 2. it is enacted, That there shall be one

the Morning till 12 at Noon, and from two in the Afternoon till six at Night. P. R. C. 239.

7. And they may demand and take the Fees therein mentioned. P. R. C. 239.

8. And it is also thereby enacted, That if the said Masters, or any of them, shall directly or indirectly by any Act, thift, colour, or device, have, take, or receive any Money, Fee, or Reward, Covenant, Obligation, Promise, or any other Thing, for his Report or Certificate in writing or otherwise, or for any other Matters in the Act expressed, other than the said respective Fee or Fees in the Act mentioned; that then every such Master (being thereof legally convicted) shall thenceforth be disabled from the Execution of his Office, and shall forfeit to the Party grieved so much Money as shall be taken contrary to the Act, and shall also forfeit 100*l.* one Moiety to the King, the other Moiety to the Party grieved, who shall sue for the same in any of the King's Courts by Action of Debt, Bill, Plaint, Information, or otherwise &c. P. R. C. 241.

9. The Business in Equity encreasing, and the Master's Business in forming Writs decreasing or refused, the Ld. Chancellors have of late Time referred Matters of Account, and such like, to their Examinations, which are ordinarily decreed according to their Certificate or Report. P. R. C. 238.

10. Exceptions likewise taken to Answers and Irregularities in Practice, Contempts and such like are referred to them. P. R. C. 239.

11. Masters in Chancery have the same Privilege of laying their Actions in Middlesex as Barristers have. Gibb. 40. Burroughs v. . . .

His Lordship said, that Directions of this Sort have been made in *Mathematical and Algebraical Inquiries*. Ibid. 370.

12. A Question being, whether one Book was an Abridgment of another, or only evaluely done and colourably only, the Ld. Chancellor said, he did not see what other Method he could take to determine it, than by directing an Inquiry before the Master, and in order that he may better determine it, his Lordship thought he ought to direct, that the Master be attended by two Persons skilled in the Profession of the Law to assist him; But his Lordship chose rather, that 2 Persons should be agreed upon by consent of both Parties, than to be appointed by the Court. Which being afterwards done, his Lordship said, that the best Way was to leave all Matters in Difference to the Arbitration of those 2 Counsel, and if they should not be able to make an Award, then they to have Liberty to choose an Umpire. And the same was agreed to. Barn. Chan. Rep. 368, 370. Hill. 1740. Gyles v. Wilcox.

13. A Client gave a Bond to his Attorney, reciting, that whereas B. (the Attorney) had been serviceable to J. C. (the Client) in several Causes, and still continues to be so, and the said J. C. being thoroughly sensible of the same Services and Favours, if the the said J. C. shall leave to the said B. a Legacy of 1000*l.* then the Obligation to be void, otherwise to stand in full Force. J. C. died, but left no Legacy to B. whereupon B. brought an Action of Debt against the Executor of J. C. and had Judgment. The Executor brought a Bill for Relief as unduly gain'd. Ld. C. Hardwick, who had before decreed for the Bond, now upon a Rehearing, directed that the Master inquire, what those Services were, which B. did for J. C. and what he ought to be allowed for them; And that he likewise inquire, whether B. ought to have any Allowance made him for any Extraordinary Services done by him. Barn. Chan. Rep. 475, 483. Pasch. 1741. Walmley v. Booth.

For more of Master in Chancery. See Reports, Answers, and other proper Titles.

Master of a Ship.

(A) His Power and Duty.

1. **M**ASTER of a Ship is the Chief Mariner. Sti. 152. Roll. Mich. 24 Car. in Case of Wood v. Clement.

2. The whole Power and Charge of the Ship being committed to the Master requires a Staid Man and of Experience, whereunto the Owners are to take great Heed; for his Power is described, partly by the Owner or Setter forth of the Ship, and partly by the Common Law of the Sea; by Means and Virtue whereof, the Master *may, if need be, borrow Money in a strange Country with the Advice of his Company † upon some of the Tackle or Furniture of the Ship, or else sell some of the Merchants Goods, provided that the Merchant be repaid again at the ‡ highest Price that the like Goods are sold for at the Market: which being done, the Freight of those Goods so sold and repaid shall also be repaid by the Master to the Owner of the Ship, as well as the Freight of the Rest of the Merchants Goods, except the Ship ¶ perish in the Voyage, and in this Case, only the Price that the Goods were bought for shall be rendered, and for no other Cause may the Master take up Money, or sell any of the Merchants Goods, altho' it were in danger of Ship-wreck. Mal. Lex Merc. 102. cap. 22.

3. He is, before his Departure, to deliver the Names of all the Persons which he is to transport, and of his Mariners, which with us is but lately established: And at his Return he is to deliver a true Inventory of the Goods of any Persons, which shall happen to depart this Life in that Voyage, not only because his Kindred and Friends may have Intelligence of it, but also because their Goods may be safe and forth coming for one whole Year: Of which Goods in the mean Time, the Bedding and Appurtenances may be taken by the Master and his Mate to their Uses, as also such Clothing and other Things then upon his Body may be delivered to the Boats-man and the Company, who do for that dispose of the dead Body, putting the same into the Sea. Mal. Lex Merc. 103. cap. 22.

4. When a Ship laden to sail from Bourdeaux to Caen, or some other Place, is overtaken at Sea by a Storm, so that she cannot escape without casting some of her Lading and Merchandize over-board for lightening the said Ship, and preserving the rest of the Lading, and the Vessel itself; Then the Master ought to say, Sirs, It is convenient to cast over-board some of the Ships Lading. And, if there be no Merchant but what gives his Consent, or approves thereof by his Silence, then the Master shall use his own Discretion, and cast over-board some Part of the Lading; and, if the Merchants do not like of it, but that they gainsay or contradict it, the Master nevertheless ought not to forbear casting out so much Goods as he shall see convenient, he and the third Part of his Mariners taking their Oath upon the Bible, that keeping their right Course, they were fain to cast part of the Lading over-board to save their Lives, and the Ship, and the Rest of the Lading. And the Wines, or other Goods that were cast over-board, ought to be prized and valued according to the just Value of the Goods saved. And when those shall be sold, the Price thereof shall be divided, Liver for Liver among the Merchants. And the Master ought to make the Division, and to compute the Damage of the Vessel, or the Freight at his own Choice, and to repair the Damage sustained; the Mariners also ought to have a Tun free, and another divided by Lot, according as it shall happen, if it appear, that he to whose Lot it fell, did

* S. P. And he may freight out the Ship, take in Goods and Passengers, mend and furnish the Ship. 2 Molloy, cap. 2. S. 14.—
† S. P. with Advice of his Mariners. Ibid.—‡ S. P. Ibid.—¶ S. P. Ibid.

As to Casting Goods, over-board.

He may in Case of Danger and Extremity, cast the Goods into the Sea. Jenk. 165. pl. 16.—
S. P. admitted by Holt Ch. J. 6 Mod. 12.
* King Richard 1. Eldest Son of K. H 2. instituted a Body of Naval Laws, in his Return from

the Holy Land, in the Island of Oleron, which are yet extant with some Additions ; De quibus, Vide Mr. Selden's Mare Clausum, Lib. 2. cap. 24. and I suppose they are the same, which are attributed to him by Mat. Paris, Anno 1196. and he constituted Justices to put them in Execution. Hale's Hist. Law, 145, 146.

the Part of a good and able Seaman. Otherwise he shall be barred of his Privilege. And the Merchants in this Case may lawfully put the Master to his Oath. Mieg's Laws of Oleron. 5, 6. S. 8.

Cocquets.

5. He must not carry any counterfeit Cocquets, or other fictitious and colourable Ship Papers, to involve the Goods of the Innocent with the Nocent. 2 Molloy 233. cap. 2.

Colours.

6. He may not use any unlawful Colours, Ensigns, Pendants, Jacks or Flags, whereby his Ship or Lading may incur a Seizure, or the Cargo receive any Detriment or Damage. 2 Molloy 232. cap. 2.

Customs.

7. Nor must he refuse the Payment of the just and ordinary Duties, and Port-charges, Customs and Imports to the Hazard of any Part of his Lading ; yet if he offers that which is just, and pertains to pay, then he is excused. 2 Molloy 233. cap. 2.

Cutting down Masts and Rigging.

8. If it happen that the Master by Reason of foul Weather thinks fit to cut down his Mast, he ought first to call the Merchants, if there be any aboard the Ship, and to say unto them, *Sirs, It is requisite to cut down the Mast, to preserve the Ship and Lading*, it being in this Case, no more than becomes my Duty. Nay, it oftentimes happens, that they cut Cables and Rigging, leaving both the Cables and Anchors behind them, to save the Ship and her Lading ; All which Things are reckoned Liver by Liver, as Goods that were cast over-board. And, when it pleases God, that the Vessel arrives safely at her Port intended, the Merchants shall pay to the Master without any delay their Shares or Proportions, or sell the Goods, or pledge them, or procure Money to satisfy the same, before the said Goods be taken out of the Ship. And if he has allowed of them, and there happen Controversies and Differences touching the Premises, so that he observes a Collusion therein, the Master must not come by the Loss, but ought to have his Freight. Mieg's Laws of Oleron 6. S. 9.

Disposing of the Ship or Goods.

9. When a Man is made Master of a Ship, or other Vessel, and the said Ship or Vessel, belonging to several Part-owners, departs from her own Port, and comes to Bourdeaux, Rouen, or any other Place, and is there freighted for Scotland, or some other Foreign Country ; the Master in such Case may not sell the said Vessel, unless he hath a Procuration, or a special Order for that Purpose from the Owners. But in Case he want Monies for the necessary Provisions of the said Vessel, he may for that End, with the Advice of his Mariners, pawn or pledge part of the Tackling of the said Ship or Vessel. Mieg's Laws of Oleron. 4. S. 1.

2 Molloy. cap. 2. S. 16. — And where the Ship is well engaged, she is for ever obliged, and the Owners are concluded thereby till Redemption. But in regard Masters might not be tempted to engage

10. When a Merchant freights a Ship at his own Charge, loads her, and sends her to Sea, and she comes into an Harbour, where by Reason of contrary Winds she is fain to stay till her Monies be all spent, the Master in that Case ought speedily to send to his own Country for Money. But he ought not to lose his Armogan, that is a good Opportunity ; For, if so, he is accountable to the Merchants for all Damages that shall happen thereby. But the Master may take Part of the Wines, or other Merchant Goods, and dispose thereof for the present Occasions of the Ship. And when the said Ship shall be arrived at her right Port of Discharge, the Wines that the Master shall have disposed of, shall be valued and appraised at the same Rate as the other Wines shall be commonly sold for, neither more nor less : And the Master shall have the Freight of such Wines as he has disposed of as aforesaid. Meigs's Laws of Oleron 8. S. 22.

the Owners, or in fetter them with such Sort of Obligations, but where there is very apparent Cause and Necessity, they seldom suffer any to go Skipper or Master, but he that hath a Share or Part in her ; so that if Monies or Provisions be taken up, he must bear his equal Share and Proportion with the Rest. Nor can the Master on every Case of Necessity impawn the Vessel or Furniture ; For if she be freighted, and he and the Owners are to join in the laying in of Provisions for the Voyage, and perhaps he

wants Money, (a great Sign of Necessity) yet can he not impawn the Vessel or Furniture any other or further, than for his own Part or Share in her, the which he may transfer or grant, as a Man may do an 8th or 5th Part in Lands or Houses: But such Obligation of the Vessel must be in Foreign Parts or Places, where the Calamity or Necessity is universal on the Vessel, that will oblige all the Owners. 2 Molloy, cap. 2. S. 15.

11. However, Orders and Instructions are as carefully to be look'd upon as the Magnet. 2 Molloy, cap. 2. S. 16.

12. When the Master shall arrive at Gravesend, he shall not be above 3 Days coming from thence to the Place of Discharge; nor is he to touch at any Key or Wharf till he comes to Chester's Key, unless hindered by contrary Winds, or Draught of Water, or other just Impediment to be allowed by the Officers; And likewise he or his Purser are there to make Oath of the Burden, Contents, and Lading of his Ship, and of the Marks, Number, Contents, and Qualities of every Parcel of Goods therein laden, to the best of his Knowledge; Also where, and in what Port she took in her Lading, and what Country built, and how manned, who was Master during the Voyage, and who the Owners; And in Out-ports must come up to the Place of unlading, as the Condition of the Port requires, and make Entries, on Pain of 100 l. 2 Molloy 238. cap. 2. S. 20.

Entries.

13. Nor is such a Master to lade aboard any Goods outwards to any Place whatsoever without entering at the Custom-house her Captain's Name Master, Burthen, Guns, Ammunition, and to what Place she intends, and before Departure to bring in a Note under his Hand of every Merchant that shall have laid aboard any Goods, together with the Marks and Numbers of such Goods, and be sworn as to the same, on pain of 100 l. 2 Molloy 238. cap. 2. S. 20.

14 Car. 2. cap. 11. 12 Car. cap. 18.

14. No Captain, Master, Purser, of any of his Majesty's Ships of War, shall unlade any Goods before Entry made, on pain of 100 l. 2 Molloy, 238, 239. cap. 2. S. 20.

15. He ought not to ship any Merchandizes, but only at the publick Ports and Keys. 2 Molloy 232. cap. 2.

Going from Port to Port.

16. No Ship to go from Port to Port in England, Ireland, Wales, Jersey or Guernsey, or Berwick, unless the Owners are Denizens or naturalized, and the Master and three fourths to be English. 2 Molloy 237. cap. 2. S. 18.

17. If the Master shall have Freight from Port to Port within the Realm, he ought to have Warrant for the same on Pain of Forfeiture of the Goods; and he is to take forth a Cocquet, and become bound to go to such Port designed for, and to return a Certificate from the chief Officers of that Port where the same is designed for, and discharged within six Months from the Date of the Cocquet. 2 Molloy 239. cap. 2. S. 21.

18. He may sell Bona Peritura. Vent. 238. per Hale Ch. J. in delivering the Opinion of the Court. Hill. 24 & 25 Car. 2. in Case of Morfe v. Slue.

Goods.

19. If the Master has any Suspicion, he may detain the Goods for his Freight. Per Doctor Lane. Arg. 6 Mod. 13. — S. P. by Holt Ch. J. Ibid. 12.

20. He is not to bring any Goods from any Place, but what are of the Growth of that very Country, or those Places which usually are for the first shipping, on Pain of Forfeiture of their Vessel and Furniture. 2 Molloy 237. cap. 2.

Importing Goods from what Place.

21. This does not extend so far, but that Masters may take in Goods in any part of the Levant or Streights, although they are not of the very Growth of the Place, so that they be imported in English Ships, three fourths English Mariners; So likewise those Ships that are for India, in any of those Seas to the Southward and Eastward of Capo bona Speranza, although the Ports are not the Places of their very Growth. 2 Molloy 237, 238. cap. 2.

12 Car. 2. cap. 18.

But *Sugars, Tobacco, Cottons, Ginger, Indices, Fustick, or any other dving Wood of* 22. Any *People of England* may import (the *Master and Mariners being three fourths English*) any Goods or Wares from *Spain, Portugal, Azores, Madeira, or Canary Islands*; may in *Ships* that are not *English built*, Bullion may be imported; so likewise in those that are taken by way of Prize Bona Fide. 2 Molloy 237. cap. 2. S. 19.

of the Growth of his Majesty's Plantations to be shipped, carried or conveyed from any of the English Plantations, are to be carried to no Place in the World, but *are to come directly for England, Ireland, Wales, or Berwick*, upon Pain of Forfeiture of Ship and Goods; And the Master is to give Bond with one Security in 1000 l. if the Ship be under the Burden of 100 Tons, and 2000 l. if above, that upon Lading he brings his Ship directly into England, Ireland, Wales, or Berwick, (the Danger of the Seas excepted) so likewise they are to do the same for the Ships that shall go from the Plantations to the Governor, upon Forfeiture of the Ship and Goods. 2 Molloy 238. cap. 2. S. 19.

23. But *from the Netherlands, or Germany*, there may not be imported any Sort of Wines (other than *Rhenish*) *Spicery, Grocery, Tobacco, Pot-Ashes, Pitch, Tar, Salt, Rosin, Deal-boards, hard Timber, Oil, or Olives* in any Manner of *Ships whatsoever*. 2 Molloy 232. cap. 2.

Mariners. 24. The Master is to keep his Company in Peace, and if any *Mariner* shall be hurt in doing Service, or by his Companion, the Master shall cause him to be healed, as he who is only answerable for the Fact within Ship-board; and then by his Authority recover from the other *Mariner* the Charges, and any Thing that the hurt Man has lost thereby, Except that he who is hurt or lamed have provoked the other by evident Assault or Stroaks. Mal. Lex. Merc. 103. cap. 22.

And if a *Mariner* fall Sick, the Master shall cause him to be laid in a House, with all Suttentation necessary and usual in the Ship, but shall not stay in the Ship until he be healed, and when he recovers Health shall give him his Hire, or if he die shall give it to the Wife or nearest Friends. But if a *Mariner* be not hurt in the Ship's Service, the Master shall hire another in his Place, and if he have a greater Hire, that *Mariner* then shall recover the Surplus. Mal. Lex. Merc. 103. cap. 22.—And always the Master ought to lend his *Mariners* if they want. Ibid.—If through the Master's Fault the *Ship Boat* perish with any *Mariners* in it by spoiled Ropes or otherwise, then shall the Master pay one whole Year's Hire to the Heirs of the drowned. Ibid.

25. Also he ought to give his *Mariners* *Flesh* upon Sunday, Tuesday, and Thursday, and upon other Days Fish, or such like, with sufficient Drink; But no Meat to them that sleep not in the Ship. Nevertheless, the Quality and Quantity of *Mariners* Food and Hires goes diversly according to the divers Customs of Countries, and the Conditions made with them at the entering of the Voyage, whereof Remembrance is kept to avoid Discords, which are more dangerous on the Seas than on Land. Mal. Lex. Merc. 103, 104. cap. 22.

26. 11 & 12 W. 3. cap. 17. If the Master of any Merchant Ship shall, during his being abroad, force any Man on Shore, or wilfully leave him behind in the Plantations or elsewhere, or refuse to bring home all such Men as be carried out with him, who are in a Condition to return when he is ready to proceed in his Voyage homeward bound, such Master being convicted thereof, shall suffer three Months Imprisonment without Bail.

Other Ships and their Anchors. 27. If a Ship in her Voyage, lying any where at Anchor, be struck or grappled with another Vessel under Sail, for want of good steering, whereby the Vessel at Anchor is prejudiced, and the Goods in her damaged; in such a Case the whole Damage is to be in common, and to be equally divided and appraised half by half. And the Master and Mariners of the Ship that struck, or grappled with the other shall swear on the Holy Evangelists, that they did it not wittingly or wilfully; the Reason of this Judgment is, that an old Vessel might not purposely come in the way of a better; which she will hardly do, as long as the Damage must be equally shared. Mieve's Laws of Oleron 7 S. 14.

28. When two or more Vessels lie in a Harbour, where there is but little Water, so that the Anchor of one of the Vessels lies dry, the Master of the other Vessel ought to speak to the Master of the other Vessel to take up his Anchor, for it is too nigh and may do a Prejudice. And, if the said Master, and his *Mariners* refuse to take up the said Anchor, then the other Master and his

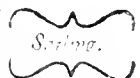
his Mariners may take up the said Anchor, and remove it at a further Distance; and, if the other oppose, and Damage afterwards happen thereby, they are bound to give full Satisfaction for the same; but if they had placed a Buoy to the Anchor, and then the Anchor should cause any Damage, in this Case they shall not be bound to repair the Damage; and therefore being in an Harbour, they ought to fasten such Buoys or Anchor-marks, and such Cables to their Anchors, as may plainly appear and be seen at full Sea. Miege's Laws of Oleron 7. S. 15.



29. If a Pilot undertakes the Conduct of a Ship, to bring her to St. Malo, or any other Port, and fails in his Undertaking, so as the Ship miscarry through want of Skill; the said Pilot shall make good all the Damages that shall ensue thereby, but if he be not able to make Satisfaction, he ought to lose his Head; and if the Master, or any of the Mariners, or Merchants, cut off his Head, they shall not be accountable for it; however, before they do it, they ought to know whether he has wherewith to make Satisfaction. Miege's Laws of Oleron 8, 9. S. 23.

30. When a Ship or other Vessel arriving at any Place makes in towards a Port or Harbour, and puts out her Flag, or gives some other Sign to have a Pilot come aboard, or a Boat to tow her into the Harbour the Wind or Tide being contrary, and a Contract is made for piloting the said Ship into the said Harbour accordingly; and so far as in some Places it is a Custom, and an unreasonable one, that the third or fourth Part of the Ship lost shall accrue to the Lord of the Place where that sad Accident happened, and like Proportion to the Salvors, and only the Remainder to the Master, Merchant, or Mariners; therefore the Persons contracting for the Pilotage of the Vessel, to ingratiate with their Landlord, and to get to themselves Part of the said Ship and her Lading, do like base and treacherous Villains wittingly and designedly misguide the Ship that she may be lost, and feigning to aid, help, and assist the distressed Mariners, themselves are the first in pulling the Ship to Pieces, in purloining and carrying away the Lading contrary to all Reason and a good Conscience; and, that they may be the more welcome to their Landlord, run to his House to bring him the Tidings of this unhappy Disaster; whereupon the said Landlord comes with his Men, and takes his Share and the Salvors theirs, and the Rest is left for the Merchants and Mariners; which being contrary to the Laws of Almighty God, this Law therefore shall be established, that (notwithstanding any Law or Custom to the contrary) all Landlords, Salvors, and all others, that shall take, or parcel out any of the said Goods, shall be accursed, excommunicated, and punished as Thieves and Robbers; and as for such false and treacherous Pilots, the Judgment is, that they shall be put to a rigorous and unmerciful Death, that very high Gibbets shall be for that Purpose set up as near the Place as conveniently may be, where they to be guided and brought the said Ship or Vessel to ruin as aforesaid; and thereon shall these accursed Pilots shamefully end their Days; which Gibbets shall be left standing, as a Memorial of the Fact, and as a Caution to other Ships that shall afterwards sail that way. Miege's Laws of Oleron 9. S. 24.

31. If a Ship being in an Harbour waits for her Freight to depart therewith, the Master ought, before he depart, first to * advise with his Company, and say, Sirs, what think you of this Weather? whereupon perhaps some will tell him, it is not late yet to sail the Wind being but newly changed, and we had best first to see it settled; and others possibly will say, the Weather is good and fair. In such Case, the Master is to concur with the major Part; upon failure of which, if the Ship shall come to be lost, he shall make good the same (if he hath wherewithall) according to the full Value upon a just Appraisalment. Miege's Laws of Oleron 4. S. 2.



* S. P. nor must he stay in Port or Harbour without just Cause, when a fair Wind invites his Departure 252. cap. 2.

32. He may not set Sail without able and sufficient Mariners both for quality and Number. 2 Molloy. 232. cap. 2.

Ship.
See Hypo-
thecation
(A) pl. 1.—
* He may

33. By the Common Law the Master of a Ship could * not impawn the Ship or Goods; for no Property either general or special was in him, nor is such Power given unto him by the constituting of him a Master. 2 Molloy. 235. cap. 2.

He may Pawn the Ship if Occasion be. Vent. 238. Morfe v. Slue.

33. 22 & 23 Car. 2. cap. 11. S. 2. Where any Goods shall be Laden on board any English Ship of the Burden of 200 Tuns or upwards, and mounted with 16 Guns, or more if the Commander shall yield up the Goods to any Turkish Ships, or to any Pirates, or Sea Rovers without fighting, he shall, upon Proof thereof made in the Court of Admiralty, be incapable of taking Charge of any English Ship as Commander, and if he shall hereafter take upon him to Command any English Ship, he shall suffer Imprisonment by Warrant from the Court of Admiralty during 6 Months for every Offence; and in Case the Persons taking the said Goods shall release the Ship, or pay unto the Master any Money or Goods for Freight, or other Reward, the said Goods, or Money, or the Value thereof, as also the Master's Part of such Ship so released, shall be liable to repair the Persons, whose Goods were taken, by Action in the Court of Admiralty, and in Case the Commander's Part of the Ship together with such Money and Goods shall not be sufficient to repair all the Damages sustained, the Reparations recovered on the Master's Part of the Ship shall be divided pro Rata amongst the Persons prosecuting and proving their Damages, and the Persons damaged shall have their Action against the Master for the Remainder.

S. 3. No Master of any such English Ship being at Sea, and having discovered any Ship to be a Turkish Ship, Pirate or Sea-rover, shall depart out of his Ship.

S. 4. If the Master of any English Ship, tho' not of the Burden of 200 Tuns, or mounted with 16 Guns, shall yield his Ship unto any Turkish Ship, Pirate or Sea-rover (not having at least his double number of Guns) without fighting, such Master shall be liable to all the Penalties in this Act.

S. 5. Upon Process out of the Court of Admiralty it shall be lawful for all Commanders of his Majesty's Ships, or the Commanders of any other English Ships, to seize such Ships or Masters so offending, according to the Process, and the same to send in Custody into any Ports of his Majesty's Dominions, to be proceeded against according to this Act.

S. 7. If the Mariners or inferior Officers of any English Ship laden with Goods shall decline or refuse to fight and defend the Ship, when they shall be thereunto comanded by the Master, or shall utter any Words to discourage the other Mariners from defending the Ship; every Mariner, who shall be found guilty of declining, or refusing as aforesaid, shall lose all his Wages due to him, together with such Goods as he hath in his Ship, and suffer Imprisonment, not exceeding 6 Months, and shall during such Time be kept to hard Labour for his Maintenance.

35. A Ship put into Boston in New-England, and there the Master took up Necessaries, and gave a Bill of Sale by way of Hypothecation, and now there being a Suit against the Ship and Owners to compel Repayment, a Prohibition was moved for; and the Court held, that the Master could not by his Contract make the Owners personally liable to a Suit, and therefore as to them granted a Prohibition, but as to the Suit against the Ship denied a Prohibition, for the Master can have no Credit abroad, but upon giving Security by Hypothecation, and it is not reasonable to hinder the Court of Admiralty to give a Remedy, where we can give none ourselves. 1 Salk. 35. Trin. 2 Annæ. B. R. Johnson v. Shippen.

36. 1 Ann. Stat. 2. cap. 9. S. 1. If the Principal be convicted of Felony, stand mute, or challenge peremptorily above 20 Jurors, the Accessory may be proceeded against as if such principal Felon had been attainted, notwithstanding such Principal be admitted to his Clergy, pardoned, or otherwise delivered before Attainder; and such Accessory, if he be convicted, or stands mute, or challenges, as aforesaid shall suffer as if the Principal had been attainted.

6 Mod. 79.
S. C. by
Name of
Jonson v.
Shepney.

37. *11 Geo. 1. cap. 9. S. 5.* If any Owner of, or Captain, Master, Officer or Mariner belonging to any Ship, shall wilfully cast away, burn, or destroy the Ship, or direct, or procure the same to be done, with intent to prejudice any Person, that shall have underwritten any Policy of Insurance thereon, or any Merchant that shall load Goods therein, or any Owner of such Ship; the Persons offending being thereof convicted, shall be adjudged Felons, and suffer without Benefit of Clergy.

38. He is not to import into, or export out of, any the English Plantations in Asia, Africa, or America, but in English or Irish Vessels, or of the Vessels built and belonging to that Country, Island, Plantation, or Territory; the Master and three fourths of the Mariners to be English, upon the Forfeiture of Ship and Goods; and if otherwise, they are to be looked upon as Prize, and may be seized by any of the King's Officers and Commanders, and to be divided as Prizes according to the Orders and Rules of Sea. 2 Molloy. 237. cap. 2.

What Ships and Mariners to make Use of.

39. All Goods of the Growth of his Majesty's Plantations are not to be imported into England, Ireland, or Wales, Island of Jersey or Guernsey, but in such Vessels as truly belong to Owners that are of England, Ireland, Wales, Jersey, or Guernsey, and three fourths at least of the Mariners are to be English, upon Forfeiture of Ship and Goods. 2 Molloy. 237. cap. 2.

40. Master of a Ship has the Power of choosing the Sailors, and nor the Owners; for when the Part-Owners had made the Defendant Master they could not put any Servants upon him without a special Agreement for it, for Breach whereof an Action would lie, for the very making him Master impowers him to choose his Servants, for he is answerable for all Exents, and therefore but reasonable he should have Liberty of choosing such Men as he can confide in, and for whose Honesty and Diligence he may take Security; and the Owners have no Means to avoid it but to recal the Master's Authority; and it is one of the Inconveniences of Jointenancy, that one alone cannot do that; Judgment pro Defendente. 12 Mod. 434. Mich. 12 W. 3. Rosiere v. Sawkins.

41. When a Master freights a Ship, he ought to shew his Merchants the Cordage that belongs to her, and, if they see any Thing amiss or wanting, he must rectify it; For, if for Want of good Cordage, any Pipe, Hoghead, or other Vessel should happen to be spoiled or lost, the Master and Mariners ought to make it good to the Merchants. So also, if the Ropes or Slings break, the Master not having shewed them to the Merchants, he must make Satisfaction for the Damage; But if the Merchants say, That the Cordage is good and sufficient, and rest satisfied therewith, and afterwards it happens that they break; in that Case each of them shall share the Damage, viz. The Merchant to whom the Goods belong, and the said Master with his Mariners. Miegé's Laws of Oleron. 6. S. 10.

Tackle.

42. A Vessel being laden with Wines, or other Goods, and hoisting Sail at Bourdeaux, or any other Place, if the Master and his Mariners have not trimmed their Sails as they ought to have done, and it happens that ill Weather overtakes them at Sea, so that the Main-yard shakes or breaks one of the Pipes or Hogheads; the Ship being arrived at her Port of Discharge, the Merchant says to the Master, that by Reason of his Main-yard his Wine was lost; in that Case, if the Master replies, it was not so, both he and his Mariners, (be it four or six, or such of them as the Merchants shall think best) must take their Oaths, that the Wine was not destroyed by them, nor by the Main-yard, or through their Default, as the Merchants charge them, and then the said Master and his Mariners shall be acquitted thereof. But, if they refuse to make Oath to that Effect, they are then obliged to make Satisfaction for the same; For they ought to have ordered their Sails aright, before they sailed from the Port where they took in their Lading. Miegé's Laws of Oleron. 11. S. 11.

(B) Chargeable.

(B) Chargeable. In what Cafes.

S. P. 2 Molloy 258. **I**F a Master fet forth his Ship for to take in *certain Charge or Lading*, and then *takes in any more*, especially of *other Men*, he is to lose all his whole Freight; For by other Men's Lading, he may endanger the Merchants Goods divers Ways. And in such Cafe, when Goods by Storms are *cast over Board*, it shall not be made good by Contribution or Average, but by the Master's own Purse; For if he ** over burthen* the Ship above the true Mark of Lading, he is to pay a Fine. Mal. Lex Merc.. 99.

But if the Goods are brought into the Ship secretly against his Knowledge, it is otherwise; and Goods so brought in may be subjected to what Freight the Master thinks fitting.——* He must not *over-charge* or lade his Ship *above the Birth-mark*, or take into his Ship any Person of and obscure or unknown Condition, without Letters of safe Conduct. 2 Molloy 232. cap. 2.

2. If a Ship do enter into any other Port or Harbour than she was freighted for against the Master's Will, as by a Storm, or by some Force, then the Goods shall be transported to the Port conditioned on the Master's Charges; but this must be tried by the Master's Oath, and two of the Mariners, or else the Master may be in further Danger. Mal. Lex. Merc. 99.

Molloy. 232. cap 2. S. 4. S. P. nor must he stay in Port or Harbour, without just Cause when a fair Wind invites his Departure.——But if the Ship's Company differ in Opinion, as to sailing or Not, the Master is to concur with the *major Part*. Mieg's Laws of Oleron. 4. S. 2.

3. Such is the Duty of a Master of a Ship that is provident, that he ought not to make Sail, and put forth to Sea without the Advice and Consent of the *most Part of his Company*, especially when the Weather is stormy, otherwise he shall answer the Damages that cometh thereby; principally if he have not provided an expert Pilot, or if the Ship happen to fall over in the Harbour. Mal. Lex. Merc. 102 cap 22.

4. The Master shall be punished also by Damages, if the *Overloop* of the Ship be *untyt*, or the *Pump* be *faulty*, or a *sufficient Covering* be wanting, especially for Corn, Victual, or such like Commodities. Mal. Lex Merc. 103. cap. 22.

5. The Master is not bound to render an Account of all to the Owners; as for Passengers which are found unable to pay. Mal. Lex Merc. 121. cap. 30.

S. P. For the very lading them aboard makes them liable, and that as well by the Common Law as the Law Marine. 2 Molloy 246. cap. 3. S. 14.——But if the Merchant or Passenger keeps his Goods by himself, as Monies or such Things in his Coffers, and then finds Fault to have lost them: Then the Master and Company are to purge themselves by their Oath; but if afterwards, notwithstanding they be found guilty, the Denier shall pay the double, and also be punished for Perjury. Mal. Lex Merc. 103. cap. 22.

6. When any Goods or Merchandises are delivered unto the Master, or his Clerk the Purser of the Ship, and laid within Board, or to the Ship Side, both ways is at the Master's Peril. But the Master is not bound to answer for such Things as are put in his Ship * without his and his Company's Knowledge; because where Men are found ignorant, they are also esteemed not to consent. Mal. Lex. Merc. 103. cap. 22.

Goods secretly brought in, and not entered in the Purser's Book, or Bills of Lading, the Master is not responsible for, unless it be such as the Parties bring into the Ship about them, as Cloaths, Money, and the like, which are seldom entered; and most commonly those that are visible he is answerable for. Molloy. 248.

So if the Master forewarns a Passenger to keep his Goods, and that he will not take Care thereof, if they be lost or purloined by the Crew; it is held, that he is not answerable for the same, especially if there be any Agreement. Ibid.

But if Goods be sent aboard, and the Master appoint a Cabin for the same, and deliver the Key to the Lader, and tells him he will not be answerable if a Loss happens, yet if the Goods are stolen he must make Satisfaction. Ibid. 249

7. The Master is liable for all *Damages* sustained by *bad Hooks, Ropes, Blocks or Lines*, if the Mariners do give *Notice* of it, and they shall bear their Parts in the Damage, and so is he also to answer any Damage happening by unreasonable *stowing or breaking of Goods*, and therein he and his Company may be put to their Oath. Mal. Lex. Merc. 103. cap. 22.

For if any Damage happens by the Delivery of the Goods into the Lighter, as

that the *Ropes break*, and the like; there he must answer; but if the Lighter comes to the Wharf or Key, and then in taking up the Goods, the Rope breaks, the Master is excused, and the Wharfinger is liable. 2 Molloy 233. cap. 2.

8. Whatsoever shall *happen through Fault, Negligence, or Chance, which might be avoided, or if it be done by the Passengers, or other than himself and his Company*, the Master is answerable. Mal. Lex Merc. 103. cap. 22.

He hath by the Common Law no Property either General or

Special by the constituting him Master; yet, as an Officer, he must render an Account for the whole Charge, when once committed to his Care and Custody, and on Failure make Satisfaction; and therefore for *Misfortunes* happening, either *through Negligence, Willfulness, or Ignorance of himself or Mariners*, he must be responsible. Molloy 229 ——— 3 Mod. 323.

9. If by the Master's Default *Confiscation of Goods*, or other Damages happen for *Non-Payment of Custom, or false Bills of Entries* in the Custom-House for Goods, or for *transporting of unlawful Goods*, the Master shall answer for the same with the Interest. Mal. Lex Merc. 103. cap. 22.

But concerning the suing for the said Goods, the Master may well do it, as

the Merchant may pursue for spoiled Good. And notwithstanding, if it shall be found, that *the Merchant is in any Fault* concerning the Goods, as aforesaid; then *if the Master, and four of his Company Mariners swear no Fault to have been in them*, the Master shall be cleared thereby. Mal. Lex Merc. 103. cap. 22.

10. Error of a Judgment in B. R. in *Assumpsit* brought by the Mayor and Commonalty of L. against H. where they declared of a *Custom*, That they and their Predecessors, Mayors, &c. have had of every Master of a Ship 8*d. per Tun* for every Tun of *Cheese* brought from any Place in England to the Port of London ab Oriente de London-Bridge in the Name of *Weighage*; and that the Defendant being Master of a Ship had brought to the Port of London so many Tuns, which at that Rate came to so much, which he had not paid; Upon Non Assumpsit, Verdict and Judgment was for the Plaintiff, whereupon H. brought a Writ of Error, and assigned for Error, That the Action did not lie against the Master, but that the Duty is due by the Merchants, Owners of the Goods: But the Judgment was affirmed; For the *Master is intrusted with the Goods, and hath a Recompence* from the Merchants for bringing them, and is responsible for them, and therefore shall be charged for the Duty; and it would be infinite to search for the Owners of the several Goods, which are all in the Custody of the Master, who brought them into Port, and therefore he shall be charged. 3 Lev. 37, 38. Mich. 33 Car. 2. C. B. Mayor &c. of London v. Hunt.

Molloy 251, 252. cap. 2. S. 2. cites S. C. — Tho' the Master is not strictly the Exporter, yet as to Port Duties the Master is always looked on as such, and is the Person answerable; For to put them to seek the Merchants to answer Duties is impracticable, and it is but reason-

able the Master should pay a Duty for the Benefit of the Port, and that the Town should have the Duty who are to maintain the Port. 1 Salk. 249. Mich. 15 W. 3. B. R. Vinckstone v. Ebdon.

11. If a Master shall *weigh Anchor*, and stand out to his Voyage after the Time covenanted or agreed on for his Departure, if any *Damage* happen at Sea after that Time, he shall refund and make good all such Misfortune. Molloy 255.

12. So soon as *Merchandizes* and other Commodities are put aboard the Ship, whether she be riding in Port, Haven, or any other Part of the Seas, he that is Exercitor Navis is chargeable therewith; and if the same be there lost, or *parloyned, or sustain any Damage, Hurt or Loss, whether in the Haven or Port before, or upon the Seas* after she is in her Voyage, whether it be by *Mariners or by any other through their Permission*, he that is Exercitor Navis must answer the Damage, for that the very lading of the Goods aboard the Ship does subject the Master to answer the same; and with this agrees the Common Law, where it was adjudged, That

* This was a Trial at Bar, and Hale Ch. J. said, That the Master is Exercitor Navis, and if in this Case the Court should let loose the

Master, the Merchant would not be secure. And if they should be too quick upon the Master, it might discourage all Masters; so that the Consequence of this Case is very great; but the Jury gave a Verdict for the Defendant, the Court inclin- ing that way. Mod. 85. Mich. 22. Car. 2. B. R. Mors v. Sluce — The Court inclin'd strongly for the Defendant, there *not being the least Negligence* in him. Vent. 191. Hill. 23 & 24 Car. 2. B. R., S. C. — But afterwards in Hill. 24 & 25 Car. 2. It was adjudged for the Plaintiff by the Opinion of the whole Court; The Reasons whereof were delivered by Hale Ch. J. 'That tho' by the ** Admirall Civil Law, the Master is not chargeable *Pro Damno fatali*, as *Pirates, Storm, &c.* but where there is any Negligence in him, he is, yet *this Case is not to be measured by the Rates of the Admirall Law, because the Ship was infra Corpus Comitatus.* And the first Reason for his being liable is, because he takes a Reward, and the Usage is to pay him Half-Wages before he goes out of the Country. 2dly. If he would *he might have had a Caution for himself*, which he omitted, and taking in the Goods generally, he shall answer for what happens. 3dly. To excuse the Master, a Difference must be shewn between him and a common Hoyman, Carrier, or Inn-holder. [But as to that there is no Difference between him and a Hoyman. 2 Lev. 68. S. C.] He is † *rather an Officer than a Servant*, as he may impawn the Ship, and sell Bona Peritura; And as to an Objection of the Master's receiving Wages from the Owners, he answered, that in Effect, the Merchant pays him; For he pays the Owner's Freight, so that it is but handed over by them to the Master; If the Freight be lost, the Wages are lost too; For the Rule is, Freight is the Mother of Wages; so that tho' the Declaration is, That the Master received Wages of the Merchant, and the Verdict is, that the Owners pay it, it is no material Variance. Vent. 238, 239. S. C. — Adjudged 2 Lev. 69. S. C. — Received for the Plaintiff. Raym. 220. S. C. — ** But by our Law, Case lies against him for Goods lost, tho' without his Default. 2 Jo. 69 S. C. — S. P. Because he was a publick Officer, and because his Salary is Part of his Hire, and did arise from his Care and Diligence to be taken for the safe Custody of the Goods; Per Holt Ch. J. 12 Mod. 481. cites S. C. — But if the Ship had been robbed *at || Sea*, the Master had not been answerable, tho' he was chargeable at Land; Per Holt Ch. J. 12 Mod. 484, cites S. C. — Ibid. 490. — || S. P. Whether by *Enemies, Ships of Reprize, or Pirates*; For there, if no Fault or Negligence was in him, but that he performed the Part of an honest, faithful and valiant Man, he shall be excused. 2 Molloy 232. cap. 2. — S. C. cited by Holt Ch. J. in Case of *Boson v. Sanford, & al.* And held clearly, that tho' the Master is chargeable in Respect of his Wages, so are the Proprietors likewise in Respect of their Freight, which they receive for the Portage of the Goods, at the Election of the Plaintiff. 3 Lev. 258, 259. — † Eyre J. held, that there is no Difference between a Land-Carrier and a Water-Carrier, and that the Master of a Ship was *no more than a Servant to the Owners* in the Eye of the Law; and that the Power he has of Hypothecation, is by the Civil Law. 2 Salk. 440. in Case of *Boson v. Sanford.*

‡ 2 Vent 191. Arg. says, that he is not liable in Case of Fire, or sinking of the Ship.

S. P. For if once the Mariners have taken Charge of them the Master becomes immediately responsible, if they steal, lose, damnify, or imbezil them. 2 Molloy 247. cap. 3. S. 15.

13. If the Master shall receive Goods at the Wharf or Key, or shall send his Boat for the same, and they happen to be lost, he shall likewise answer both by the Marine Law, and the Common Law. 2 Molloy 231. cap. 2. S. 2.

14. If Goods be laden aboard, and after an Embargo or Restraint from the Prince or State comes forth, and then he breaks Ground, or endeavours to sail away, if any Damage accrues, he must be responsible for the same. The Reason is, because his Freight is due and must be paid; nay, altho' the very Goods be seized as contraband Goods. 2 Molloy 232. cap. 2. S. 3.

15. He

15. He ought not to *lade* any of his *Merchants Goods aboard* any of the King's *Enemies Ships* (admitting his own *Vessel leaky or disabled*) without *Letters of safe Conduct*; otherwise the same may be made *Prize*, and he must answer the *Damage* that follows the *Action*. 2 Molloy 232. cap. 2.

16. *Nor shall he come, or sneak into the Creeks or other Places, when laden homewards, but into the King's great Ports, (unless he be driven in by Tempest;)* for otherwise he forfeits to the King all the *Merchandize*, and therefore must answer. 2 Molloy 232. cap. 2.

17. He must *not lade* any *prohibited or unlawful Goods*, whereby the whole *Cargo* may be in danger of *Confiscation*, or least subject to *Seizure or Surreption*. 2 Molloy 232. cap. 2.

18. After his *Arrival at Port* he ought to see that the *Ship be well moored and anchored*; and after *re-laded*, not to depart or set *Sail*, till he hath been *cleared*; for if any *Damage* happens by *Reason of any Fault or Negligence* in him or his *Mariners*, whereby the *Merchant or Lading* receives any *Damage*, he must answer the same. 2 Molloy 233. cap. 2.

19. He must not set *sail* with *insufficient Rigging or Tackle*, or with *other or fewer Cables than is usual and requisite, Respect being had to the Burthen of the Vessel*. 2 Molloy 233. cap. 2.

20. If *fine Goods or the like* are *put into a close Lighter, and to be conveyed from the Ship to the Key*, it is usual there, that the *Master* send a *competent Number of his Mariners* to look to the *Merchandize*, if then any of the *Goods are lost and imbezeld*, the *Master* is *responsible*, * and not the *Wharfinger*; but if such *Goods are to be sent aboard a Ship*, there the *Wharfinger*, at his *Peril*, must take care the same be *preserved*. 2 Molloy 233. cap. 2.

* Pasch. 26 Car. rul'd at Guild Hall, by L. C. J. Hales.

21. And as the *Law ascribes these Things and many more to him as Faults*, when committed by him or his *Mariners in Ports*, so there are *other Things*, which the *Law* looks upon to be as *Faults* in him *in his Voyage*, when done. 2 Molloy 233, 234. cap. 2.

As if he deviates in his Course without just Cause, or steers a dangerous

and *unusual Way*, when he may have a more *secure Passage*; though *to avoid illegal Impositions*, he may sometimes change his *Course*; nor may he *sail by Places* infested with *Pirates, Enemies, or other Places* notoriously *known to be unsafe*, nor engage his *Vessel among Rocks, or remarkable Sands*, being thereto not necessitated by *violence of Wind and Weather, or deluded by false Lights*. 2 Molloy 234. cap. 2.

22. The *Master* shall not be answerable for the *Contracts of their Mariners*, but they may be *detained* for their *Crimes*. 2 Molloy 234. cap. 2.

23. *Master of a Ship went a trading Voyage beyond Sea, and died*; the *Succeeding Master open'd his Effects*, in the *Presence of the Crew*; and then *sent a Letter with a Bond inclosed to the Widow*, wherein he bound himself to answer to her the *Sum of 300 l.* if the *Ship arrived safe*; the *Sum* the *Deceased left, being 200 l.* which was the *Rate of Respondentia Bonds* there. The *Master traded, and made 300 l. per Cent. of the Money*. The *Question* was, Whether he should be bound to any more than this *Bond*, or answer to the *Widow* the *Profits of the Money* made in way of *Trade*? The *Counsel for the Widow, and the Ld. Keeper* too, thought it differ'd from the *Case of an Executor*; because the *Ship* was to go a *trading Voyage*, and the *Money* was *designed to be laid out in Trade*, and the *succeeding Master* is in *Effect*, but a *Trustee for the Representative of the former*. And they held, that *if he traded with the Money as with his own with Care and Prudence, and then through any Accident the Money was lost, he would not be accountable*. It was therefore *decreed, that he should account to the Widow for the Profit made by the Trade, deducting reasonable Allowance for Labour and Skill*. The *Ld. Keeper* thought this *Resolution* necessary for the *Incouragement of Trade*; it being a *Comfort to a Man to know*, that if he should die, the *Improvement of his Effects* in the *Way of Trade* by the *succeeding Master* should be for the *Advantage of his Family*. 10 Mod 20, 21. Pasch. 10 Ann. in Canc. Brown v. Litton.

24. On the *Hypothecation* of the Master, the Ship is fuable in the Admiralty, but the Owners are not. 1 Salk. 35. Trin. 2 Ann. B. R. Johnson v. Shippin.

25. A Master of a Ship is discharged of Goods, when he lands them at the Custom House, and gives the Proprietor Notice. MS. Tab. cites 5 March. Eggletham v. Partyes.

26. Master of a Ship takes upon him to sell the Ship at an undervalue to the Agent of the E. Ind. Company. This is a Breach of Truith in the Master, and decreed that the E. Ind. Company shall answer for the real Value of the Ship and Cargo, but not for Possibility of Gain. MS. Tab. cites 1 December 1718. East India Company v. Ekins.

(B. 2) Owners. How far bound by his Contract or Default.

If the Owner had been Party, and had covenanted that there should be such Proceedings in the Voyage, he should on Non-performance thereof have been liable to the Damages. And the Valuation of the Ship in the later Clause, viz. Obliging the Ship to the Performance, would not excuse or lessen the Damage, and the Owner by Assent to the Act or

Agreement of the Master obligeth himself; per Keck. 2 Ch. Cases 239. in the S. C. Anon.

1. **A.** A Master of a Ship, of which B. was Owner, treated with J. S. for taking the Ship to freight at 80 Tons to sail from London to Falmouth and thence to Barcelona without altering the Voyage, and there to unlade, at a certain Rate per Ton. And to perform this, the Master and Merchant (J. S.) execute a Charty Party, but B. was no Party thereto; and by the Charter Party the Master obliges the Ship, and what was therein valued at 300 l. The Master deviates and commits Barretry, and the Merchant in effect loseth his Voyage and Goods. For the Merchandize being Fish, came not till Lent was past, and was Rotten. Sentence was given against the Master and Ship, in the Court of Admiralty at Barcelona, and affirmed on Appeal to a Higher Court. The Ship coming to the Merchant's Hands the Owner brought Trover. The Merchant brought a Bill to stay this Suit, and another was brought by the Owner for Freight, and claim'd Deductions out of both for his Damages sustained by the Master's Breach of Articles. For if the Owner gives Authority to the Master to contract, or allow his Contract, he shall be liable to Loss as well as Gain, by Occasion of that Contract, and if he will have the Gain, viz. the Freight by the Master's Contract; he shall also bear the Loss. And Ld. Chancellor held, that because the Charter Party valued the Ship at a certain Price, the Owner should not be obliged further, and that only with Relation to the Freight, not to the Value of the Ship; and that the Master is liable for Deviation and Barretry, but not the Owners, else Masters should be Owners of all Men's Ships and Estates; and decreed accordingly. 2 Ch. Cases 238, 239. Mich. 29 Car. 2. Anon.

2. Where the Ship is well engaged, she is for ever obliged, and the Owners are concluded thereby till Redemption. 2 Molloy 236. cap. 2.

* S. P. by the Common Law, and he hath no Power over the Ship; the

3. Master of a Ship is but a * Servant to the Owners, and if he buys Provisions on Tick, tho' he has Money from the Owners, the Owners are liable to the Debt in Proportion to their several Shares in the Ship. Hill. 1709. 2 Vern. R. 643. Speering & al. v. Degrave, Gallway & al.

Power which he hath is by the Civil Law. Per Eyre J Show. 102. Boson v. Sandford.—cites Hob. 111.—He is rather an Officer than a Servant. Vent. 238. Morlev. Slue.

4. In a Voyage the Master of a Ship is the Owner's Servant, and his Duty requires him to provide Necessaries for the Ship, and it is the Owner's Interest that they should be provided; Therefore what the Master necessarily takes up, (tho' not upon Bottomry) and employs for that Purpose, the Owners must pay. M.S. Tab. cites 27 March. 1710. Cary v. White.

(C) Actions &c. by him.

1. IF any Man *compel the Master to overburthen the Ship or Boat*, he may therefore be *accused criminally*, and pay the Damages happening thereby. Mal. Lex. Merc. 99.

2. Either Master or Owners may bring an Action for the *Freight*. Per Cur. 2 Salk. 440. Mich. 1 W. & M. B. R. in Case of *Bofon v. Sandford*. 1 Show. 30.
S. P. in S. C.

3. Master of a Ship is in many respects *suable*, and may sue in *Things concerning the Ship* as well as the Owner, and what the Master recovers in this Action is to the Use of the Owners; Per Holt. 12 Mod. 383. Pasch. 12 W. 3. in Case of *Mikes v. Caly*. And the
Master may
bring
Action
against any
Merchant

for Freight in his own Name. Ibid.—But *Quatenus Master* he cannot bring *Trover for the Ship*. Ibid.—But he may have *Case* if by a *Seizure* of the Ship he be hindered of his *Voyage*. Ibid.—And he shall have *Trespafs for a Disturbance of him in his Office*. Ibid.

4. *Case* by Master of a Ship *against a Person who distrained Corn* with which the Ship was freighted, *whereby he lost his Voyage*, will lie; or he may have *Trespafs* and declare on his *Possession*. 12 Mod. 381. Pasch. 12 W. 3. *Mikes v. Caly*.

5. It is mere *Indulgence* to Mariners to sue for *Wages* in the *Admiralty*, but if the Master *sues for Wages* there a *Prohibition* shall go; For he contracts on the *Credit* of the Owners, but the Mariners on the *Credit* of the Ship. 1 Salk. 33. Trin. 12 W. 3. *Clay v. Sudgrave*. Carth. 518.
S. C.

(D) Actions against him.

1. IF an *Infant* being *Master* of a Ship by *Contract* with another *take upon him to bring certain Goods from St. Christopher's to England, and there to deliver them*, but *delivers them not* according to *Agreement*, but *wastes and consumes them*, he *may be sued in the Admiralty Court*, altho' he be an *Infant*, for this *Suit* is but in *Nature* of a *Detinue*, or a *Trover and Conversion* at the *Common Law*, and a *Prohibition* denied for that *Cause*. 2 Molloy 234. cap. 2. S. 13.—cites *Furnes v. Smith*. 1 Roll. Abr. 530.

2. Where a *Ship is lost* by the *Master's Neglect*, *Trover* lies not against him, but a *special Action on the Case*; the *Storm* by which the *Ship* was lost cannot be *material* in *Trover*, but if *Defendant* sold the *Share* of the *Ship* before the *Storm*, then *Trover* well lies, tho' the *Master* were appointed by the *Part Owners*. Cumb. 371. per Holt Ch. J. 8 W. 3. B. R. Anon.

(E) Actions, Pleadings, and Evidence.

1. BY the *Marine Law*, he, that will charge a *Master* with a *Fault* as in *Relation* to his *Duty*, must *not* think that a *general Charge* is sufficient in *Law*, but he ought to *allign and specify the very Fault* where-with he is so charged. 2 Molloy 234. cap. 2. S. 13. So that he
shall not in-
fer, that
such or such
a sad Disaster
has happen-
ed, or been occasioned by Reason of some Fault in the Mariners; But must not only prove the Fault it self; but

must also prove that that Fault did dispose to such a sad Event ; or that such a Misfortune could not have hap-
pened without such a Fault precedent. 2 Molloy 234. cap. 2. S. 13.

2. What is taken from the Master in Relation to the Ship, he shall have Case or Trespass for at his Election, with this Difference, that if he bring Trespass he must declare upon his Possession. Per Holt. 12 Mod. 383. Pasch. 12 W. 3. in Case of Mikes v. Caly.

For more of Master of a Ship in General, See Hypothecation, Mariners, and other proper Titles.

Master of the Rolls.

(A) His Power &c.

1. **B**Y the Statute of 21 H. 8. c. 13. there are 12 Masters of Chancery. P. R. C. 233.
2. The honourable the Master of the Rolls is one and the Chief. P. R. C. 233.
3. His Patent is for Life ; In it he is styled Clericus Parvæ Bagæ, Custos Rotulorum, & Custos Domus Converforum Judæorum. P. R. C. 233.
4. He taketh in open Court his Oath, which is ordained by the 18 Ed. 3. and is as follows ;
5. You shall swear, that well and lawfully you shall serve our Sovereign Lord the King and his People in the Office of Clerk of the Chancery, to which you are intituled ; you shall not assent to, nor procure the King's Disherison, nor perpetual Damage to your Power ; nor shall you do, nor procure to be done, any Fraud to any Man's Wrong, nor any Thing that toucheth the keeping of the Seal. And you shall lawfully counsel in Things which touch the King when you shall be thereunto required ; and the Council which you know touching him you shall conceal ; and if you know of the King's Disherison, or perpetual Damage, or Fraud to be done upon Things which touch the keeping of the Seal, you shall use your lawful Power to redress and amend it ; and if you cannot do the same, then you shall certify the Chancellor, or others which may cause the same to be amended to your Intent. P. R. C. 233, 234.
6. He is Keeper of the Records, Judgments, and Decrees, of this Court. P. R. C. 234.
7. The Records and Rolls of Chancery since the beginning of Richard the 3d's Time are kept in the Chapel of the Rolls, the Rest are kept in the Tower of London. P. R. C. 234.
8. The Master often sits in Court with the Lord Chancellor or Keeper, and in his Absence hears and determines Causes there ; and in the Evenings, and at other Times, when the Court at Westminster, or elsewhere before the Lord Chancellor or Keeper is not sitting, hears and determines Causes at the Rolls. P. R. C. 234.
9. Cardinal Woolsey (who was Chancellor the 29 H. 8.) is said to have introduced the Masters judging in Causes in the Lord Chancellor's Absence ; and the Ld. Coke in the Preface to his third Report says, he cannot conceive that the Master of the Rolls has a lawful Authority to do, or to determine Causes at the Rolls, (as of later Times has been used,) unless he be Authorized by special Commission under the great Seal ; which it seems he now is. P. R. C. 234, 235.

But heretofore, when he had no such Commission, the Acts done by him were entered as done either per Curiam or per Cancellar. P. R. C. 235.

10. He

10. He has a long Time been ranked with the great Officers of the Realm, as appears by the Statute 12 R. 2. c. 2. where it is enacted, that the Chancellor, Treasurer, and Keeper of the Privy Seal, the Steward of the King's House, the King's Chamberlain, the Clerk of the Rolls, the Justices of both Benches, the Barons of the Exchequer, and others that should be called to the naming of Justices of the Peace, Sheriffs, Escheators, Customers, Comptrollers, &c. should be sworn to do the same faithfully, and without Affection. P. R. C. 235.

11. He hath great Power and Preheminence by Prescription, Statutes, and Commission. P. R. C. 235.

12. Some have been of Opinion, that by his Office he is a general Conservator of the Peace; but it is said he makes out Process, and takes Recognizances thereupon, not by any Power incident to his Office, but by Prescription P. R. C. 235.

13. The Master of the Rolls does yearly, from Time to Time, transmit in Estreats of Parchment, Prest Writ, in a conform Measure, and of one Size written on the one side only, all and singular Charters, Letters Patents, Writs-Close, Commissions, Licences, &c. out of the said Patent Rolls, and the same Estreats the King's Chancellor, or the said Master of the Rolls for the Time being, shall deliver in their own Persons yearly to the Barons of the Exchequer in the Terms of Michaelmas and Easter for Execution and Process to be had and made thereupon for the King. Gilb. Hist. Exch. 229, 230. cap. 7.

14. A Decree made by the Master of the Rolls alone without the Assistance of two Masters in Chancery was allowed to be Error. Vern. 273. Mich. 1684. Smith v. Turner.

15. 3 Geo. 2. cap. 30. All Orders and Decrees made by the Master of the Rolls, except Orders and Decrees of such Nature as according to the Course of the Court ought only to be made by the Lord Chancellor, Lord Keeper, or Lords Commissioners, shall be deemed valid Orders and Decrees of the Court of Chancery; subject nevertheless to be discharged, or altered by the Lord Chancellor, &c. so as no such Orders or Decrees be inrolled, till the same are signed by the Lord Chancellor, &c.

(A) Maxims.

1. **M**AXIMS are the Foundations of the Law and the Conclusions of Reason; and therefore ought not to be impugned, but always to be admitted; but they may by Reason be conferred and compared the one with the other, tho' they do not vary, or it may be discussed by Reason which Thing is nearest the Maxim, and the Mean between the Maxims, and which is not; but the Maxims can never be impeached or impugned, but ought always to be observed, and held as firm Principles and Authorities of themselves. Pl. C. 27. b.

It is a sure Foundation or Ground of Art, and a Conclusion of Reason, so called quia Maxima est ejus Dignitas & certissima Au-

thoritas, atque quod maxime omnibus probetur, so sure and uncontrollable, as that they ought not to be questioned; and is what is elsewhere called a Principle and is all one with a Rule, a Common Ground, Postulatum or Axiom. Co. Litt. 10. h. 11. a. — And its being called a Principle or Principium is as much as to say Primum Caput, from which many Cases have their Original or Beginning, which is so strong, as it suffereth no Contradiction and therefore it is said in our Books, *Contra Negantem Principia non est disputandum.* Co. Litt. 343. a.

2. The Alterations of any of the Maxims of the Common Law are most Dangerous. 2 Inst. 210.

3. The

3. The *Laws of all Nations* are doubtless raised out of the Ruins of the *Civil Law*, as all Governments are sprung out of the Ruins of the Roman Empire, and it must be owned that the Principles of our Law are borrowed from the Civil Law, and therefore grounded upon the same Reason in many Things; per Holt Ch. J. 12 Mod. 482.

For more of Maxims there will either be added a Collection of them with References to all the Books of Law down to this Time at the End of this Work; or a distinct Treatise will be printed of them.

Melius Inquirendum.

(A) *What it is, and the Effect thereof.*

The Melius Inquirendum is in its own Nature at the Common Law to be a Supplement

* For such Restriction is both without Precedent and pre-judicial to Truth; per Hobart and Tanfield, absente Coke, In the Court of Wards. Hob. 73. Curtice's Case.

If defective in the Points found; But if it find some

1. **A** Tenure is found of the King as of his Manor of Dale by 3 s. a Melius Inquirendum finds a Tenure by Knight's Service of the King; This is a Tenure by Knight's Service of the said Manor, and not in Capite; for the Melius only supplies that which was defective. Jenk. 296. pl. 48..

to a Defect or Uncertainty of a former Office, and so the Tenure being found certainly here to be of the King as of a Manor, and by some Service certain and the Uncertainty only for some other Part, when the Melius Inquirendum comes it perfects that, and so makes but one Office and must be joined together. And as to the Case in D. 292. Trin. 12 Eliz. where it is resolved, that an Office being found that Lands were held of the Queen, but per que Servitiz ignorant, and thereupon a Melius Inquirendum was awarded, whereby the Tenure was found to be of a Subject, that now the first Office was void and the Melius Inquirendum was in the Nature of a Diem clausit extremum, it was said, that this was nothing to the Purpose; For that was not a Melius Inquirendum at Common Law, but grounded upon the Statute of 2 E. 6. and taking his Nature and Force from thence; therefore the Resolution is expressly that the Melius Inquirendum there is as the first Office and absolute in itself by the Sense of that Statute, which is but in two Cases mentioned in the Statute Resolved by Hobert and Tanfield in the Court of Wards, absente Coke. Hob. 50. pl. 56. Inche v. Roll.

2. A Melius Inquirendum issues upon an Office found Virtute Brevis de Mandamus: The said Melius Inquirendum ought not to restrain the Inquiry to any Tenure, although it be of the King; but shall leave the Inquiry without any * Restriction. The Want of the Words Coram Escheatore, in the Writ of Mandamus does not vitiate it; For the Writ of Mandamus ought to be before the Escheator, and cannot be otherwise. Jenk. 294. pl. 42. (bis).

3. A Melius Inquirendum will never support a defective Inquisition. 3 Mod. 336. Hill. 2 W. & M. B. R. the King v. the Warden of the Fleet. Hill. 5 W. 3. B. R. Linch v. Coote.

(B) *Grantable. In what Cases, and How.*

* S. P. per Cur. 12 Mod. 496. Pasch. 13 W. 3 the King v. Atkinson. --- S. P. But upon Office found Virtute Brevis vel Com-

1. **T**HE Writ of Melius Inquirendo lieth, where the first Office is found by Virtue of a Writ of Diem clausit extremum, the which Office wanteth Certainty in divers Points, as in the Tenures of divers Lands, or in the Value of any of them &c. then shall issue forth such Writ of Melius Inquirendo. But if the first Office be found by the Escheator * Virtute Officii sui, and not by Virtue of any Writ or Commission, and the Office wanteth Certainty in divers Things, as before; then a Melius Inquirendo shall not issue forth, but the Office and Inquisition returned shall be as † void, because it is not found by Virtue of any Commission or

Writ

Writ, but only ex Officio of the Escheator, without any Command to him to do the same; and therefore the same shall be taken as void, if it want Certainty in any Point. F. N. B. 255. (B).

missionis; For Melius Inquirendum shall not be awarded

where they do not award the former Writ. Br. Office devant &c. pl. 38. cites 4 E. 4. 22, 23. —
 † A Melius Inquirendum shall not issue after a void Office. Arg. Mo. 218. Mich. 27 & 28 Eliz. in Mounson's Case. — D. 298. b. Marg. pl. 30. says it was so resolved. 2 Eliz.

2. A Melius Inquirendo shall be awarded upon a Surmise made in Court, that the Lands are of a * greater yearly Value than is declared by the Office. And upon like Reason, upon a Surmise made, that they are holden by other Services, or that the Tenant was seised of other Lands or other † Estate than is mentioned in the Office, a Melius Inquirendo shall be awarded. F. N. B. 255. (D).

* Defendant was outlaw'd at the Suit of an after Judgment-Creditor, who got a Lease from the

Crown at a quarter Part of the Value, viz. For 120 l. per Ann. where the Lands were well worth 48 l. and he levied only the 120 l. per Ann. and let the Outlaw take the rest. The first Judgment-Creditor brought an Elegit, and would have the Lessee account for the whole Value; But it was decreed, (by which a former Decree was set aside) that the Lessee could levy no more than the extended Value, which was at 120 l. per Ann. and could not enter and take all the Profits; For the Crown has no Interest in the Land extended, but only Perception of Profits, but the Party may take out a Melius Inquirendum, and have them extended at a greater Value. And it was agreed, that the Lessee should change Place, and let in the first Judgment Creditor, and he pay the Lessee 200 l. per Ann. till Lessee's Debt be satisfy'd, and the Outlawry to remain in Force. And the Extent upon the Elegit after the Extent upon the Outlawry was held void Quoad the Protector. Hard. 106. Trin. 1657. Masters v. Whitfield and Hoskin. — Cited and adjudged accordingly. Parl. Cases 72. Attorney General v. Baden.

† An Office post Mortem found that the Person died seised of Lands, but not what Estate he died seised of in those Lands. It was resolved by the three Lords Ch. J. Assistants, That the said Office is not utterly void, but may be supply'd by a Melius Inquirendum, as well to perfect what Estate the Deceased held, as of what Estate he died seised; and it was decreed accordingly. Ley 15, 16. Mich. 7 Jac. Netherfole's Case.

3. 2 E. 3 E. 6. cap. 8. S. 8. Enacts that When the Jury finds De quo vel de quibus &c ignorant, or per quæ Servitia ignorant, the first shall not make a Tenure of the King, nor the last a Tenure in Capite, but in such Case Melius Inquirendum shall issue forth.

Note, that it is the ancient Course in the Exchequer, that if it be found by Of-

fice that F. S. was seised in Fee, and dy'd, but of whom the Tenements are held they do not know, that a Commission shall issue to enquire certainly of whom &c. and if it be found that of W. N. then the Party shall have Ouster le Main. But if Office be found that it is held of the King, but by what Services they do not know; this is good for the King, and it shall be intended to be held in Capite by Knights Service; For the best shall be taken for the King, but now in those Cases Melius Inquirendum shall be awarded by this Statute. Br. Office devant &c. pl. 59. cites 30 H. S.

4. It was found before the Coroner super Visum Corporis, That J. Harleston fell into a Marlepit fortuito, and sodied. Afterwards, by the Procurement of the Queen's Almoner, a Commission issued out of the Crown Office (Quali in Nature of a Melius Inquirendum) and was awarded to the Sheriff to enquire of his Death, and of what Goods and Chattles he was possessed at the Time of his Death, and it was found before the Sheriff, that he was Felo de se &c. It was moved, that this Writ or Commission was not well awarded, but utterly void; For the Statute of 28 Ed. 3. cap. 9. is expressly, that no such Commission shall be granted; and that the Sheriff shall not take Indictment by Writ or Commission, and F. N. B. R. 144. and 250. agreeth therewith. But Ive the Clerk informed the Court that they have divers Precedents since the Statute of such Commission awarded. Cro. E. 371. Hill. 37 Eliz. in B. R. Harleston's Case.

A Melius Inquirendum is seldom or never granted, tho' in such Case there are Affidavits, that the Party had his Senes. It hath been granted where any Fault is in the Coroner, or any Uncertainty in the Inquisition re-

turn'd. This Writ is generally granted upon Offices or Tenures, and directed to the Sheriff, but never to a Coroner in Case of a Felo de se, who makes his Inquiry super Visum Corporis; per Pemberton Serjeant. 3 Mod. 238. Trin. 4 Jac. 2. B. R. in Case of the King v. Bunny.

5. If an Office be found for the King, and upon a Melius Inquirendum be found for the King likewise, but not warranted by the Writ, so that all is insufficient and void, a new Writ of Melius Inquirendum ought to be granted. But if upon such former Melius Inquirendum it had been found against the King,

But in good Discretion a Melius Inquirendum shall not be King,

awarded after Office found against the King without Issue of some Record, or other present Matter for the King, for avoiding Vexation to the Subject.

King, he should not have a new Melius Inquirendum; 1st. Because then there would be no End of such Writs. 2dly. If in a Diem clausit extremum, or Mandamus &c. it be found against the King, no such new Writs shall issue, and so it shall be upon a Melius &c. 3dly. If Office be found for the King, the Party grieved may traverse it, and if this Traverse be found against him, this makes an End of the Matter; so if it be found for him that renders the Traverse, this shall bind the King as to this Matter. But if upon the Melius Inquirendum it be found for the King, yet the Party grieved may traverse it. 3 Rep. 168. Hill. 7 Jac. Paris Stoughter's Case.

S. P. Because the Verdict was with the prout patet, whereas it ought to be full and direct 13 Rep. 2. Trin. 7 Jac. in Cur. Ward, Westcott's Case.

6. In an Inquisition upon a Diem clausit extremum the Words of the Verdict being, that Part of the Lands were holden so and so *Pro aliquo ipsis Juratoribus noto sive cognito in Contrarium*, it was retolv'd, that it was insufficient, and not traversable, but to be supply'd by a Melius Inquirendum, especially because those Words do not import any express affirmative Verdict; and thereupon a Commission in Nature of a Writ of Melius Inquirendum was awarded to inquire better of the Tenure of the said Lands so uncertainly found, and of all other the Lands and Hereditaments found in the said Inquisition. Ley. 10. 11. Trin. 7 Jac. Westcot and William's Case.

An Office not finding any Dying seised, and finding a Tenure of common Persons only is mere-void; But if any Tenure in Capite, or by Knight's Service had been found of the King, and no dying seised, yet

7. It was found that B. was seised of divers Lands at the Day of his Death, but not found of what Estate he was seised in those Lands, nor that he died seised of such Estate, nor any Tenure by Knight-Service in Chief or otherwise by Knight's Service was found thereby; but that he died 25th July last past &c. Whereupon a Melius Inquirendum issued, which likewise found not what the Estate was, of which &c. but only that he was seised of such Estate as appeared in the first Inquisition. Whereupon issued a *Quæ plura*, and then another Melius Inquirendum, which *Quæ plura*, and last Melius &c. and Inquisition thereupon found being grounded on the former Inquisition, wherein the King was not intitled to any Lands at all, and so no Cause to inquire of *Plura till a Seisin found*, the whole was held to be void, and decreed accordingly. Ley. 22. Trin. 8 Jac. Barham's Case.

the Office had not been void but voidable, and a Melius Inquirendum should have been awarded to inquire better of the Estate whereof he was seised, and whether he died seised or No; but otherwise where no Tenure is found of the King. Ley. 36. Pasch. 9 Jac. Shallock's Case.

8. An Inquisition post Mortem found the Land held of A. by 5 s. Rent as of his Manor of D. and a Melius Inquirendum found the same Lands to be held of B. as of his Manor of S. by the same Services as in the former of A. It was held, that tho' in Truth some Part of the Lands might be held of the King, yet no new Melius Inquirendum could be awarded to inquire better of the Tenure of the said Lands after the Death of the same Ancestor, unless there were a Record to prove a Tenure for the King, and then a *Sci. fa.* would lie on the Statute of Lincoln to seise the Lands; But no new Office or Melius Inquirendum could be; and it was decreed accordingly. Ley 27, 28. Mich. 8 Jac. Gardiner's Case.

S. C. Vent. 181. Hill. 23 & 24 Car. 2. by Name of Stanlake's Case. And Hale said, Where a Coroner hath inquired, no Melius Inquirendum can go, as upon

9. It was moved for a Melius Inquirendum to be granted to the Coroner of Kent, who had returned an Inquisition concerning the Death of one that was killed within the Manor of Greenwich; he had returned that he died of a Meagrim in his Head, when he was really killed with a Coach. Hales said A Melius Inquirendum is generally upon an Office post Mortem, and is directed to the Sheriff. But Twifden said this cannot be to the Sheriff; In 22 Ed. 4. the Coroner must enquire only super Visum Corporis. And if you will have a new Inquiry, you must quash this. Indeed, a new Inquiry was granted in *Hiles Bartly's Case. It being prayed that the Court, being the supreme Coroner, would examine the Misdemeanor of the Coroner Hales Ch. J. bid them make some Oath of his Misdemeanor,

Misdemeanor, because he is a sworn Officer. Without Oath we will not quash this Inquisition. Newdigate said, that in the Case of *Hiles Bartly* the Inquiry was not filed, and that that was the Reason why a new one was granted. Hales ordered the Coroner to attend, who (he said) must take the Evidence in Writing, and that he should bring his Examination into Court. Mod. 82. Mich. 22 Car. 2. B. R. Anon.

an Office found after the Death of the King's Tenant; For unless they could take some Excep-

tion to the Inquisition to quash it, the Coroner could not enquire again; but if the Misdemeanor of the Coroner were somewhat more clearly made out, the Court said they would set the Inquisition aside, and cause a new one to be made. And the Court said, that in *Michael Bartholomew's* Case, [which seems to be S. C. as *Hiles Bartly* here cited] and also in *Tomms's* Case it was proved that there was *Prædicitio* with the Coroner to suppress the King's Evidence, and so the Inquisition was set aside upon a Male se gefsit — * 2 Sid 90. 101. Trin. 1658. Michael Barlee's Case.

10. Upon Inquisition of a *Felo de se* returned in B. R. by Certiorari it was moved for a *Melius Inquirendum* on *Affidavit of Melancholy* and *Distractio*; but held not grantable, unless there had been some Irregularity in the Caption of it; and ordered the Administrator to *traverse the Inquisition*, as is usual in the Exchequer in Cases of Inquests of Office, as *Talis venit & queritur seipsum colore &c. gravari & minus Rite &c.* And agreed by all the Bench he might do so, but held by some of the Bar that it is not traversable. Upon Action of Trover for the Deceased's Good's, it will hold good, and cannot be traversed. 2 Show. 199. Pasch. 34 Car. 2. B. R. the King v. Ripley.

Skin. 45. S. C. — 2 Jo. 198. Pasch. 34 Car. 2. B. R. and it is there said, the Ld. Ch. J. Hale had declared his Opinion that it was traversable.

11. The Defendant was *Felo de se*, and the Coroner's Inquest found him a *Lunatick*, and now Mr. Jones moved for a *Melius Inquirendum*, but it was denied, because there was no Defect in the Inquisition, but the Court told him, that if he could produce an *Affidavit that the Jury did not go according to their Evidence, or of any indirect Proceedings of the * Coroner*, then they would grant it; but it was afterwards quash'd, because they had omitted the Year of the King. 3 Mod. 80. Pasch. 1 Jac. 2. B. R. The King v. Hetherfal.

S. C. cited Carth. 73. Mich. 1 W. & M. B. R. in Case of the King v. Bonny. — * If a Coroner's Inquest be quashed, the Coroner must

take a new Inquest super Visum Corporis; but if a *Melius Inquirendum* be granted on a Male se gefsit of the Coroner, the new Inquiry must be before the Sheriff or Commissioners, not super Visum Corporis, but upon *Affidavits*; For none but the Coroner can inquire super Visum Corporis, and he is not to be trusted again; but when an Inquisition is quashed, it is as if no Inquisition had been taken. 1 Salk. 190. Mich. 1 W. & M. B. R. The King and Queen v. Bunney. — S. P. But where his Inquisition is quashed for a Defect in Point of Form only, he may and ought to take a new one in the like Manner as if he had not taken any before. Hawk. Pl. C. 54. cap. 9. S. 53.

12. A. drowned himself in a Pond, and the Coroners Inquest found him *Non Compos Mentis*, because it is more generally supposed that a Man in his Senses will not be *Felo de se*. And it was moved for a *Melius Inquirendum*, and that the *Inquisition* might be quashed; for that it sets forth *Quod Pred. Defend. circa Horam Octavam ante Meridiem in quoddam Stagnum se projecit & per Abundantiam Aquæ ibidem statim suffocat. & emergit. erat* which is *insensibile*. It was objected, that there is no Exception taken to the Substance of the Inquisition, and the Word *suffocat.* had been sufficient, if the Word *Emergit.* had been left out. The Court were of Opinion, that there being another Word in this Inquisition, which carries the Sense, it is therefore sufficient; but if it had stood singly upon this Word *Emergit.* it had not been good. 3 Mod. 100. Pasch. 2 Jac. 2. in B. R. the King v. Saloway.

(C) Grantable

(C) Grantable. *At what Time.*

1. **A**FTER the Inquisition is returned and filed, *Melius Inquirendum* shall not be granted so long as that Inquisition is in Force, and not quashed; For such an Inquisition is not traversable, but an Inquisition on a *Melius Inquirendum* may be traversed, because it is not taken super *Visum Corporis*; and this was agreed per tot Cur. to be good Law. Carth. 73. Mich. 1 W. & M. B. R. the King v. Bonny.

(A) Memorandum.

1. **U**PON a Motion in Arrest of Judgment for that this *Action* was brought by Bill, and the Entry on the Record &c. was with a general Memorandum; *ff. Memorandum quod alias scilicet. Term. Sanct. Mich.* and the Plaintiff declared, that the Defendant *Falso & malitiose on such a Day &c. indicted the Plaintiff for keeping a Bawdy-House*, upon which Indictment he (the Plaintiff) was arraigned and tried &c. *Et inde Legitimo modo Acquietatus* (viz.) on such a Day at the Sessions held in the Old Bailey &c. which *Day of Acquittal* was by the Plaintiff's own shewing after *Michaelmas Term* began, of which Term the Bill was; And Holt Ch. J. cited a Case between **Dutchinson and Thomas** in the time of Hale Ch. J. where after Verdict it appear'd, that the Cause of Action accrued on a Day after the Term began, in which the Action was brought, and the Bill was of the Term with a general Memorandum, as in this Case, and it was adjudged, that the Bill did relate to the first Day of the Term, and therefore that Judgment was arrested; and so it was in the principal Case; but it has been held good if **Bail* was filed after the Term began. Carth. 114. Pasch. 2 W. & M. B. R. Venables v. Datté.

* S. P. per Cur. 2 Lev. 13. Trin. 29 Car. 2. Tatlow v. Bateman.

2. In making up your Issues &c. in the *Memorandum*, after the Words *In Custod' Mar' &c.* if the Action be *De Placito quod*, then say, (*De Placito Debit'*)——If *pro eo videlicet*, then (*De Placito Transgr' super Casum*)——If in Ejectment, then (*De Placito Transgr' & Ejectionis firme*)——If in Covenant, then (*De Placito Convention' fract'*)——If in Trepass, then (*De Placito Transgr' &c.*) Reg. Plac. 7, 8. cap. 1.

3. The Entries of the ordinary Proceedings in the *Common Pleas* are not by *Memorandums*, as in the King's Bench and Exchequer; for as the one was designed to determine Criminal Proceedings, and the other the Revenue, so the Proceedings in Common Cases in both Courts, not being the original and Principal Design of their Establishment, these Proceedings are the *By-Business* of these Courts, and entered by way of Memorandums; But in the Case of an *Action of an Attorney*, which is the *By-Business* of the Court, the Proceedings are entered by a Memorandum. G. Hist. C. B. 39. cap. 4.

4. Defendant *demurred*, and shewed for Cause, that in the Memorandum it is not said, whether the Bill was in a Plea of Debt or Cause, or in what Plea. It was argued for the Plaintiff, that the Bill is set out in hæc Verba, and shews itself; Judgment for Plaintiff. Barns's Notes in C. B. 233. Trin. 7 & 8 Geo. 2 Adkin v. Worthington.

5. Plaintiff declared upon a Memorandum upon a Bill, but omitted in the Memorandum the Words (*in a Plea of Trepass upon the Case*) Defendant

dant demurred, and shewed this Omission specially for Cause; Per Cur. The Plea appears by the Bill, which is set forth Verbatim in the Declaration; Judgment for Plaintiff. Barns's Notes in C. B. 235. Trin. 7 & 8 Geo. 2. Adkin v. Worthington.

6. Defendant moved that Plaintiff might insert the true Day of filing the Bill (viz. February 3d last) in the Memorandum at the Head of his Declaration, and that Defendant might have Leave to plead a Tender of last Term, the Declaration not having been delivered till after the Term. The Rule to shew Cause was made absolute on hearing Council on both Sides. Barns's Notes in C. B. 253. Easter 12 Geo. 2. Potts v. Creswell.

Menace.

(A) Menace. *What shall be said a Menace sufficient to avoid Things.* See Durefs (B)

1. **I**f a Man does a Thing upon a Menace for Doubt of Death, he shall avoid it, tho' no Act or Force be used against him. 43 E. 3. 19.

2. Menace to kill a Man if he will not make a Deed is sufficient to avoid it. 13 H. 4. Title Durefs, 20. 39 E. 28. b. Though there be not any Act to constrain him to it. Perk. S. 18.

3. If a Man makes a Deed upon Menace of Battery to avoid great-er Evil, this shall avoid the Deed. 4 H. 4. 2. Contra 13 H. 4. Durefs 20. Menace of corporal Pain shall avoid a Deed, otherwise it

is of Goods. Fin. Law. 8. b.

4. If a Man menace another that if he will not enter into a Bond of 100 l. to him he will eject him out of the House in which he dwells; upon which, to avoid the Ejectment out of his House, he enters into the Obligation; this Menace is not sufficient to avoid this Obligation; Because it is not made to * his Life † or Member, but only to his Estate. Mich. 15 Ja. in the Star-Chamber, between Goodrick and the Lord Clifton. Resolved by the Judges, the Lord Cook, the Lord Keeper, and Court; And it was said, that an Action being brought upon this Bond, the Defendant pleaded per Dinas, and yet it was found and adjudged against him. In Debt upon an Obligation, the Defendant said, that A and B. took his

* Fol. 125.

Beasts and chased them to D and the Defen-

dant demanded his Beasts, and they refused to deliver them, and said, that if the Defendant did not make Obligation to the Plaintiff that they would beat and maim him if he took his Beasts, by Force of which Menace he made Obligation, Judgment si Actio; And by three of the Justices, and by the best Opinion, this is no Plea; for it shall not be avoided but by Menace of his Body, and not by Menace of his Goods. Br. Durefs, pl. 16. cites 7 E. 4. 21. † Orig. (Un.)

5. Menace of Imprisonment is as good Cause to avoid a Deed or Obligation, as Menace of Life and Member; by the Opinion of the Justices except Prifot. Br. Dures, pl. 9. cites 39 H. 6. 50. Contra of Imprisonment made to my Father, Mother, Feme,

or Brother, I shall not avoid a Deed by this. Ibid.—And Menace to burn or break a House is no Cause to avoid a Deed. Ibid.

(B) By whom, *being made by a Stranger.*

If a Stranger menace J. W. to make to me an Obligation,

1. **I**F a Stranger menace by Covin of him who is to have the Benefit fit to make a Deed, it is avoidable. 43 E. 3. 19. and he makes it by the Menace; there J. W. shall avoid it by the Menace of the Stranger, as well as if the Obligee himself had made the Menace; Quod Nota; a good Case, and agreed by all the Justices except Prifot. Br. Dures, pl. 1. cites 39 H. 6. 50.

2. Debt by W. C. the Defendant said, that the Plaintiff by A. B. and others unknown, by Covin of him the Plaintiff, him the Defendant at N. in the County of N. menaced that he would take and imprison him wheresoever he could find him, unless he should pay 10 l. to the same Plaintiff, or make to him an Obligation of 10 l. by which the Defendant, fearing of the Threats and Imprisonment aforesaid, made and delivered the aforesaid Writing to the same Plaintiff, of which he prayed Judgment &c. And the Plaintiff demurred, and the Defendant also; and the Opinion of the Court was against the Plaintiff; by which he was nonsuited, and brought a new Action. Br. Dures, pl. 1. cites 28 H. 6. 8.

(C) Punishable.

1. **I**F one menace an Attorney for prosecuting him in the King's Court in a Suit there, he shall be fined and imprisoned by the Court where the Party is Attorney; per Doderidge J. Lat. 220.

2. 9 Geo. 1. cap. 22. S. 1. Enacts, that if any Person shall knowingly send any Letter without a Name subscribed, or signed with a fictitious Name, demanding Money, Venison, or other valuable Thing &c. or if any Person shall by Gift or Promise of Reward, procure any other to join him in any such unlawful Act, every Person so offending, being convicted, shall be guilty of Felony, and shall suffer Death without Benefit of Clergy.

(D) Justifiable, in what Cases and how far.

1. **T**RESPAS. Where the Father dies seized, and J. N. abates, the Son cannot justify Menace made to the Abator without alleging, that he entered upon him; but if he enters, and the Abator continues Possession, there he may menace him, that he shall repent as the Law wills, (for without Entry he cannot punish him for the Trespass) *absque hoc*, that he menaced him of Life and of Member. Br. Trespass, pl. 158. cites 22 H. 6. 48.

2. Debt upon an Obligation, the Defendant said, that it was made by menace of the Plaintiff to imprison him; the Plaintiff said, that he said to the Defendant, that he would sue him for 10 l. Debt, which he owed him, and for which the Obligation was made, and imprison him, if he could, if he would not pay him &c. which is the same Menace &c. and the Opinion of the Court was, that it is no Plea; For the one is a lawful Menace, and the other is a Tortious Menace. Br. Dures, pl. 23. cites 16 E. 4. 7.

(E) Of

(E) Of what Persons; and Pleadings, and Proceedings.

1. **I**N Præcipe quod reddat, if the Tenant pleads the Release of the Demandant, and the Demandant says, that it was made at A. by Menace, the other shall say that he made it of his good Will, and not by Menace. Br. Traverſe, per &c. pl. 365. cites 43 E. 3. 19.

2. The Juſtices of Bank may enquire of Menace and Imprisonment of an Attorney in the King's Palace by Inquest of Officers of the Palace, and Proceſs upon it ſhall be by Capias and Exigent. Br. Proceſs, pl. 178. cites 32 H. 6. 34.

3. Proceſs was made to the Warden of the Fleet of Menace and Imprisonment in the Inferior Palace of Westminster. Br. Proceſs, pl. 180. cites 32 H. 6. 34.

4. In Debt upon an Obligation the Defendant ſaid, that the Plaintiff menac'd him at B. by which he made the Obligation at L. and the Plaintiff ſaid, that he menac'd him at B. but he after made the Obligation at L. at large, and not by the Menace, and the Defendant ſaid, that he did it by the Menace, Priit; and the others e contra; and it was doubted where the Viſne ſhall come. Br. Dette, pl. 25. cites 33 H. 6. 24.

5. Debt upon an Obligation againſt a Prior under the Covent Seal; he ſaid that the Prior his Predeceſſor carry'd 5 Chanons, who were all the Covent, to D. and there menac'd them to make the Obligation, by which Menace they made the ſaid Obligation, and it was held there, that a Covent or Commonalty may do an Act by Menace. Br. Dures, pl. 2. cites 35 H. 6. 17.

In Replevin, the Defendant avow'd for Rent-charge granted by Abbot and Covent of
D. the Plaintiff ſaid, that before the making of the Deed, and at the Time of the making thereof &c. the ſaid F. then Abbot menac'd A. B. C. and D. the Monks who were then the Covent, that is to ſay, 7 in all, to imprison them and detain them in Priſon till they ſealed the Deed, by Force of which they made the Deed, and it is held there Prima facie, that Covent nor Commonalty can neither be imprison'd, nor menac'd to be imprison'd generally, nor by general Pleading, but they may be menac'd, as by ſpecial Pleading above, that is to ſay A. B. C. and D. who made the Covent. But per Moile, he ſhall ſay that theſe and no more made the Covent &c. Br. Dures, pl. 9. cites 39 H. 6. 50.

6. It is no Plea, that the Mayor and his Commonalty made the Deed by Menace. Br. Dures, pl. 18. cites 21 E. 4. 8. 14 & 15.

For more of Menace in general. See Dureſs, Treſpaſs, and other proper Titles.

Merchants.

(A) What Regard the Law pays them, and their Uſages.

1. **M**erchandize is ſo Univerſal and Extenſive, that it is in a Manner * The Cuſtom of Merchants is part of the Common Law of this Kingdom, of which the Judges ought to take Notice; and

impoſſible, that the Municipal Laws of any one Realm ſhould be ſufficient for the ordering of Affairs and Traffick relating to Merchants. The Law concerning Merchants, is called the Law Merchant from its univerſal Concern, whereof all Nations do take ſpecial Knowledge, and the * Common and Statute Laws of England take Notice of the Law Merchant, and leave the Cauſes of Merchants in many Inſtances to their own peculiar Law. As in the 13 Ed. 4. 9, 10. A Merchant-Stranger made Suit before the King's Privy Council for certain Bales of Silk feloniously

if any doubt arise about the Custom, they may send for Merchants to know the Custom; per Hobart Ch. J. Winch. 24. Van-Heath v. Turner.—We take Notice of the Laws of Merchants that are general, not of those that are particular Usages; per Holt Ch. J. 2 Salk. 443. Lethulier's Case.—That cannot be a Law or Custom among Merchants, which is grounded on a Fraud. N. Ch. R. 88. Borre v. Vande.

2. In War, Merchants in an Enemies Country are privileged from any Violence to be offered them. 3 Molloy 459. cap. 7. S. 15. cites Grot. de Jure Belli et Pacis, Lib. 2. cap. 11. S. 12.

3. There are likewise (for the Accomodation of Commerce and Traffick) in all Countries Privileged Ships and Boats serving the Country or the Prince, which have great Prerogatives of being free of Impotts and Customs, and not subject to Arrests. And all Ships are subject to this Service upon Command, and if they refuse, the Ships are forfeited by the Law Maritime. 3 Molloy 459. cap. 7. S. 15. cites Lex Mercat. 110, 111.

4. If a Merchant commit any Offence, for which he is to be amerced, this Amercement shall be Salva Merchandiza sua; Because Trade and Traffick is the Livelyhood of a Merchant, and the Life of the Commonwealth, wherein the King and every Subject hath an Interest. 3 Molloy 459. cap. 7. S. 15. cites Magna Ch. cap. 14. 2 Inst. 28.

5. By the Statute of the 5 H. 4. cap. 7. Merchants alien shall be used in this Realm as Denizens be in others. 3 Molloy 459. cap. 7. S. 15.

6. A Man delivered Kerties to be sold in Spain; the Factor falls to one who becomes a Bankrupt; and it is a Law in Spain, that if the Factor enter it before a Register, and had a Testimonial, that he shall be discharged. And the Court said, we will judge here that he shall be discharged. 3 Molloy 459, 460. cap. 7. S. 15. cites 2 Rolls Rep. 497. Caps v. Tucker.

Brownl. 102.
S. C. seems
a Transla-
tion of Yelv.

7. Debt upon a Bill by a Merchant to pay Foreign Coin amounting to 300l. to be paid upon the Payment of the Feast of the Purification called Candlemas Day. Upon Non est Factum pleaded, and Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Declaration was not good, because Payment of Candlemas is not known in our Law; yet the Judgment was affirmed; for that amongst Merchants such Payment is known to be on the 20th of February, and it appears that the Detendant was a Merchant, and the Judges ought to take Notice of it, being used among Merchants for the Maintenance of Traffick. Trin. 6 Jac. B. R. Yelv. 135. Pierfon v. Pountey.

8. All other Subjects are restrained to depart the Realm, to live out of the Realm, and out of the King's Obedience, if the King so thinks fit; but Merchants are not, for they may depart, and the same is no Contempt, they being excepted out of the Statute of 5 R. 2. cap. 2. and by the Common Law they might pass the Seas without Licence, tho' not to Merchandize. 3 Molloy. 460. cap. 7. S. 16.

9. Merchants by Law-Merchant may assign Debts, but otherwise of Actors and Transfactors in England. Arg. 2 Chan. Cases 37. in Case of Fashion v. Atwood.—But it was decreed that Debts assigned by Parol by the Clothier to the Factor as a Security for what the Factor had overpaid should go to the Executors or Creditors of the Factor deceased, and not to the Bond Creditors of the Clothier. 2 Chan. Cases 38. Trin. 32 Car. 2. Fashion v. Atwood.

(B) *Who* are said to be Merchants.

i. **E**VERY one that buys and Sells, is not from thence to be denominated a Merchant, but *only he who Trafficks in the way of Commerce by Importation or Exportation*; or otherwise in the way of *Emption, Vendition, Barter, Permutation, or Exchange*, and which makes it his living to buy and sell, and that by a continued Assiduity, or frequent Negotiation in the Mystery of Merchandizing; but those that buy Goods to reduce them by their own Art or Industry into other Forms than formerly they were of, are properly called Artificers, not Merchants; not but Merchants may, and do alter Commodities after they have bought them, for the more expedite Sale of them, but that renders them not Artificers, but the same is part of the Mystery of Merchants; but Persons buying Commodities, tho' they alter not the Form, yet if they are such as sell the same at future Days of Payment for greater Price than they cost them, they are not properly called Merchants, but are Usurers, tho' they obtain several other Names, as Ware-house Keepers, and the like; but *Bankers, and such as deal by Exchange* are properly called Merchants. 3 Molloy. 456, 457. cap. 7. S. 13.

2. If a *Person*, who otherwise is no Merchant, being beyond Sea takes up Money and draws a Bill upon a Merchant, he cannot in an Action brought upon this Bill against him as the Drawer thereof plead that he was no Merchant; For the very taking up the Money and drawing the Bill makes him a Merchant to this Purpose, and is a merchandizable Act. Comb. 152. Mich. 1 W. & M. at Serjeant's Inn in Fleetstreet. Sarfield v. Witherly.

3. *Merchant* includes all sorts of Traders as well and as properly as Merchant Adventurers, cites Spelm. Guilda D. 279. b. A Merchant Taylor is a Common Term; per Holt Ch. J. 2 Salk. 445. Mayor &c. of London v. Wilks.

A Merchant Taylor is Nonsense and Unintelligible, they knew not

what it meant; so the Court seemed to think. 2 Salk. 611 Trin. 4 Annæ. B. R. Queen v. Harper

For more of Merchants, See **Bills of Exchange, Factor, Partners,** and other proper Titles.

Merger.

(A) *In what Cases* there may be a Merger.

i. **E**STATE at *Common Law* cannot merge in an Estate by *Custom*. And. 191. Mich. 27 & 28 Eliz. Smith v. Lane.

2. *Franktenement* cannot drown in a *Chattel*. 10 Rep. 48. b. Mich. 10 Jac. Lampet's Cafe.

3. No Merger can be where Estates *differ only in Quality* and not in Quantity. Arg. Roll. R. 178. Pasch. 13 Jac. B. R. in Cafe of Bowles v. Berrie.

Raym 413. —As a Tenancy after Possibility of Issue extinct,

and a Tenancy for Life. Roll. R. 173 Pasch. 13 Jac. B. R. in Cafe of Bowles v. Berrie. Z. z z z

4. An

Cro. J. 176.
Gibson v.
Searl.

4. An *Interest* will not drown in an *Authority*; as Lessee of a Manor, except Writs, Eitrays, Perquisites of Courts &c. and (a Lease being made afterwards of all those) the Lessee of the Manor is made Bailiff; it was adjudged to be no Surrender. Arg. Hard. 47. Hill. 1655. cites the Case of Gibbs v. Seale.

Mergers are
edious in E-
quity and
never allow-
ed unless for
special Rea-
sons. Wms's Rep. 41. Pasch. 1701. in Case of Philips v. Philips.—See Devise. S. C.

5. There is no Rule or Case that there shall be a Merger, where the *Estates may stand*; and the taking it so is only to preserve the *Intention* of the Parties. Arg. Raym. 37. Mich. 13 Car. 2. B. R. in Case of Stevens v. Brittreddge.

3 Lev. 407.
Mich. 6 W.
& M. C. B.
Godbolt v. Freeston.—Ibid. 457. Hill. 7 W. 3. C. B. Duncomb v. Duncomb.—Raym. 36. Mich. 13 Car. 2. B. R. Stevens v. Brittreddge.

6. Where there is an *intermediate Estate*, there can be no Merger. Arg. Cumb. 81. Hill. 4 Jac. 2. B. R. in Case of Deighton v. Greenville.

7. *Equal Things cannot drown one another.*

(A 2) In what Cases, where the *Estates* are in *different Rights and Respects*.

And if the
Lessor dies
the Term is
revived. Arg.
3 Le. 111.
says it was so
holden by some—Br. Extinguishment 54. that the Term is extinct, tho' it remains affets.—Cited Arg. 2 Roll. R. 472. Mich. 22 Jac. B. R. in Case of Litchden v. Windsmore and Tucker.

1. **I**F Lessee for Years makes Lessor Executor the Term is not drowned; because he has the Freehold in his own Right and the Term en auter Droit. Co. Litt. 338. b.

Lessee for
Years Re-
mainder for
Years; if the first takes Estate for Life, his Estate for Years is not so determined, but that the Remainder stands. Brownl. 181. Trin. 9 Jac. Bicknall v. Tucker.—So if A. has a Term in Right of his Wife, or as Executor and purchases the Reversion, it is no Extinguishment, because he has the Term and Reversion in different Rights; per Holt Ch. J. 1 Salk. 326. Hill. 11 W. 3. B. R. in Case of Gage or Grey v. Acton.—Cro. J. 275. Platt v. Sleep.—See Bridgm. 29. Crocker v. Kelsey—Cro. J. 688. Trin. 21 Jac. S. C.

2. *Estate for Years and a Freehold may consist with a several Respect*; per Tirrel J. Arg. Cart. 62. cites 1 Inst. 338.

S. P. 1 Le.
334. Arg.
Trin. 33
Eliz. B. R.
cites S. C.—
S. C. cited 3
Le. 111.
Trin. 26
Eliz. contra,
that the
Term is ex-
tinct, altho'
he had the
Term in his
own Right,
and the Free-
hold in the
Right of the
Church.—
S. C. cited 1
Roll. R. 247
Trin. 12 Jac.
that by the best
Opinion it is an
Extinguishment,
and that so it was
taken in
Sir Francis Flem-
ing's Case.—Lane
101 Hill. 8 Jac.
contra, that it
does not exting-
uish his Term;
per Bromley J.—
But see Winch.
120. contra, that
it was a Surrender,
cites Rudd's Case.—
So is Hutt.
105. in S. C. als.
Sir A. Capel's Case.—
So Jenk. 200. in
pl. 18. that the
Lease is extinct.—
So of a
Master of an Hos-
pital. Ibid.—But
if a Lease for Years
be made to A. one
of the Commonalty
of London, and
afterwards he be-
comes Mayor, this
Lease is not extinct;
and so of a Dean
and Chapter. Ibid.

3. It was said at the Bar, if a Parson Patron and Ordinary makes a Lease for Years of the Globe Land of the Parsonage, and after the Parson dies, and the Lessee for Years is made Parson, and after he dies, that his Executors shall not have the Residue of the said Term which is to come; because the Term was extinct by the Franktenement of the Land, which the Parson had in him; the which Catline Ch. J. denied, For he said that he had the Term in his own Right, and in the Capacity of his Natural Body, and the Inheritance as Parson, which is in another Capacity, and therefore the Term shall not be extinguished; but some at the Bar said, that he had both in his own Right, and to his own Use; and therefore they said, that it is Reason that it should be extinguished notwithstanding that he had it in several Capacities; and it is not like where the Termor has the Term of Years as Executor of the Lessee; For there if he dies the Term shall be revived. Pl. C. 419. b. 420. a. Trin. 14 Eliz. in Case of Bracebridge v. Cook.

Trin. 12 Jac. that by the best Opinion it is an Extinguishment, and that so it was taken in Sir Francis Fleming's Case.—Lane 101 Hill. 8 Jac. contra, that it does not extinguish his Term; per Bromley J.—But see Winch. 120. contra, that it was a Surrender, cites Rudd's Case.—So is Hutt. 105. in S. C. als. Sir A. Capel's Case.—So Jenk. 200. in pl. 18. that the Lease is extinct.—So of a Master of an Hospital. Ibid.—But if a Lease for Years be made to A. one of the Commonalty of London, and afterwards he becomes Mayor, this Lease is not extinct; and so of a Dean and Chapter. Ibid.

4. The *Lessor enfeoffed the Lessee to the Use of others*; in this Case, if the Statute of 27 H. 8. cap. 10. of Uses had never been made, the Term had been merged at Common Law. But Trin. 27 Eliz. it was resolved that the Term was saved. 7 Rep. 20. a. cites it as Cheyney's Case.

S. C. cited 7 Rep. 38.
—2 Le. 178
cites it so
adjudged in
Case of Che-

ney v. Oxenbridge.—2 And. 192. S. C. adjudged.—cited Arg. Winch. 109.—S. C. adjudged Mo. 196.—So a Feoffment of Rent to the Grantee and others to the Use of Grantor. And. 85. Monk's Case.—And. 233. Bate v. Villers.—A seised of Land leased the same to B. for 99 Years, and 2 Years after by Lease and Release conveyed the Inheritance to B. and to another to the Use of A and the Heirs of his Body, with diverse Remainders over; And if by this Conveyance the Lease for 99 Years was destroy'd in all or in Part, was the Question? It was argued, but adjournatur. Vid. 2 Lev. 126, 127; Hill. 26 & 27 Car. 2. B. R. How v. Stile.

5. So of Bargain and Sale to Lessee to make him Tenant to the Præcipe for suffering a Common Recovery to the Use of the Lessor and his Heirs. Cro. J. 643. Mich. 2 Jac. B. R. * Ferrers and Curson v. Fermor.

* 2 Roll.
245. S. C.
—Because
it was in him
for another

Purpose; per tot. Cur. Mod. 107. Pasch. 26 Car. 2. B. R. Fountain v. Cook.

6. Livery by Lessee for Years as Attorney to the Lessor is no Extinguishment of the Term. Mo. 280. Mich. 31 & 32 Elix. C. B. Batty v. Trevillian.

But where
A. was Lessee
for Years,
Remainder to
B. in Tail,

Remainder over, and Lessee enfeoffed J. S. and made a Letter of Attorney to W. R. to enter into the Lands, and seal the Feoffment and deliver it in his Name to the Use of B. and his Heirs, and B. made Letter of Attorney to C. to enter in his Name, who entered accordingly, This was held a good Feoffment, tho' both the Lessee and Attorney were Disseisors; For it is good between the Feoffor and Feoffee; For the Remainder-man by the Feoffment and Entry is remitted, and the Term gone, the Freehold having come to it. Gouldsb. 92. Trin. 30 Eliz. Mounson v. West.

7. A Man has the Custody of a House, and afterwards he becomes the Owner of the House; his Custody therein ceases; Arg. Godb. 419.

But if Lessee
of a House
afterwards

* accepts a Grant of the Custody of the same House, 'tis no Surrender. Arg. Hill. 1655. Hard. 47. cites the Case of Gibbs v. Seales.

* Contra; For the Custody of the same Thing which was let before is another Interest in the same Thing leased, and cannot stand with the first Lease. Cro. J. 177. Trin. 5 Jac. in Case of Gibson v. Searl.—S. C. cited D. 200. in Marg. as adjudged that it was a Surrender.—Per 4 J. against 2. that tis a Surrender. D. 200. Marg. E. of Arundel v. Ld. Gray.

(B) In what Cases there shall be a Merger.

1. IF one has a Portion of Tithes, and afterwards he purchases the Rectory, out of which &c. The Portion of Tithes is not extinct but remains grantable. Agreed by Counsel of both Sides; and Haughton J. gives this Reason for it, because the Portion of Tithes may be more ancient than the Rectory, and that the Rector anciently had no Title to the Tithes; For before the Council of Lateran, every one paid his Tithes to what Parson he would, 2 Roll R. 161. Pasch. 18 Jac. B. R. in Sir Edward Cook's Case.

2. A. was seised in Fee of a Manor, out of which a Fee-Farm-Rent was issuing, and purchas'd in the Rent, and took the Conveyance to himself in Fee. By this the Rent is merged in the Inheritance. 10 Mod. 525, 526. Mich. 10 Geo. in Canc. Atcherley v. Vernon.

(C) Of

(C) Of what Estates. Copyholds.

1. **W**HERE the Lord enfeoffs his Copyholder to the Use of others, the Copyhold Estate is saved by the 27 H. 8. 7 Rep. 38. Mich. 5 Jac. in *Lillington's Case* says, it was so resolved 28 Eliz. in the Court of Wards in one *Hed's Case*.

And. 191. *Smith v. Lane*.—S. P. But if he takes a Lease for Years of the Manor, it is but a Suspension of his Copyhold during the Term. Arg. Cro. J. 84 Mich. 5 Jac. B. R. says it has been so adjudged.

2. If a Copyholder in Fee takes Assignment of a Lease made to J. S. yet the Copyhold is drown'd. 2 Rep. 17. Mich. 28 & 29 Eliz. C. B. Lane's *Case*.

3. The Custom of a Copyhold Manor was, that if a Copyholder for Life died seised having a Wife at the Time of his Death, that she should have her Widowhood in it; A Copyholder purchases the Fee in the Name of A. who conveys it to B. for Life, the Remainder to the Copyholder in Fee; afterwards the Copyholder takes Wife, and grants this Remainder to C. in Fee, and dies; this Wife shall have the Widowhood in this Land; for the Copyhold was not destroyed nor extinguished, by Reason of the Estate of Life of B. which hindered the Destruction of the Copyhold. Although the Copyhold be destroyed by the said Feoffment of it, as to the Lord in this Case; yet it is not, as to the Copyholder. By the two Ch. J. and Ch. Baron. Jenk. 318. pl. 15. cites 18 Jac. Cro. 573. *Waldoe's Case*.

4. Lord of a Manor, having by the Custom the Cut of the Woods growing on the Lands, grants all the Woods and Underwoods growing, and to grow on the Copyhold to the Copyholder and his Heirs. This shall not merge in the Copyhold. Vern. 21. Mich. 1681. *Faulkner v. Faulkner*.

5. Copyholder in Tail takes a Conveyance of the Freehold in Fee; Lord Chancellor seem'd to make little Doubt, but that the Copyhold was merged. Vern. 458. Pasch. 1687. *Parker v. Turner*.

Ibid. 593. Hill. 1685. S. C.—S. P. That there is no Title remaining by Virtue of the Copyhold intail'd, and Judgment accordingly. Cart. 122. Pasch. 17 Car. 2. C. B. *Taylor v. Shaw*.

6. If a Copyholder for Life surrenders, that is drown'd, and the new Estate comes out of the Estate of the Lord; but if in Fee it is otherwise. Arg. Show. 285. Mich. 3 W. & M. in *Case of Glover v. Cope*.

(D) Of what Estates. Fee Simple.

S. P. Carth. 258. *Simmonds v. Cudmore*.—1 Salk. 338. S. C. 1. **T**WO Fee Simplees that may stand in several Persons distinct, when they meet in one Person, cannot do so, but the greater and absolute Fee doth swallow up the base and limited Fee. Hob. 323. Pasch. 17 Jac. in *Case of Elvis v. Archbishop of York*, cites *Hutly's Case*.

(E) Of what Estates. Fee Tail.

Carth. 258. *Simmonds v. Cudmore*.—An Estate 1. **T**HE Statute of *Westminster 2.* having made Estates Tail a Kind of particular Estates, they must (the Protection of the Statute being gone by the Fine) like all other such Estates be subject to Merger and

and Extinguishment when united with the absolute Fee. 1 Salk. 338. *Tail cannot be merged or surren-*
 Hill. 5 W. & M. Simmonds v. Cudmore.

dered or extinct by Accession of greater Estates. 2 Rep. 61 Br. Parlemt, 73. Hill. 41 Eliz. C.B. in Wiscott's Case. — 8 Rep. 74. b. Trin. 7 Jac. in Ld. Stafford's Case. — If Lands are given in Fee to one, who was Tenant in Tail, his Issue shall not be remitted, because the later Act takes away the Force of the Statute De Donis. Arg. Show. 420. cites 1 Rep. 48. 2 Rep. 46. — Where a *Man has Title to Land by a Tail, and after the same Land is given to him by Parliament*, his Heir shall not be remitted; For by the Act of Parliament all other Titles are excluded for ever; For it is a Judgment of the Parliament that this Gift only shall stand. Per Englefield J. Br. Parliament, pl. 73. cites 29 H.S. in Case of Button v. Savage. — So where the *King has Title in Tail*, and the Land is given to him by Parliament in Fee, the Tail is determined, so that the Heir shall not avoid Leases nor Charges &c. made by his Father; For the last Statute binds all former Titles and Estates not excepted. Ibid.

2. Tenant in Tail, *Remainder to the King*; Tenant in Tail makes a Lease for Years, and is *attainted*, the King shall avoid the Lease; for the *Estate Tail* is as much gone by Merger as if Tenant in Tail was dead without Issue. 1 Salk. 338. Hill. 5 W. & M. Simonds v. Cudmore.

(F) Of what Estates. Estate for Life.

1. LAND devisable is given to the Baron and Feme in Tail, the Remainder to the Heirs of the Baron, and after the Baron devised the Reversion to his Feme, and died without Issue, and therefore she was adjudged to be seised in Fee; For the Fee came to the naked Franktenement by the Devise and Death of the Baron without Issue. Br. Estates, pl. 60. cites 27 Aff. 60.

2. Where Land is given in special Tail to the Baron and first Wife, the Remainder to the Baron in Tail, and the first Wife dies without Issue, the Baron is seised by the second Tail in Remainder, because the Franktenement for Life merged in the Remainder. Br. Estates, pl. 9. cites 50 E. 2. 4.

3. Land is given to W. and A. his Feme in special Tail, the Remainder to B. in Tail, the Remainder to the right Heirs of B. The Baron dies without Issue, and A. the Feme survives, and is Tenant in Tail after Possibility of Issue extinct, and takes another Baron and has Issue, and after B. dies without Issue, to whom A. the Feme is Heir, and after A. dies. The 2d. Baron shall be Tenant by the Curtesy; For when the Remainder in Fee came to the Feme Tenant in Tail after Possibility of Issue, the Franktenement was merged in the Fee, and so A. was seised in Fee. Br. Estates, pl. 25. cites 9 E. 4. 17, 18.

Br. Quod et de forceat, pl. 11. cites S. C. per Middleton. Remainder to Baron and Feme in special Tail, Remainder to the Heirs of Baron; The Feme dies. Quere if the Estate of Tenant in Tail after

Possibility is drowned in the Inheritance? Brown held that it should, but Dyer e contra. Mo. 18. Mich. 2 Eliz. Auon.

4. One cannot have an Estate for his own Life and the Life of another at the same time in present Interest; for the Greater will drown the Lesser; But if the Greater be in Præsentia, and the Lesser in Futuro, as a * Lease to A. for his own Life, Remainder to him for Life of B. it is otherwise. Godb. 51. Mich. 28 & 29 Eliz. B. R. Arg. in Case of Windfmore v. Hulbert.

For an Estate for his own Life is greater than an Estate for another's Life, and shall drown

the Estate for another's Life. Godb. 51, 52 Mich. 28 & 29 Eliz. B. R. Arg. in Case of Windfmore v. Hulbert. — Arg. 2 Roll. R. 445. S. C. cited and said the Opinion of the Court was that the Remainder was void. — D. 10. — 11 Rep. 83. b — 2 Rep. 60. b 61. Wiscot's Case. — So it is by Grant, but not by way of Limitation Per Doderidge J. 2 Roll. R. 445. Trin. 21 Jac. B. R. cites Lucel's Case. — S. P. per Fleming Ch. J. Bullt. 137. Bowles v Poor. — * Per Gawdy J. Goldsb. 158. in Case of Roffe v. Ardwick — But if I make to one a Lease for his own Life and 100 Years, both to begin at the same time, the Lease for Years is drowned. Godb. 51, 52. Arg. in Case of Windfmore v. Hulbert.

5. Lease to A. for the Life of B. without Impeachment of Waste, the Remainder to A. for his own Life. He is now punishable for Waste; for

the first Estate is surrendered. Arg. Godb. 52. Mich. 28 & 29 Eliz. B. R. in Case of Windfinore v. Hulbord.

10. 17. S. C. 6. A. *Tenant for Life, Remainder to B. in Fee* of a Copyhold; B. makes a Lease by Parol, *Tenant for Life and B. join in a Surrender* to the Use of B. This is a good Lease against B. and by the Surrender of A. to the Use of B. his Estate is merged in the Fee, and as it were extinct, and cannot hinder the Lease to have Operation; and is all one as if he were dead, and being all in one Hand, cannot have any Privilege severed from the Inheritance; as if he in Remainder grants a Rent-charge, and after the Tenant for Life *surrenders*, the Rent shall commence presently. Cro. E. 160. Mich. 31 & 32 Eliz. B. R. Dove v. Willet.

Cited Roll. R. 178. — It is a good Limitation, and he has Estate for all the three Lives. Cro. E. 182. Utty Dale's Case. — It is good for the three Lives; and all Leases by Bishops and Tenants in Tail are so, and if granted by way of Remainder are not good. Cro. E. 491. Roos v. Atwood. — Goldsb. 187. Rolfe v. Ardwick. — M. 208. Roos v. Audwick. — So if it was to *A. and his Heirs during his Life, and the Life of B. and C.* Limitations are good enough, and the Heir shall have this Rent as a Party specially named, and as next by De Bent, though it be not properly an Estate descendable. Cro. J. 282. Trin. 9 Jac. B. R. Bowles v. Poor.

8. Lease for Life, Remainder for Life or in Tail, on Condition that if Lessee does such Act, he shall have Fee. By Performance of the Condition he shall have Estate in Fee, and yet this shall not drown the Estate for Life. 8 Rep. 76. Trin. 7 Jac. in Ld. Stafford's Case.

Buls 61. S. C. 9. J. S. seised of Land in three Parishes in Fee has three Sons A. B. and C. and devised Land in one Parish to A. in another to B. and in another to C. and if either of them died, the other surviving should be his Heir. Nothing but a Freehold passing by the Devise, the Reversion in Fee descending on the Eldest had drowned the Estate; so that on the Death of A. his Heir shall have his part, and the Remainder vests not in B. and C. Cro. J. 260. Mich. 8 Jac. B. R. Wood v. Ingersale.

Roll. R. 178 S. C. 10. Covenant to stand seised to the Use of himself and Wife for their Lives, without Impeachment of Waste, and after their Decease to the Use of first Son &c. in Tail, Remainder to his own right Heirs. Resolved, that the Covenantor and his Wife were seised of an Estate Tail executed sub modo, i. e. till the Birth of first Son, and then by Operation of Law the Estates are divided, i. e. Covenantor and Wife become Tenants for their Lives, Remainder to the Issue Male in Tail, Remainder over; For the Estate for their Lives is not absolutely drowned, but with this implied Limitation, till they have Issue Male. 11 Rep. 80. Pasch. 13 Jac. Lewis Bowles's Case.

11. Lease for Life to A. Remainder for Life to B. — B. grants his Estate to A. This is an Extinguishment, and the first Lessee is immediate Tenant to the Lessor; Per Doderidge J. and agreed by Ley Ch. J. 2 Roll. R. 485. Mich. 22 Jac. B. R. Hurd v. Foy.

Std. 17. S. C. 1 Lev. 11. S. C. — 3 Lev. 407. S. C. cited in Case of Godbold v. Freestone. — A. had Issue three Sons, B. C. and D. and devised Land for 30 Years to C. 12. Devise to A. (being the Heir at Law) for Life, and if he die without Issue living at his Death, then to B. another Son, and his Heirs; But if A. has Issue living at his Death, then the Fee shall remain to the right Heirs of A. for ever. A. suffers a common Recovery, and dies without Issue. Resolved, that the Estate for Life devised to A. shall not merge in the Reversion descended to him, contrary to the express Words and Intent of the Will; but shall leave an opening as they call it, for the Interposition of the Remainders, when they shall happen to interpose between the Estate for Life and the Fee. Adjudged a contingent Remainder, and barred by the Recovery. Raym. 28. Mich. 13 Car. 2. B. R. Plunket v. Holmes.

to perform his Will, and pay his Debts, and made C. Executor, and if C. dies within the 30 Years, then D. shall have what shall remain of the 30 Years, and died. B. died without Issue, and the Inheritance descends on C. and afterwards C. died and left W. R. his Son and Heir; but held that D. should have the Residue of the 30 Years; For tho' the Term was extinct in C. yet it is a new Devise to D. the Words being that he shall have such Term &c. Cro. E. 128. Hill. 31 Eliz. B. R. Lowe v. Lowe.——; Le. 110. Trin. 26 Eliz. in the Exchequer. Vincent Lee's Case. S. C.

13. If Lands are given to A. for Life, Remainder to A. and B. in Fee, it is not any Merger because it is one Conveyance. Arg. Raym. 36. Mich. 13 Car. 2. B. R. cites 2 Rep. 60. Wiscor's Case.

14. If a particular Estate is limited to A. and B. and a Remainder is limited adequate to them to drown, (As) to them for their Lives, the Remainder to their Heirs; The Estates for Life shall be consolidated. Arg. Raym. 36. Mich. 13 Car. 2. B. R. cites Lewis Bowles's Case.

But when there is a particular Estate for Life to two, and the Re-

mainder is not answerable to them; as to three for Life, Remainder to two in Fee, they are distinct Estates. Ibid. 37. Arg.

15. Feme Covert Tenant for Life, Remainder to her first Son; She and her Baron accept a Fine of the Fee; Afterwards a Son is born, and the Feme dies. The Remainder is destroyed, and the Estate of the Wife merged; tho' had she survived her Baron she might have waved the Fee and revived the Estate for Life. 2 Lev. 39. Hill. 23 & 24 Car. 2. B. R. Purefoy v. Rogers.

16. Estate to A. for Life, Remainder to B. and his Heirs for the Life of A. Remainder to the Heirs of the Body of A. and Remainder over; The Wife of A. shall not be endowed; For the Estate for Life of A. does not merge. 3 Lev. 437. Hill. 7 W. 3. C. B. Duncomb v. Duncomb.

(G) Of what Estates. Terms for Years.

1. LEASE to A. for 10 Years to begin now; Lease to B. for 10 Years to begin at Michaelmas; a Purchase of the Fee Simple by first Lessee drowns his Term. D. 112. pl. 49. Hill. 1 & 2 P. & M.

If Lessee for Years purchases the Reversion of part, the

Lease holds for the Residue; per Ventris J. 2 Vent. 32.—Lease in future may merge. Brownl. 47. Hopkins v. Radford.—It was admitted that a future Interest will not prevent a Merger. 2 Wm's Rep. 237. Trin. 17. 24. Whitchurch v. Whitchurch.

2. Lessor mortgaged his Reversion to Lessee for Years, and paid the Money at the Day; it was held that the Lease for Years was utterly extinct. 3 Le. 6. Mich. 4 Eliz. C. B. Anon.

S. P. per Periam J. Golds. 92. pl. 5.

3. Feme Executrix has a Term, and she takes Baron, and the Baron purchases the Reversion; the Term is extinct as to the Wife, if she survives; but in respect of all Strangers, it shall be accounted as Affets. Mo. 54. pl. 157. Pasch. 5 Eliz.

Dal. 52. pl. 25.

4. Baron of a Termor * purchased the Fee; Per Manwood, the Term is extinct; But if † Feme Termor marries him in Remainder, the Term continues; For one is the Act of the Husband, the other the Act of the Law. 4 Le. 38. 6 Eliz. C. B. Anon.

Hetley 36.—Godb. 2. Pasch. 17. Eliz. C. B. Anon. S. P. but Dyer

thought they were Tenants in Common of the Fee—* Pl. C. 418. b. Bracebridge v. Cook.—Cro. J. 275.—Baron is Termor, and the Wife purchases the Fee; or if the Wife has the Reversion before Marriage, this extinguishes the Lease, but not if the Fee descends to the Wife after Marriage. Jenk. 73. pl. 38. cites Cro. J. 275. Platt v. Sleep.—But Quære if they had had Issue, so that the Husband would be Tenant by the Curtesy? Ibid.—Buls. 118. S. C.—† Jenk. 73.

5. A Tenant for Life and the Administrator of Lessee for Years of a Term in futuro viz. to begin after the Death of Tenant for Life join in the Purchase of the Fee Simple; Per Manwood, the Term is not extinct, because only an Interest Termini; Per Mounson, it is not extinct, because he has the

Godb. 2. S. P. and seems to be S. C.—Arg. Roll B. 27.

the Term as Administrator *En Auter Droit*; Per Dyer, if Executor has a Term and purchase the Fee Simple, the Term is determined. 4 Le. 37. 6 El z. C. B. Anon.

6. Estate for Years granted to A. and the Wife of the Reversioner shall not drown in the Reversion of the Baron, but upon Death of the Wife survives to A. Pl. C. 418. Trin. 14 Eliz. Bracebridge v. Cook.

7. Lessee for Years marries with Feme Tenant for Life; The Interest of Lessee by the Intermarriage is not extinct; For it is but a Possibility and not an Interest; per tot. Cur. 3 Le. 158. in Case of Cadee v. Oliver.—cites it as adjudged 17 Eliz.

8. A. leases for Years to B.—B. devises the Occupation of &c. to his Wife, so long as she shall continue sole, but after she shall marry, to his Son. A. enfeoffs the Wife, who after took Husband; this is no Merger, but the Son may enter. And. 162. Rudyard v. Hannington.

67. S. C. by the Name of Haverington's Case.

9. A. leases for Years to B. and after makes a Lease for Years in Reversion to C. and afterwards devises the same Lands and other Lands to C. for Life for to bring up A's Children. C. entered and took the Rent &c. Virtute Testamenti; it seems this is a Merger of the Lease. See Le. 129. Trin. 30 Eliz. B. R. Coleburn v. Mixstones.

10. Devisor seized in Fee devises a Term for 21 Years to A. and if he die within the Term, Remainder to B. By descent of Inheritance to A. Unity of Possession, His Grant, or his Forfeiture, the Remainder is defeated; but if the Land be devised for 21 Years to A. and if he die within the Years that B. shall have the Residue of the Years, no Act of A. can prejudice the Remainder in B. Per tot. Cur. Mo. 269. Mich. 30 & 31 Eliz. in the Exchequer. Lee v. Lee.

11. He that has an Estate for 10 Years may Surrender to him that has an Estate for 12 Years, and the Estate is drowned and the other shall come into Possession; and a Surrender to him that has a greater Estate for Years is good as to him that has an Estate for Life; and where the Surrender is to a Termor in Reversion, it is all one if the Reversioner had a greater Estate for Years or not. Cro. E. 302. Trin. 35 Eliz. B. R. Hughs v. Robotham.

But if Lessee for 20 Years leases for 10 Years, and Lessee for 10 Years Surrender to Lessee for 20 Years, this is good to convey his Interest, but * not drown the Estate, but he has the 20 Years as before; otherwise it is of a Surrender to another that has the Reversion for Years. Cro. E. 302. Trin. 35 Eliz. B. R. Hughs v. Robotham.—* Ow. 97. in Case of Perrin als. Porey v. Allen.

12. Lessee for 60 Years takes a new Lease to begin 10 Years after; it was adjudged to be a Surrender presently. Arg. Cro. J. 84. Mich. 3 Jac. B. R. in Case of Gibson v. Searle.—cites it as * Jesse's Case. 37 Eliz. C. B. by Dyer and Cro. E. 522.

Arg. 3 Le. 244. says it was so held by Dyer and Cro. E. 522. Brown J. 2 Eliz. in Barkins's Case.—* Cro. E. 521. Mich. 38 & 39 Eliz. C. B. Ive v. Samms. S. C.

13. A Man may have a greater and lesser Estate in him at one Time, where the Lesser is subsequent, as an Estate for Life, Remainder for Years. Arg. Cro. E. 491. Mich. 38 & 39 Eliz. B. R. in Case of Rous v. Adwick.

14. Devise of Land to B. till C. is 21, and then to B. and C. for their Lives. If this be a Term for Years in B. during the Minority of C. and a Freehold to B. and C. this Term cannot stand with the Freehold, and therefore is drown'd, and they are immediate Jointenants of the Freehold; per two Justices; and agreed by Walmley J. that if this shall enure as an immediate Devise, then the Term shall be extinct, and they are Jointenants of the Freehold; but perhaps the Will did not intend the Freehold to take Place till after the Years expired. Cro. E. 532. Mich. 38 & 39 Eliz. in Scacc. Block v. Pagrave.

15. Lessee for Years, Remainder for Life, Remainder in Fee. The Remainder-man in Fee enfeoffs Lessee for Years, and makes Livery; It was adjudged

judged a good Feoffment; because it was not a Surrender, by Reason of the mean Estate for Life; per Tanfield Ch. B. Lane 117. cites 41 Eliz. Eades v. Knotsford.

16. The Use of Land is limited to *A.* for 99 Years, and that *J. K. L. M. N. and O.* who were Feoffees to Uses, should be seised to their own Use in Trust for *A.* and his Heirs, with Power to *A.* to alter and limit the Trust as he should think fit. Afterwards *A.* on his Marriage assigns the 99 Years Term to *J.* (one of the Trustees) and *W. R.* a Stranger, in Trust for himself (viz. *A.*) for Life, Remainder to his Wife for Life, Remainder to the Heirs Male of their two Bodies, and by the same Deed limits the Trust of the Inheritance in the same Manner. *A.* grants a Rent-charge to *Sir R. B.* and his Heirs, with Power to enter &c. *A.* and his Wife die, leaving *B.* their Son. The Rent being arrear *Sir R. B.* enters. Then *J.* and the other Trustee assign the Term of 99 Years to *B.* who leased to the Plaintiff in Ejectment. The Jury upon hearing the Opinion of the Court found for the Plaintiff for all save a sixth Part; For so much was droven'd and surrender'd by the Assignment of *A.* to *J.* one of the six Jointenants of the Reversion. Vent. 193. Pasch. 24 Car. 2. B. R. *Sir Ralph Bovey's Case.*

17. A lesser Term cannot merge in a greater. Arg. Show 306. Mich. 3 W. & M. B. R. in Case of *Leach v. Thompson.*

Cro. E. 173
Hill. 32 Eliz.
B. R. Porry

Allen——By taking a second Lease for 60 Years, a first for 21 Years is merged. Cro E 231. Pasch. 23 Eliz. B. R. in Case of *Wing v Harris.*——; Le. 242. Mich. 32 Eliz. B. R. S. C.——So if Lessee for Years takes a new Lease for a lesser Term, it is a Surrender of the first. Arg Cro. J. 84 Mich 3 Jac. B. R. in Case of *Gibson v. Searle.*

(H) Of what Estates. Trust Terms in Equity.

1. **R**everſion in Fee fraudulently conveyed to a Termor for 3000 Years, and without his Consent or Privity, on purpose to drown the Term, and to hinder the Termor's making Provision for younger Children was decreed not to be merged. Fin. R. 220. Tr. 27 Car. 2. *Danby the Father v. Danby the Son and Pierce.*

2. Lessee for a 1000 Years assigns the Term to the Lessor in Trust for his Wife and Children, and the Lessor accepted the Trust, and declared it to be for the Wife and Children &c. The Court supported the Trust notwithstanding the Merger of the Term in the Inheritance, and decreed the Heir of the Lessor to make a further Assurance of the Remainder of the Term to a Purchaser of the Term from the Son of the Lessee. Fin. R. 424. Mich. 31 Car. 2. *Sanders v. Bournford and Allen & al.*

3. A Portion was limited to be raised out of a Term for Years for a Daughter; the Fee after descends on the Daughter. She within Age devised the Portion. Master of the Rolls relieved against the Merger, and decreed the Portion to go according to the Will of the Daughter. 2 Vern. 90. Mich. 1688. *Powell v. Morgan.*

Term of 500
Years raised
out of an E-
state in Fee,
for Daugh-
ters Portions
is not mer-

ged at Law, nor the Trust extinguished in Equity by the Descent of the Inheritance on a Daughter, but remains still a subsisting Charge on the Estate; per Somers C. 2 Vern. R. 554. Hill. 1697. *Thomas v. Keymish.*

4. A Sum of Money was charged upon Lands payable to *J. S.* and vested in Trustees in Fee till Payment, and the same legal Estate still continuing in them there can be no Merger by an Estate Tail coming to *J. S.* who was intitled to the Money. But had this been a meer equitable Charge upon the Land, and a Fee Simple had come to *J. S.* it might then have been a Merger. 2 Wms's Rep. 601. 604. Trin. 1731. *Duke of Chandois v. Talbot.*

(I) *By what Act.*

1. **W**HERE the *Inheritance comes to the Particular Estate*, be it by the *Act of God, the Law or the Party*, the particular Estate is drown'd. 2 Rep. 60. b. Hill. 41 Eliz. C. B. Wiscot's Case.

2. *Tenant for Life, and Remainder-man in Tail join in a Feoffment or Fine to a Stranger.* The Estate for Life is merged, and yet the Feoffee or Conufee shall hold during the Life of the Tenant for Life, tho' the Tenant in Tail be dead without Issue; per Holt Ch. J. Carth 260. Hill. 4 W. & M. B. R. in Case of Simmonds v. Cudmore.

3. *Tenant in Tail, Remainder to the King.* Tenant in Tail makes a Lease for Years, and is *attainted*; the King shall avoid the Lease; For the *Estate Tail* is as much gone by Merger as if Tenant in Tail was dead without Issue. 1 Salk. 338. Hill. 5 W. & M. Simmonds v. Cudmore.

[For more of Merger in General, See **Extinguishment, Portions, Charge** and other proper Titles.

Mesne.

(A) Mesne. *Against whom.* [*Where there are several.*]

S. P. Br. Mesne pl. 14. cites 28 H. 6. 6. — S. P. Till he comes to the Chief Lord. Br. Mesne, pl. 22. cites 39 H. 6. 30. But Brook says, it seems that the *first Writ of Mesne ought to commence by the Tertenant*; For none can be distrained but him, and therefore he may have Writ of Mesne against his Mesne, and the first Mesne against the second, and so ut supra — But it seems that *none can have Writ of Mesne but he who is grieved by Suit, unless the Tertenant*; For he may have Writ of Mesne, *Quia timet distringi*, and so cannot any of the Mesnes; for they cannot be distrained. Ibid. cites 7 H. 4. 12. in the written Book.

2. If one be *Tenant by the Curtesy of a Mesnalty &c.* and the Tenant is distrain'd, the Writ of Mesne shall be sued *against him in Reversion, and not against Tenant by the Curtesy.* F. N. B. 136. (N).

3. *A. Seigniorie is granted to Baron and Feme, and to the Heirs of the Baron, and in a Per quæ Servitia the Tenant will not atorn, unless they will grant to acquit him &c. whereupon the Baron grants for him and his Heirs to acquit the Tenant and his Heirs, and afterwards the Baron dies; the Tenant may bring a Writ against the Husband's Heir during the Feme's Life, who is Tenant for Life, and good.* F. N. B. 136. (O).

(A. 2) Sta-

(A. 2) Statute 13 E. 1. cap. 9:

1. 13 E. 1. cap. 9. S. 1. **E**NACTS that *When Chief Lords distrain in their Fee for * Customs and Services to them due, and † there is a ‡ which ought to acquit the Tenant, sithence it lieth not in the Mouth of the Tenant after that he hath replevied the Distress, to deny the Demand of the Chief Lord, which avoweth in the King's Court, that the Distress is lawfully taken upon his Tenant, which is upon the Mefne.*

* Sec (D) —
† (G) —
‡ (C) —
The Mis-
chief here
first menti-
oned, before
the making

of this Statute, was, The great Delays which were used in the Writs of Mefne, in which the Process at the Common Law was Summons, Attachment and Distress infinite, and yet the Tenant in Default of the Mefne was presently distrained by the Lord Paramount, which Mischiefe appeareth by the Preamble of this Act; For Remedy whereof a more speedy Proceeding is given by this Act in a Writ of Mefne. Another Mischiefe was, when the Mefne had nothing within the same County; For there the Tenant was without Remedy, and tho' the Mefne had sufficient in another County, the Common Law extended not thereunto, in both which Cases Remedy is given by this Act. 2 Inst. 373.

S. 2. *And many have been heretofore sore grieved by such Distress, in so much as the Mefne (notwithstanding that he hath whereby he may be distrained) doth make long Delays before he will come into the Court to answer for his Tenant unto the Writ of Mefne.*

S. 3. *And further, the Case was most hard when the Mefne had Nothing.*

S. 4. *In Case also when the Tenant was ready to do his Services and Customs unto his Lord, and the Chief Lord would refuse to take such Services and Customs by the Hands of any other than of his next Tenant, and so such Tenants in Demean lost some whiles the Profits of their Lands for a Time, and some whiles for their whole Time, and hitherto no Remedy hath been provided in this Case.*

By the Com-
mon Law
the Lord Pa-
ramount
might have
refused his
Services by
the Hands of

the Tenant peravaile, or by the Hands of the Tenant for Life, where Reversion was over, because the Mefne or he in Reversion was his very Tenant in Privy, for the which Remedy is given by this Act. 2 Inst. 374.

S. 5. *A Remedy is provided and ordained hereafter in this Form; That so soon as such Tenant in Demefne (having a Mefne between him and the Chief Lord) is distrained, incontinent the Tenant shall purchase his Writ of Mefne.*

S. 6. *And if the Mefne, having Land in the same County, absent himself until the Great Distress awarded; the Plaintiff shall have such Day given him in his Writ of great Distress, afore the coming whereof two Counties may be holden, and the Sheriff shall be commanded to distrain the Mefne by the Great Distress, like as it is contained in the Writ, and nevertheless the Sheriff in two full Counties shall cause to be proclaimed solemnly, that the Mefne do come at a Day contained in the Writ to answer his Tenant.*

This must be
understood
of a Writ of
Mefne re-
turnable into
the Court of
Common
Pleas, and
not of a Writ
of Mefne

that is vicountel, and not returnable. 2 Inst. 374.

S. 7. *At which Day, if he come, the Plea shall pass between them after the common Usage.*

S. 8. *And if he do not come, then such Mefne shall lose the Services of his Tenant, and from henceforth the Tenant shall not answer him in any Thing, but the same Mefne being excluded, he shall answer unto the Chief Lord for such Services and Customs, as before he ought to have done to the same Mefne.*

If the Mefne
appears not
at the Grand
Distress he
shall be fore-
judged: that

is to say, that the Mefne shall lose the Services of his Tenant of the Tenements before holden. And that the Mefne being omitted, the Tenant from henceforth shall be attendens and respondents to the Chief Lord by the same Services as the Mefne holdeth by, But it is to be observed, that the immediate Chief Lord must be named in the Fore-judger; For albeit he be a Stranger to the Writ, and by his Death the Writ of Mefne shall not abate, yet in the Judgment he that is then immediate Lord Paramount must be particularly named. 2 Inst. 374.

S. 9. *Neither*

Here three Things are to be observed. *T. 9. Neither shall the Chief Lord have Power to distrain so long as the aforesaid Tenant doth Offer him the Services and Customs due.*

1st. That the Tenant must offer and tender the Rent or Service due upon the Land, and not be ready only, by Reason of the Word [Offer]. 2dly. This must be done at the Time when the Lord comes to distrain. 3dly. That this Act is to be understood of the Services and Customs which the Tenant may do, as Payment of Rents, Delivery of Heriot-Service, or the like; but extendeth not to personal Services annexed to the Persons of the Mesne, as Homage, Fealty &c. For he cannot say, I become your Man, nor swear to him Fealty &c. But after Fore-judger, then the Tenant shall do all Manner of Services which the Mesne ought to have done; For then the Mesnalty is extinct; but as long as the Mesnalty remains, the personal Services remain with the Mesne, *Servitia personalia sequuntur Personam.* 2. Inst. 374.

Hereby Provision is made for the Tenant to take any Advantage that the Mesne might do, if the Chief Lord demand other Services than the Mesne ought to do, albeit he be a Stranger to the Avowry. 2 Inst. 374.

The Tenant in such Case had no Remedy by the Common Law. 2 Inst. 374.

See (L. 2) pl. 1. 3. *S. 12. And if the Sheriff return, that he hath nothing whereby he may be summoned, then shall the Tenant sue his Writ of Attachment.*

S. 13. And if the Sheriff return, that he hath nothing to be attach'd by, he shall nevertheless sue his Writ of Great Distress, and Proclamation shall be made in Form aforesaid.

S. 14. And if the Mesne have no Land in the Shire where the Distress is taken, but hath Land in some other Shire, then a Writ Original shall issue to summon the Mesne unto the Sheriff of the same Shire, (where the Distress is taken) and when it is returned by the Sheriff, that he hath nothing in his Shire, a Writ judicial shall issue to summon the Mesne unto the Sheriff of the same Shire; in which it shall be testified, that he hath Land, and Suit shall be made in the same Shire, until they have passed unto the Great Distress and Proclamation, as above is said, of the Mean having Land in the same Shire in which the Distress is taken.

S. 15. And nevertheless Suit shall be made in the same Shire where he hath nothing, as above is said of the Mesne that hath nothing, until the Process come to the Great Distress and Proclamation.

This Remedy here given of Fore-judger is a better and speedier Remedy than the Common Law gave. 2 Inst. 375.—* See (N)

S. 16. And so after Proclamation made in both Counties the Mesne shall be forejudged of his Fee and Service.

S. 17. And where it happeneth sometimes, that the Tenant in demesne is enfeoffed to hold by less Service than the Mesne ought to do unto the Chief Lord, when after such Proclamation the Tenant hath attuned unto the Chief Lord, and the Mesne being excluded, the Tenant must of Necessity answer unto the Chief Lord for all such Services and Customs as the Mesne was wont to do to him.

This Act speaketh only of the Mesne, and not of the Mesne and his Heirs, and therefore the Heirs of the Mesne shall not be forejudged within this Statute. 2 Inst. 375.—West. 2. 13 E. 1. cap. 55. Enacts that For all Things Recorded before the King's Justices, or contained in Fines (whether Contracts, Covenants, Obligations, Services for Customs acknowledged, or any other Things inrolled) a Writ of Execution shall be within the Year, but after the Year a *Si Fa.* whereupon if Satisfaction be not made, or good Cause shewed, the Sheriff shall be commanded

S. 18. And after that the Mesne is come into the Court, and hath confessed that he ought to acquit his Tenant, or be compelled by Judgment to acquit, if after such Confession or Judgment it is complained, that the Mesne doth not acquit his Tenant, then shall issue a Writ judicial, that the Sheriff shall distrain the Mesne to acquit the Tenant, and to be at a certain Day before the Justices, for to shew why he hath not acquitted him before; And when they have not proceeded unto the Great Distress, the Plaintiff shall be heard.

commanded to do Execution. In like Manner also shall the Ordinary be commanded in his Case. * Howbeit, as concerning a Mefne, who by Recognizance or Judgment is bound to acquit what is said before (viz. in this Act of 13 E. 1. cap. 9. S. 18.) must be observed Lord Coke says that

* This Clause was added *In Majorem Rei Cautelam*, that the Provision made by the Statute of 13 E. 1. cap. 9. [S. 18.] viz. In Case that in a Writ of Mefne, after the Mefne is come into Court &c. and whereupon Forejudger is given [as appears by the following Clause, or S. 19] Now if the Plaintiff in the Writ of Mefne should only take his *Sci. fa.* then no Forejudger should follow thereupon; therefore this Clause in the above Act of 13 E. 1. cap. 45. at the End thereof. (viz. concerning a Mefne. &c.) was added, That the former General Words of the said Act, viz. (* or any other Things involled &c.) should not take away the Benefit of the former Act, [viz. 13 E. 1. cap. 9.] concerning the Forejudger in a Writ of Mefne, but this Act [viz. 13 E. 1. cap. 45.] being in the Affirmative takes not away either the Common Law, or the Benefit of the former Act concerning the Forejudger. For the Plaintiff may take Benefit of either the one or the other at his Election. But note, the Forejudger is given only against him that made the Acknowledgment, or against whom Judgment is given, and not against his Heirs, and therefore this Act is an Addition declarative to the former, viz. *That a Sci. Fa. may in those Cases lie against the Heir.* 2 Inst. 472. Upon the Words of the Statute 13 E. 1. cap. 45. — This is cap. 44. in Rait. Stat. but in Keble's Stat. it is as here * These Words are in Keble's Statutes, but not in Raital's.

S. 19. *And if the Plaintiff can prove that he hath not acquitted him, he shall yield Damages, and by Award of the Court the Tenant shall go quit from the Mefne, and shall attorn unto the Chief Lord.*

This Branch gives Damages and Forejudger, and the

Plaintiff cannot take Damages and leave the Forejudger, but he must either take both according to this Branch, or neither of them. 2 Inst. 375.

S. 20. *And if he come not at the first Distress, a Writ shall go forth to distrain him again, and Proclamation shall be made, and as soon as it is returned, they shall proceed in Judgment, as afore is said.*

S. 21. *And it is to be understood, that by this Statute Tenants are not excluded, but they shall have a Warranty of the Mefnes and their Heirs, if they be impleaded of their Lands, as they have had before.*

Here the Tenant has Election either to take the Benefit of

this Act by taking the Process given by the same, or to take the Process at the Common Law; and this was *Abundans cautela*; For this Statute being in the Affirmative the Tenant might have had Election if this Clause had not been, but *Abundans Cautela non nocet*: And the ancient Sages of the Law did ever make Things as plain, and leave as little to Construction as might be. 2 Inst. 375.

S. 22. *Nor shall the Tenants be excluded, but that they may sue against their Mefnes, as they used heretofore, if they see that their Process may be more available by the old Custom than by this Statute.*

S. 23. *And it is to wit, that by this Statute no Remedy is provided to any Mefnes, but only in the Case where there is but one only Mefne between the Lord that distraineth and the Tenant.*

So that no Forejudger can be but when there is but one

Mefne between the Lord Paramount and the Tenant. 2 Inst. 375.

S. 24. *And in Case where that Mefne is of full Age.*

Though a Feme Coverd be not excepted by the Words, yet by good Construction she is. 2 Inst. 375.

S. 25. *And in Case where the Tenant may attorn unto the Chief Lord * These* without Prejudice of any other than of the Mefne, which is spoken for *Words are* Women, Tenants in Dower, and Tenants by the Curtesie, or otherwise for Term *Specially intended of* of Life or in Fee-Tail, unto whom for certain Causes Remedy is not yet provided for, but (God willing) there shall be at another Time. *Tenant in Dower, or for Life, or in Tail*

with a Remainder over; For against them no Forejudger shall be given, but their Extent is much larger: — If Disseisor or any other that hath a defeasible Title in the Tenancy doth forejudge the Mefne, this shall not prejudice the Disseisee, or him that Right hath; For they are within the Remedy of these Words viz. That every Forejudger ought to be *sine Præjudicio alterius.* 2 Inst. 375. — So if the Mefne is disseised, and a Forejudgment is had against the Disseisor; this does not bind the Disseisee Co Litt 100. b. — But if the Daughter forejudges the Mefne, and a Son is born after the Fore-judgment, the Son shall not avoid it; For it was *Sine Præjudicio alterius*, when the Judgment was given. 2 Inst. 375. — S. P. Co Litt 100. b. Because he had no Right at the Time of the Forejudgment. — So it is if the Tenant enter into Religion, and his Heir forejudges the Mefne, and then the Ancestor is devisor'd, he shall be bound, *Causa qua supra.* Co Litt. 100. b. — If two Interlocutors bring a Writ of Mefne, and the one is summoned and severed, and the other sueth forth, he cannot forejudge the Mefne; because he cannot respondere Capitali Domino de eisdem Servitiis & Consuetudinibus, que prius facere debuit Prædictus

dictus Medius. 2 Inst. 375.—So it is if there be *two joint Mesnes*, and the one appears, and the other makes Default, no Fore-judgment shall be for the same Cause necessarily collected upon the same Words. 2 Inst. 375.—They that are *seised in auter Droit*, as the *Bishop* in Right of his Bishoprick, or the *Abbot or Prior* in the Right of his Monastery, or the like, shall neither forejudge, nor be fore-judged; because it is to be intended, that it cannot be done Sine Prajudicio alterius; for that Consent of them is not had, which by Law to the Alteration of any Estate is requisite, as the Dean and Chapter to the Bishop, and the Covent to the Abbot, Prior &c. 2 Inst. 375, 376.—If the *Mesne hanging Writ* of Mesne against him *alien by Fine*; albeit the Right of the Mesnalty passeth to the Conusee, yet the Mesne may be forejudged, and the Conusee shall not take Advantage of those Words, Sine Prajudicio alterius; because he came to the Mesnalty *Pendente Breui*, and in Judgment of Law, the Mesne (as to the Plaintiff) remains seised of the Mesnalty; For, *Pendente lite nihil innovetur.* 2 Inst 376.

(B) *Of what Thing.*

1. **I**f a Man prescribes to be acquitted of all Services, he ought to be acquitted of Relief. 39 D. 6. 31. adjudged.
2. If the Tenant is distrained for more Service, than the Mesne ought to pay to the Lord Paramount, the Mesne is not bound to acquit him of the Surplusage but only of the other. 39 D. 6. 31. b.

* *Acquittal* is compound- ed of ad and the old Verb *Quie- tare*, and sig- nifieth in Law to dis- charge, or keep in Quiet, and to

(C) * *Acquittal. What Thing will be good Cause to have Acquittal.*

1. **I**f the Lord confirms to the Tenant to hold by less Services, a Writ of Mesne lies upon it. 30 E. 3. 13. (It seems it is intended with Warranty; For there is a Parlane of Warranty of Charters upon the Deed.)

see that the Tenant be safely kept from any Entries, or other Molestation for any Manner of Service issing out of the Land to any Lord that is above the Mesne; And hereof cometh Acquittal and Quietus est, (that is) that he is discharged; and he that is discharged of a Felony &c. by Judgment is said to be Acquitted of the Felony, *Acquietatus de Felonia*; and if he be drawn in Question again, he may plead *Auterfoits acquit*. And therefore if Tenant being Religious holds in Frankalmoign, be distrained by any Lord Paramount, the Mesne (to keep the Tenant quiet) may put his Beasts in the Pound instead of the Beasts of the Tenant. Co. Litt. 100.

There are *two kinds* of Acquittals, one *Express* and the other *Imply'd*. The *Express* is *three manner* of Ways. 1. By *Fine or Deed*, either at the Creation of the Tenure or after. 2. By *Acknowledgment of Acquittal*. 3. By *Prescription*.—*Imply'd* is *five manner* of Ways. 1. By *Owerty of Services*. 2. By *Tenure in Frankalmoigne*. 3. In *Frankmarriage*. 4. By *Homage Ancestrell*. 5. In *Dower*. 2 Inst. 373.—F. N. B. 136. (A)(B)(C)—Co. Litt. 100. S. P.

2. If before the Statute of *Quia Emptores* a Man by Deed had made a Feoffment of Land with Warranty to hold by certain Services without any Word of Acquittal in the Deed, no Writ of Mesne lies upon it. 30 E. 3. 24.

3. *Frankmarriage* is Cause of Acquittal, and therefore upon this lies Writ of Mesne; per Hanke J. quod nota. Br. Mesne, pl. 20. cites 12 H. 4. 9.

Litt. S. 141. 4. Note that *Tenure in Frankalmoign* is good Cause of Acquittal. Br. Mesne, pl. 13. cites 38 H. 6. 12. 21.

5. *And Prescription of Acquittal* is good Cause of Acquittal. Ibid.

6. Lord, Mesne and Tenant; the Mesne grants his Mesnalty to A. for Life, the Remainder to C. in Fee; A. brought *Per que Servitia* against the Tenant, who said, that he is ready to attorn saving to him the Acquittal; and A. granted the Acquittal, by which the Tenant attorn'd, and after A. died, he in Remainder, never shall *distrain for the Services, till he had confess'd the Acquittal likewise; For otherwise the Tenant shall be charged to the Lord, and also to the Mesne. Br. Mesne, pl. 18. cites 18 E. 4. 7.

* Orig. (dis-crein.) but should be *dis-creignera*.

(C. 2) *Acquittal inforced.* How. And what amounts to it.

1. **I**F a Man has Judgment to recover his Acquittal in a Writ of Mefne, and he be not afterwards acquitted, he shall have upon the Recovery a *Distringas ad Acquietandum* &c. if it be three or ten Years after the Judgment given; and that is is given by the Statute Westm. 2. cap. 9. F. N. B. 136. (S)

So if the Mefne do acknowledge Acquittal by Fine, and after he sueth a Scire facias thereupon, and he appeareth not at the Return of the Writ, then shall Issue a Writ of Distringas ad Acquietandum &c. and an Alias and Pluries &c. until he appear; and if he come upon the Distringas, and cannot plead any Thing, but that he ought for to acquit him, then the Plaintiff shall recover Damages against him. F. N. B. 136 (S)

2. And if the Ancestor do acknowledge an Acquittal in a Court of Record, the Tenant shall have a *Scire Facias* against the Heir to acquit him without other Specialty &c. F. N. B. 136. (T).

But notwithstanding such acknowledgment of the

Acquittal, in a Writ of Mefne against the Heir he may plead, that he had nothing in the Seigniorship without shewing how, As that it was denied &c. Contra of his Father who acknowledged &c. F. N. B. 136(T) in the Notes there (a) cites 28 E. 3. 93.

3. And if a Man recover Acquittal in a Writ of *Mefne* &c. he shall after have a *Distringas ad Acquietandum*, and if he do not appear, he shall be forejudged, by Default, of his Mefnalty; and so if he appear, and it be found by Verdict against him, he shall be forejudged. F. N. B. 136. (U).

4. The *Mefne* by Licence of the Tenant may put his Beasts into the Land of the Tenant, and there if the Beasts of the Tenant are removed for the Time, so that none are there but the Beasts of the Mefne for the Lord to distrain, this is a good Acquittal; and it is better Acquittal than Payment of the Rent or Services. Br. Mefne, pl. 14. cites 28 H. 6. 6.

(D) For what Causes it lies.

1. **I**F the Tenant be distrained for Services, where nothing is Arrear, if the Heine upon Notice of it doth not put his Beasts in the Pound and take the Beasts of the Tenant out, and upon this sue a Replevin, Writ of Mefne lies against him. Co. 9. Avowry. 22. b. (Queere this; For it seems he may join the Tenant if he sues Replevin, and so aid him.)

S. P. Br. Mefne, pl. 26. cites 34 H. 6. 47.

2. If the Tenant be distrained, and Avowry made upon the Mefne for Services, where nothing is due, yet if the Mefne upon Request will not join the Tenant and plead it, a Writ of Mefne lies against him; Because the Tenant * could not plead this Plea, being a Stranger to it. 10 H. 6. 26. 17 E. 3. b. 39 E. 3. 34. b. Dubitatur. 17 E. 3. 15.

** Fo. 126.*

3. If in Replevin by the Tenant the Avowry be made upon the Mefne in such Manner that it is abateable by the Mefne, yet if the Mefne will not join to the Tenant to abate it, and the Tenant cannot abate it because he is a Stranger to the Avowry, Writ of Mefne lies. 10 H. 6. 26.

4. As, if the Avowry be made upon the Mefne for Relief as Heir to his Father, if he had a Brother who was seised of the Mefnalty after the Death of the Father, and so the Avowry ought to be upon him as Heir to the Brother; yet because the Tenant being a Stranger to the Avowry

Writ cannot plead it, Writ of Mesne lies; For he is distrained in his Default. 10 H. 6. 26.

5. If there are several Mesnes one after the other, and the Lord Paramount, or any of the Mesnes distrain the Tenant, though it be not in Default of the Mesne who is the nearest to the Tenant, yet the Tenant shall have Writ of Mesne against him; For he may have his Remedy over. 29 E. 3. 34. Adjudged. 39 E. 3. 19. b.

See (G)—
S. P. Br.
Mesne, pl.
26. cites 34
H. 6. 4.
But when
the Tenant

6. If there are Lord, two Mesnes and one Tenant, and the Tenant brings Writ of Mesne against his Mesne, this Mesne may have Writ of Mesne against his Mesne, because he was vexed with a Writ of Mesne by the Tenant in his Default. 18 H. 6. 33. 17 E. 3. 44. 7 H. 4. 18. b. 18 E. 3. 19. 29 E. 3. 24.

is grieved and has Acquittal, he has no other Remedy but to resort to him of whom he had Acquittal.

7. So if there are several Mesnes, each shall have his Writ against his Mesne, after he himself is charged in Writ of Mesne. 17 E. 3. 44. 39 H. 6. 31. b. Curia.

8. But a Mesne shall not have Writ of Mesne against his Mesne, before that he himself is charged in Writ of Mesne. 19 E. 3. 44.

The Dis-
tress must
be taken for
the Customs
or Services
which the
Tenant, by
reason of his

9. See in the Additions of Writ of Mesne in Natura Brevium, that where there is Lord, Mesne, and Tenant, and the Tenant is distrained for the Suit to the Hundred, or for Resiency, Writ of Mesne does not lie; For it shall be done by him who is reliant. Br. Mesne, pl. 30. cites 4 E. 3.

Tenure ought to do to the Lord; within which Suit-Service to a Hundred is comprehended, but not Suit real, which is by Resiency either to an Hundred, Leet, or Tourn; For this is not by Reason of his Tenure. 2 Inst 273.—F. N. B. 137. (A).

(E) Equality. What shall be said an Equality to have Acquittal.

S. P. Br.
Mesne, pl.
5 cites 11 H.
4. 52.

1. Equality of Services, as if the Tenant holds of the Mesne by the same Services as the Mesne holds over, this is good Cause of Acquittal to have this Writ. 11 H. 4. 52. 3 H. 6. 42. b. Fitz. Na. 136. (B) 39 H. 6. 29. 19 E. 4. 8. 4 H. 6. 28. 30 E. 3. 24.

2. Services will acquit Services of the same Nature. 22 E. 3. 3. b.

F. N. B. 136.
(F)—In
Mesne, be-
cause the
Plaintiff was
distrained by
A. Lord Pa-

3. If the Tenant holds by more Services of the Mesne than the Mesne holds over, as by more Rent or other Services, yet this is good Cause of Acquittal to have this Writ; For he holds of the Mesne by the same Services as the Mesne holds over and more. 4 H. 6. 28. Adjudged. 18 E. 3. 19. b. 39 E. 3. 19. b.

ramount, in Default of C. the Defendant who is Mesne, where the Tenant held of the Mesne by 20 s. and the Mesne over of the Lord by 1 d. and so bound him by Equality of Services; This is good Equality; Pertor. Cur. For where the Tenant holds of the Mesne by so many Services as the Mesne holds over, it suffices; and here the 20 s. is equal with the 1 d. and more; but where the Tenant holds of the Mesne by 20 s. and the Mesne over by 30 s. there is no Equality. Note the Diversity. Br. Mesne, pl. 9. cites 4 H. 6. 28.

4. But if the Tenant holds by 20 s. and the Mesne by 30 s. this shall not be Equality to have Acquittal. 4 H. 6. 28.

5. If the Tenant holds by Rent for all Services of the Mesne, and the Mesne holds over by Rent and Homage, this shall be good Acquittal for the Rent; for it is of one and the same Nature. 22 E. 3. b. 30 E. 3. 4. Admitted.

6. But otherwise it is for the Homage; because this is not of the same

same Nature with the Rent. Dubitatur. 22 E. 3. 3. b. Contra. 30 E. 3. 4. Admitted.

(E. 2) Acquittal. Ousted or fet aside ; By what.

1. **I**F a Man has Acquittal against his Lord, and a Stranger brings a *Præcipe quod reddat* of the Rent against the Lord, and recovers, the Tenant shall be bound by this Recovery, and shall lose his Acquittal. Br. Mefne, pl. 23. cites 37 H. 6. 33, 34. per Prisot and Danby.

Brook makes a *Quare*, if this is not meant where the Recoveror recovers

the Rent by just Title, For if it be faintly, the Tenant may falsify the Recovery (which seems to be true) by the Statute of 7 H. 8. 4 which wills, that Recoveror who recovers Land for Trust, &c. may distrain and make Avowry upon the Tenant, as the Party who suffered the Recovery might have done, if no Recovery had been suffered; * But Recovery against the Lord shall bind the Tenant, and Recovery against the Tenant binds the Lord, and shall change his Avowry; but in this Case the Recoveror was put in Seisin of the Rent recovered by Payment of 2 d. by the Tertenant, but the Case of the Statute supra is, where the Recoveror cannot obtain Seisin nor Attornment of the Tenant. Ibid.—* Br Judgment, pl 51. cites 37 H. 6. 35.

(F) Who shall have it, in respect of the Estate.

1. **T**ENANT in Tail shall have Writ of Mefne against Donor for Equality. 12 D. 4. 9. 21 E. 3. 49. in the time of E. 1. Age 120.

2. **F**eme Tenant in Dower shall have a Writ of Mefne against the Heir of her Baron; For she is attendaut to him for the third part for Equality of Service. 28 E. 3. 95. Admitted in the time of E. 1. Age 119. per Berr.

Fol. 127.

3. **T**he Baron and Feme shall have a Writ of Mefne, where they are distrained for the Lands of the Feme. F. N. B. 136. (1).

(G) In what Cafes the * Writ lies.

1. **I**F upon the Reversion of the Tenure it be limited that the Tenant shall do the Services to the Lords Paramount, he shall not have Writ of Mefne for Distress for Rent by the Lords Paramount; because he himself is bound to pay it for the Mefne to the Lords Paramount. 49 E. 3. 10. b. 21 E. 3. 49. 22 E. 3. 3. b.

See (D).—
* Breve de Medio, a Writ of Mefne so called by Reason of the Words of the Writ of Mefne,

which are, Unde idem A. qui Medius est inter C. & præfatum B — A. is Mefne between C. that is the Lord Paramount, and B. that is the Tenant paravall. Co. Litt. 100.

2. **I**f Lord Mefne and Tenant are by Equality of Service, if the Lord distrains the Tenant for such Services as lie in payment of Money, as Relief or Rent, he shall not have Writ of Mefne against his Mefne; For he himself is bound to pay it for his Mefne. 49 E. 3. 10. b.

S. P. for these are not Corporal Services. Br. Mefne, pl 25. cites S. C.

3. **B**ut otherwise it is if he be distrained for Homage, or other Corporal Services, which cannot be done but by him who is Tenant in Right. 49 E. 3. 10. b. 18 E. 3. 19. b. 21 E. 3. 49.

Br. Mefne, pl 25. cites 49 E. 3. 10. —If the Tenant be

distrained for the * Relief of the Mefne, or for reasonable Aid, albeit they are rather Improvements of Services than Services, yet the Tenant shall have a Writ of Mefne; because they grow by Reason of the Tenure. 2 Inst. 373 — F. N. B. 136 (M) — * S. P. tho' it be only a thing Personal; quod nota. Br. Mefne, pl. 14. cites it as agreed 25 H. 6. 6.

Where there is Lord and Tenant, and the Mesne Paravaile releases to the Tenant to hold by 2 d. for all Services and Faciendo Capitali Domino Servitia debita, in this Case the Tenant shall do those Services for the Mesne, and as to the Mesne who Reserves it, and not * for himself; For he shall not hold of both. Br. Mesne, pl. 25. cites 49 E. 3. 10.—* Orig. (per luy Mesne.)

S. P. Br Mesne, pl. 25. cites S. C. and his Mesne shall have other Writ of Mesne; For he it not bound to discharge this Mesne of any Services, but his immediate Mesne; and so see Druryty where these Words faciendo Domino Capitali Servitium Debitum shall hold Place to oust the Tenant of his Writ of Mesne, and when not.

4. So it is tho' the Tenant be limited upon the Reservation to do the Services Paramount for the Mesne; For he cannot do it for him. 21 E. 3. 49. 49 E. 3. 10. b. Dubitatur, 22 E. 3. 3. b.

5. But if Lord two Mesnes and Tenant are by Equality of Services, and the Tenant is limited upon the Reservation to do the Services Paramount for his Mesne, and the Lord distrains for Rent or Fealty, the Tenant shall have Writ of Mesne against his Mesne; because he is not bound to pay the Services for the first Mesne. 49 E. 3. 10. b.

6. And so each may have Writ of Mesne against the other. 49 E. 3. 10. h.

7. If Tenant by 12s. had made Feoffment before the Statute to hold by 12s. that is to say to pay to the Feoffor 2 s. and to the Lord Paramount the other 10 s. if the Feoffee be distrained by the Lord Paramount for 12s. Rent he shall not have Writ of Mesne for Non-acquittal of the 10 s. because he himself might pay it. 30 E. 3. 4. adjudged.

8. If there be Lord Mesne and Tenant, and the Mesne grants to the Tenant to acquit him against the Lord and his Heirs, and after the Lord dies, and the Feme of the Lord is indowed, he shall acquit him against the Tenant in Dower. Br. Grants, pl. 147. cites 31 E. 1.

If the Mesne hath paid the Services to the Lord Paramount, yet if the Tenant be afterwards distrained for those Services, he shall have a Writ of Mesne. F. N. B. 136. (H).—
Though the Services of the Mesne are not in Arrear, yet a Writ of Mesne lies; because the Tenant cannot plead Riens Arrear. Ibid. in the Notes there (a) cites 39 E. 3. 34. Contra 17 E. 3. 15. and adds See 39 E. 3. 19. and 11 H. 4. 52.

9. The Plaintiff counted that he held of the Defendant by 10 s. and that he is distrained for 6 s. by the Lord Paramount; and the Defendant said that Not distrained in his Default, Clai [for the Plaintiff replied] we held of the Defendant who held over of one W. who held over of one R. and we are distrained by R. Lord Paramount, where there are two Mesnes between us and R. Lord Paramount; and yet if the Mesne paravaile pays the Services to W. his next Mesne to him, and W. does not pay to R. Lord Paramount, so that R. distrains the Tenant paravaile, there the Tenant shall have Writ of Mesne against his next Mesne, and as it seems this compelled him to take other Writ of Mesne against the said W. the High Mesne; but per Knivet the issue of the Defendant is good, and then quære what Remedy for the Tenant; but Brook says the Law seems contrary to Knivet, which see Title Mesne in Fitzh. 35. 18 E. 3. 19. Br. Mesne, pl. 11. cites 39 E. 3. 19.

10. Lord, Mesne and Tenant; the Lord avowed upon the Mesne for Reasonable Aid to make his Son a Knight, where the Lord had released to the Mesne, &c. There the Tenant cannot plead this Release, but may pray the Mesne to join to him, and upon the Joinder they may plead the Release; and if he refuses to join, the Tenant shall have Writ of Mesne and recover Damages; For to such Intent is the Joinder of the Mesne to the Tenant to plead such Pleas as the Tenant cannot plead; For a Stranger to the Avowry cannot plead in Bar to it. Br. Mesne, pl. 12. cites 39 E. 3. 34.

A. is Lord, B. Mesne, C. Mesne, and D. Tenant; A distrains B. for Services, D brings

11. In Replevin, it is said that if the Lord Paramount distrains the Tenant Paravaile, and he requires the Mesne to put his Beasts in Pledge for the Beasts of the Tenant, and he refuses, the Tenant shall have Writ of Mesne upon this special Matter; quod Conceditur per tot. Cur. Br. Mesne, pl. 4. cites 7 H. 4. 18.

Writ of Mefne against C. and recovers; It seems, that notwithstanding the Recovery against C. yet if B. had no Notice of the Distress, or if his Services were not Arrear, a Writ of Mefne lies not against him by C. any more than it lies against C. without Notice, when his Services were not in Arrear; For in that Case there is no Default in him. F. N. B. 136. (H). in the Notes there (b) cites 7 E. 4. 18.

12. The Mefne ought to acquit the Tenant against all the Lords Paramount. F. N. B. 135. (M) Marg. cites 18 H. 3. Mefne, 78. and 29 E. 3. 34. acc.

13. If there be Lord, Mefne and Tenant and the Tenant is distrained by the Lord, for which he brings a Replevin, the Lord avows upon a Stranger, the Tenant may have a Writ of Mefne; yet the Mefne cannot join, because the Avowry is made upon a Stranger. F. N. B. 135. (M) Marg. cites 13 E. 4. 16.

14. If the Mefne grants to the Tenant to acquit him after the Tenure made, Fitzherbert conceived that he should have a Writ of Mefne. F. N. B. 136. (H). In the Time of E. 1. the Tenant brought a Writ of

Mefne because he did not acquit him of a Rent-charge demanded, having by Deed bound him and his Heirs to warrant and acquit him and it was maintainable. F. N. B. 136. (P).

15. If the Mefne's Beasts are impounded for those of the Tenant, he shall have a Replevin of them, and so may each Mefne have &c. And if any Mefne refuse to do so, the Tenant shall have a Writ of Mefne; Per Cur. F. N. B. 136. (H) in the Notes there (b) cites 7 H. 4. 18.

16. If the Avowry is abateable, or if no Services are due or Arrear, yet if the Mefne will not join on Request with the Tenant, a Writ of Mefne lies; For the Tenant being a Stranger shall not plead in Abatement of the Avowry. Ibid.

(H) Mefne, [at what Time the Writ lies.]

1. **I**F there be an Equality of Tenure, Scilicet, of Homage between Lord Mefne and Tenant, The Tenant shall not have Writ of Mefne upon the Distress of the Lord Paramount, before he himself hath made or tendered Homage to the Mefne. 30 E. 3. 24.

2. If there be two Tenants, and one brings Replevin upon a Distress taken by the Lord, the Mefne cannot join to the Plaintiff, unless the other Jointenant first joins to the Plaintiff; for the one alone does not hold of the Mefne, but both hold of the Mefne. Br. Jointenants, pl. 35. cites 12 E. 4. 2.

(H. 2) At what Time; Before Notice or not.

1. **I**F the Tenant be distrained by the Lord for such Services as the Lord holds of the Mefne, he shall have Writ of Mefne without giving Notice to the Mefne; but if he be distrained for other Services than those by which the Tenant holds of the Mefne, he shall give Notice to the Mefne before he shall have Writ of Mefne, which see in Old Nat. Br. in the Additions. Br. Mefne, pl. 31. cites 15 H. 6. Br. Notice, pl. 21. cites 15 H. 6. and Fitzh. Mefne 2.

(H. 3) What

(H. 3) *What the Mesne may do in Ease of the Tenant:*

But Brook says it seems to him, that if the Defendant pleads, that *Ne Prius*

pas, the Plaintiff may reply by the special Matter, which is, Lord, Mesne and Tenant, and the Lord distrains the Tenant, and he takes out his Beasts and does not send his own Beasts, and of them takes Replevin, Quære if he shall conclude *& sic cepit* &c. as upon *sic dedit* when a Man brings Formedon of Land recovered in Value which was not given. Ibid.

1. **L**ORD, Mesne and Tenant are; the Lord *distrain'd the Tenant*, the Mesne may take his Beasts out of the Pound, and put his Beasts into it, in spite of the Lord, and shall have Replevin of them, tho' his Beasts were not taken. Br. Mesne, pl. 24. cites 13 E. 4. 6.

(I) *Who shall have the Action.*

1. **H**E only, who is Tenant to the Mesne, shall have the Writ. 17 E. 3. 39. b.

Br. Mesne, pl. 34. cites S. C.—F. N. B. 136. (G) S. P.—

2. A Lessee for Life of the Tenancy shall not have Writ of Mesne where there is a Reversion over; For then he holds of the Reversion. 17 E. 3. 39. b.

But Tenant in Dower shall have Writ of Mesne against him in Reversion; because she has her Estate by the Law. Ibid.

Br. Mesne, pl. 34. cites S. C.—But then he must count ac-

3. If Lessee for Life be of the Tenancy, the Remainder in Fee to another, the Lessee shall have Writ of Mesne; Because he is Tenant to the Mesne. 17 E. 3. 39. b.

ording to his Case. F. N. B. 136. (G) in the Notes there (c) cites 13 E. 3. Mesne 12. 17 E. 3. 39. b.

4. If Lord, two Mesnes and Tenants are, and the last Mesne purchases the Tenancy for Life, he shall have Writ of Mesne against the first Mesne; For he continues Tenant to him. 17 E. 3. 39. b.

5. Tenant in Dower shall have Writ of Mesne. Br. Mesne, pl. 34. cites V. N. B. and pl. 35. cites Fitzh. Age. 119. in the Time of E. 1.

F. N. B. 136. (K)

6. So of Tenant in Tail. Br. Mesne, pl. 32. cites ancient Tenures. tit. Frankmarriage, and pl. 35. als. 36. cites Fitzh. Age. 119. in the Time of E. 1.

Where an Abbot, or such a Man

7. An Abbot sued a Writ of Mesne by reason of the Confirmation made to him in Frankalmoign, and it was maintainable. F. N. B. 136. (Q)

of Religion, holds his Tenements of his Lord in Frankalmoign, his Lord is bound by the Law to acquit him of every manner of Service, which any Lord Paramount will have or demand of him for the same Tenements; and if he doth not acquit him, but suffereth him to be distrained &c. he shall have against his Lord a Writ of Mesne, and shall recover against him his Damages and Costs of Suit &c. Co. Litt. 99. b. S. 141.—This extends to all Ecclesiastical Persons, that hold in Frankalmoign, be they secular or regular; for the Mesne ought to acquit all of them; for they be bound to make Prayers for their Founder and his Heirs, and in Consideration of those Prayers the Founder &c. is bound to pay to the Chief Lord all Rents and Services issuing out of that Land. Co. Litt. 99. b.

(K) *Against whom it lies.*

1. **T**HE Writ lies only against him, who is Tenant to the Lord Paramount.

Fol 128.

The Tenant shall not have a Writ

of Mesne against the Grantee for Life F. N. B. 136. (K)

2. If the Mesne grants over the Mesnalty to another for Life, and Tenant attorns, the Writ of Mesne does not lie against him in the Reversion for Non-acquittal during the Life of Grantee for Life; For he is the Lord. 17 E. 3. 31. b.

3. If there be a Lessee for Life of a Mefnalty, the Remainder to another in Fee, the Writ of Mefne lies against the Lessee for Non-Acquittal, because he is Tenant to the Lord Paramount. F. N. B. 136. (L)

4. The Tenant shall not have Writ of Mefne against the Grantee before Attornment; And so note, that he holds yet of the Heir of the Grantor till Attornment, and shall charge him with the Acquittal. Br. Mefne, pl. 1. cites 49 E. 3. 7.

5. Writ of Mefne shall be maintainable against the Heir of the Mefne, where his Ancestors have granted the Services of the Tenant by Fine, if the Tenant has not attorned according to the Fine; For he shall not be compelled to attorn without granting Acquittal to him; And if he grant Acquittal he shall have Writ of Mefne upon the Grant; And yet it commences after the Tenure. F. N. B. 136. (L)

(L) How it shall be brought. [Actions and Pleadings.]

1. A Mefne shall have Writ of Mefne without alleging in the Count Matter special, (scilicet) that the Tenant has brought a Writ of Mefne against him; For the Defendant may well say Not distrained in his Default. 17 E. 3. 43. b. 18 E. 3. 19.

2. But in this Case when the Defendant says Not distrained in his Default, Plaintiff cannot say generally Distrained in his Default, but ought to disclose the special Matter; For otherwise it shall not be intended to be brought for a Recovery against him by his Tenant. 18 E. 3. 19.

2 Inst. 375. S. P. and cites S. C. — A. is Lord, B. Mefne, C.

Mefne, and D. Tenant. A. distrains D. for Services; D. brings a Writ of Mefne against C. and recovers; C. brings a Writ of Mefne against B. and Counts generally B. pleads Not distrained in his Default, and the other replies contra, and the special Matter is found *ut supra*, and that the Services of B. were in Arrear, but not the Services of C. and it was held, First, That without some such special Mischief the Tenant in Service, viz. the Mefne shall not have a Writ of Mefne. Secondly, That in the Case of such Mischief he shall have it, and so each Mefne shall have it against the other, till it come to him in whom the Default is. 39 E. 3. 34. 39 H. 6. 31. 7 H. 4. 18. accordant. 3dly, That there ought to be a special Count. 20 E. 3. Mefne 14. or at least a special Replication, and that on the general Issue found, this Matter shall not aid him. F. N. B. 136. (H) in the Notes there (b) cites the Cases above-mentioned.

3. In Writ of Mefne, where Fine of Acquittal is levied between the Lord and the Tenant, by which the Lord grants and renders the Land to the Ancestor of the Plaintiff in Tail saving the Reversion, and rendering to him and his Heirs 4 s. Rent for all Services, and rendering to the chief Lord and his Heirs the Services due for the Mefne and his Heirs; there the Tenant shall have Writ of Mefne of the Services, but not of the Rent, unless he says that he offered it to the chief Lord, and he refused to receive it; quod Nota by Award; For this thing the Tenant himself ought to pay. Br. Mefne, pl. 8. cites 21 E. 3. 49.

4. In Writ of Mefne it is a good Title, that you and those whose Estate you have, acquitted me and those whose Estate &c. Br. Prescription, pl. 51. cites 31 Aff. 23.

5. In Affise; Lord Mefne and three Tenants are, the Lord distrained for the Rent of the Mefne; the one of the Tenants made Rescous; the Lord brought Affise against the Mefne and him who made the Rescous, leaving out the other, and recovered. Br. Affise, pl. 330. cites 31 Aff. 31.

And the Pleading was, That the Affise was brought against A. B.

and C. and A. came and pleaded to the Affise as Tenant of Parcel of the Tenements put in View, out of which the Rent arose, and B. said that he held jointly with E. not named, Judgment of the Writ, and if &c. Nul tort; and C. answered as Tenant of other Parcel, and said that E. is Tenant of Parcel of the Tenements not named, Judgment of the Writ &c. and if &c. Nul tort; and the Plaintiff said, that A. was intire Tenant of the Land put in View, out of which &c. and held of him the same Tenements by the same Rent, and the others are named but as Disseisors, by which &c. And the Affise was taken, which said, that A. held intirely the Tenements by the same Rent &c. And that the Plaintiff was seized, and distrained for the Rent Arrear in the Lands, and B. made Rescous, and that B. held jointly with E. prout &c. and that E. was Tenant of Parcel prout &c. And because it was found that the Plaintiff was seized and disseised,

it was awarded, that the Plaintiff *should recover Seign and Tenures*. And Querens in Misericordia against the others; and he recovered the *amercs* incurred *apud the Lord*. Br. Assise, pl. 330. cites 31 Ail. 31.

And by him, 6. The Defendant said, that where the Plaintiff has counted that he is the Defendant *disfrained by J. our Lord*, he said that he did not hold the Land of this J. *Prisi*; and no Plea by Finch; For if he holds of one who holds over of J. yet the Writ well lies. Br. Mesne, pl. 2. cites 44 E. 3. 2.
 And by him the Defendant may disclaim in his Seignory. *Quere*. Ibid. — *It herefore* the Defendant said, that *Not disfrained in his Default*, and the Plaintiff, upon this Plea, had Judgment to recover the Acquittal; *Quod Nota*. But it was said that it was contrary. Mich. 30 E. 3. Ibid.

7. In Writ of Mesne, because the Plaintiff held of the Defendant by such Services &c. of which Services he is seized &c. and said that he is disfrained by the Lord Paramount in Default of the Defendant for Homage &c. The Defendant said, that his Father acknowledged the Mejnalty to N. as that which he had of his Gift, who granted and rendered it to the Father again, and to M. his Feme, and to the Heirs of M. and that his Father died, and so the Plaintiff held of M. Judgment &c. And per Cur. it is no Plea without saying that he attorned to this Grant; *Quod Nota*; And the reason seems to be in as much as without Attornment the Grantee cannot avoy upon the Tenant, and by the same Reason the Tenant shall not have Writ of Mesne against the Grantee before Attornment. And so note, that he holds yet of the Heir of the Grantor till Attornment, and shall charge him with the Acquittal, and yet after the Fine nothing can descend to the Heir of the Conulor. Br. Mesne, pl. 1. cites 49 E. 3. 7.

8. A. brought a Writ of Error against B. where B. brought a Writ of Right Patent against him in Oxon, and made Protestation to sue in Nature of Assise of Novel Disseisin, and made Plaint of 9 s. Rent, to which A. said, that Assise non, for the said B. held the Land of him as Mesne by 9 s. and that this A. is Lord Paramount, and he took so much Rent of him as of his very Tenant, and demanded Judgment, if against him who is Lord Paramount of so much Rent Assise ought to be, and if he demanded other Rent *Nul tort*, &c. By which the said B. demurred upon the Plea, because he did not give him Colour, and prayed the Assise, and the Assise was awarded, and found for the Plaintiff in the Assise, by which he recovered; and because they awarded the Assise without Inquiry of the Matter pleaded in Bar they erred; and there it was agreed, that notwithstanding the Defendant in the Assise took not the Tenancy of the (same) Rent, but said of (so much) Rent, and gave no Colour, yet the Bar is good; For when he said of so much Rent, and to any other Rent pleaded *Nul tort*, it is well pleaded; and also he cannot say of the same Rent; For the Rent in the Bar was the Rent which the Mesne ought to pay to the Lord, and then the Mesne cannot take Rent of himself; and therefore because the Assise was awarded without putting the Party to answer to the Bar, it is Error; wherefore they awarded, that for this Error and others the Judgment be set aside in all, and awarded that the Tenant in the Assise be put in the same Plight as he was before the Judgment, and that the other be put to pursue further in this Court if he will, or have a new Assise at his Will. Br. Error, pl. 30. cites 50 E. 3. 18.

9. It is said in a Note, that it is a good Plea in Writ of Mesne for the Defendant to say that the Plaintiff has nothing in the Land. Br. Mesne, pl. 22. cites 7 H. 4. 12.

10. The Issue of *Donce* [in Frank-marriage] in the fourth Degree, shall not have a Writ as on a Frank-marriage, but as on a Gift in Tail. F. N. B. 136 (B) in the Notes there (a) cites 12 H. 4. 9.

11. Where the Defendant in Writ of Mesne pleads to the Writ, because the Mejnalty descended to him and his Sister who is alive, the other may say, that after the descent Partition was made, so that this Mejnalty was allotted

to the Defendant, and well; quod Nota. Br. Confess and Avoid, pl. 2. cites 3 H. 6. 42, 43.

12. If there are three Lords, Mefne and Tenant, and the Tenant is distrained for Relief of the Father of the Mefne, and the Mefne will not join to plead to the Avowry, and the Tenant brings Writ of Mefne, and the Mefne pleads to the Writ, that one of the Lords is dead, Non allocatur to the Writ nor to the Count; because Death of a Stranger shall not abate the Writ nor Count; For the Judgment is no other upon Forejudger, but that the Tenant shall be Attendant on the Chief Lord, which may be good, notwithstanding the Death of the Lord. Br. Mefne, pl. 28. cites 10 H. 6. 26.

F, N. B. 126. (P) acc.— 2 Inst. 374 acc.— For the Tenant who is distrained cannot abate the Avowry of the Lord by this Default,

if the Mefne will not join to plead in Abatement of the Avowry. Ibid.—Also if the Lord distrains the Tenant for Services of the Mefne which are not due, there the Tenant cannot abate the Avowry if the Mefne will not join to plead to it; quod Nota, and therefore it is no Plea to the Writ of Mefne. Br. Mefne, pl. 2. cites 10 H. 6. 26.

In Mefne the Defendant pleaded to the Writ the Death of the Lord pending the Writ; and per Cur. * if this Plea be good, it is to the Action and not to the Writ; but by the Opinion of the Court it is no Plea. Brooke makes a Quere; For if Process upon Forejudger had been taken, there he cannot be Attendant to a dead Person; but where no such Process is taken, as here, it seems no Plea. Br. Mefne, pl. 9. cites 4 H. 6. 28. — * Orig. (sic eo son Plea 11). — But Hill. 21 H. 7. it was agreed per tot. Cur. Contra, viz. That where Writ of Mefne was brought, and the Lord Paramount died before the Judgment of Forejudger, it shall abate the Writ, and yet he is not Party to the Action, but he ought to be Party to the Judgment. Kelw. St. a. pl. 1.

13. And per Paston, Strange and Cottessmore J. if the Mefne has Issue a Son and a Daughter and dies, and after the Son dies without Issue, there if the Lord Paramount makes Avowry upon the Daughter, as Heir of her Father, after Distress taken upon the Tenant, the Tenant in his Writ of Mefne may make the Daughter Heir to her Father, without mention of the Son. Ibid.

14. In Writ of Mefne, the Writ was that he acquit him of the Services which H. demanded of him de libero Tenemento suo quod tenet de E. in 7. unde Predict. E. qui medius est inter eos cum acquietare debet; and so by the Writ he supposed that E. is Mefne, and in the Count he said that H. distrained him after the Death of J. Father of E. for the Relief of E. which does not suppose that E. is Mefne but by Argument, and therefore ill; per Prifor. Br. Mefne, pl. 13. cites 38 H. 6. * 12.

* It should be 21. b.

15. In Writ of Mefne, the Abbot Plaintiff counted that he he'd of the Defendant 20 Acres of Land in Frankalmoign, and the Defendant did not acquit him of the Services, which J. demanded against him of his Land in C. which he held of the Defendant, of which the Defendant is Mefne between them, inasmuch as he held the said Land in Frankalmoign, and that J. and all his Ancestors whose Heir he is, have acquitted the Plaintiff and his Predecessors versus quoscunque Homines Time out of Mind, and that J. had distrain'd him for Fealty 10 s. Rent and Suit of Court, and for Relief after the Death of H. Father of E. the Defendant whose Heir he is, & licet sapius requisitus &c. he did not acquit him; The Defendant said, that he and his Ancestors, whose Heir he is, have not acquitted the Plaintiff and his Predecessors of the said Services Medo & forma &c. and the others e contra, and found for the Plaintiff; and it was alleged in Arriest of Judgment, that it was Feofail in as much as he does not count of the Certainty of the Tenure between E. the Mefne, and J. the Lord Paramount; and also that the Count is double, viz. the Tenure in Frankalmoign, and the Prescription, where each is good Cause of Acquittal; and also that the Prescription is to acquit him versus quoscunque Homines, where Writ of Mefne does not lie, but to have Acquittal against him who has Tenure in these Lands, and no other, but against others Writ of Covenant lies and not Writ of Mefne, And the Opinion of Prifor and several other Justices was, that the * Plaintiff ought to surmise the Tenure between the Mefne and the Lord Paramount in his Count, and after they saw the Book of Novæ Narrationes, which made no mention of the Tenure between the Mefne and the Lord Paramount, and it

S. P. But it was held that the Prescription was not good, because it was, That he and his Ancestors have acquitted the Plaintiff &c. and did not by the Defendant and his Ancestors, whose Heir he is; but because in one Roll those Words, (whose Heir &c.) were written, and in another Roll they were omitted, therefore it was amended per Cur. For it

was Misprision of the Clerk, and to ill if it had not been amended, quod Nota. *Br. Prescrip-tion*, pl. 43. cites 39 H. 6. 34. 29. — * The Court held, that the Plaintiff ought to sur-

mise the Tenure and the Services, between the Mesne and the Lord Paramount, as well as between the Tenant and the Mesne. *Br. Mesne* pl. 13. cites 38 H. 6. 12. And the same per *Prifot* eodem Anno, fol. 21 — Note, That the Plaintiff in a Writ of Mesne needs not in the Count to shew the Certainty of the Tenure between the Mesne and the Lord Paramount, but to say generally that he holdeth over. *F. N. B.* 135. (M) *Marg.* cites 38 H. 6. 12 & 39 H. 6. 29. —

was of the Prescription as above, therefore they would not vary from the Course, and of this they awarded the Count good, and that the Prescription above is good against all the Lords and void against all others; quod Nota; And so it is found in this Point, and of the rest nothing is found, and therefore a good Verdict. And per *Choke* the Count is not double; for he has rely'd upon the Prescription only, and upon this is the Issue taken; and per *Prifot* the Plea is not double, because Tenure in Frankalmoign is not sufficient Cause of Acquittal unless he shews the Gift, and therefore it is not double; For here he did not shew the Gift; by which it was awarded that the Plaintiff recover his Acquittal against the said E. &c. *Br. Mesne*, pl. 14. cites 28 H. 6. 6. — [It should be 39 H. 6. 29.]

16. Writ of Mesne by an Abbot against J. S. and counted that he and his Predecessors time out of Mind have held of the Defendant and his Ancestors in Frankalmoign, and the Plaintiff and his Predecessors rendered annually to the Defendant and his Ancestors 1 d. and the Defendant and his Ancestors have held over of W. N. by 12 d. and so demanded Acquittal of the 1 d. by the Tenure; and for the 11 d. prescribed that the Defendant and his Ancestors have acquitted the Plaintiff and his Predecessors time out of Mind, and that the Plaintiff was distrained for 12 d. by the Chief Lord, and the Defendant had not acquitted him; and the Defendant travers'd the Prescription of the 11 d. and so to Issue, and found for the Plaintiff; and it was alleged in Arrest of Judgment, that the Declaration was double, one for the Tenure in Frankalmoign, which is an Acquittal in it self by the Law, and another the Prescription; But because the Parties were at Issue upon the one Point only, viz. the Prescription, therefore the Doubleness is vain by several, and by some it is not double; For he demands several Acquittances, one for the 11 d. and another for the 1 d. by Owelty in Frankalmoign, and the 11 d. by Prescription, * but it was not admitted; and Exception was not taken if he who held in Frankalmoign, which is free of all other Services, rendered 1 d. of Rent or not. *Br. Mesne*, pl. 16. cites 4 E. 4. 35.

* Orig (tamen) but it seems it should be (tamen).

So of such Gift in Tail after the Statute &c. For all that is done at the Reservation of the Tenure. *Ibid.*

17. And per *Billing J.* if Lord and Tenant were before the Statute of Tenures by 12 d. Rent, and the Tenant before the Statute had given to hold of him by 1 d. and granted over to acquit him of the 11 d. now if he had been distrained by the Lord for the 12 d. he should have had Writ of Mesne, and should demand Acquittance of the 1 d. by the Tenure, and of the 11 d. by the Deed; quod non *Negatur.* *Ibid.*

18. And if Lord, Mesne and Tenant are at this Day, and the Tenant holds by 1 d. and the Mesne over by 12 d. and the Mesne by Deed grants to the Tenant, reciting the Tenure &c. to acquit him of the 11 d. he shall have Writ of Mesne, and declare upon the Tenure for 1 d. and upon the Deed for 11 d. per *Billing J.* but *Markham Ch. J.* Contra; For he shall have Writ of Mesne of the 1 d. and Writ of Covenant upon the Deed for the 11 d. For this came after the Tenure. *Billing* said this was the ancient Usage, but it is Contra at this Day, in avoiding of Circuity of Action; As where a Man after the Lease, grants to the particular Tenant to hold without Impeachment of Watt. *Ibid.*

19. Mesne against N. supposing that he was distrained by the Lord of W. for 100 s. Relief &c. in Default of the Defendant, and counted that he held of the Defendant by Knight's Service; and the Defendant said, that the Land is out of the Fee and Seigniorie of the Lord of W. And it was argued if it be a good Plea, or if he shall traverse the Tenure; but at last the Plea was adjudged good, and the Issue was accepted. Per *Danby*, the Issue shall be, if the Land be held of him or not. Per *Littleton* Contra, for the Issue shall

shall not be so, but where it is counted that he held &c. and it is not fo in the Count, by which the Issue supra was accepted. Br. Mesne, pl. 10. cites 9 E. 4. 27.

20. Writ of Mesne against A. B. inasmuch as the Plaintiff held of him, and he over of J. S. and that the Plaintiff is distrained by J. S. in Default of the Defendant, and that he ought to acquit him; Sulyard demanded Judgment of the Writ; For where the Plaintiff has supposed that he held of us, and we over of J. S. we say, that we hold over of J. S. in Jure M. Uxoris ejus, and not otherwise; And per tot. Cur. except Chocke, it is a good Plea to the Writ; For otherwise per Brian, the Mesne shall be drove to two Acquittals, the one against J. S. only by this Conclusion, and against J. S. and his Feme for Cause of Tenure. Br. Mesne, pl. 19. cites 22 E. 4. 35.

21. Ancient Demesne is a good Plea in a Writ of Mesne. F. N. B. 136. (K). Yet see in a Writ of Mesne on a Deed of Acquittal by the Tenant the Defendant alleged that the Lands are held of the Manor of S. which is ancient Demesne, and it was not allowed, but was put to answer to the Deed. F. N. B. 136. (K) in the Notes there (d) cites 34 E. 1. Mesne 38 ——— But see in a Writ of Mesne by Tenant in Dower against the Heir, who alleges that the Tenements are held of the Manor of C. which is ancient Demesne, and tho' it was said, that one cannot have Process of Forejudging on Proclamations in a Court of Ancient Demesne, and that the Heir cannot be distrained there, because he has only the Services &c. yet it was awarded that he should take nothing; and it was said, that *this Plea shall be pleaded in a Petit Writ of Right in the Lord's Court, and that he shall make Protestation &c.* F. N. B. 136 (K) in the Notes there (d) cites 28 E. 3. 45. acc. 30 E. 3. 12. per Skipw.

22. It was agreed that where there are Lord, Mesne and Tenant, the Tenant may plead Release made to the Mesne; to which Fitzherbert J. agreed. Br. Releases; pl. 25. cites 14 H. 8. 4.

(L. 2) Process and Proceedings.

1. THE Writ of Mesne ought to be brought in the County where the Lands lie, and if Nihil be returned against the Lord, a Writ shall issue to another Sheriff on a Testatum. F. N. B. 135. (M) in the Notes there (b) cites 29 E. 3. 3.

2. If in Writ of Mesne against two the one appears, and the other makes Default, Distress with Proclamation shall not issue against the other who made Default; For the Plaintiff cannot * recover the Acquittal by the Default of the one where the other appears, and the one shall not answer without the other; per Thirne and Hanke. But Brook makes a Quære thereof; For otherwise it seems when the Process is determined against the one; For then if the other be Convict Judgment shall be against both, the one by Default and the other by Conviction. Br. Mesne, pl. 21. cites 14 H. 4. † 27.

3. If the Sheriff returns Nihil upon Summons, and upon the Attachment; and upon the Distress in Writ of Mesne, yet the Plaintiff may have Judgment of Forejudger against the Mesne by the Statute, as well as if all the Process had been returned served; quod Nota, in a Quære Impedit. & non Negatur. Br. Mesne, pl. 29. cites 11 H. 6. 3.

4. The Writ may be sued and removed out of the County at the Suit of the Plaintiff by a Pone without Cause, and at the Suit of the Defendant with Cause shewn, as in a Replevin. F. N. B. 136. (A)

5. The Men of Cornwall claim to plead a Plea in a Writ of Mesne in the County without Writ, and that they had an Allowance thereof in Eyre. F. N. B. 136. (D).

6. Tho' Writ of Mesne be depending betwixt the Mesne and Tenant Paravail, yet the Lord shall distrain the Tenant Paravail for the Rents and Services, and not tarry till the Writ of Mesne be ended betwixt them, whether he ought to acquit the Tenant or no. F. N. B. 136. (D).

See (A. 2)
S. 11, 12, 13,
14, 15.

Br. Process,
pl. 45. cites
S. C.

* Orig. is
(receive)

† It should
be (3?)

Kelw. 81 pl. 1. Contra. See (L) pl. 12.

The Process at Common Law was Summons, Attachment, and Distress infinite in the same County where the Writ was brought. Co. Litt. 100. — The Plaintiff in a Writ of Mesne may choose either the Process at Common Law or upon the Statute of Westm. 2. Co. Litt. 100. b.

7. Tho' the Lord dies pending the Writ of Mesne, yet the Writ shall not abate. F. N. B. 136. (F). — 2 Inst. 374. — Br. Mesne, pl. 23. cites 10 H. 6. 26. S. P. as to the Death of one of the Lords.

8. The Process in a Writ of Mesne is Summons, Attachment, and Distringas; and if the Defendant hath not any Thing in the County, by which he can be distrained, then the Plaintiff may surmise that he hath Assets in another County, and pray a Distringas thither, and he shall have it by the Statute; and upon that he shall be forejudged &c. if he do not appear, and the Writ be served and returned against him; but that is given by the Statute; For at the Common Law he shall not have but Distress infinite in the same County where the Writ was brought, and that is in the County where the Land is; and at this Day he may choofe whether he will sue the Process at the Common Law, Distress infinite in the County, or the Process which is given by the Statute, Summons, Attachment and the grand Distress, which shall have Day to answer by such Times as two Counties may be holden, in which the Sherifff shall make Proclamation that he come to answer the Plaintiff, and if he do not come, and the Writ be returned, then he shall be forejudged. F. N. B. 137. (A).

(M) Mesne. Judgment at what Time.

Br. Damages pl 196. cites 13 E 4 6. — Br. Mesne, pl 5. cites 11 H. 4. 52.

1. **I**F the Defendant in Writ of Mesne saith Not distrained in his Default; the Plaintiff may have Judgment presently for the Principal (Scilicet) to recover the Acquittal. 17 E. 3. 44. adjudged. Contra 30 E. 3. 21. b. adjudged.
2. So if he saith Not distrained within his Fee. 17 E. 3. 44.
3. In Writ of Mesne if Defendant acknowledges the Acquittal in Coparcenary with another, as by conveying the Mesnalty to her and her Sister; the Plaintiff shall not have Judgment against her; because the Acquittal ought to be by both. 3 H. 6. 43. (for the Writ shall abate.) But otherwise it is if Partition be between them. 3 H. 6. 43.

(M. 2) Judgment. How and of what.

* Judgment was that Defendant should be distrained of the Acquittal, and no Judgment that the Plaintiff recover the Acquittal. Br. Mesne, pl 15 cites 15 Ass 9. — † S. P. and yet these are not Errors. Br. Mesne, pl 15. cites S. C. — † S. P. and the Judgment was affirmed

1. **S**EE 14 E. 3. Mesne 7. A. brings a Writ of Mesne against B. and counts of an Acquittance by reason of Tenure in Frankalmoign, and * Judgment was that he should recover Damages, and a Precept went to the Sheriff quod distringeret B. ad acquietand. B. dies; a Scire facias goes against C. the Heir of B. to have Acquittal. C. not acknowledging that he had the Seigniorie at the Time, or that he had any more &c. pleads, that he hath nothing by Discent in Fee from his Father within the same Lands &c. and Note, the Abbot in the said Recovery counted of Frankalmoign Unde Chartam &c. and therein these Points were agreed, viz. 1st. That this Judgment is well enough to warrant a Scire facias for the Acquittal. 2d. That no other Process of Execution lies against the Heir than a Scire facias &c. 3d. That the Plaintiff † need not shew the Charter whereby he deraigned the Acquittal on the Recovery. 4th. When an Acquittal is granted for one who is not Mesne, it is no Cause to have a Writ of Mesne, but only of Covenant. 5th. On an Acquittal which binds the Ancestor by Reason of a Tenure in Frankalmoign, Frank-Marriage, or a Deed whereby the Acquittal is granted, if the Heir has the Mesnalty, he shall be bound to the Acquittal by Writ of Mesne, † alio he has nothing by

by Descent in Fee-Simple from him by whom the Acquittal commences ; but there it seems he may disclaim in the Mefnalty ; Quære ; wheretore the Abbot had Judgment &c. and affirmed in a Writ of Error. F. N. B. 136. (U) in the Notes there (a) cites 15 Aff. 9.

notwithstanding these Matters ; but Brook says quod mirum 15. cites S. C.

of failure of Affets if the Acquittance was by Deed of his Ancestor. Br. Mefne, pl. 15. cites S. C.

2. It seems that where there are two Mefnes, one Mefne shall not recover Damages against the other before Execution. F. N. B. 136. (H) in the Notes (b) cites 20 E. 3. Mefne 14. and 17 E. 3. 44. and 18 E. 3. 19.

3. In Mefne against one as Heir of M. his Mother, who had bound her and her Heirs to the Acquittal, the Defendant said, that M. after took to Baron J. N. to whom the Plaintiff had released to him and to his Heirs all the Acquittal, and that the Defendant is Son and Heir to the said J. N. and M. Judgment &c. and because the Plaintiff bound the Defendant as Heir of his Mother, and he pleads a Release to his Father and his Heirs, and so it is another Acquittal, and therefore no Bar, the Plaintiff had Judgment to recover the Acquittal, and Damages taxed by the Court 100 s. Br. Mefne, pl. 7. cites 38 E. 3. 10.

4. In Scire facias it was said, that if a Man confesses the Acquittal and suffers the Tenant to be distrained in his Default, Distress shall issue against him ; and if he comes and it is found against him, he shall render Damages and shall be forejudged ; but if he makes Default after distraining he shall be forejudged, but without Recovery of Damages, and this by the Statute, as it is said there. Br. Mefne, pl. 3. cites 46 E. 3. 31.

5. In Scire facias, it was agreed that a Man shall recover Damages in Writ of Mefne, if he be distrained in Default of his Mefne who ought to acquit him. Br. Mefne, pl. 27. cites 50 E. 3. 23.

Contra in Scire facias upon Acquittal acknowledged by

Fine. Ibid. — And yet it is agreed that in Distress upon the same Scire facias a Man shall recover Damages ; quod mirum, and therefore Vide librum & tit. Scire facias in eodem Casu. Ibid — If a Man brings a Writ of Mefne where he is not distrained, the Writ is maintainable, but then he shall not recover Damages ; For the Writ is brought only to recover the Acquittal &c. F. N. B. 136. (E).

6. Defendant pleaded Not distrained in his Default, by which the Plaintiff prayed Judgment of the Acquittal, and had Judgment to Recover it immediately upon this Plea ; quod nota, and therefore the Plea shall not serve but to defend the Defendant from Damages, as it seems. Br. Mefne, pl. 5. cites 11 H. 4. 52.

S. P. S Rep. 134 in Mary Shipley's Cafe. — He shall have Judgment, but no Execution for the present. Hob. 59.

7. In Writ of Mefne against two, and the one appears, and the other makes Default, Distress with Proclamation shall not issue against the other who made Default ; For the Plaintiff cannot recover the Acquittal by the Default of the one, where the other appears ; and the one shall not Answer without the other ; per Thirne, and Hanke. But Brook makes a Quære thereof ; For otherwise it seems when the Process is determined against the one, for then if the other be Convict, Judgment shall be against both, the one by Default, and the other by Conviction. Br. Mefne, pl. 21. cites 14 H. 4. 27.

8. In Writ of Mefne by the Tenant, the Judgment is no other upon the Forejudger, but that the Tenant shall be Attendant on the Chief Lord. Br. Mefne, pl. 28. cites 10 H. 6. 26.

9. The Tenant shall not recover Acquittal against the Mefne, * nor is the Mefne bound to acquit him of more Services than he pays to the Lord ; so that if the Lord ditrains for more Services than the Mefne ought to do to him, he is not bound to acquit the Tenant, but of those which he ought to do to the Lord, which the Lord of Right ought to have ; quod nota. Br. Mefne, pl. 14. cites 28 H. 6. 6.

* Orig (Nest tenus).

10. Nota Arguendo in Dower it was agreed, that if in Writ of Mefne the Defendant pleads that Not distrained in his Default, the Plaintiff shall recover the Acquittal, and for the Damages he shall be at issue &c. and so see that

There are two several Judgments in a Writ of

Mesne, *One* that in this Action there may be *two Judgments*; For of the Damages at the Common Law, another by the Statute of W. 2. cap. 9. At the Common Law he shall have Judgment to recover his *Acquittal*, and if he be distrained or damnified his *Damages and Costs*. Co. Litt. 100.

11. If the *Mesne* has paid the Services to the Lord Paramount, and the *Tenant* be afterwards distrained for those Services, he shall have a Writ of Mesne; but it is a Question, whether he shall recover Damages in this Writ. But it seems, he shall, because the Mesne shall recover Damages against the Lord, if he will put his Cattle into the Pound for the Tenant, and sue a Replevin &c. And yet Not distrain'd in his Default is a good Plea in Writ of Mesne; and if he pays the Services, he is not distrain'd in his Default. F. N. B. 136. (H).

See (A. 2) S. 16, 17, 18, 19 23; and in Notis there.

(N) *Forejudger, in what Cases, and the Effect thereof, and Judgment How.*

1. SEE in the ancient Tenures tit. Frank-marriage that *Tenant in Tail* shall have Writ of Mesne, but not Process of Forejudger, unless it be in Advantage of his Issue; quod nota. Br. Mesne, pl. 32.

2. The Judgment by the Statute of W. 2. is a *Forejudger* of the Mesnalty, and that in two several Cases; One upon Process given by the said Statute, viz. *Summons, Attachment, and Grand Distrains, and if he cometh not, and the Writ be returned*, he shall be forejudged; the other Case is, where a *Tenant recovereth his Acquittal* in a Writ of Mesne, if he be not acquitted afterwards, he shall have a Writ of *Distringas* ad quietandum against the same Mesne, and if he cometh not, he shall be forejudged by his Default of the Mesnalty; and so if he cometh, and it be found against him by Verdict, he shall be forejudged: But Forejudger in that Case is not given against his Heir, for that the Statute speaketh only of the Mesne, amittat Servitia de A. (le Tenant) de Tenementis prædictis, & quod omisso prædicto T. Præfat. R. (le Seigneur Paramount) modo sit attendens & respondens per eadem Servitia per quæ T. tenuit. The said Statute in Case of Forejudgment doth not bind a * Feme Covert; and yet if such Judgment be given against a Baron and Feme, it is not void, but erroneous, and to be reversed in a Writ of Error; and so Forejudgment against a *Tenant in Tail* shall bind the Issue in Tail in an Avowry, until he reverseth it by Error. If two *Jointenants* bring a Writ of Mesne, and the one is summoned and severed, the other cannot forejudge the Mesne; For he ought to be attendant to the Lord Paramount, as the Mesne was, and that he cannot be alone. And so it is if there be two *Jointenants Mesnes*, and in a Writ of Mesne brought against them, one maketh Default, and the other appears, there can be no Forejudger. Co. Litt. 100.

3. No Forejudgment can be but when there is but one Mesne between the Lord distraining and the Tenant, because the Tenant upon the Forejudgment cannot be attendant to the Lord distraining, in respect there is Mesne between them, and so the said Statute provideth for it in express Terms. Co. Litt. 100. b.

4. Where there was Lord, Mesne and Tenant, and the Mesne was arrear, and the Lord distrained the Tenant, and the Tenant had offered the Rent, the Lord might have refused; and for this Reason Process of Forejudger was given; quod nota. Br. Avowry, pl. 6. cites 2 H. 6. 1.

5. In Forejudger, the Judgment is no other than that the Mesne shall be forejudged, and that the Tenant shall be attendant Capitali Domino. F. N. B. 136. (F) in the Notes (d) cites 10 H. 6. 26. Per Strange.

6. If there be Lord Mesne and Tenant, and the Tenant holdeth of the Mesne by Fealty, and 3 s. Rent, and the Mesne takes a Wife, and the Tenant

* Forejudger against Baron and Feme Covert is not void, but Error; For the Feme shall not have Cui in Vita. Br. Mesne, pl. 33; cites 9 E. 3 and Old Nat. Brev.

Br. Mesne, pl. 28. cites S. C.

nant brings a Writ of Mesne against the Mesne, and forejudges him, and the Mesne dies, the Wife of the Mesne shall have Dower of the Rent by which the Tenant held, and shall not be Attendant unto the Tenant. Perk. S. 432.

7. If there be Lord, Mesne and Tenant, and the Mesne holds by Priority, and the Tenant in a Writ of Mesne doth forejudge the Mesne; in this Case the Mesnalty is extinct, and the Tenant shall be answerable to the Lord *De eisdem Servitiis & Consuetudinibus quæ prius facere debuit prædictus Medius*; And in this Case the Tenant shall hold by Priority; For 1st. he shall hold per Antiquius Feoffamentum; 2^d. The Mesne in Supposition of Law was said to hold the Land. 3^d. The Statute of W. 2. that gives the Forejudger, provideth that he shall hold by the same Services and Customs, and in such Sort, as it may be done sine Præjudicio alterius, and this should be to the Prejudice of the Lord by Priority, if he should lose that Benefit. 2 Inst. 392.

(O) Lord, Mesne and Tenant. *Actions by one against the other. In what Cases there must be a Joinder.*

1. **I**N Replevin H. P. avow'd, because G. W. held of him two Manors by Fealty and four Marks Rent, of which Services &c. and that the Manors are of the Value for 280^l. and for 14^l. for Aid to make his eldest Son a Knight, who is above 15 Years, he avow'd upon G. W. as upon his very Tenant, and well, tho' he had not Writ to levy it; For he may levy it by Distress; And the Plaintiff who was Tertenant, and held of G. W. and G. W. over of H. P. the Avowant. &c. pleaded Release made by the Lord to the Mesne of all Services, Actions, and Demands, except Fealty and four Marks Rent; Judgment if he may avow for Aid. And it was held, that the Plaintiff cannot plead the Plea; For he is a Stranger to the Release, and a Stranger to the Avowry; And that he cannot plead any Plea but Hors de son Fee, or a Thing which tantamounts; nor can he plead Riens Arrear; But ought to have required the Mesne to have joined with him in Answer. And they two might have joined in this Plea, and if he would not, then the Tenant might have had Writ of Mesne against him, and recovered Damages; For to this Effect is the Joinder of the Mesne to plead such Plea as the Tenant cannot plead; and afterwards the Mesne made his Attorney to join to the Plaintiff; quod nota bene. Br. Avowry, pl. 75. cites 39 E. 3. 34.

Br. Mesne,
pl. 12. cites
S. C.

If Lord Mesne and Tenant are, and the Lord distrains, the Plaintiff brings Replevin, and the Lord avows upon the Mesne, who joins to the Tenant Gratis, this is well; For Summons ad Auxiliandum does not lie; For it is upon Fee Simple. Br. Joinder in Action, pl. 64. cites 7 E. 4. 19.

3. Replevin by T. against K. who made Conusance as Bailiff of C. by Tenure of nine Houses by certain Services &c. held of C. his Maister by M. and avowed upon M. who was a Mesne, upon which came this same Mesne and said that the Plaintiff held one of the said Houses of him by 20^s. and so he is Mesne between them, and prayed that he might be admitted to join with the Plaintiff; and the best Opinion was, that he may join to discharge him in Writ of Mesne, tho' the Plaintiff did not pray it, and tho' they did not agree in the Quantity of the nine Houses, and tho' he did not shew Mesnalty to be of the whole; For per Littleton, there is Mesnalty for this Parcel. But Brian J. contra. And per Jenny, the Joinder is good to plead to the Avowry, or in Abatement &c. Br. Joinder in Action, pl. 69. cites 12 E. 4. 16.

4. The Joinder is not only to disclaim, but is to plead such Pleas in bar, and in Abatement of the Avowry, as the Plaintiff who is a Stranger cannot plead. Ibid.

So if there be Lord, two Mesnes, and a Tenant, and the Lord avowes upon the Mesne Pa-

5. It was agreed, that if there are *Lord Mesne and two Tenants* and one of the Tenants brings Replevin; and the Lord avowes upon the Mesne, the other ought to join to the Plaintiff, so that the Mesne may join to them two; For he cannot join to the one alone. Br. Joinder in Action, pl. 67, cites 21 E. 4. 2.

with all the Mesnes paravail ought to join for Mischief of the Tenant; For otherwise the Mesne Paramount alone cannot join to the Tenant alone; For there is no Privy between them Ibid.

(P) Replications.

1. **I**N Mesne the Plaintiff counted how he held of the Defendant, and is distrained in his Default, and the Defendant said that the Mesnalty descended to her and to one M. as to two Sisters and one Heir who is in full Life, Judgment of the Writ; and a good Plea by the Opinion of the Court; For he ought to have the Action against both; by which the Plaintiff shewed how Partition was made between the Defendant and her Sister, and this Mesnalty allotted to the Defendant &c. and a good Replication. Br. Replication, pl. 2. cites 3 H. 6. 42.

(Q) Lord, Mesne, and Tenant. *Inter se. Where the one purchases of the other.*

1. **W**HERE there is Lord, Mesne, and Tenant, and the Lord distrains for Service of the Mesne, the Tenant in Assise may plead Riens Arrear; Contra to the Avowry in Replevin; quod quere of Riens Arrear in Assise; For it is not clear there. Br. Avowry, pl. 85. cites 27 Ass. 51.

2. In a Writ of Mesne, if the Defendant acknowledges the Acquittal, the Plaintiff may distrain him for not acquitting him. Br. Fines, pl. 45. cites 38 E. 3. 33.

3. Lord, Mesne, and Tenant; the Lord distrains the Tenant, the Mesne may put his Beasts in the Pound for them and bring Replevin, which shall be general; For there is no other Form of the Writ as it is said elsewhere; and if the Defendant says that he did not take, or that the Property was in a Stranger and not in the Plaintiff, then the Plaintiff may shew the special Matter by Replication and maintain the Writ. Br. General Brief, pl. 18. cites 7 H. 4. 18.

4. If twenty Mesnes are between the Tenant and the Lord Paramount, yet the Mesne next Paramount holds the Land of the Lord Paramount by Rent; Per Hill. Br. Intrusion, pl. 8. cites 11 H. 4. 82.

3 Lc. 261.
Anon. S. P.
32 Eliz. in
the Court of
Wards.

5. If Lord, Mesne, and Tenant be, and Tenant holds of the Mesne by 10s. and the Mesne holds by 1d. now if the Lord Paramount purchases the Tenancy, the Mesne shall have the Overplus of the Rent as a Rent-seck, and may ditrain for it; because the Rent was Rent-Service before, and the Nature of the Rent is not changed by the Act of the Mesne. Kelw. 104. pl. 11. Casus incerti Temporis.

(R) How

R) *How the Mefne ſhall be ſaid to hold.* By Common Law or Cuſtom.

1. **W**HERE there is Lord, Mefne, and Tenant in Gavelkind, the Rent and Services of the Mefne * may be held at Common Law, unless it be ſpecially ſhewn that the Rent is of the Nature of the Land ; Quod Nota, and Quære. Br. Rents, pl. 6. cites M. 30. E. 3.

* And ſhall not be intended of the Nature of the Land, unless it be 30. E. 3. ac-

ſpecially ſhewn ; Quod Nota. Br. Cuſtoms, pl. 24. cites M. 3 E. 3. but it ſhould be M according to Br. Rents, pl. 6.

(S) *Extinguiſhment of Mefnalty.*

See (A. 2) S. 8, 9. & in Notis.

1. **I**F there be Lord, Mefne, and Tenant, and the Mefne grants the Mefnalty to one for Term of Life, and after the Lord releaſes to the Tenant of the Land all the Right which he has in the Land, there the Mefnalty is extinguiſhed ; For the Services which the Mefne has ſhall be in Reſpect of the Services which he does over to the chief Lord ; yet the Tenant for Life ſhall have the Services for his Life ; Quære inde ; and ſo ſee Releaſe between the Lord and the Tenant extinguiſhes the Mefnalty ; But it ſeems, that if there be any Surplus he ſhall have it. Per Babb. Ch. J. Br. Releaſes, pl. 20. cites 8 H. 6. 24.

Co. Litt. 152. b.

2. If there be Lord, Mefne, and Tenant, and the Mefne is attainted of Felony, the Lord Paramount ſhall have the Mefnalty preſently. 2 Inſt. 37.

3. The King Lord, Mefne in Capite, and Tenant paravail in Socage ; The Mefne granted the Mefnalty to the Uſe of himſelf for Life, Remainder to the Uſe of Tenant paravail in Tail. The Queſtion was, if the Mefnalty be ſuſpended during the Life of the Mefne by Force of this Remainder in Tail ? Reſolved, that a Remainder in Tail, or for Life expectant upon Eſtate for Life, or in Tail, will never ſuſpend a Mefnalty, Seigniority, Rent &c. For tho' the Remainder veſts immediately, yet this cannot ſuſpend the preſent Franktenement of the Rent during the Life of the firſt Tenant for Life ; Becauſe the Tenant for Life is Tenant to the Lord, or to him in Reverſion, ſo long as he lives, and he ſhall do the Services, and the Avowry ſhall be made upon him ; For he is the very Tenant by the Manner, and during his Life the Heir of him in Remainder in Tail ſhall not be in Ward ; And as Seigniority, Rent &c. * cannot be ſuſpended in Part, and in Eſſe for Part in reſpect of the Land out of which it is iſſuing, ſo cannot Seigniority, Rent &c. be ſuſpended in Remainder and in Eſſe for a particular Part in Poſſeſſion ; For then would enſue Fractions of Eſtates, and particular Eſtates would be created without Donors or Leiſors againſt the Maxims of Law. 9 Rep. 134. Mich. 9 Jac. in the Court of Wards. Af-cough's Caſe.

* This Point was denied by the Court. Vent. 277. Mich. 27 Car 2 B. R. in Caſe of Hodgkins v. Robſon & Thornborough.

4. But if the Mefne grants his Mefnalty to one for Life or in Tail, the Remainder to Tenant paravail in Fee, there the Mefnalty is extinguiſhed ; Becauſe he has as high an Eſtate in the Inheritance of the Mefnalty as he had in the Tenancy, and there is no Poſſibility of reviving the Mefnalty ; And in the ſame Caſe the Mefnalty is not extinguiſhed for the Inheritance and In Eſſe for the particular Eſtate for Life or in Tail in Poſſeſſion, but by the Remainder in Fee is extinguiſhed in toto ; For otherwiſe there would be this Abſurdity, viz. that there would be a Fee Simple of the Tenancy paravail, and alſo a Fee Simple of the Seigniority Paramount, and an Eſtate for Life only, or in Tail of the Mefnalty, and ſo a Tenancy in Fee Simple ſhould be held of a Mefnal-

a Mesnalty for Life, or in Tail only, and a Seigniori in Fee should be issuing out of a Mesnalty for Life or in Tail only, which is impossible and cannot any ways be. 9 Rep. 134. b. 135. a. in Afcough's Cafe. and cites 3 H. 6. 1. and 15 E. 4. 12.

5. If the Tenant *infeoff* the Lord Paramount and his Wife and their Heirs, this is only a Suspension of the Mesnalty; For if the Wife survives, both Mesnalty and Seigniori are reviv'd. Co. Litt. 152. b.

Mesne Profits.

(A) *Who shall have them*; Being claimed by several.

1. **L**ANDS are extended on a Statute Staple, yet the Conufee is not in Possession before he has received them; for he may pray that they be delivered to the Appraisors, according to the Statute of *Acton Burnell*. The Question is, who shall have the Rent, whether the Conufor, the Conufee, or the Queen? The Writ is *Cape in Manum noſtram*, fo that the Lands are in the Queen's Hands. This is like to the Cafe of *Disceit*, where he shall not have the Mesne Issues; So as it seemed to the Court that the Conufee should not have them, but they did not say expressly who should have them. Goldsb. 108. pl. 14. Mich. 30 & 31 Eliz. Anon.

2. In Cafe of a *Fee Simple*, where the Uncle enters before the Birth of a Child, that after-born Child is not intitled to the Mesne Profits. Arg. 10 Mod. 414. Trin. 4 Geo. 1. B. R.

3. In Cafe of a *Divorce* in the Spiritual Court a *Vinculo Matrimonii*, the Husband is not answerable for the Mesne Profits of his Wife's Estate. Arg. 10 Mod. 414.

(B) *From what Time*.

1. **N**. And A. his Feme seised in Fee leased to W. for 17 Years and to his Heirs, and W. died within the Term, and P. his Heir entred, and levied a Fine to M. and retook to him and K. his Feme in Fee, and P. died; then N. died; and A. durst not approach in the Life of P. and now she offered to enter, and K. disturbed her, and she brought Assise against K. and recovered Damages from the Time of the Disturbance, and not before; for K. was Covert, and was not a Disseisor till the Disturbance; for before that P. was a Disseisor only. Br. Damages, pl. 95. cites 11 Aff. 21.

2. In Debt; Per Catisby, if I *infeoff* a Feme Covert, and after the Baron disagrees, the Feoffment is void; per Brian, I agree to it, for the Feoffment was never good without the Agreement of the Baron; quære of this Opinion, for Brooke says it seems to him to be good till the Baron disagrees, and quære, what Relation the Disagreement shall have? for it seems that the Profits taken Mesne between the Disagreement and the Livery shall not be rendered to the Feoffor; and quære if a *Præcipe quod reddat* had been brought against the Baron and Feme after the Livery, and after the Baron disagreed pending the Writ, it seems clearly that the Writ shall abate, and yet the Mesne Profits may be justified; for this is executed. Br. Feoffment de terre, pl. 36. cites 1 H. 7. 16.

So it seems where the Demandant recovers the Land against the Baron and Feme by Judgment before the Disagreement of the Baron; for if the Demandant enters before the Disagree-

ment, there it is executed also; quod nota. Br. Feoffment de terre, pl. 36. cites 1 H. 7. 16.

3. *Inrolment* cannot relate to the Mesne Profits; per Manwood Ch. B. Lane 65. Trin. 7 Jac. Sir Edward Dimock's Case.

4. *Relief* was for Mesne Profits since the Time of the Bill. Chan. Rep. So from the Time of the Right accrued, tho' a long Time since, and tho' omitted in a former Decree. 2 Chan. Rep. 259. 34 Car. 2. Coventry v. Hall, als. Frederick v. Thynn.

5. Note, if one recovers and has *Judgment in Ejectment* according to the usual Practice by *Confessing Lease Entry and Ouster* &c. it was made a Doubt by the Court if upon such Confession Lessee may have Trespass for the Mesne Profits from the Time of the Entry confessed; For it seems that it is *Estoppel between the Parties* to say that he did not enter; tamen quære; because this Confession is taken to be to a special Purpose only. Sid. 210. pl. 7. Trin. 16 Car. 2. B. R. Anon.

6. A. being possessed of a Term only as a Trustee, entred as in his own Right, and being disturbed brought Ejectment and got Judgment, whereupon the Cesty que Trust brought a Bill to be relieved; A. denied the Trust, but it was decreed against him, and that the *Judgment in Ejectment*, or any other Judgment obtained in an Action for Mesne Profits (if any such there was) should be *Vacated in the Record* thereof; but the Defendant A. not to give the Plaintiff any Account of the Profits received out of the Premises, unless he refuse to deliver up the Possession, nor then neither, but only for the Profits received after such Refusal. Fin. R. 373. Trin. 30 Car. 2. Hodgkinson v. Moor.

7. The *Recovery of the Mesne Profits* is from the Time of the Action brought; and * without an *actual Entry*, there can be no Recovery of the Profits; per Cur. 6 Mod. 222. Mich. 3 Ann. B. R. Anon.

* Br. Trespas, pl. 187. cites 9 E. 4. 39. that Trespass lies for entry but it

the Mesne Profits, tho' the Disseisee did not enter; but that in pleading he must allege Re shall not be traversed &c. quod Nemo Negavit.

8. On Appeal from the Rolls the Question was, if the Plaintiff was intitled to Relief for Mesne Profits received by the Defendant whilst a Cause was pending in this Court, and the Defendants had an *Injunction*? Per Ld. Wright, he is not intitled but from the Time of his *Entry*; if the Plaintiff entered he might recover at Law; the Injunction did not prevent an Entry; and dismissed the Bill. 2 Vern. 519. Mich. 1705. Tilly and Ux. v. Bridger.

9. In Case of a *Breach of a Condition subsequent* to the vesting of the Estate in the Defendants Lord Harcourt decreed a Re-conveyance and an Account of the Rents and Profits *only from the Time of the Non-performance*, or Refusal. Ch. Prec. 387. Pasch. 1714. Hunt v. Hunt.

G. Equ R. 43. S. C.

10. Where *no Entry* is made in the Life of the *Pernour* by the Person intitled to the Mesne Profits, Equity will not *relieve* for them unless in Case of a *Trust*, or an *Infant*; per Ld. Cowper. 2 Vern. 724. Mich. 1716. Hutton v. Simpton.

Cesty que Vie die; the Tenant continues Possession, neither he nor the Lessor

knowing that the Lease was determined; per Lord Macclesfield, where one has Title of Entry and neglects to enter, but sleeps upon it for several Years, as he has no Remedy in Law so neither has he in Equity, because of his own Negligence, and this Court will not make the Tenant in Possession so holding over to be but a Bailiff or Steward, whether he will or not; but in the principal Case there *having been 2 Daughters of the same Name*, and so, tho' the Nominee had been dead long before, yet the other of the same Name being living, by which the Lessor's Mistake was occasioned, and therefore he decreed an Account for the Mesne Profits from the Expiration of the Lease; and so it would be where any *Fraud to conceal the Title from the Lessor* had been used, or in Case of an *Infant*; but otherwise generally where the Party has no Remedy at Law he shall have no Relief in Equity for the Mesne Profits but from the Time of the Entry made. Ch. Prec. 516. Pasch. 1719. Duke of Bolton v. Deane.

* If A. enters on the Lands of B. an Infant, B. when of Age shall by Bill in Equity recover the Profits from the Time of the first Entry; because where one enters upon an Infant he is chargeable as Bailiff or Guardian, and no Laches shall be imputed to the Infant; and therefore it will be construed as if B. entered as soon as his Right accrued; admitted, Arg. 2 Wms's Rep. (645) Mich. 1731. in Case of Bennet v. Whitehead.

11. A. having a Term for Years granted to him of Lands devised the same to C. his younger Son and died; C. entered on Part of the Lands, and the other Part was in the Possession of J. S. who pretended it was his Inheritance; C. brought his Bill against J. S. for the Mesne Profits of that Part of the Premises in his Possession, and it appearing that the Defendant had concealed a Counter-part of a Lease of the same Lands executed by himself, and which made out the Plaintiff's Title Lord C. King decreed the Defendant to Account for the Rents and Profits from the Time of the Testator, at which Time C's Title accrued. 2 Wms's Rep. (644.) Mich. 1731. Bennet v. Whitehead.

See Trespass
(K.) pl. 3, 4, 5.

(C) Action for them. Who shall have Action, and at what Time; After the Estate determined.

S. C. cited
per Coke
Roll R. 61.
in Case of
Grange v.
Howlett.

1. **W**HERE Judgment is reversed by Error &c. he who reversed the Judgment shall not have Action for the Mesne Profits, nor for the Mesne Occupation. Br. Relation, pl. 44. cites 4 H. 7. 10. per Keble.

2. If Incumbent be removed in *Quare Impedit*, the Plaintiff shall not have the Mesne Profits; per Coke. Roll. R. 61. Mich. 12 Jac. B. R. Grange v. Howlett.

3. *Tenant pur auter Vie* is disseised; if *Cestuy que Vie* dies, he shall have Trespass for the Mesne Profits, because he cannot enter by the Act of God, Arg. Roll. R. 147. Hill. 12 Jac. B. R.—Otherwise he must enter before he can bring his Action; per Coke Ch. J. 3 Buls. 25.

See Eject-
ment.

4. 16 & 17 Car. 2. cap. 8. S. 3, 4. Execution shall not be stayed by Writ of Error upon any Judgment after Verdict in Dower, *Ejectione Firmæ*, unless the Plaintiff in such Writ, become bound to the Defendant in such a Sum as the Court to whom the Writ is directed shall think fit, that if the Judgment be affirmed, or the Writ discontinued in his Default, or he be Non-suit, he will pay such Damages and Sums of Money (to ascertain which a Writ of Inquiry shall Issue to inquire of the Mesne Profits and Damages by Waste done after the first Judgment) as shall be awarded and Costs of Suit.

5. Where there is a Recovery in Ejectment and an Action for the Mesne Profits is brought in the Name of the Plaintiff in the Ejectment; there the Plaintiff needs in this Case only to give the Recovery in the Ejectment in Evidence, and to prove the Lands to be the same Lands recovered; but if the Action of Trespass for the Mesne Profits be brought in the Lessor's Name, (as it may be) there the Defendant may give his Title in Evidence, if he have any, and put the Plaintiff to try the Matter over again. 2 L. P. R. 600, 601.

6. An Ejectment as it is in Common Practice, is but a feigned Action, to which the Lessor of the Plaintiff who is the Principal Person is not a Party, and therefore he cannot maintain an Action for the Mesne Profits, without an actual Entry, but the Lessee may. Per Cur. Skin. 424. Pasch. 6 W. & M. B. R. Andrew Newport's Case.

7. Trespass will lie for Mesne Profits after Recovery in Ejectment, tho' Writ of Error is pending. 12 Mod. 138. Mich. 9 W. 3. Donford v. Ellys

(D) What Action lies for them.

1. **I**N Affise it was found that the Plaintiff within Age was seized and disseised and came to the Land and put in his Foot, but took no Profit, and the other ousted him, and yet he shall recover Damages from the first Disseisin; and therefore it seems that he was not remitted by his Entry; For then he ought to recover his first Damages in Trespass. Br. Damages, pl. 159. cites 26 Aff. 42.

2. 11 H. 6 cap. 3. *As well other Actions as an Assise shall be maintainable against Pernor of the Profits.*

3. Account lies not against *Abator* or *Intrudor*; because they pretend to be Owners; per Dyer. Ow. 84. Mich. 14 & 15 Eliz. in Case of *Tottenham v. Beddingfield*.

4. Upon a *Recovery* of Lands in an Action of *Trespafs* and *Ejectment*, the Plaintiff may afterwards bring an Action of *Trespafs* against the Defendant for the *Mesne Profits* of the Land: So it was held in the Case of *Wilmot v. Holden*. Trin. 1652. B. S. *The Mesne Profits are such Profits of the Land as did grow due betwixt the Time of the Demise and in the Declaration, and the Time of the Recovery, but more he shall not recover; for if he be more damnified, it was his own Fault that he brought his Action no sooner.* 2 L. P. R. 596.

(E) *What other Remedy may be had for them, and How. And what must be done to intitule the Party.*

1. IT was held, that where a Man would recover the *Mesne Profits* in an Action of *Trespafs*, he must prove *Entry into every Parcel*, and not into one Part in the Name of all. Clayt. 35. 11 Car. *Gledel's Case*.

2. If a Man is put to *Election to proceed at Law or in Equity*, if the Bill be for Land, and to have an *Account* of the *Mesne Profits*, he may elect to proceed in an *Ejectment at Law for the Possession, and in Equity on the Account*. Because at Law he can recover Damages for the *Mesne Profits*, from the Time only of the *Entry laid in the Declaration*. Vern. 105. Mich. 1682. Anon.

cover Damages at Law for the Time the Possession was detained from him, after such Entry he shall not turn that Action at Law into a Suit in Equity, and bring a *Bill for an Account of the Profits*, except in Case of an *Infant* or some other very particular Circumstances; per Ld. Wright Ch. Prec. 252. Patch 1705. *Tilly v. Bridges*.

3. After a Decree for *Enjoyment* it is proper to exhibit a *Bill* for the *Mesne Profits*. 2 Ch. Cafes. 72. Mich. 33 Car. 2. *Coventry v. Thiane*.— Ibid. 134. Hill. 34 & 35 Car. 2. *Coventry v. Hall*.

4. An *Infant* brought a *Bill* against an *Intrudor* for an *Account* of Profits. The Ld. Keeper North observed, that *Littleton* says, if a Man intrudes upon an *Infant*, he shall receive the Profits but as *Guardian*, and the *Infant* shall have an *Account* against him in this Court, as against a *Guardian*; But to that it was answered, that in this Case a *Verdict had passed against the Infant*, and that binds his Right as to an *Account* of Profits, and that the *Possession was recovered in the Life-time of the Infant's Father*; and in such Case *Latches* would run upon an *Infant*; and besides the Plaintiff was not proper for an *Account* here, until he had first recovered at Law. But the Court retained the *Bill* and directed there should be a Trial in *Ejectment* at the King's Bench Bar next Term. Hill. 1684. 1 Vern. 295, 296. E. of *Newburgh v. Bickerstaffe*.

5. Motion to set aside a *Verdict* recovered in an Action for the *Mesne Profits* after a *Recovery in Ejectment* shewing that the Defendant in the *Ejectment* had brought another *Ejectment* since and recover'd, so that the first *Recovery* was *disaffirmed*, and therefore there ought to have been no *Recovery* for the *Mesne Profits*. But the Motion was denied by the whole Court. 2 Vent. 72. Mich. 1 W. & M. C. B. Anon.

6. A *Delivery* of a *Declaration in Ejectment* is a sufficient *Entry* for *Recovery* of *Mesne Profits*, because the Party is estopped by the *Verdict*, but it is not an *Ejection* in Law, so as to be given in Evidence to Bar a Demand for Rent. Cumb. 453. Trin. 9 W. 3. B. R. *Bell v. Clarke*.

7. The

* Br. Trefpafs, pl. 187. cites 9 E. 4. 39 that Trespafs lies for the Mesne Profits, tho' the Disseisee did not enter. But that in pleading he must allege Re-entry, but it shall not be traversed &c. Quod nemo Negavit.

7. The *Recovery* of the Mesne Profits is from the Time of the Action brought; and * without an *actual Entry*, there can be no Recovery of the Profits; per Cur. 6 Mod. 222. Mich. 3 Ann. B.R. Anon.

8. On a Judgment in *Ejectment against the Tenant in Possession* the Plaintiff will have his Costs, and be intitled to an Action, to recover the Value of the Mesne Profits in Damages, which he can never recover by a Judgment against the Casual Ejector. Arg. 8 Mod. 118. Hill. 9 Geo. Smith v. Jones.

(F) Account for them. Who shall have it.

1. **I**F I am *disseised* of a Manor, and my Tenants pay their Rent to the Disseisor, and after I *re-enter*, I shall not have the Rent again of my Tenants which they paid to my Disseisor, but the Disseisor shall answer for all in Trespafs or Allife &c. per Brian Ch. J. Kelw. 2. 12 H. 7.

2. *Devisee entered* and held the Land for 20 Years, and afterwards the *Devise was adjudged void*. He to whom the Land descended brought Action of Account against the Devisee but adjudged that the Action did not lie; per Manwood J. 3 Le. 24. Mich. 15 Eliz. C. B. cites it as the Case of Monox. — Ow. 84. S. C. cited per Manwood.

3. If an *Attainder* be reversed by Act of Parliament, the *Patentee* shall not answer for Mesne Profits; otherwise if *reversed* by Writ of Error; per Holt Ch. J. Cumb. 424. cites 3 H. 7. — S. P. per Twisden J. Vent. 176.

(G) Account. Where the Heir shall account for them.

1. **O**NE *Co-heir entering and avoiding the Tenant's Lease* shall answer the Moiety of the Profits to the other Co-heir. Chan. Rep. 49. 16 Car. 1. Drury v. Drury.

2. A made a Lease for Years of a House, and then convey'd it to J. S. and dies. J. S. being beyond Sea, the *Conveyance was burnt* in the Fire of London, and thereupon *the Heir of A. enters* and receives the Rents. But the Deed of Settlement being found by Verdict, the Heir during the Lease was only as a Bailiff and Receiver, and decreed to account. Fin. R. 285. Hill. 29 Car. 2. Lister v. Lister.

3. A *defective Conveyance* made to a younger Child without any Consideration of Money, and not in Pursuance of any Marriage Agreement, or for any valuable Consideration, was decreed to be made good, and that the *Heir* shall answer the Mesne Profits taken by him. 2 Chan. Cases 134. Hill. 34 & 35 Car. 2. Coventry v. Hall.

4. Where an *Heir at Law* was *disinherited upon a nice Construction* of the Words, by which an Estate Tail was limited to his Mother, but the dying in the Life of Testator her Heir could not take, tho' the Testator fully intended he should. *Ld. Cowper* would not decree him to account for the Rents and Profits, there being no Infant in the Case, but left the Plaintiff to his Remedy at Law by Entry and Ejectment. Ch. Prec. 453. Mich. 1716. Sympton v. Hornsby.

(H) What

(H) What Things shall be recovered as, or in Lieu of the Mefne Profits. See Emble-
ments.

1. **I**F *Diffeifor* re-enters into the Manor, he shall have the Ward which happened in the Time of the *Diffeifor*, and Presentment of a Church in like Manner. Br. Chattels, pl. 8. cites 2 H. 7. 1, 2. Br. Emble-
ments, pl. 17.
cites S. C.

2. Where an Order was made, that J. S. should have the Mefne Profits and Issues of such Lands, the same is *not to be intended* that the Party shall have the Crop growing by the Manurance of another, but the Value of the Land as it might be leased. And so it is where the Sheriff returns Issues &c. For the Corn there growing may be of the Value of 40*l.* where the Land is but of the Value of 10*l.* 3 Le. 174. Mich. 29 Eliz. Blunt v. Ward.

(I) Recoverable against whom, and in what Cases. See Damages
(G)—Error
(K)

1. **I**F a Feme Covert be *enseoffed* of Land her Husband being beyond the Sea, and he returns, and will not suffer his Wife to take the Profits of the Land, nor to continue Seisin of the same Land, but causeth her utterly to relinquish and refuse the Seisin and Occupation of the Land, and he himself utterly refuses to occupy the Land, now by this Means he shall discharge himself the Damages from the Time that his Wife and he did refuse the Occupation of the Land in a Writ of Entry in the Per brought against him and his Wife, in Case the Feoffor of his Wife was a *Diffeifor*. But for the Time that his Wife did occupy the Land, he shall answer Damages; tamen Quære &c. Perk. S. 44.

2. Where Land is *lost* by a *Scire Facias* without warning the Tenant, he shall be restored to the Land and the Mefne Profits. Jenk. 122. pl. 45.

3. If *Extent* be avoided by *Audita Querela*, the Conuisee must account for Mefne Profits; per Holt. 12 Mod. 358. Mich. 13 W. 3. in Case of Pullen v. Purbeck.

4. If one Tenant in Common brings *Ejectment* against the other, there can no Mefne Profits be recovered. 12 Mod. 657. Hill. 13 W. 3. in Case of Johnson v. Allen.

(K) Pleadings. And what Evidence must be given in Actions for them.

1. **I**N pleading, a *Re-entry* must be alleged, but it shall not be traversed. Br. Trespals, pl. 187. cites 9 E. 4. 39.

2. Per Cur. after a *Recovery* in *Ejectment*, if an Action of Trespals be brought for the Mefne Profits before the Lease, *nothing* shall be given in Evidence but the Value of the Profits, and *not the Title*; for otherwise long Trials would be infinite; and if betwixt the same Parties, or against Under-tenants the Record is an *Estoppel*; but Quære (says the Reporter) if the Defendant be one who hath a Title, whether he may not give that in Evidence. Sid. 239. Hill. 16 & 17 Car. 2. B.R. Collingwood and Ramsey v. Several Defendants.

For more of Mefne Profits See Damages, Ejectment, and other proper Titles.

Metes and Bounds.

(A) What may be done by Metes and Bounds.

1. **A** Court of *Frankpledge* cannot be divided by Metes and Bounds. Arg. Sti. 101. Pasch. 24 Car. B. R. in the Case of *Thin v. Thin*.—cites Co. Litt. 32.—Nor a *Hundred*. ut ante.
2. *Dower* is assignable, either by Metes and Bounds, or in Common, or in special Manner. Arg. Sti. 101. in Case of *Thin v. Thin*.—cites Lib. Intrat. 18.

For more of Metes and Bounds, See *Dower, Forest, (J)* and other proper Titles.

Mill.

(A) Customs to Grind at Mills. Extend to whom and what.

And where the Tenants of D. have used by Prescription to grind at my Mill of D. Secta Molendini lies. Ibid. per Newton. — But per Paslon, peradventure Secta Molendini does not lie; but where there is a Tenure; and they shall not be bound to Grind other Corn there, but that which grows upon the same Land, which is held by this Tenure. Ibid. — See Custom (G) pl. 3, 4.

1. **S**ECTA Molendini lies most properly where a Man holds by Fealty and Suit to his Mill and he will not do the Suit; or he may distrain for the Suit. Br. Nufance, pl. 12. cites 22 H. 6. 14. per Newton.

2. Tenants hold of A. as of his Manor by Fealty, and Suit to the Lord's Mill; the Lord aliens the Mill with the Suit of the Tenants to B.—A. dies, and his Son enters, and supposing that his Tenants who held of his Manor could not do Suit to him that had not the Manor erected a new Mill elsewhere on his Demesnes, and had the Suit to his own Mill which B. used to have; For none can have Suit to his Mill by reason of a Tenure, unless of Corn growing in certain Land, and that within his Seigniorie. 4 Rep. 88. b. Pasch. 43 Eliz. B. R. in Luttrell's Case.

3. In an Action on the Case for erecting a Mill the Lord declared upon a Custom for all the Inhabitants to grind at his Mill, and that Defendant had built a Mill there contrary to the Custom; Adjudged a good Custom, and well pleaded; And Suit to a Mill may be by reason of Tenure or Service, and also by Custom, and so may well bind Strangers. 2 Buls. 195. Hill. 11 Jac. Hix v. Gardiner.

4. A new erected House is within the Custom of Multure, and that none may grind elsewhere but in Case of excessive Toll, or that the Grift cannot be ground in convenient time. cited Hard. 177. as the Case of Seintley v. Bendell. 3 Car.

To compel all the Tenants within the King's Manor to grind at the King's Mill

is a personal Prerogative of the King's, which no other Lord can have but by Tenure, Custom, or Prescription. But it will extend to a Fee Farmer, because it is for the King's Advantage. Hill 12 & 13 Car. 2. Hard. 177. White and Snook v Potter.

5. An *Abbot* had a Mill within the *King's Manor*, at which Mill all the *Inhabitants* were bound by *Custom* to grind their *Corn* &c. The *King* granted the *Manor* over, and the Mill came afterwards to the *Crown* by the *Dissolution* of the *Abbey*, and the *King* granted it inter alia in *Fee Farm*; and the *Reliants* and *Inhabitants* were decreed to grind there as if it were a *prerogative Mill* and appertaining to the *King's Manor*, at which of common *Right* all the *Tenants* of the *Manor* ought to grind their *Corn*, and by *Custom* all the *Inhabitants*. And this was decreed on *View* of diverse *Presidents*; but none of the *Presidents* were in point, to wit, of a *Mill in gross*, which never was appertaining to the *King's Manor*, or originally in the *King*. Mich. 1655, *Hard. 21. Currier v. Cryer.*

(B) *Who may erect a Mill. And where.*

1. A Lord of a *Manor* had 4 *Mills*, and declared that all the *Tenants* of the *Plaintiff* within the same *Town*, and all the *Reliants* there &c. ought, and time out of *Mind* &c. had used to grind at the said *Mills* of the *Plaintiff*, and that *Defendant*, one of the *Tenants* of the *Plaintiff*, had erected and set up an *Horse Mill* within the said *Town*, and there the *Reliants* grinded. It was held, that peradventure upon such *Matter* an *Action* lies; Because the *Defendant*, being one of the *Tenants* of the *Plaintiff*, is bound by the *Custom* and *Prescription*, So as he has offended against the *Privy* of the *Custom* and *Prescription*. 1 *Le. 273.* in *Case of Ruffel v. Hansard.* cites 22 *H. 6.* pag. 14. pl. 23.

2. A *Manor* was held of the *King* in *Fee Farm*, and it was the *Custom* for the *Reliants* to grind at the *Lord's Mill*, and not elsewhere; in this *Case* any *Tenant* may set up a *Mill on his own Ground* out of the *Manor*, but not within the *Manor*; But if the *Owner* or *Tenant* of such a *Mill* out of the *Manor* cause or persuade any of the *Tenants* or *Reliants* within the *Manor* to grind there, or fetch any *Grist* out of the *Manor* to his own *Mill*, in that *Case* he may be prohibited by a *Decree* of the *Exchequer*; but they cannot decree any *Mill* to be destroyed, unless erected within the *King's Manor* to the *Prejudice* of the *King's Mill*. Mich. 12 *Car. 2.* *Hard. 175.* *Green v. Robinfon and Wood.*

Hard. 178. Hill. 12 & 13 Car. 2.

3. A *Mill* was newly erected near to a *Manor* of the *King's*, in which were *Mills*; the *Court* would not decree it to be demolished; and they doubted if a *Mill* not within the *King's Manor* might be demolished where there is no *Tenure* or *Custom*, whereby the *Inhabitants* are obliged to grind at the *King's Mill*. *Hard. 184.* *Pasch. 13 Car. 2.* the *Mayor* of *Scarborough v. Skelton.*

But decreed not to take away any *Grist* from the other *Mill*, but demolishing can be de-

creed only in the *King's Case*, or that of his *Patentee*. *Hard. 178. Hill. 12 & 13. Car. 2.* *White & Snoke v. Potter.*

4. One had an ancient *Mill* which had a *Water-course* to it: The *Water-course* is diverted; the *Tenant* builds a new *Mill* following the *Stream* in the same *Tenement*, and well enough. *Arg. 2 Show. 141.* Mich. 32 *Car. 2.* *B. R.* cites *Daniel v. Clerk.*

(C) *Actions. Diverting the Water-course.*

1. If one erects a new *Mill* on his *Freehold*, and another diverts the *Water-course* from this *Mill*, tho' it passes by his *Land*, yet if the *Water* used to follow this *Course*, *Action* on the *Case* lies against him; For he cannot use his *Land*, or the *Water* that passes by his *Land* to the *Damage*

In *Case* of diverting a *Water-course* the *Plaintiff*

ought to prove his Mill to be an ancient Mill, or else he may be nonsuit. Per Holt Ch. J. Carth. 85. in Case of Heblethwait v. Palms.

mage of another; and they say that has been several times so adjudged. Palm. 290. Trin. 20 Jac. B. R. the Earl of Rutland v. Bowler.

2. If a Man has a *Water-course* running thro' his Ground, and erects a Mill upon it, he may bring his Action for diverting the Stream, and not say *Antiquum Molendinum*; and on the Evidence it will appear, whether the Defendant has Ground thro' which the Stream runs before the Plaintiff's, and that he used to turn the Stream as he saw Cause; For otherwise he cannot *justify though the Mill be newly erected*. Per Hale. Vent. 237. Hill. 24 & 25 Car. 2. B. R. in Case of Cox v. Matthews.

3. A. hath two Acres of Land, to which an ancient Water runneth, which he prescribes to have *Pro Usu & Commodo* generally sixty Years before he had a Mill upon his Land, and he builds a new Mill 6 Yards lower than where the ancient Mill stood; B. hath an ancient Dam upon the same Stream which he pulls down, whereby great part of the Stream running to the Mill of A. is diverted; it seems that A. may maintain an Action upon this Case. Skin. 65. 175. Mich. 34. and Pasch. 36 Car. 2. B. R. Palms and Heblethwait.

(D) Actions for other Matters relating to Mills.

1. **I**F I have a Mill, and another erect another Mill, by which I lose my Custom, no Action lies, unless he [*disturb the Water*. Hutt. 100. cites 11 H. 4. 27.

2. If a Mill be set upon Posts, no Waste lieth for it. 4 Le. 241. Pasch. 8 Jac. B. R. Ward's Case.

3. Lord may have an Action on the Case, or an Affise of Nufance for building an *House to the Nufance of his Mill*. 3 Salk. 248. Mich. 9 W. 3. Anon.

(E) Pleadings.

1. **S**UIT to a Mill is *appendant* to the Mill, and in pleading a Lease of the Mill it is sufficient without mentioning of any Thing in the Lease of the Suit. Arg. 2 Buls. 195. cites 17 E. 3. 64.

2. In Affise, the Plaintiff was of a Mill, and *did not say Water-mill, or Wind-mill*, and yet good. Br. Demand, pl. 18. (bis) cites 21. Aff. 23.

3. Feme had Title of Dower to a Toft, and pending the Writ, and before the Demand made in the same Writ the *Toft is made a Mill*; yet the Demand shall be of a Toft as it was at the time of the Teste of the Writ; but if it had been made a Mill before the Writ purchased, there it should be otherwise, as it seems. Br. Demand, pl. 33. cites 13 H. 4. and Fitzh. tit. Dower, 175.

For more of Mill, See **Dilines, Nufances, Water-courses** and other proper Titles.

* Mines.

(A) How to be used.

1. 21 Jac. 1. cap. † ENACTS that nothing in the said Act contained shall
3. S. 11, 12. extend to any Commission or Grant concerning the dig-
ging, compounding, or making of Allom, or Allom Mines, &c.

b. and Justice Twisden said, that he knew no Reason why my Lord Coke's single Opinion should not be as good an Authority as Fitzherbert in his Nat. Br. or the Doctor and Student. 2 Mod. 193. Hill. 28 & 29 Car. 2. in Case of Astry v. Ballard.——S. P. 3 Keb. 723. in S. C. ——† The Proviso, concerning the making of Allom, or Allom-Mines, in this Act needed not, for they belong to the Subject in whole Ground soever the Oar is; and therefore any Privilege thereof cannot be granted but in the Kings own Ground. 3 Inst. 185.——2 Hawk. Pl. C. 234. cap. 79. S. 23. S. P.

2. A Man opens a Mine in his Land, and digs till he digs under the Soil of another; he may follow his Mine there; but if the Owner digs there also he may stop his farther Progress; and said to be the Use in Cornwall. 2 Vent. 342. per Wilde J. on a Case referred to him by Ld. Bridgman 22 Car. 2.

3. It was said by the Solicitor General, that there was a great Difference between Pits and Mines; For if a Mine be opened, he that may work the Mine is not obliged to pursue the Vein of Ore under Ground; but he may sink Pits in pursuit of it which are necessary to come at the Oar, and as many as he thinks proper; and Ld. Chancellor said, it had been so resolved before Powel J. on great Consideration, and consulting and examining the most able Miners; Cases in Equity in Ld. C. King's Time, 79. November 10. 1729. Clavering v. Clavering.

(A. 2) Who may dig for Mines, in Respect of his Estate.

1. IF a Man demises Land for Life, or Years, in which is a Coal Mine open, the Lessee may dig in it; For the Mine being open, it shall be intended by his demising all the Land that his Intent is as General as his Demise; but if the Mine was not open at the Time of the Demise, the Lessee by Lease of the Land is not empowered to make new Mines; but in such Case if he leases his Land and all Mines therein, the Lessee may dig for Mines there; resolved. 5 Rep. 12. Trin. 41 Eliz. C. B. Saunder's Case.

S. P. Co. Litt 54. b.—S. C. cited 2 Mod. 193. accordingly in Case of Astry v. Ballard.—A. seized of Lands in Fee, in which

were Mines unopened, by Deed conveyed the Lands and all Mines, Waters, Trees &c. to Trustees and their Heirs to the Use of himself for Life, Remainder to the Use of B. for Life, Remainder to his first &c. Son in Tail Male, Remainder over; Upon a Bill brought after A's Death by the Heir of A. to prevent B's opening any Mine, it was urged that the Mines being expressly granted with the Lands, it was as strong as if they had been limited to A. for Life, and like Saunder's Case. 5 Rep. 12. But Lord C. Macclesfield contra, and held that B. having only an Estate for Life subject to Waste, he shall no more open a Mine than he shall cut down Timber-Trees; For both are equally granted by this Deed, and the meaning of inserting Mines, Timber-Trees and Water was, that all should pass; but that as the Timber and Mines were part of the Inheritance, no one should have Power over them but such as had an Estate of Inheritance limited to him; and of that Opinion was Lord C. King on a Re-hearing. 2 Wms's Rep. 240. Mich. 1724. Whatfield v. Bewit.

2. A Question was, if Copyholder of Inheritance may dig Mines in his Land? The Court seemed to think he might; For that otherwise Mines there should never be opened; as in the Case of the Glebe of a Parson. Sid. 152. Trin. 15 Car. 2. B. R. in Case of Rutland (Lord) v. Gie.

5 K

3. Lands

* A Mine is not properly so called till it is opened; it is but a Vein of Coals before; and this was the Opinion of my Lord Coke in his first Inst. 54.

3. *Lands in which are Coal-Mines not opened are settled upon A. in Tail, Remainder to B. for Life, but not without Impeachment of Wast, Remainder to C. in Tail, and A. opened Mines and worked them and died without Issue; B. the now Tenant for Life opened the Earth to pursue the old Vein of Coals, and C. moved for an Injunction to stay the opening the Earth in any new Place; but Ld. C. King thought B. might work all Mines which were lawfully opened by the preceding Tenant in Tail, tho' subsequent to the Settlement, and so denied the Injunction.* 2 Wms's Rep. 388. Mich. 1726. Clavering v. Clavering.

4. If a Person breaks up, or even attempts, or *threatens to break up Mines which he ought not to do*, that is a Reason for coming into Chancery to have an *Injunction*; per Ld. Chancellor. Barn. Chan. Rep. 497. Pasch. 1741. in Case of Gibson v. Smith.

See Wast
(M) pl. 16.

(B) *Pafs.* What shall pass by grant of Mines.

2 Lev. 185. 1 I. **I**T was said, that when a Man is seised of Lands wherein there are S. C. and the **M**ines open, and others not open; and a Lease is made of these Lands Court held that by the in which the Mines are mentioned; it is no new Doctrine to say that the Words *Land and Mines*, *close Mines shall not pass*; Arg. 2 Mod. 123. Hill. 28 & 29 Car. 2. B. R. there being *Astry v. Ballard.* Mines open at the Time of the Demise, the Mines open only passed, and gave Judgment accordingly. — 2 Jo. 71. 72. S. C. acc. — 3 Keb. 723. S. C. acc.

[For more of Mines in General, see *Prerogative* and other proper Titles.]

Mifcasting.

(A) Mifcasting by the Plaintiff. Where it shall *prevent Judgment.*

1. **I**N *Annuity* Judgment was given *Quod recuperet annum Reditum & Arreragia ejusdem tam ante Impetrationem Brevis quam post incurfa, quæ quidem Arreragia in toto se Attingunt ad 75 l.* and this was a *Quarter's Annuity more than was incurred*; and this being assigned for Error, the Court held it not so, because the Judgment was perfect without the casting up the Arrearages, which is the Office of the Clerk only; and it appearing by the Record, how much the Arrears amounted to, (the Day of purchasing the Writ and of the Judgment given being certain) the Mistake was the *Default of the Clerk*, and so the first Judgment affirmed. D. 55. b pl. 8. Trin. 35 H. 8. Trewinnarde v. Skewys.

2. *Assumpsit* to pay 12 l. Jury found a Promise to pay 7 l. the Judgment was reversed; because it is not the same Assumpsit. D. 219. b. Marg. pl. 11. cites 10 Eliz. Billingley's Case.

3. Debt; and declared that the Defendant had bargained with him to give him for the Pasturing of every Horse by the Night 2 d. and for every Ox 1 d. Halfpenny, and sheweth that he had pastured 70 Horses and 300 Oxen, Et ideo actio accrevit to demand &c. and he demanded more than upon his own shewing it appeared he should have; For the number of the Horses and Oxen did not amount to the Sum of which he had counted; and this was alledged in Arrest of Judgment: after Verdict found for the Plaintiff;

tiff; but Judgment was given for the Plaintiff notwithstanding. Cro. E. 22. Mich. 25 Eliz. in C. B. More's Case.

4. In a Writ of *Annuity* Plaintiff demanded 20 Nobles, and it appeared by his own shewing, he was to have but 19; and the Writ was abated by award of the Court. Cro. E. 22. Mich. 25 Eliz. C. B. cited in More's Case per Fenner as Anflow's Case.

So in *Debt* upon *Mortgages* of 51 s. sd. the several Sums in the Count do

not amount to the Sum demanded; upon Error assigned Judgment was Reversed. Mo. 298. Pasch. 21 Eliz. B. R. Smith v. Vow.—So in *Debt* the Demand was of 19 l. 17 s. and declares upon 5 several Contracts, and shews the certainty upon every one of them, which being cast up amounted to 20 s. more than was demanded; and because he does not shew how he was satisfy'd of the Remnant 'twas held quod Nil capiat. Het. 119. Mich. 4 Car. C. B. Calthrop v. Allen.

5. In *Debt* in a Bafe Court the *Plaint* was of 6 l. 14 s. 2 d. and declared that the Money grew due by 2 several Contracts, viz. so much for the one and so much for the other, and which was more by 3 d. than contained in the *Plaint*; the Defendant pleaded as to 6 l. 14 s. 2 d. Nil debet &c. and it was found for the Plaintiff; and Judgment, that the Plaintiff recover prout narravit. Error was brought and this Matter assigned, for that the Judgment is to recover 3 d. more than was found by the Jury to be due; and tho' the Defendant pleaded only to the Sum contained in the *Plaint*, yet the Issue and Trial should be of the Sum specified in the Declaration; and Fenner and Yelverton J. thought it to be clearly Error. Yelv. 5. Trin. 44 Eliz. B. R. Crumpton v. Smith.

And it seems that there is a Diversity where the *Plaint* (for the Purpose) is of 10 l. and the Declaration is viz. for 10 l. for an Horse and 5 l. for another Contract, and Defendant pleads to

the 10 l. Nil debet, and nothing to the other, and it is found accordingly; yet this is good; For the Declaration is Surplusage; because the *Plaint* was answered in Toto with the principal Contract laid in the Declaration, viz. the Horse; whereas in the principal Case here the *Motes* mentioned in the Declaration being upon several Contracts and neither of the Contracts alone and by it self amounting to the Sum specified in the *Plaint*, every Part of the Declaration is made material, and so being found short by the Verdict, the Judgment given thereupon seems to be Erroneous; per Fenner and Yelverton J. Quod Gaudy non multum impugnavit. Ibid.—Noy. 44. S. C. by Name of Crumpton v. Smith, says it was held Error, but because it was of so small a Matter as 3 d. the Court afterwards propounded a Composition, to which the Parties agreed; and the Book says, Note D. 55. [which see supra pl. 1.] and the Difference; For there the Declaration and Judgment were good, and the casting up of that after was the Act of the Clerk.

6. An Action on the Case against an Executor on the Assumpsit of the Testator for several Wares of several Values expressed, quæ in toto artingunt, and mistakes the Sum total, and makes it less than the Particulars, and Assumpsit to pay this; yet well, for it is less, and it is the * Fault of the Clerk; otherwise, as it seem'd to some where the Sum is made greater than the Particulars amount to, and Assumpsit to pay the said greater Sum, if vitium Clerici be the Reason of the said Judgment. Jenk. 318 pl. 13. cites † 8 Jac. Spore's Case, and 8 Jac. Aderton's Case and says Cro. 247. is not well printed.

* For the Miscasting of a Clerk shall not prejudice, especially where it is less than it ought to be. Cro. J. 569. Spore v. Drury.—

In Case on Assumpsit, it was over cast 3 l. and on Error brought it was amended. 1 Buls. 171. Armitage v. Dison.—Ibid. cites Caughton's Case to the same Purpose.—3 Buls. 156. cites S. P. resolved at Serjeant's Inn—Roll. R. 335. says that the S. P. was so adjudged.

† It should be (18) and is Cro. J. 569. Pasch. 18 Jac. in the Exchequer Chamber, Spore v. Drury. The Miscasting is under the Sum by the Plaintiff in his Declaration and Judgment reversed; but it is said, Note, this was upon the first Motion without further Advise ment. Cro. J. 247. Trin. 8 Jac. Aderton v. Dunstar.

There is a Diversity, where the Plaintiff frames his Declaration according to an Account of particular Sums taken by himself, and where it is by the Parties which assume to pay for the several Commodities delivered Quæ in toto se artingunt to so much wherein the Mistake is, if it be by the Party himself and there is more cast up in the last Total than in the former, this is not Idem, nor yet amendable; but otherwise it is where the same is done by the Party which Assumes; per Fleming Ch. J. 1 Buls. 180 Busby v. Hadderton—Noy. 88. Kitley v. Haines.—Assumpsit to deliver 20 Pound of Cummin and Alledges breach in not delivery of 21, it is ill being apparently for more than he ought to have Jenk 288 pl. 22.

7. A sells B. as many Oats, as according to the Rate of 10 s. 6 d. per Quarter comes to 52 l. whereas 96 Quarters and 6 Buttels comes to 52 l. and three Farthings over; and it is not possible in effect to order the Measure so as to hit just the Sum, (as the odd Hours in a Year are not accounted

For de Misamis non Curat Lex. Jenk. 287. pl. 22. S. C. in

—Noy. 44.
45. by the
Name of
Crompton v
Smith.

in the Year) and so because the *Account was so nice and the odds so trifling*, Judgment was given for B. the Plaintiff. Hob. 88. Hill. 11 Jac. Lastlow v. Tomlinson.

8. In *Assumpsit* the Plaintiff counted, that in Consideration he should dye *dyers Cloths into several Colours*, and named to many severally, as amounted in all to be 60. The Defendant promised to pay him so much for the Dying of every several Cloth, and avers that he did accordingly dye the said Cloths, amounting in all to 59. (Whereas in fact they were 60 as above) and that the Money came to 19 l. It was adjudged for the Plaintiff, and was assigned for Error, that it appeared he should have dyed 60 and dyed but 59, and so the 19 l. not due. But Judgment was affirmed; For it was first averr'd that he dyed all, which appeared before to be 60, so that the other was only a mis-summing. Hob. 89. Trin. 12 Jac. Rot. 1599. in the Exchequer Chamber. Bayle v. Gird.

1 Roll. R.
335. Hill.
15 Jac. B. R.
S. C. Farrer
v Snelling.
—3 Buls.
155. S. C.—
2 Buls. 149.
—2 Lev.
56. Bolton
v. Lee

9. *Covenant for payment of Rent of 20 l. per Annum for four Years and a half*; and for *Non-payment of 110 l.* according to the said Covenant the *Action is brought*: Adjudged good, and affirmed in Error: For *in Covenant Damages only are to be recovered*; and this Surplus in miscomputing shall be abated: It is otherwise in * *Debt* for Rent, where more is demanded than is due; for in this Case the Debt demanded only is to be recovered. Jenk. 324. pl. 38. cites Mich. 13 Jac. B. R. Farrer v. Snelling.

Hob. 89. Bayle v. Bird. — * 2 Lev. 4. Hulm v. Sanders.

But where
the Certainty
of the De-
mand cannot
appear but
from Matter
of Fact De-
bers the Deed
or Contract,

10. Where an Action is grounded on a *Specialty* or a *Contract for a Sum certain* or a *Statute* which gives a certain Sum for a Penalty, he must * not vary from the Sum. But when the *Demand is of no certain Sum*, his varying from the first Sum is not material; For he shall not recover according to his Demand in the Declaration, but according to the Verdict. Cro. J. 498. Mich. 16 Jac. B. R. † Pemberton v. Shelton.

which the Deed or Contract refers to, there the Variance will not vitiate. Farr. 88. Gripps v. Ingledon.
* S. P. without any Matter dehors to help it. Farr. 88. Grips v. Ingledew. — Because if he does he may bring Action for the very Sum, and so the Defendant shall be twice charged; per Montague Ch. J. 2 Roll R. 55. S. C.

† 2 Roll R. 54. S. C. and says it was on the Statute of 2 E. 6. of *Tithes*.

11. In an *Information for Recusancy* the Demand was of less than according to the Statute it amounted to, yet the Plaintiff had Judgment. 2 Roll R. 90. Pasch. 17 Jac. B. R. Sir Geo. Curfon's Case.

Lat. 175.
S. C.

12. Plaintiff declares on a Sale of several Parcels of Tobacco, viz. for one Parcel 5 l. and for another 3 l. 2 s. 6 d. &c. and concludes *Que &c. in toto se attingunt to 55 l.* which on a Computation is less than the Particulars; Per Jones and Whitlock J. only present, the Count is good; For there is a particular Promise for every Parcel, and the summing up the Particulars, is only Surplusage and Officiousness of the Clerk, and so Judgment was affirmed. Poph. 209. Hill. 2 Car. Risley v. Haines.

13. In *Assumpsit* for 11 l. the Plaintiff counts *pro diversis Denariorum Summis lent at several Times*; the Jury found the Defendant indebted but in 10 l. yet the Plaintiff had Judgment, and shall be barr'd for the Residue; For it is for diverse Things; but it had been otherwise if it was of one *intire Contract*. D. 219. b. Marg. pl. 11. cites 3 Car. in Scacc. Walton v. Boats.

14. In Case by A. against B. the Count was, that B. was indebted to C. in 43 l. 1 s. for &c. which he promis'd to pay him, and that C. was indebted to A. and became Bankrupt, and that the Commissioners did assign the Debts of C. in quadam *Schedula* containing the said Debt of 43 l. 1 s. B. pleaded that he made no such Promise to C. The Verdict found that B. was indebted to C. in 41 l. 1 s. which he promised to pay, and that the Commissioners assigned the Debts of C. in quadam *Schedula* containing the aforesaid Sum of 43 l. 1 s. to the Plaintiff. Resolved that this is the same Promise, and

and if C. himſelf had brought the Action, he ſhould have recovered upon this Verdict, and A. now ſtands in his Place. And 2. The Assignment is not in queſtion ; For the Iſſue and the Verdict are concluded to the Promise, and ſo that which they find touching the Assignment is not material ; However *the Assignment is not laid to be of ſuch a Sum, as by that Name,* for then it would have been a Queſtion, Whether good or not ; And the Court inclined that it would have been good. *But the Assignment is laid to be of the Debts of C. mentioned in a Schedule, containing 43 l. 1 s. and and ſo it was found by the Jury, and therefore the Court ſhall intend it to be in ſuch a Manner, as that the Debt of 41 l. 1 s. might well paſs thereby.* And after much Debate Judgment was given for the Plaintiff. All. 28. Mich. 23 Car. B. R. Baker v. Edmonds.

15. If an Action be on the *Contract it ſelf* &c. there if the Party miſtakes the Sum agreed upon, he fails in his Action ; But if he brings his Action upon the *Promise in Law*, which ariſes from the Debt, there, tho' he miſtake in the Sum, he ſhall recover ; and ſo hath it been adjudged. Allen 29. Mich. 23 Car. B. R. in Caſe of Baker v. Edmonds.

16. An Action was brought upon an *Indeb. Aſſ. for 190 Weathers* ſold by the Plaintiff to the Defendant at 18 s. a Sheep, which in all amounts to 190 l. Iſſue was joined and a Verdict for the Plaintiff. The Declaration was held repugnant, and Judgment that Nil capiat per Breve. Sti. 214. Paſch. 1649. Bolton v. Wills.

17. If the *Damages given by the Jury* are not more than the Plaintiff has laid in his Declaration, the Miſcaſting is nothing. Sti. 341. Mich. 1652. B. R. Watts v. Lowth.

Lev. 58.
Hunt v.
Hurlewood.
—2 Roll.
R. 126.

Griffin's Caſe.—2 Lev. 99. Vanafton v. Mackarley.

18. In an *Avowry for Rent*, if it appears by the ſhewing of the Party himſelf, that *Part is not yet due*, yet the Avowry is good for the Rent due, and ſhall not *abate* for the Whole. Arg. Saund. 286. Trin. 21 Car. 2. cites 11 Rep. Godfrey's Caſe.

Hob. 164.
Contra. O-
therwiſe if
found ſo by
Verdict, in
Caſe of Colt

v. Glover.—If the Quantity of the Rent be equal and agreed in pleading, and the Variance be only upon Part Arrear, there tho' the Avowant avows for more than is in Arrear, yet he ſhall have Return for ſo much as is Arrear. Otherwiſe where the Parties differ upon the Quantity of the Rent, and it appears that he is intitled but to two Parts of which he avows for, and not to all it is otherwiſe. Mo. 281. Batten v. Trevilian.—cited Saund. 286. in Caſe of Duppa Executor of Baskervil v. Mayo.

19. Bond for *Delivery of 35000 Tiles, to the Value of 144 l. at 15 s. 6 d. per 1000*, where it ſhould have been 135000. Penalty of the Bond was 288 l. The Intent was to pay a Debt of 144 l. in Tiles at 15 s. 6 d. per 1000. Beſides by this Miſtake the Condition is impoſſible, ſo Urraque Via 'tis with the Plaintiff, and Judgment accordingly. 2 Show. 15. Trin. 30 Car. 2. B. R. Holmes v. Ivy.

20. In *Debt of Rent* the Plaintiff declared for 100 l. due for ſo many Years, and it appeared upon calling up the Sums, that he had declar'd for 8 l. too much, yet the Court was of Opinion that he might recover for the Reſidue. 5 Mod. 215. Paſch. 8 W. 3. * Thwaites's Caſe.

* Farr. 88.
S. C. cited in
Caſe of
Grips v.
Ingledew.—
Sty. 175.

Barker v. Pomeroy. S. P.—Farr. 91. per Holt Ch. J. S. P. in Caſe of Grips v. Ingledew.

21. The Difference is between a *Debt ariſing by Deed*, but referring to ſomething *Debors*, and a *Debt ſtated in the Deed itſelf*. In the firſt Caſe the Plaintiff by remitting of his Demand ſets all right, but otherwiſe in the laſt. Farr. 87. Mich. 1 Ann. B. R. Grips v. Ingledew.

[See for more of Miſcaſting in general, *Trial (C. g.) pl. 1. to 8.*]
and other proper Titles.

* Misnomer.

* The Law does not favour Advantages of Misnomer any further than the strict Rule of Law requires, neither in Writs which may be abated, and new purchased in their Room, nor principally in Grants or other Conveyances, in which Case the Party has no Remedy to have new. 6 Rep. 64. b. in Sir Moyle Finch's Case.

(A) ** *What is Misnomer in Particular in Christian and Surnames, Idem Sonantia.*

1. † **J**ulian and Gylian is not one and the same Name; quære. Br. Misnomer, pl. 44. cites 26 Aff. 16.

** The Names of Men at this Day are only Sounds for Distinction sake, tho' they perhaps originally imported something more, as some natural Qualities, Features, or Relations; but now there is no other Use of them, but to mark out the Families, or Individuals we speak of, and to difference them from all others. G. Hist. C B. 181. cap. 17.

† But where Debt upon Bond was brought against J. by the Name of Jacob, and he pleaded, that he was called and known by the Name of Jacob, and not Jacob, it was over-ruled. 1 Mod. 107. Pasch. 26 Car. 2. B. R. Jacob Aboab's Case.

* S P. 3 Bulf. 121. in Case of Jones v. Stenar.

2. In Debt the Obligation was * *Baxter with an S.* and the Writ *Baxter without an S.* and Exception was taken, & non Allocatur; For it bears one and the same Sound; quod nota. Br. Misnomer, pl. 18. cites 3 H. 4. 4.

3. In Audita Querela the Writ was *W. Langwhot*, and the Indenture of Defeasance upon which &c. was *Langawhat*, and therefore ill; but it was amended by the Statute. And per Portman, *Dokawra* for *Dekawra*, shall abate the Writ. Br. Misnomer, pl. 32. cites 21 H. 6. 7.

Br. Misnomer, pl. 26. cites S. C.

4. *Burgeles* for *Burges* was held good in a Release by him, the Defendant pleading that Burges by the Name of Burgeles released &c. Br. Faits, pl. 34. cites 22 H. 6. 48.

5. *Strayte* and *Strete* are not all one. Br. Misnomer, pl. 48. cites 5 E. 4. 57. per Cur.

6. In Trespass, a Man outlawed by Name of *J. Stek* and taken by *Capias Utlagatum* said that his Name is *J. Stokes*, and not *J. Stek*, and had Sci. Fa. against the Plaintiff, who said, that known by the one Name and by the other &c. Br. Misnomer, pl. 58. cites 14 E. 4. 6.

Br. Misnomer, pl. 62. cites S. C.

7. Note, that where the *Original was Senjohn* without a T. and the *Exigent was Sayntjohn* with a Y. and T. therefore the Outlawry was reversed; For there is as much Difference as between Hereford and Hertford. Br. Misnomer, pl. 80. cites 2 R. 3. 13.

8. *Forster* and *Foster* is no Error in a Fine. Cro. J. 77. E. of Rutland v. Forster.—So *Sarvine* for *Sarmin* will not vitiate a Bond for the Variance. 3 Lev. 66. Cull v. Sarmin.

So of *Maure* and *Moore*, *Hoorde* and *Hode*, *Elvuill* and *Elvin*. Cited 2 Roll. R. 168.

9. It was assigned for Error, that one *Baskervill* was returned upon a *Venire Facias*, and the Name of *Baskerfield* was upon the *Distingas*; For *Field* is *Campus*, and *Vill* is *Locus Ubi sunt multa Habitacula*; and all the Judges held clearly that it was Error. But Mountague Ch. J. thought that they were *not several Names*, but only a Name differing in the Sound, as *Stoke* and *Stoakes*, *Hastin* and *Hastings*. 2 Roll R. 168. Trin. 18 Jac. B. R. in Case of *Maeduncon v. Stafford*.

So of *Harewood* and *Harrwood*; *Contra* where in the *Venire Facias* a Juror was

10. In an Action upon the Case for malicious Prosecution upon an Indictment one of the Jurors Names in the Declaration was *Lancester*, and in the Record it was *Lancafter*; and ruled no Variance, tho' of different Sound, but shall be intended the same Record. *Contra* Mainard, who was for the Defendant. All. 91. Mich. 24 Car. B. R. Anon

named *Swift*, and in the *Distringas & Jurati* named *Swift*; For where there is an (S) for an (F) it is clearly bad; For they have not the like Pronunciation. 3 Bull. 121. Mich. 13 Jac. Jones v. Stenor.

11. *Nunne* and *Nonne* are Words of the same Sound; per Cur. 2. Jo. *So of Segear and Segar.* 2 Trin. 34 Car. 2. B. R. *Nonne v. Maxey.* Roll R. 425.

Mich. 14 Jac. B. R. *Brunger v. Segar.*—*So Bikerstaffe and Bickerstaffe.* 1 Vent. 73. Pasch. 22 Car. 2. E. R. *Heskett v. Lee.*—*So Clpfton and Clepfton; So Bofon and Bozon;* per Yelverton J. Bull. 8.

12. There is a substantial Variance in Sound, Original and common Use, that is not amendable. As if a Man declared against J. S. and *Agnes* his Wife, and the Record of Nisi prius is *Anne* his Wife; this is a material Variance, and not amendable. G. Hist. C. B. 177. cap. 17.

(A. 2) What is. *By altering the Name into another Language.*

1. **A** Ssife by an Infant by Name of *Tb. Filius Johannis Hum. in Latin*; the Defendant said that the Plaintiff was a Bastard, and if &c. Nul tort; and it was found that he was a Bastard, and was seised and disseised, and that he is known by the Name supra; And because he does not claim as Heir, it suffices to name him by the Name by which he is known, and also he was an Infant, in whom shall not be adjudged Misprision, wherefore he recovered the Land and Damages; quod nota. Br. Nofme, pl. 39. cites 35 Aff. 13.

2. *Præcipe quod Reddat versus Johannem Filium R. at T.* the other said that *John* is a Bastard, Judgment of the Writ; Finch said, he is known by this Name; Per Thorp, if he be a Bastard, yet he is Son, and awarded the Writ good; quod nota; and yet he was named J. filius R. in Latin, but if it was in English, it may be taken for a Surname; For per Kirton, where it is in Latin, he shall not say that Known by this Name only; Thorpe contra, by Award. Br. Misnomer, pl. 39. cites 39 E. 3. 24.

3. In Debt, if the Name of the Defendant be *J. Fitzwilliam*, and the Writ is *Præcipe Johanni filio Wilhelmi*, it is a good Plea to the Writ that his Father's Name was Roger; For Fitzwilliam is a Surname, but Filius Wilhelmi is the proper Name of the Father; note the Diversity; For the Translation of the Name from the Vulgar Language into Latin will alter the Matter. Br. Misnomer, pl. 12. cites 40 E. 3. 22.

Br. Brief, pl. 468. cites S. C. — pl. 6. cites 44 E. 3. 12.

4. If there are two English Names that are distinct, and one Latin Name for them both, this makes no Alteration in the Record; as *James* and *Jacob* are two English Names, and for them there is one Latin Word, viz. *Jacobus*; A Direction to Jacob. Vice Com. the Return was Respond' Jacob'; and well enough. G. Hist. C. B. 177. cap. 17.

5. A Writ was (*ad respondendum J. S. & Fidei Uxori ejus*) and the Defendant pleaded in Abatement of the Writ, because the Name of the Wife was (Faith) in English, therefore they pretended that it should be [Fidei.] Rodes said he knew a Wife called (Troth) in English, and she was called (Trothia) in Latin, and it was good. And all the Court adjudged this Writ good here. Goldsb. 86. pl. 10. Pasch. 30 Eliz. Anon.

(B) What is. *By Omissions.*

1. **T**HE King licensed N. to found a Provost of a Chauntry, which shall be called *Provost of the Chauntry of C.* and after the King impleaded

impleaded by Name of *Provost of the House of C.* and for this Misnomer the Quare Impedit abated, tho' it was averred for the King that it was known by this Name. Br. Misnomer, pl. 24. cites 38 E. 3. 14.

2. Writ was brought against *Priores of Newark of D.* and was abated because it was not *Priores of the House of Newark*; Quod Nota Bene. Br. Misnomer, pl. 25. cites 38 E. 3. 28.

3. Præcipe quod reddat was against *Mich. of Tryage*, and Protection, for *Quia Moratur* was shewn forth for *Mich. Tryage* without (of) and for the Variance it was disallowed by Award. And per Thirning, Culpepper, and Hill, Justices *M. of T.* and *M. T. cannot be intended one and the same Person*; Contra Hanke, but it was adjudged ut supra against Hanke. Nota. Br. Misnomer, pl. 22. cites 11 H. 4. 70.

(B. 2) Difference between Misnomer in Grants, Obligations &c. and judicial Proceedings.

1. **I**N Conveyances in *Fines or Feoffments*, the Change of the real Christian Name into another Name does not avoid it; For there is *no apparent Mistake of the Clerk*, and Charters receive a benign Interpretation, and most against the Grantor. G. Hist. C. B. 176, 177. cap. 17.

2. If two Names are in original Derivation the same, and are taken promiscuously to be the same in common Use, tho' they differ in Sound, yet there is no Variance; As *Piers Griffith* brought an *Audita Quere*la, and *Outlawry* was pleaded by the Name of *Peter Griffith*, and allowed. G. Hist. C. B. 177. cap. 17.

3. It does not follow that what will be sufficient to amount to a *Descriptio Personæ*, to enable a Man to take by will be sufficient for him to sue by. Per *Eyre and Powis Junior*, J. 10 Mod. 208. Hill. 12 Ann. B. R. in *Case of Cambridge University v. Archbishop of York*.—Als. *Vavafor v. Crofts*.

See Estoppel
(O)(Q) per
tot.

(C) Pleadings.

1. **A**SSISE against *Julian*, the Defendant pleaded a *Feoffment by Deed* by the Ancestor to the Defendant by Name of *Gylian*; and it was held that he ought to plead by the Name contained in the Deed; for *Julian and Gylian* is not one and the same Name. Quere. Br. Misnomer, pl. 44. cites 26. Aff. 16.

2. Note per *Kirton*, that if *Action* be taken against *W. T.* he cannot say that his Name is *R. T.* Judgment of the Writ; For it cannot be intended the same Person; and Judgment given against *W. T.* shall not bind *R. T.* Br. Misnomer, pl. 11. cites 40 E. 3. 3.

3. *Trespas* against *J. T. Prior of N.* and one came in proper Person, and said that he is *Prior of N.* and that his Name is *T. D.* and not *J. T.* Judgment of the Writ, and the Plaintiff said that *J. T.* was *Abbot the Day of the Writ* purchased, & non allocatur, without saying, and yet is; and the other that he is Not *Abbot*, Prist; And if he was *Abbot the Day of the Writ*, and deposed after, this ought to be shewn ex parte Querentis. Per *Newton*, Ch. J. Br. Misnomer, pl. 35. cites 22 H. 6. 45.

And yet the
Baron shall
plead for him-
self also, and
so he did,

4. *Scire Facias* against *R.* and *Ann* his Feme, and he and his Feme came in proper Person, and said that you have here *R. L.* and *Agnes* his Feme, in proper Person, which *Agnes* was warned by Name of *Anne*, and is named *Anne* in the *Scire Facias*, and demanded Judgment of the Writ; For her Name

Name is Agnes and not Anne, and it is a good Plea by them for the Feme, and if it be found it goes to all. Br. Misnomer, pl. 8. cites 33 H. 6. 22. *and said that he had nothing in the of the Writ.*
 Land but in Right of Agnes his Wife who is now alive not named in the Writ. Judgment and a good Plea per Cur. Quod Nota. good Cafe. Ibid.

5. In Qua. Imp. for the Church of Taunton, Defendant pleaded a Fine of *Tivertaunton*; Per Frowike Ch. J. Defendant need not aver them to be all one, unless the Names in the Fine and in the Action were clear contrary. Kelw. 49. b. P. 18 H. 7. pl. 1.

6. Debt against *J. S. Executor of the Testament of J. N.* and upon the *Capias* the Defendant came in *Gratis*, and said, that where he is named *J. S.* his Name is *R. S.* Per Edgar he shall not have the Plea; for *J. S.* and *R. S.* cannot be intended one and the same Person, and the Sheriff cannot take the one for the other, and so no Damage to him. But Frowike and Vavisor contra, and that he may have the Plea for the Mischief of Outlawry, and there is perfect *Conusance* here that he is the same Person, because he is named *Executor of J. N.* Quære. Br. Misnomer, pl. 40. cites 21 H. 7. 8.

7. Obligation by John Cozen, and the Acquittance is John Cousin, it is not good, without *Averment* that he is known by the one Name and the other. And. 212. in Case of Mariot v. Mascall.

8. Debt; and Counts *quod cum predictus Jacobus per Nomen Johannis Winlow* such a Day and Year, *per quoddam Scriptum suum* Obligatorium concessit &c. Defendant demanded Oyer &c. by which it appeared that Defendant, by the Name of *John Winlow fecit Scriptum* &c. And the Condition was, If *James Winlow* paid &c. Whereupon Defendant demurred &c. and per tot. Cur. the Action lay not, for John cannot be James. Cro. E. 897. Field v. James Winlow. als. dict' John Winlow.

9. If the Plea be of an Acre, and the Deed of a Manor, it is well; For the Acre may be Parcel of the Manor. Jenk. 170. pl. 33.

10. The safe Method of pleading, where there is a *Variance between the Plea and the Deed*, is to plead that the Land in the Plaint was convey'd by the Name expressed in the Deed. And so in all Cases where there is no *Repugnancy between the Deed and the Plea*; unless in a Case which cannot stand with Law. Jenk. 170. pl. 33.

11. Assumpsit against *Jermin*. Defendant pleads his Name is *Jermy*, *abique hoc*, that it is *Jermin*. Per Cur. it is a material *Variance*, but cured by Defendant's Appearance; but Defendant ought to plead *quod Jermy, qui implacitatus est per Nomen Jermin, dicit*, that his Name is *Jermy*. So Judgment was, *quod Resp. ouster.* Cumb. 188. Hill. 3 W. & M. Tallent v. Jermy. *The Pleading was thus, (viz.) Et Predictus John Germyn (with an N. venit & de-) fendit &c. & dicit, that his Name is Germyn, & non Germyn prout &c.* Carth. 207. Tallant v. Germyn.

12. The Defendant pleads, that he was baptized by the Name of *Micha*, and not *Michael*; the Plaintiff replies, that he is known as well by the Name of *Michael* as *Micha*. The Defendant demurs, because he ought to have traversed that he was *baptized*, and not that he was known by one Name and the other; for a Man cannot have two Christian Names. And Judgment was given for the Defendant. L. P. R. 5. cites Pasch. 7 W. Regis.

13. The Declaration must be of the Name in the Obligation with an *Alias of the real Name*; For the Declaration, as it is said, must shew the Cause of Complaint, as it is; therefore it must in all Things follow the Obligation, and the Intent of the Alias is only to shew he has been differently called from the Name in the Obligation; and therefore if a Man oblige himself by the Name of *J. S. Esq;* and afterwards he is made a Knight, the Plaintiff cannot declare against *J. S. Knight, alias J. S. Esq;* G. Hist. C. B. 179. cap. 17. *S. P. adjudged Bull. 216 Trin. 10 Jac Saxey v. Whempson — See D. 279. b pl 9. Hickman v. Shotbolt — Where one is misnamed L. 7. Cites*

in a Bond, the Writ must be brought against him by the same Name as in the Bond. R. S. Dyer 279. — Bull. 216. per Yelverton J. in Case of Saxey v. Whempson.

(C. 2) Pleadings. *In what Cases it is a good Plea.*

At Common Law, if a Person be *misnamed* by a wrong Christian Name, yet he shall not plead Misnomer to the Felony; For the *Indictment is sworn against the Party present*, and appearing to their View, and so no Injury by the Misnomer, as might be where the Party appears by Attorney; and Felons generally go by no certain Name, and have no fixed Habitation; and therefore this is altered by the Statute of Additions. G. Hist. C. B. 175. cap. 17.

The Plea of Misnomer was allowed in Abatement to an *Indictment of Murder*. Carth. 297. Hill. 5 W. & M. the Lord Banbury's Case.

But in Appeal he may plead Misnomer, and this by Roll. viz. in Name of Baptism. *Ibid.*

2. If the *Inquest be taken upon Misnomer of the Party who is indicted*, and find it; upon such Manner of Verdict the Party shall not have Conspiracy; quare of this Misnomer; For it is said 3 H. 6. 26. That he shall not plead Misnomer, but Not Guilty, and the Inquest shall inquire if he be the same Person or not. Br. Conspiracy, pl. 2. cites 33 H. 6. [1] and 34 H. 6. 9.

3. It shall not be a Plea where the *Action is founded upon Specialty*; Contra where it is upon *Matter in Fact*. Br. Misnomer, pl. 57.

(C. 3) Pleadings. *By whom.*

1. *A* *Wife against Isabel*; it was taken a good Plea, that *she had to name Elizabeth and not Isabel*, Judgment of the Writ; but it is doubted, whether a *Bailiff* shall plead such Plea in *Affise, or Attorney*; But the Party himself in Person may clearly. Br. Misnomer, pl. 43. cites 20 Aff. 61.

S. P. Br. Misnomer, pl. 13. cites S. C. But J. S. shall not have such Plea.

2. *Trespafs against J. S. and A.* it is a good Plea for *A.* to say that *she is the Feme of J. S. not named Feme*; Judgment of the Writ. Br. Brief, pl. 56. cites 42 E. 3. 23.

S. P. tho' they are one Person in Law. 6 Rep. 64. b. in Sir Moyle Finch's Case

3. So where it is brought *against J. S. and A. his Feme, A. may say that she is not the Feme of J. S.* Judgment of the Writ; but J. S. shall not have the Plea, per tot. Cur. And the Reason seems to be inasmuch as ** none* shall plead Misnomer, *but the Party himself*. Br. Brief, pl. 56. cites 42 E. 3. 23.

—Debt against two Executors, the one cannot plead Misnomer of his Companion in this Action, nor in an Action Real. Br. Misnomer, pl. 69. cites 14 H. 6. 3. —But may say in this Action, that the Testator made him and one J. N. (naming his Companion by his right Name) his Executors, which J. N. is alive not named in the Writ, Judgment of the Writ. *Ibid.* —Or in *Præcipe quod Reddat against two*, and the one is misnamed, the other cannot plead Misnomer of him, but may say, that he holds jointly with one such &c. of the Gift of A. B. not named in the Writ &c. Judgment of the Writ &c. *Ibid.*

* S. P. Br. Misnomer, pl. 13. cites S. C. —S. P. Br. Affise, pl. 306. cites 29 Aff. 70. —S. P. Br. Trespafs, pl. 37. cites 35 H. 6. 50, 51. Br. Misnomer, pl. 10. cites S. C. —S. P. Br. Misnomer, pl. 63. cites 29 Aff. 70. and 20 H. 6. 30. —Lutw. 36. Mich. 9 W. 3. C. B. Shovel v. Evance. —If two are joint'd in a Writ, the one shall not plead Misnomer of the other 6 Rep. 64. b. cites 14 H. 6. 3. b. and says the Reason is, That Misnomers are not favour'd in Law to have Advantages taken of them, in Detestation of nice and dilatory Exceptions.

Attorney may plead that which enlarges the Name

4. Debt against J. H. of D. the Defendant said by Attorney, that there is D. in H. and D. in F. and none without Addition. And per Chaunt. Attorney may [well] plead this; For it is not Parcel of the Name of his Master; by which the other said, that there is a *Veil of D. in the same County*,

County without Addition, Prist; and the other e contra. Br. Misnomer, *of his Master,* pl. 76. cites 10 H. 6. 26. *and is not contrary to*

his Warrant. Br. Misnomer, pl. 62. cites 2 H. 6. 10. 11.

5. Debt against a Feme; at the Exigent, she render'd herself, and the Sheriff returned quod reddidit se; and upon this she came, and said, You have here J. who was the Feme of R. F. who is sued by the Name of J. who was the Feme of J. F. and said, that her Baron had to Name R. and not J. Judgment of the Writ; and admitted a good Plea, tho' she herself answered; For it was agreed, that several who come at the Capias, or at the Pone Gratis, may plead Misnomer; quod nota; and so see that she pleaded Misnomer of another Person, viz. of her Baron. But it seems now, that this is as Parcel of her Name. Br. Misnomer, pl. 29. cites 19 H. 6. 43.

6. The Baron may plead Misnomer of his Feme to the Writ; contrary of other Persons. Br. Brief, pl. 426. cites P. 3 H. 6. 22.

his Feme, he appear'd, and said, that the Feme's Name was E. and not M. Judgment of the Writ; and a good Plea, per Bingham; quod nullus negavit. Br. Misnomer, pl. 35. cites 22 H. 6. 45. ————*As in Trespafs against J. and M. Do in Assise against A. and Margery his Feme, who said that Margery was dead before the Writ was purchased, and his now Feme is named Margaret; Judgment of the Writ, and the Writ abated. Br. Misnomer, pl. 45. cites 30 Ass. 19.—But it should be 30 Ass. (16.)*

7. Debt by Al. Bass, where her Name was Al. Coff, and the Defendant would have pleaded Misnomer by his Attorney by Special Warrant against Al. Coff, who brought Writ by Name of Al. Bass, and it was admitted that he cannot plead it by Attorney; and the Warrant was not admitted; For he was a Stranger. Br. Misnomer, pl. 51. cites 5 E. 4. 108.

So if a Man impleaded by Misnomer imparles, he cannot by Attorney, nor in proper Per-

son, come after, and plead Misnomer, nor other Thing contra to the Warrant of Attorney. Br. Misnomer, pl. 72.—But it is said that where J. S. is impleaded by Name of W. S. the Attorney by special Warrant may plead Misnomer, in such Form, viz. J. S. who is here impleaded by Name of W. S. p. sicut Loco suo &c. And so see Misnomer pleaded in Name of Baptism; Quare thereof, For it is but a Note. Br. Misnomer, pl. 55. cites 8 E. 4. 9.

8. Appeal or Trespafs against several, the one cannot plead Misnomer of the other, but he may plead the Death of his Companion, or that there is no such in Rerum Natura; For the one proves that the Writ shall abate, and the other proves that the Writ was never good. Br. Misnomer, pl. 59. cites 21 E. 4. 70, 71.

(C. 4) *Pleadings. At what Time.

* See Error (L b)

1. IN Præcipe quod reddat at the Grand Cape against W. N. he may come and say that his Land is seized into the Hands of the King, and that his Name is R. and not W. Br. Misnomer, pl. 35. cites 22 H. 6. 45. per Newton.

2. In Debt against J. Wrybolt he was returned Nihil upon the Original, & non est inventus upon the Capias, and appeared and pleaded gratis Misnomer Wrykbolt for Wrybolt; and by some he shall have the Plea gratis as here to avoid Vexation; but by the best Opinion if he comes by Process served, or in Ward, he shall have the Plea, but not when he comes gratis; For he is at no prejudice; because if the Sheriff takes him or his Goods, he shall have Trespafs, or false Imprisonment; for he is not the same Person. Br. Misnomer, pl. 54. cites 3 E. 4. 15.

3. If Exigent be awarded against R. P. and he renders himself to the Sheriff, he shall not plead that he is W. P. and not R. P. For he came in without Garnishment; But if a Man comes by Capias, or Distress, or by Summons of his Land, he shall plead Misnomer, for the Trouble which he has of his Person, Goods or Lands. Br. Misnomer, pl. 56. cites 8 E. 4. 18. per Littleton.

S. P. Br. Misnomer, pl. 66. cites S. C.—So of other Persons. Ibid. pl. 2.—Note, that in Debt against J. Prior of the Church of St. Peter of C. he im-
 parled by Attorney, and at the Day came and pleaded that it is founded by the Name of Prior of the Church of St. Peter and Paul of D. Judgment of the Writ; and because he had imparled by Attorney before, therefore was outted of the Plea, per Cur. For this is all but one Name. Br. Misnomer, pl. 9. cites 35 H. 6. 5.—So where he imparles by the Name of the Prior of St. Peter and Paul, he shall not say that he is Prior of St. Peter only; For it is all one. Ibid.—For when he affirms his Name, he cannot plead Misnomer after. Ibid.—And it is not like where a Man is named of D. and imparles, and after comes and says, that there is over D. and nether D. and none without Addition; For this stands with, and is only Addition, and no Part of his Name. Ibid.

5. Motion to set aside a Judgment irregularly entered up, and to set aside the Execution thereon. Charles Earl of Banbury gave a Warrant of Attorney to enter up Judgment by that Name, but the Plaintiff entered it up by the Name of Charles Knowles Esq; it appeared that the Bond was by the Name of Charles Earl of Banbury &c. The Court set it aside, but said, if a Nobleman will admit himself to have a wrong Name, so that it cannot appear to the Court that he is a Peer, he shall not after say he is a Peer, and so to alter the Nature of the Execution. 11 Mod. 94. Mich. 5 Ann. in B. R. Ld. Banbury's Case.

See Estoppel
(O)

(C. 5) Pleadings. Estoppel in what Cases.

1. **P**urchase of Charter of Pardon, where a Man is misnamed and outlawed of it, shall not conclude him to plead Misnomer; For he cannot otherwise purchase the Pardon but according to the Name in the Record; quod nota. Br. Misnomer, pl. 32. cites 18 R. 2.

2. Joan T. brought Appeal of Death against B. by Name of Cycily T. and after that the Defendant had imparled, she came and said that her Name was C. and prayed &c. by which the Defendant went without Day; Quære if she shall have other Suit by Name of C. It seems that she may. Br. Misnomer, pl. 23. cites 9 H. 5. 1.

But a Stranger to the Record cannot so Estop me; Quære therefore, if J. D. be impleaded if he shall say that he is W. D. It seems that he shall not; for he is not this Person. Ibid.—* Orig. (record').

3. Where I bring an Action against another by Name J. D. and the Defendant admits this Name, and I * Recover where my Name in Fact is W. D. the Defendant shall Estop me in another Action by Name of W. D. to say that my Name is other than J. D. Br. Misnomer, pl. 78. cites 30 H. 6. 2. per Forfcue.

But Contra between him and Strangers. Ibid.—But upon Recovery against him by Default by such Name, there it shall not be Estoppel to him; For it cannot be intended the same Person; Note a Diversity. Ibid.

4. Where Action is brought against J. H. where his Name is R. H. and he appears and pleads and suffers it, this shall be Estoppel between them in all other Actions after. Br. Misnomer, pl. 7. cites 33 H. 6. 7. 19. 50.

But where he recovers by Misnomer in Court of Record contra; For in the one Case he may say that he by Name &c. recovered in the base Court; but upon Recovery in the Court of Record he cannot vary from the Name which is contained in the Record; Nota. Ibid.

5. If a Man recovers Debt in a base Court by Name of J. Hastings, where his Name is J. Hastings, yet it is good, and he may bring Action at the Common Law of the Debt recovered, and he may aver that he is the same Person. Br. Misnomer, pl. 68. cites 9 E. 4. 41, 42. per Littleton, Fairfax, Chocke, Needham, and Jenney.

6. In *Assumpsit* against B. Plaintiff declared, that in Consideration he would be Bail for him in a *Plaint of Debt* commenced by Adderby against B. in London, he promised to save him harmless, and shews that Execution was awarded against the Plaintiff and he was forced to pay the Money; the Jury found the Promise, but likewise found that the first Action was conceived and entered by the Name of Adderby, and the Bail put in by that Name, but that the Declaration was by the Name of Adderley, and the whole Proceedings after were in that Name. Adjudged, that the Plaintiff Nil capiat per Breve; For the special Matter proves, that the Plaintiff had no Cause of Action notwithstanding the finding the Assumpsit; For he was not damned by Reason of the Bail at the Suit of (Adderby) for which the Assumpsit was made, but the taking the Plaintiff was tortiously done, he not being Bail for (Adderley) nor was the Defendant's Promise on Account of such Bail. Mo. 407. Trin. 37 Eliz. Adderby v. Boothby.

G. Hist. of C. B. 179. 180. cites S. C. and adds this Reason viz That the Verdict has no Credit against a Record, and that therefore it cannot reconcile the Difference that appeared between the Records.— S. C. Cro. E. 458 (bis)

Paſch. 38 Eliz by Name of Frampton v. Delamere.

7. If a Man is impleaded by his wrong Name, and upon the *Plea in Bar* pleaded, Judgment is given for the Defendant; if he be afterwards impleaded by his right Name, he may plead in Bar the former Judgment, and aver that he is un' & ead' Persona; for no Man ought to be forced to take Advantage of the Misnomer. G. Hist. C. B. 176. cap. 17.

8. In Grants and Obligations, the Mistake of the Surname doth not vitiate; because there is no Repugnancy that a Person should have two Surnames; so that he may be impleaded by the Name in the Deed, and his real Name brought in by an Alias, and then the Name in the Deed he cannot deny, because he is estopped to say any thing contrary to his Deed; For that is what they call an Absurdity to deny that which the Party himself has formerly admitted; and he cannot with Success deny his real Name, as an Obligation of John Gate where his Name is Gate is good G. Hist. C. B. 178, 179. cap. 17.

(C. 6) Abatement of Writ by what Misnomer. Names of Baptism.

1. ASSISE against Isabel N. it was taken as a good Plea that she had to Name Elizabeth and not Isabel; Judgment of the Writ, and because it was testified by several, therefore the Writ was abated for this Cause upon Nient Dedire of it; quod nota. Br. Misnomer, pl. 43. cites 20 Aff. 61.

And in Affise it was admitted that it is a good Plea, that where the Plaintiff is named J. in the Affise, his Name is R. Ibid. cites 25 Aff. 36.

2. Scire facias against three. One came and said that where he is named John P. his Name is Henry and not John, and that he has nothing but jointly with W. P. not named, Judgment of the Writ; and the Plaintiff confessed it and the Writ abated, and so see Misnomer of Name of Baptism. Br. Misnomer, pl. 17. cites 47 E. 3. 14.

3. In Affise by Cicily D. against two the one pleaded a Release of the Plaintiff in Bar, and the other pleaded that her Name is Julian and not Cicily, and it &c. that his Ancestor died seised, and he is in by Descent; and all suffered; quod nota Misnomer in proper Person. Br. Misnomer, pl. 20. cites 11 H. 4. 26, 27.

4. The Abbot of B. was indicted by Name of J. Abbot of B. of diverse Trespasses, and came to the Bar and was arraigned, and said that he laid to Name Roger and not John, and the Bishop of London testified it; by which the King's Attorney would not further maintain for the King; by which

he went without Day without Inquiry of the Trespass. Br. Misnomer, pl. 21. cites 11 H. 4. 41.

5. It seems that a Man cannot plead Misnomer in his Name of Baptism, but in his Surname; For he may be known by 2 Surnames; but only by one Name of Baptism. Br. Misnomer, pl. 2. cites 2 H. 6. 5.

If the Christian Name be wholly mistaken; this is, regularly, fatal to all legal Instruments, not only to Declarations, but Grants and Obligations; also the Reason is, because it is repugnant to the Rules

6. A Bond was entered into by the Name of *John*, but in the Condition for Payment he was named *Robert*, and so was the Name subscribed, and Robert was in Truth his real Name. Per Cur. There is a great Difference between the Case of a Corporation and this Case, Quia constat de Persona, and Judgment was given for the Plaintiff. Vid. Lutw. 894. and Comb. 40. Mich. 2 Jac. B. R. *Istead v. Clarke*.——But this Judgment was afterwards reversed per tot. Cur. in the Exchequer Chamber. Lutw. 895. b. *Clark v. Istead*. And says the following Cases, which are strong and direct to the Purpose, were cited in Maintenance of the Reversal, viz. D. 279. b. *Shotbolt's Case*. Cro. E. 897. *Field v. Winslow*. Mo. 897. *Panton v. Charles*. Ow. 48. [the Case of one *Leufage*. Mich. 32 & 33 Eliz.] Cro. J. 558. *Watkins v. Oliver*. Ibid. 640. *Baby v. Shepherd*. 2 Brownl. 648. Sir Edw. Ashley's Case.

of Christian Religion, that there should be two Christian Names; for that allows no re-baptizing; therefore you cannot declare against the Party, but by that Name in the Obligation, and bring in his true Name by an Alias; for that supposes the Possibility of two Christian Names, and you cannot declare against the Party, and aver that he made the Deed by his wrong Name; For that is to set up an Averment contrary to the Deed; and there is that Sanction allowed to every solemn Contract, that it cannot be suppressed but by a Thing of equal Validity; and if he be impleaded by the Name in the Deed, he may plead that he is another Person, and that 'tis Not his Deed. G. Hist. C. B. 174, 175 cap. 17.——And therefore if *Edward* obliges himself by the Name of *Edmund*, it will [be fatal,] but tho' a Person cannot have two Christian Names at one and the same Time, yet they may, according to the Institution of the Church, receive one Name at their Baptizing to make double Names, yet it doth force a Man to abide by the Name given him by his Godfathers when he comes himself to make Profession of Religion. G. Hist. C. B. 175. cap. 17.

7. When there is a sufficient Expression and Specification of Parties, whatever is redundant and over and above, (like all other Surplusage) though mistaken, cannot hurt and destroy the Force of the Grant, according to the Rule Utile per inutile non vitiatur; and therefore a Grant to *George Bishop of Norwich*, where his Name is *John*, or to *Henry Earl of Pembroke*, where his Name is *Robert*, or to *Emmy the Wife of J. S.* where her Name is *Emelyn*, it doth not vitiate. But in pleading in these Cases, the Christian Name ought to be shewn; for the Death of the Individual is a good Plea in Abatement, which often falls out where the same Office, Dignity, or Relation, continues in another. G. Hist. C. B. 175, 176. cap. 17.

(C. 7) Pleadings. Known by the one Name and the other.

1. **ENTRY**; supposing the Entry to be by *W. and K. his Feme*, and the Tenant said that she had to Name *J.* and the Demandant said that she is known by the one and by the other; & non allocatur, but was compelled to maintain that she had to Name *K.* Br. Misnomer, pl. 26. cites 21 E. 3. 47, 48.

2. Assise by *J. Will'* the Defendant pleaded Misnomer, that the Name of the Plaintiff is *J. Wood*, and found by the Assise that he is known by the one Name and by the other, and so the Writ good; quod mirum ex Parte Querent. For the Plaintiff shall not say for Plea, that he himself is known by the one Name and by the other; But where the Defendant pleads Misnomer of himself, the Plaintiff may say that the Defendant is known by the one Name and by the other; but every Man must take precise Notice of his own Name, as appears elsewhere. Br. Misnomer, pl. 42. cites 22 Ass. 1.

3. Scire facias was sued against the *Prior of Saint John's of Hierusalem* in England upon a Recovery in Wast which was *Prior of the Hospital of Saint John of Jerusalem in England*; and Exception taken; Per Thorp it is known by the one Name and the other, and therefore Answer; quod Nota. Br. Misnomer, pl. 15. 44 E. 3. 16.

4. Scire facias against W. S. who said that *his Name is W. C. and not W. S.* Judgment of the Writ, and this in proper Person; Markham said known by the one and by the other; Priit; and the other e contra. Br. Misnomer, pl. 28. cites 19 H. 6. 2

5. Trepass by the *Abbot of R.* the Defendant said that the *Foundation is Abbot of St. Peter of R. and not Abbot of R. only*; Judgment of the Writ, and the other e contra. Br. Misnomer, pl. 53. cites 1 E. 4. 6. But where the Defendant pleads Misnomer of himself, it is

a good Plea for the Plaintiff to say that he is known by the one and by the other; For a *Man may be known by 20 Names*, and yet he has not but one Name. Ibid. — But where the Defendant pleads *Misnomer in the Plaintiff*, there, Known by the one and by the other is no good Plea for the Plaintiff; For he ought to take Conufance of his own Name; contra of the Name of the Defendant; For he is another Person. Ibid.

6. The Master of *Burton Lazar* and his Confreres pleaded, that they were known, impleaded, and used to implead, as well by the Name of *Master and Confreres of Burton Saint Lazar of Jerusalem in England of the Order of Saint Lazar*, as by the Name of *Master and Confreres of the Hospital of Burton Lazar*; quod Nota, that Known by the one Name and the other is a good Plea; But it seems that they cannot take any Grant, but by their true proper Name. Br. Misnomer, pl. 37. cites 9 E. 4. 20.

7. In Debt it was agreed clearly for Law, that if *Misnomer be pleaded in a Prior for Variance of the Name of the Corporation*, the other may say that Known by the one and by the other. Br. Misnomer, pl. 85. cites 16 H. 7. 1.

(C. 8) Pleadings. *Where a different Person of the same Name appears, or is pleaded to be so.*

1. IT is said, that when there are *two J. S's of one and the same Vill*, and the one is impleaded and not named *Elder or Younger*, and he who is impleaded appears, he shall not compel the Plaintiff to put Addition, but shall answer. Br. Additions, pl. 47. cites 39 H. 6. 46. But if a Stranger of the same Name appears, he shall compel

the Plaintiff to put Addition by his *Surmise*, which shall be entered in the Roll; quod Nota Diverfity. Ibid

2. In Scire facias against me another of the same Name appears, the Plaintiff may say that he is not the same Person, and the other shall not have *Traverse to it*, for he has Advantage thereof; For this is a Discharge to me in this Action; per Danby &c. Br. Misnomer, pl. 56. cites 8 E. 4. 18. If one appears who is not the Defendant but is of the same Name, there

the Plaintiff may say that there are two of the same Name, and his Suit is against the other and not against him who appears, and give Addition, and Procefs shall Issue against the Party with Addition; quod Nota; per Moile J. Br. Additions, pl. 12. cites 33 H. 6. 53, 54.

3. But per Moyle, if I bring an Action against *W. T. Taylor*, and *W. T. Smith* appears, I may say that he who appears is *W. T. Smith*, and not *W. T. Taylor*. Ibid. But if two W. T.'s Taylors are, and he who is not sued appears,

there I shall say, that *W. T. Taylor* who appears is *Son of N. T.* and the other against whom the Action is brought is *W. T. Son of J. T.* and so is not the same Person. Ibid.

(C. 9) Pleadings.

See Abatement. —
Addition.

(C. 9) Pleadings. Of the Place where.

1. **I**N *Præcipe quod reddat* of Tenements in *Herfigh* the Tenant pleaded a Recovery of the same Tenements in *Hoftrick*; and per Thorp it is a good Plea; For the *Vill* may be known by the one Name and the other. Br. Misnomer, pl. 74. cites 39 E. 3.

2. In Debt against *J. H. of D.* the Defendant said by Attorney, that there is *D. in H. and D. in F.* and none without Addition; And per Chaunt, Attorney may well plead it; for it is not Parcel of the Name of his Master; by which the other said, that there is a *Vill of D. in the same County without Addition*, *Priſt*; and the other eontra. Br. Misnomer, pl. 76. cites 10 H. 6. 26.

S. P. Br. Misnomer, pl. 77. cites S. C.

3. Maintenance against *J. S. of P.* who said that he was never of *P.* without shewing of what *Vill* he was, and a good Plea; and yet Exigent does not lie in this Action; but this is a good Plea of Misnomer by the Common Law. Br. Misnomer, pl. 61. cites 11 H. 6. 11.

A Man cannot plead Misnomer of the Place. Br. Traverſe, per &c. pl. 786. cites 16 H. 7. 7.

4. In *Replevin of a Taking in Sale* the Defendant shall not say, that the Place is named *Dale*, and not *Sale*; For he shall not plead Misnomer of the Place, as he shall do of the Place of which the Defendant is named in *Trespas*; but he may say in *Replevin* that the *Taking* was in another Place, and not in the Place in the *Writ*. Br. Misnomer, pl. 86. cites 16 H. 7. 5.

S. P. unless in Action where Process of Outlawry lies. Br. Misnomer, pl. 64. cites 8 H. 6. 9.

5. *Aſſiſe* [of Lands] in *Middleſex* was brought in *C. B.* and the *Writ* was *de libero Tenemento in C.* and the *Plaint* was of a *Mesnage*, 100 Acres of Land, 10 Acres of Meadow, 30 of Pasture, and 10 of Wood, with the Appurtenances &c. And it was pleaded, That the Tenements &c. were in *H.* and not in *C.* Judgment of the *Writ*; and if &c. *Nul tort &c. Quære* if he need not say, *And not in C.* in as much as the *Writ* is only supposal, viz. *De libero Tenemento. D. 78. pl. 43. Mich. 6 E. 6. Charleton v. Saunders & al.*

6. In *Trespas in Holderneſſe apud W.* The Defendant (in respect of some Misnomer) pleaded that there was no such *Vill, Hamlet, nor Lieu Conus &c.* The Plaintiff replied, *Priſt*, that there is, without shewing in certain, either that it is a *Vill, Hamlet, or Lieu Conus*, and this in Detestation of nice and dilatory Exceptions. 6 Rep. 64. b. 65. a. in *Sir Moyle Finch's Caſe.*

7. If the Plea be of the Manor of *D.* and the Deed is of the Manor of *S.* this is a material Variance; For the Manor of *S.* cannot be understood to be Parcel of the Manor of *D.* nor to be the Manor of *D.* *Jenk. 170. pl. 33.*

(C. 10) Replication and Rejoinder.

1. **I**F *A.* gives Bond by Name of *B.* and he is afterwards sued by the Name of *B.* He may plead Misnomer, and the Plaintiff may plead Misnomer, and the other may reply, that he made the Bond by the Name of *B.* and estop him by demanding Judgment if against his own Deed, he shall be admitted to say that his Name is *A.* and then he may rejoin, and say that he made no such Deed; and this he must do without Oyer; For if he prays Oyer, he admits his Name to be *B.* 1 Salk. 7. pl. 17. Mich. 3 Ann. B. R. cited as said per Cur. in another Case in the same Term.

(D) Mis-

(D) Misnomer. Relieved in *Equity*.

1. **A** Misnomer was *in a Bond*, [but it was ordered, that] no Advantage be taken of it. Toth. 89. cites 11 May 33 Eliz. Colton v. Car. Cro. E 847. S C.

For more of Misnomer in General, See **Abatement, Addition, Grants (B) &c. Rescues**, and other proper Titles.

Mifrecital.

1. **I**F a Thing is referred to * *Time, Place, and Number*, and that is mif-taken, all is void. Arg. Pl. C. 392. b. Trin. 13 Eliz. in Case of the Earl of Leicester v. Heydon. * *Defeasance* of a Recognizance recited as made the 10th of

November, where it was the 2d. is void. Per Archer J. Cart. 150. cites D. 50. b.

2. Mifrecital in an *immaterial Point*, and where it is only an additional Flourish in *things Circumstantial* shall not avoid a Grant ; as where the Husband has a Term in Right of his Wife, and this Term is recited as made to the Husband. Per Archer J. Cart. 149. Mich. 18 Car. 2. C. B. in Case of Foot v. Berkley.

3. A Mifrecital *in the Beginning of a Deed*, which goes not to the End of a Deed, shall not hurt, but if it goes to the End of a Sentence, so that the Deed is limited by it, it is vitious. Per Archer J. Cart. 149. in Case of Foot v. Berkley.

For more of Mifrecital in General, See **Grants (R. 3) (R. 4)**. and other proper Titles.

Mistake.

(A) Mistake of *Time*.

1. **I**T was pleaded that A. the Husband of B. died the 20th. of February 39 Eliz. and that afterwards, viz. the 21st. of November, 39 Eliz. B. did marry C. so that the (*afterward*) is sufficient. Arg. Bridg. 45. Mich. 13 Jac. in Case of Smallman v. Agborrow.

2. *Summons* to appear Tuesday the 17th. of April, (where Friday was the 17th.) before Justice of Peace, on a penal Statute, the time being impossible it was as if no Summons had been. 1 Salk. 181. Trin. 2 Ann. B. R. Queen v. Dyer.

(B) Mistake of *Words*.

1. **T**HE Words of a Deed were, that after the Death &c. the Tenements aforesaid *shall Revert* instead of *Remain* to J. S. yet it is a good Remainder; because, as it seems, every one's Deed shall be taken most strong against himself. Br. Faits, pl. 26. cites 21 E. 3. 49.

3 Bill. 153.
S. C. ———
Cro. J. 390.
Wood v.
Garnon. ———
Mo. 848.

2. *Restrain for Distrein*, if Rent be Arrear, not being limited to any Thing which should be retrained, as On the Cattle, or On the Land, and so shall not be taken to mean distrein. Roll. R. 330. 367. Hill. 31. and Pasch. 14 Jac. B. R. Moody v. Garnon.

[For more of Mistake in General, See **Grants**, (D. 2) (Q) &c. **Mistaking**, and other proper Titles.]

Modo et Forma.

1. **M**ODO & Forma are Words used in Pleading, and sometimes they are only formal, and sometimes they are material; These Words are mostly used in the Answer of the Defendant, whereby he denieth himself to have done the Thing laid to his Charge *Modo et Forma Declarata*. Reg. Plac. 92. cap. 2.

2. In *Debt by a Servant against his Master for his Salary upon a Retainer*, it is a good Plea, that he did not retain the Servant *in Husbandry*, and he shall not be compelled to say *Non retinuit* generally; For it may be, he retained him in other Service, and not in Husbandry; but *Non retinuit Modo et Forma* is a good Plea; For this shall be referred to the Declaration by these Words *Modo et Forma*. Br. Labourers, pl. 46. cites 38 H. 6. 22.

Reg. Plac.
299. cap. 8.
— There
is another
Diversity.
That tho' the
Issue be upon
a Collateral
Point, yet if
by the find-
ing of Part
of the Issue
it shall ap-
pear to the
Court that no
such Action lieth
for the Plaintiff,
no more than if
the whole had
been found, there
Modo et Forma
are but Words
of Form. Co. Litt.
281. b.

3. Where *Modo et Forma* are of the Substance of the Issue, and where but Words of Form, this Diversity is to be observed; where the Issue taken goeth to the Point of the Writ or Action, there *Modo et Forma* are but Words of Form, as in the Case of the Writ of Entry in Casu Proviso. But otherwise it is, when a collateral Point in pleading is traversed; as if a Feoffment be alleged by two, and this is traversed *Modo et Forma*, and it is found the Feoffment of one, there *Modo et Forma* is material. So if a Feoffment be pleaded by Deed, and it is traversed absque hoc quod feoffavit *Modo et Forma*, upon this collateral Issue *Modo et Forma* are so essential as the Jury cannot find a Feoffment without Deed. Co. Litt. 281. b.

4. *Modo et Forma* do not put the Day nor Place in Issue; but only the Matter and Substance of the Plea. Reg. Plac. 188. cap. 5.

5. Where a Traverse is with a *Modo et Forma* &c. that will put the Manner, as well as the Matter in Issue, where the Manner is material, as the Time, the Fact, and other Circumstances, when they are the Effect of the Issue. Reg. Plac. 189. cap. 5.

[For more of *Modo et Forma*, See **Master and Servant**, (U) pl. 10. **Trial** (C. g) pl. 53. &c. and other proper Titles.]

Moieties.

(A) *Moieties. Grant. In what Cases it shall take Effect by Moieties.*

See Jointenants (R).—
Baron and Feme —
Grant (G. a. S).

1. **A** Gift in Tail to a Brother and Sister are several Estates; Per Hobart, it ought to appear in the very Deed of Gift, that it is Brother and Sister, otherwise it is a joint Tail, and the Issue shall inherit and hold a Formedon. Noy. 29. Hill. 15 Jac. C. B. in Case of **Rennington v. Cole**, cites 8 Rep. 87. 17 E. 3. 51. 18 E. 3. 39. 9 H. 6. 39. 22 E. 4. 18 E. 4. 29.

2. A. in Consideration of Service &c. gives Land to B. his Servant, and C. his Cousin in Tail. B. and C. had then an Intention to intermarry and afterwards actually did. Adjudged, The Gift being before Marriage, they take by divided Moiety. Noy. 122. Ward v. Matthews.— And says, it was so adjudged in the Court of Wards in **Edmund's** Case on such a Gift of a Father to a Son on an Intention of Marriage. Ibid.

3. Remainder in Tail Male, and for Want of such Issue, then to the Use of all the Issue Female of the Body of the said A. by the said P. begotten, and to the Heirs of the Body of such Issue Female &c. Remainder to E. and the Heirs of her Body. A. and P. left Issue 2 Daughters, B. and C.—C. dies young. These Sisters were Jointenants for Life with several Inheritances; so that a Recovery passed by B. the Survivor (who enjoy'd by Survivorship 40 Years) does not affect the Moiety of C. which must remain to E. 5 Mod. 385. Hill. 9 W. 3. Matthew v. Thompson.

(B) *Entry &c. into a Moiety. Good, in what Cases:*

1. **I**N Formedon it was agreed, that where my Villein and J. N. purchase jointly, I may enter into the Moiety of my Villein; quod nota, that a Man may enter into a Moiety. Br. Entre Cong. pl. 15. cites 48 E. 3. 16.

2. And see there, that one Tenant in Common may have an Action of a Moiety against his Companion. Br. Entre Cong. pl. 15. cites 48 E. 3. 16.

3. The Rule of Law is, that in all Cases when Coparceners or Jointenants may join in Action, and have one and the same Remedy, there if one be summoned and severed, and the other sues forth and recovers the Moiety, the other may enter with her. But when they are driven to several Actions, or where their Remedies are not equal, there if one recovers, and continues the one Moiety, the other cannot enter with her; yet when both have recovered, they shall be Coparceners again. 2 Inst. 308.

(C) *Count and Pleadings.*

1. **I**N Assise, Plaint of the Moiety of five Acres of Land is a good Plaint where Partition was made, that one Parcener should have the one Moiety, and the other Parcener the other Moiety, and in Allowance of

of other Land which was allotted to other of the Coparceners, where there were four Parceners in all, and good; the Reason is, because Partition was made by Name of the Moieties. Br. Plaint, pl. 8. cites 7 Aff. 10.

[For more of Moieties in General, See *Baron and Feme, Grant, and other proper Titles.*]

Money.

(A) *In what Cafes it may be followed.*

2 Vern. 480. i. **M**oney has *no Ear-mark*, and cannot be followed when *invested in* Hill. 1704. *a Purchase*; per Ld Wright. 2 Vern. 441. Mich. 1702. in Case of Kendar v. Milward.—Cites it as the Case of *Kirk v. Webb*, lately affirmed on Appeal in Dom. Proc.

S. P. And therefore if a *Receiver of Rents* should lay out all the Money in a Purchase, and afterwards die insolvent, yet a Court of Equity cannot charge or follow the Land. 2 Wms's Rep. 414, 415. Trint 1727. Per Ld C King, in Case of Deg v. Deg.

So if an *Executor* should realize all his Testator's Assets, and die insolvent. Ibid.

But where a Person by his Deed own'd the Receipt of the Money, and that he had therewith purchased Lands in D. and M. this was resolv'd by Ld C. King to amount to a Declaration of Trust, and to raise a specifick Lien on those Estates. Ibid. Deg v. Deg.

(B) *Restitution in what Cafes, and what Actions &c. lie for Money, as Trover, Detinue &c.*

* S P. That in Appeal of Money taken Felonice, if the Defendant be convicted, Restitution shall be awarded, notwithstanding the Property be not known. Br. Restitution, pl. 22. cites 7 E. 6. Agreed in B. R. and C. B.—S. P. Tho' it cannot be known, yet *In Odium Spoliatoris*, and because in Presumption of Law the Felon had no Money but that which he stole, the Appellant shall have Restitution. And the like upon an Indictment. Jenk. 207. pl. 39.

i. **N**OTE, that 20 d. was taken in the Purse of a Felon, who had stole 16 s. Fairfax J. said, that one Penny cannot be known from another, which Huffle J. did not deny; nor did he deny, but that Property in Money cannot be known; so it seems, that a Man shall not have Restitution of Money out of the Hands of the Sheriff; But Brook says, *tamen quære*; For it is said, that the * Contrary is used in Appeals, if the Defendant be convicted. Br. Property, pl. 34. cites 22 E. 4. 19.

2. If Money be delivered to be *re-delivered* when required; upon Refusal Debt lies. But if *Portugal &c.* Money, that may be known, be delivered to be re-delivered; *Detinue* lies. Owen. 86. Mich. 41 & 42 Eliz. *Bretton v. Barnett.*

3. *Trover* lies not of Money received by Servant for the Master's Use. Cro. El. 661. 746. Pasch. 41. and Hill. 42 Eliz. *Holiday v. Hix.*

But if the Money was in a Bag, it lies. Ibid.—Money delivered by Plaintiff to Defendant to keep, tho' it be not in Bags, Trover lies for it; Per Roll. C. J. Allen 91. *Davis v. Dyos.*

4. *Detinue*

4. *Detinue* lies not for *Money* number'd, nor a *General Action of Trespass De Bonis & Catallis asportatis*; For there is a *Special Action of Trespass* for it in the Register. Jenk. 207. 208. pl. 39.

5. *Trover* and *Conversion* was brought of divers Things and *Inter alia* of 190*l.* in *Pecuniis Numeratis*. Upon *Not Guilty* the Plaintiff had a *Verdict*, and intire Damages in *B. R.* Whereupon Error was brought in *Cam. Scacc.* and assigned, That *Trover* and *Conversion* cannot be of *Money* out of a *Bag*; But all the *Justices* and *Barons* agreed, that it well lies; For tho' it was alleg'd, that *Money lost cannot be known*, and so whether it was the Plaintiff's *Money* whereof the *Trover* and *Conversion* was as the *Action* charges, yet the Court said, that it being found by a *Jury*, that he converted the Plaintiff's *Money*; (For the *losing* is but a *Surmise*, and not material, because the Defendant might take it in the Presence of the Plaintiff or any other who might give sufficient Evidence; and tho' he took it as a *Trespassor*, yet the Plaintiff may charge him in an *Action* upon the Case in a *Trover*, if he will) the Plaintiff had good Cause of *Action*, and so Judgment was affirmed; And they said, that this *Action* lies of *Money* out of a *Bag*, as of *Corn* which cannot be known. Cro. C. 89. M ch. 3 Car. *Kinaston v. Moor*.

It seems, it is admitted, that a Man may have Property in *Money* out of his *Purse*, *Bag* or *Chest*. Br. Property, pl. 7. cites 34 H. 6. 10.

(C) Pleadings and Judgment.

See Debt(U)

1. A. Brought Debt against B. and declared upon divers Contracts, viz. that he had sold to B. such Merchandizes for so many Portagues, and such other for so many Ducats, which in the whole amounted to 700*l.* Sterling, which Sum he demanded in Sterling Money, and not in Portagues and Ducats according to the Contract; B. demurred upon the Declaration, and the Plaintiff had Judgment; For it is in his Election to demand his Debt in which of those Coins he pleased, either in the proper Coin of the Contract, or of Sterling, viz. current Money, and upon Error brought in the Exchequer Chamber the Judgment of B. R. was affirmed. Le. 41. pl. 52. Mich. 28 & 29 Eliz. *Willhalge v. Davidge*.

Cro. E. 536. in Case of *Bagshaw v. Playn* Arg. cites Hill. 32 Eliz. Rot. 637. between *Davidgs and Wythals* where Debt was brought for 20*l.* and de-

clared upon Sale of certain *Pilchards* for 22*l.* *Portugalix*, quæ attingunt ad *Valentiam* 20*l.* *legalis Moneta Angliæ*; and upon a *Nihil dicit* had Judgment to recover the 20*l.*—The Case of *Bagshaw v. Playn* was thus, viz. The Plaintiff declared against the Defendant as *Executor* to *J. S.* in *Debt* upon an *Obligation*, and demanded 47*l.* *Moneta Flandrix attingen. ad Valentiam* 40*l.* the Defendant pleaded *Plene administravit* and found against him and Judgment thereupon, *Quod recuperet Debitum prædictum*. It was assigned for Error, that it was not inquired by the *Jury* upon taking the *Verdict*, nor by *Writ* to inquire, of the Value of the Money, and to give Judgment accordingly; to which it was answered, that it was well enough, and the Value shall be intended to be as in the Declaration, and to that Purpose cited a Precedent in the Book of Entries fol. 157. and the said Case of *Davidgs and Wythals*; but after much Argument and Debate all the *Justices* and *Barons* here held it to be Error; For the Value of *Flemish Money* is not known to us here, any more than the Value of 20 Quarters of *Wheat* &c. whereof the Value is to be inquired, and to that Purpose cited 11 H. 7. 5. and 9 E. 4. 49. which is the Reason that the Plaintiff in his Declaration ought to express the Value thereof; but of current Money here, the Value whereof is known, it needeth not, and therefore the Judgment here ought to have been *Quod recuperet* the 47*l.* *Flemish Money* and a *Writ* to have been awarded to inquire of the Value thereof, and therefore as it is given, it is erroneous and for that Reason was reversed. Cro. E. 536. Mich. 38 & 39 Eliz. in *Cam. Scacc. Bagshaw v. Playn*.—The Plaintiff's affirming that the *Flemish Money* amounted to 40*l.* is no *Warrant* for the Court to adjudge upon it without finding the Value by the *Jury*. Mo. 704. Mich. 37 & 38 Eliz. in *Cam. Scacc. Plaine v. Bagshaw*.—But where Debt was brought for 39*l.* and the Count was of *Goods* sold for 60*l.* *Flemish* which amount to 39*l.* *English* to be paid on Request, and that the Defendant, tho' often requested had not paid the 39*l.* and a *Verdict* was for the Plaintiff, it was moved in Arrest of Judgment, that the Plaintiff ought to have demanded the Sum according to the Contract which was 60*l.* *Flemish* and to have shewn that it amounted to 39*l.* *English*; but per tot. Cur. non allocatur; For the Debt ought to be demanded by a Name known, and the Judges are not apprised of *Flemish Money*; besides when the Plaintiff has his Judgment, he cannot have Execution by such Name; For the Sheriff cannot know how to levy the Money in *Flemish*, and likewise it is now made good by the *Verdict* which has found the Debt demanded, viz. 39*l.* but if the Contract had been for so many Ounces of *Flemish Money* or for a Mass of *Silver* or *Gold*, there it need not be demanded by the Name of any certain Sum, because it is no Coin, nor is it usual in Trade, or Merchandize, but in such Case the Plaintiff should have *Writ* of *Detinue* and thereby recover the Thing, or the Value. Yelv. 80. Mich. 3 Jac. B. R. *Rastell v. Draper*—S C. and in much the same Words. Brownl. 90—Mo. 775. S C—S. C. Cro. J. 88. and tho' the Case of *Bagshaw v. Playn* was urged, yet the Court gave Judgment for the Plaintiff;

For they held no Difference between an Action brought by original Writ and by Bill; but in both the Plaintiff shall demand the Sum according to the English Money, and if he demands it otherwise than it is in Truth, the Defendant may therein plead in Abatement, and so help himself. And the Verdict having found that he owed so much as Plaintiff demanded, there ought not to be any further Inquiry of the Value; wherefore it was adjudged for the Plaintiff. Cro. J. 88. Draper v Rastall. — Noy. 13. S. C.

2. Money may be granted by the Name of *Bona*, but a Declaration for Money must be *Pro pecuniis Numeratis*. 2 Show. 133. Mich. 32 Car. 2. B. R. Anon.

Where the Declaration was of *Centum Nummos aureos Anglice Guineas* Holt Ch. J. said that this was very uncertain; but had it been *Centum Pecias Auri* (Vocat. *Guineas*) it had been well enough. 5 Mod. 7. Mich. 6 W. & M. in Case of St. Leiger v. Pope.

3. In Case upon four several Promises there was a Verdict for the Plaintiff, and intire Damages; it was moved in Arrest of Judgment, that *one of the Promises was ill laid*, viz. That *whereas the Defendant was indebted to him in 13l. 10s. for 9 Guineas, he promised to pay &c. and says not 9 Guineas ad valorem &c.* as he ought, the Value being not ascertained by Proclamation; And per Holt Ch. J. 1st. Any Piece of Money coined at the Mint is of Value as it bears a Proportion to other current Money, and that without Proclamation; the Unit was the old Piece, which was 20s. in King James the first Time, the Unit was by Proclamation raised 16d. which was the Reason and Occasion of the Coin of Guineas, and of their being 16d. short of the Unit. 2dly. There are Guineas of 40s. apiece and so we will intend these were, and that the Plaintiff was satisfied the rest. 3dly. That it was not necessary to set forth the Number of the Guineas; For in an *Indebitatus Assumpsit* the Consideration is only set forth to shew it was not a Debt by Bond, &c. 2 Salk. 446. Mich. 8 W. 3. B. R. Dixon v. Willoughs.

For more of Money in General, see *Bringing Money into Court, Land, Prerogative*, and other proper Titles.

(A) Monsters.

See Descent.

1. **A** Monster shewn for Money is a Misdemeanor. 2 Chan. Cases 110. Trin. 34 Car. 2. Harring v. Walrond.
It was a Child that had 4 Legs and 4 Arms and 2 Heads and but one Belly, where the 2 Bodies were conjoined; the Child died, and was embalmed to be kept for shew, but was ordered by Lord Chancellor to be buried in a Week. Ibid.

Mortdancestor.

(A) Statutes.

1. **M**agna Charta 9 H. 3. cap. 12. Assises of Novel Disseisin and Mortdancestor shall be taken in their proper Shires.
This Act is but a Declaration of the Common Law. 2 Inst. 134.
If the Lord have the Ward of the Heir of his Tenant, and when he cometh of full Age, the Guardian will not suffer him to enter into the Land, the Heir shall have an Assise of Mortdancestor against the Guardian, by this Statute. F. N. B. 196 (F)

2. Marlbridge 52 H. 3. cap. 16. If the Lord will not render unto the Heir his Land (when he comes to Age) without Plea, the Heir shall recover his Land by Assise of Mortdancestor, together with all his Damages.

If the Heir at his Ancestor's Death be at full Age, and then seised of the Inheritance, the Lord shall not oust him, nor meddle with any thing there, but shall only take simple Seisin thereof, that he may be known to be Lord; and if the Lord shall then put him out, whereby he is driven to his Writ of Mortdancestor or Cousinage, he shall recover his Damages as in a Writ of Novel Disseisin.

The King shall have Primer Seisin of Lands holden in chief, as in Times past; neither shall the Heir, or any other intrude into the Inheritance before he have received it out of the King's Hands as formerly hath been used.

This Statute is to be understood of Lands accustomed to be in the King's Hands by Reason of Knight-Service, Serjeanty, or Right of Patronage.

3. Stat. of Gloucester 6 E. 1. cap. 6. If * one die having † many Heirs, ‡ of whom one is Son or Daughter, || Brother or Sister, Nephew or Niece and the other be a farther Degree off, all the Heirs shall ** from henceforth †† recover by a Writ of Mortdancestor.

This Act was made in Affirmance of the Common Law. 2 Inst. 307. cites

Bract. lib. 4. fol. 254. 283. Britt. 181. b. and Fleta lib. 5. cap. 2. — And as a further Proof thereof Lord Coke lays, that this Act extends to dying seised after the Statute, and yet the like joining shall be in the Writ of Mortdancestor, Aiel, and Besaiel of dying seised before the Statute.

* One Right must descend from one Ancestor, or otherwise the Case is not within this Statute, [as] if two Coparceners die seised, and a Stranger abates, the Aunt and the Niece shall not join in a Writ of Mortdancestor, but shall have several Writs [viz.] the one shall have a Mortdancestor and the other a Writ of Aiel. 2 Inst. 308. — So if two Coparceners are disseised and one has Issue and dies, the Aunt and the Niece shall not join; For they have several Rights, and not one only, and therefore they must have several Actions; but when they have recovered they shall hold in Coparcenary. 2 Inst. 308.

† The Words (many, or divers Heirs) extend either to Heirs Gavelkind by the Custom, or Heirs, Female Coparceners by the Common Law. 2 Inst. 308.

‡ It likewise appears by these Words [of whom one is a Son or Daughter &c.] that this Act extends as well to Heirs by the Custom, as to those by the Common Law; if the Aunt and the Niece bring a Mortdancestor of the dying seised of the Father, the Aunt is summoned and severed, the Niece shall proceed and recover the Moiety (tho' she alone could never bring a Writ of Mortdancestor of the dying seised of the Grandfather;) because the Writ rightly and duly commenced; and when the Niece has recovered, the Aunt may enter and enjoy that Moiety with her. 2 Inst. 308.

|| These Words (Brother or Sister, Nephew or Niece) imply the Uncle and Aunt, they being Relatives, and then here are all the Persons that may have an Assise of Mortdancestor; and in Case there is one that may have an Assise of Mortdancestor, it matters not how remote the other is. 2 Inst. 308.

** By the Words (from henceforth) this Law extends to the Future and not to the Time past, and yet being made in affirmance of the Common Law, the same Law that guides in Futuro, rules also in Præterito. 2 Inst. 308.

†† These Words (recover by Writ of Mortdancestor) tho' General, have a special Intendment; For as to the Damages the Aunt alone shall recover Damages till the Death of her Husband, and both of them Damages from the Death of her Sister according to the Course of the Common Law. 2 Inst. 308, 309.

4. West. 2. 13 E. 1. cap. 20. Whereas that Justices in a Plea of Mortdancestor have used to admit the Answer of the Tenant, That the Plaintiff is not next Heir of the same * Ancestor, by whose Death he demanded the Land, and is ready to enquire the same by Assise; it is agreed, † that in Writs of Cousinage, Aiel and Besail, ‡ which be of the same Nature, his answer shall be admitted and inquired, || and according to the same Inquisition, they shall proceed to Judgment.

The Mistake chief before this Statute was, that in the Writs of Aiel, Besaiel and Cousinage, the Tenant was not admitted

to plead, That the Demandant was not Heir to him, upon whose dying seised the Writ was conceived, but he must shew who was his next Heir, which now by this Act he need not to do, but yet he may plead the like Plea as he might have done at the Common Law as he did in 6 E. 3. 2 Inst. 400.

* This Antecessor in a Writ of Mortdancestor is intended of the Father, Mother, Brother, Sister, Uncle, Aunt, Nephew, or Niece of the Demandant, and of no other. Ibid.

† But in the Writs of Aiel, Besaiel, and Cousinage, the Trial of this Issue is peremptory, and thereupon the Court shall proceed to Judgment as here is expressed. Ibid.

‡ The Difference between the Assise of Mortdancestor, and these three Præcipes appeareth by that which hath been said, and yet in some respect the Words of this Act (that they be ejusdem naturæ) are true. Ibid. — For as the Writ of Mortdancestor saith, si O. pater P. cujus hæres ipse est, fuit seiscitus in dominico suo ut de feodo de 20 acris terræ cum pertinen' in S. die quo obiit; so the Words of the Writ of Aiel are, De quibus N. avus prædict. P. cujus hæres ipse est, fuit seiscitus in Dominico suo ut de Feodo die quo obiit &c. Ibid.

|| Herein is the Difference between this Plea of Mordaunc' and the other Writs; for in the Assise of Mordaunc' the rest of the Points of the Writ shall be enquired. Ibid. — See (B)

(B) *Points of the Writ*; and inquired in what Cafes.

1. **I**N Mortdancestor the *Tenant* vouch'd one who entered into the *Warranty*, and said that the *Ancestor* did not die seised &c. and notwithstanding this the *Affise* was charged upon all the *Points of the Writ*; quod nota. Mortdancestor, pl. 20. cites 9 Aff. 3.

But where they were at Issue upon certain Points out of the Writ which passed for the Points. Ibid.

2. In Mortdancestor, the *Tenant* said that the *Ancestor of the Demandant* did not die seised, *Priest*, and the others e contra; and the *Affise* was taken, and not charged upon this Point but upon all the *Points of the Writ*. Br. Mortdancestor, pl. 21. cites 9 Aff. 14. and Itin. Derby accordingly.

Demandant, the *Affise* was taken in Right of Damages without inquiring of any other

3. Mortdancestor against several who pleaded severally, and one pleaded several *Tenancy*, and yet there the *Points of the Writ* were inquired as well as the *Plea to the Writ*. Br. Mortdancestor, pl. 35. cites 29 Aff. 10.

In Mortdancestor the Tenant denied the Point of the dying seised of the Ancestor of the Demandant only, and this was found for the Demandant; and the Affise was further charged of the other 2 Points and one, viz.

4. In Mortdancestor against several *Tenants* by several *Summons* the one pleaded *Release with Warranty of another Ancestor in Bar*, which the *Demandant* deny'd, and the other pleaded to the *Affise*, and by the *Affise* it was found Not the *Deed of the Ancestor*, and inquired over of all the *Points of the Affise*, which found that the *Ancestor* did not die seised of any *Parcel*, and the Damages found of the *Parcel* whereof the *Release* is pleaded to 40s. and Judgment of the *Parcel* in the *Release* given for the *Demandant*, because the *Release* was found false notwithstanding the *Verdict* of the *Points of the Writ*; For by all the *Justices* as to this *Parcel* of which *Release* was pleaded they need not to inquire of the *Points of the Writ*; otherwise it is upon *Counterplea of Voucher*, or *Plea in Abatement of the Writ*; For if those Matters are found against the *Tenant*, yet the *Points of the Writ* shall be inquir'd; note the *Diversity*. Br. Mortdancestor, pl. 46. cites 39. Aff. 13.

that *Demandant* was next *Heir* was found for him; but the other against him, viz. that the *Ancestor* died 50 Years before the *Purchase of the Writ*. Dyer said, he understood it for a *Principle* in pleading in a *Mortdancestor*, that where the *Tenant* in the *Land*, or the *Tenant* by *Warranty* pleads a *Bar* of the *Affise* of *Mortdancestor*, as a *Matter of Record*, *Release*, or *Collateral Warranty*, or the like, which is out of the three *Points of the Affise*, there if it passes with the *Demandant* it is *Peremptory* to the *Tenant*; but where it is pleaded in *Abatement of the Writ*, or *Voucher*, and the *Voucher* counter-pleaded by the *Demandant* and those *Pleas* found for the *Demandant*, yet all the *Points of the Writ* must be inquired and found for the *Demandant*, or otherwise he shall not recover; and he cited M. 2 E. 3. and M. 9 E. 3. and M. 10 H. 3. and 39 Aff. by good Advise-ment And he said, that here in the principal Case no *Plea in Bar* was pleaded, and but one of the *Points* only traversed, and this is no denial &c. of the other two; but said that by H. 33. E. 3. in Fitz. Mortdancestor, and by the Opinion of Fitzh. Pasch. 37 H. 8. fol. 14. when one of the *Points* is traversed the other shall be held as not denied; For it is a *Bar* as Fitzh. held it, which Dyer said is not true, because he says not *Quod Affisa non &c.* the which is the *Form of the Bar in Affise*, and cited 8 Aff. 17. in Mortdancestor of a *Rent*, where the pleading was *Hors de son Fee*, and found against him, and Judgment there given without inquiring of the *Points of the Writ*; but that 9 Aff. P. 3. where the *Tenant* said, that the *Ancestor* did not die seised, yet the *Affise* shall be charged upon all the *Points of the Writ*; and he cited Bracton. lib. 4. cap. 9. *Si Petens defecerit in uno articulo cadit Affisa Mortdancest. ac si in omnibus defecerit.* D. 310. b. 311. a. pl. 82. Pasch. 14 Eliz. *Repingale v. Cooke*.—It is to be understood that when the *Tenant* pleaded in *Bar* of the *Affise*, as *Matter of Record*, or a *Release*, or *Warranty*, or any other *Bar* that is out of the said three *Points of the Affise*. there the *Tenant* beginneth his *Plea* with *Affisa non &c.* and therefore the *Trial* of that *Issue* is *peremptory*, and the *Affise* shall never inquire of any of the *Points of the Writ*; but when the *Tenant* saith, that he is ready to hear the *Recognizance* of the *Affise*, he cannot say *Affisa non*; for that should be repugnant to his own saying, and if he say that he is ready to hear the *Recognizance* of the *Affise* of one of the *Points of the Writ*, or traverse one of the *Points of the Writ*, yet the *Court* ex officio ought to inquire of them all; and so it is if the *Tenant* plead in *Abatement of the Writ*, or vouch, and the *Demandant* counter plead the *Voucher*, and these *Pleas* be tried, or adjudged for the *Demandant*, yet the *Point of the Writ* shall be inquired, and ought to be found for the *Demandant*, or else he shall not recover. 2 Inst. 399.

And yet it was said there, that in 9 E. 3. the

5. If the *Tenant* pleads *bar Absque hoc* that the *Father of the Demandant* died seised, and this be found against him, the *Points of the Writ* shall not be inquired, because he has pleaded in *Bar*; For upon *Bar* they shall not be inquired,

inquired; but if he pleads to the Writ they shall be inquired clearly; per Fitzherbert J. Br. Mortdancerfor, pl. 1. cites 27 H. 8. 12. Tenant pleaded that the Ancestor of the Demandant did not die seised, and the Points of the Writ were inquired. Ibid — Brooke makes a *Quare* if there be any Difference where he says that he did not die seised, and where he pleads bar and traverses that he did not die seised &c. but says see else where that the dying seised is not material, but if he was seised the Day of his Death, and so are the Words of the Writ. Ibid.

6. The Points of the Writ to be enquired are according to the Words of the Writ, 1. Si W. Pater præd' A. vel Mater, Soror, Frater, Avunculus vel Amita fuit sei sit. in Dominico suo ut de Feod' de uno Mesuagio & una Virgata terræ cum pertin' in N. die quo obiit. Et si obiit post Coronation' Dom' H. Regis, [or according to 2 Inst. 399. Et si obiit infra 50 Annos jam ultimo elapsos ante Teste Brevis] 3. Et si Propinquior Hæres ejus sit. F. N. B. 195. (E) These three Points in this Assise of Mortdancerfor shall be inquired of by the Recognitors of the Assise, albeit the

Tenant make Default, and no Issue be joined thereupon; but it is not so in the Writ of Aiel, Besaïel, or Cousinage, for they are no Assises but Writs of Præcipe quod reddat, and therefore if Default be made therein, Judgment shall be given by Default, as in other Writs of Præcipe quod reddat, without inquiry of any Point of the Writ; the three Points of the Assise are Hypothetical, the Demandant affirming nothing, and the Words of the other three Writs here mentioned are Catagorical; Præcipe A. quod juste, &c. reddat B. unum mesuagium &c. de quo W. Avus prædict. B. cujus hæres ipse est, fuit seifitus in Dominico suo ut de feodo die quo obiit; now, quod petens non est propinquior hæres, is a Denial of one of the Points of the Writ of Mordancerfor. 2 Inst. 399.

7. One Point of the Writ is to inquire, *whether the Demandant be Propinquior Hæres* to his Father. Pl. C. 239. b. in Case of Willon v. Lord Barkley.

(C) *Lies. In what Cases, and of what.*

1. **I**N Assise it was said, that Mortdancerfor was brought of the Office of Bailiff of the Forest of P. Br. Mortdancerfor, pl. 17. cites 7 Aff. 12.

2. Mortdancerfor was brought of a *Bailywick*. Br. Mortdancerfor; pl. 23. cites 10 Aff. 11.

3. Writ of Mortdancerfor was of *two Parts of the Moiety of a Mill*, and the Writ awarded good, the Mill being at the Time not sever'd but remaining per my & per Tout undivided. 11 Aff. 20.

4. Mortdancerfor was brought of a *Rent-charge*. Br. Mortdancerfor, pl. 53. cites 11 Aff. 29.

5. *A Man may have Assise of Mortdancerfor in Right of Damages*. Br. Mortdancerfor, pl. 36. cites 29 Aff. 11.

6. Mortdancerfor against J. who *vouch'd to Warranty* [B], who *at the Summons ad Warrantizandum was essoign'd*, and *at the Day was essoign'd de Servitio Regis*, and *at the Day failed of his Warranty of Effoin*, and *at the same Day the Tenant was essoign'd de Servitio Regis*, and the Demandant pray'd the Assise by Default of the Vouchee for failure of Warranty, and could not have it; for none is Party to the Assise but the Tenant, till the Vouchee had warranted to the Tenant, and the Demandant shall not have the Assise by Default where the Tenant is essoign'd; by which the Assise was adjudged and adjourned. Br. Mortdancerfor, pl. 4. cites 45 E. 3. 24.

7. In Dower it was said, that if the *Guardian loses in Dower as Tenant*, or as *Vouchee where the Heir is vouch'd in his Ward*, and she recovers where she has not Title there the Infant shall have Mortdancerfor at his full Age; and this seems to be good Reason, because the Infant is not Party to the Recovery, and faint Recovery shall not void Meſne Estates. Br. Mortdancerfor, pl. 5. cites 46 E. 3. 19, 20.

In such Case the Infant might have had such Writ at his full Age at the Common Law, notwithstanding the Possession of the Guardian. 2 Inst. 154.

Br. Scire facias, pl. 77. cites S. C.

8. *Scire facias upon a Fine levied sur Conufance de Droit come ceo &c. to the Baron and Feme, and to the Heirs of the Baron who died; Per Hill the Heir of the Baron shall have Mortdancestor clearly, and Thirn and Culpeper agreed to it, because such Nature of Fine is executed; but it did not appear if the Feme surviv'd or not; but per Thirn and Culpeper, all is one. Br. Mortdancestor, pl. 7. cites 11 H. 4. 55.*

9. *It was said that where a Man leases Land for Life rendring Rent and dies, the Heir shall not have Mortdancestor of the Rent; For the Ancestor had not Fee Simple in it; Contra upon Gift in Tail and Rent reserved. Br. Mortdancestor, pl. 9. cites 7 H. 6. 3.*

S. P. Tho' the Statute of Gloucester, 6 E. 1. cap. 2. mentions only Father, Cousin, Grandfather or Great-Grandfather.

10. *The Writ of Mortdancestor lieth where my Father or Mother, Brother or Sister, or Uncle, or Aunt, or Nephew, or Neece dieth seised of any Lands, Tenements or Rents, or of a Corody or other Rents, as Hens or Capons issuing out of other Lands of an Estate of Fee-Simple: Now if a Stranger after their Deaths abate in that Land, Rent or Profits, I who am his Heir shall have this Writ of Assise of Mortdancestor. F. N. B. 195. (C).*

For all are in equal Mischief, and therefore within the same Remedy. 2 Inst. 291.

11. *And if the Ancestor were seised the Day that he died, of any Lands or Rents, or other like Things of an Estate in Fee-Simple, altho' that a Stranger entreth and disseiseth him of that Land or Tenements the Day that he dieth, so that he dieth not seised of the same Land or Rents &c. yet I who am his Heir shall have that Assise of Mortdancestor, because the Writ doth not suppose that any Ancestor died seised, but the Writ saith, Parati Sacramento Recogn. si W. pater &c. fuit seistus in Domjnico suo ut de feodo Die quo obiit &c. and the same is sufficient, altho' he dieth not seised; and the Form of the Writ is such. F. N. B. 195. (D)*

12. *If one has a Corody to him and his Heirs, and dies seised, or was seised the Day of his Death, his Heir shall have Assise of Mortdancestor, if it be taken from him. F. N. B. 196. (B)*

(C. 2) Lies. Of what Seisin.

1. **I**F there are Grandfather, Father and Son, and the Grandfather dies seised, and after the Father dies, and the Son endows the Grandmother, and she dies, and a Stranger abates, the Son shall not have Mortdancestor of the Seisin of his Father; For his Seisin was defeated by the Endowment of the Grandmother, and she is in by the Grandfather; per Wiche, which Kirton, Finch and Mombray deny'd; and yet Finch and Mombray granted that by the Endowment of the Grandmother every Mesne Estate was defeated, and therefore the Law is with Wiche, as it seems. Br. Mortdancestor, pl. 3. cites 45 E. 3. 13.

2. *Where the Issue enters and endows his Mother and after dies without Issue, and after the Tenant in Dower dies, and a Stranger abates, the Uncle of the Issue shall have Mortdancestor upon the Seisin of the Brother who was Father of the Issue, and not upon the Possession of the Issue; For by the Endowment the Seisin of the Issue was defeated; per Culpeper; quod nemo negavit; and so see the last Seisin avoided; quod nota bene. Br. Mortdancestor, pl. 6. cites 11 H. 4. 11.*

3. *If one dies in Pilgrimage beyond Sea, his Heir shall have a Writ of Mortdancestor; and in such Writ it sufficeth if he were seised the Day he went out of England, tho' it was not the Day of his Death. F. N. B. 196. (A)*

4. *If the Father enters into Religion and is profess'd, the Son shall have a Mortdancestor, if a Stranger abate in the Land. F. N. B. 196. (A).*

5. If

5. If a Man be *seised in Tail*, the *Remainder to his right Heirs*, and afterwards he dies *seised* without Issue of his Body, and a Stranger abateth, it is a Question if the Heir shall have an Assise of Mortdancestor. And says An. 21 E. 3. Itin. Suff. M. 5 H. 4. the Opinion of some was, That if the Remainder be to his right Heirs, that then he shall not have an Assise of Mortdancestor; but if a Gift in Tail be made unto one, the *Remainder to him and his right Heirs*, that then he shall have an Assise of Mortdancestor, because he hath the Remainder in Fee to him and his Heirs; but it seemeth he shall not have an Assise of Mortdancestor in the one Case, nor in the other; For the Words of the Writ are, Si. W. Pater &c. fuit *seisitus* Die quo obiit in Dominico suo ut de Feodo; and here he was not; for he was *seised* in Demesne, ut de Feodo taliato, and not in Demesne as of Fee; and therefore the Jury cannot find that he was *seised* in his Demesne as of Fee; For of the Demesne he was *seised* in Tail. Quære of that. F. N. B. 196. (K).

(D) Lies. *Against whom, and by whom.*

1. **W**HERE a Man holds two Acres of his Lord for certain Rent, and gives the one in Tail, yet he remains Tenant to the Lord of both Acres, and the Writ well brought against him without naming the Tenant in Tail. Br. Mortdancestor, pl. 19. cites 8 Ass. 35.

2. Assise; if the Donee in Tail has Issue, he may alien, and if he dies *seised* his Heir shall have Mortdancestor; For this is Fee Simple Conditional; per Green; But per Husley, the Heir Collateral shall not have Mortdancestor in this Case. Br. Mortdancestor, pl. 31. cites 18 Ass. 5.

Br. Tail & Dones, pl. 19. cites 5 C.

3. None is Abator, but he who first enters by Tort upon a Descent; but yet Assise of Mortdancestor lies *against the Heir or Feoffee of the Abator, or against the 20th Heir*. Br. Mortdancestor, pl. 61. cites 5 H. 7. 6. per Keble.

4. If two purchase jointly to them, and to the Heirs of the one, and he who has Fee dies, and after the other dies, the Heir of the first shall not have Mortdancestor; and the Reason seems to be *inasmuch as the Fee was not executed in Possession by Reason of the Survivor of the other*; and in Effect, it is now only a Descent of a Reversion, and the Feme of him who had Fee shall not have Dower; and yet he might have forfeited the Fee Simple, or given it by Feoffment, and joined the Mife in Writ of Right; For he in Reversion and the Tenant for Life may do it; Quære if he may release it. Br. Mortdancestor, pl. 59. cites 29 H. 8.

5. If a Man goes beyond Sea in Pilgrimage, and dies there, his Heir shall have a Writ of Mortdancestor. F. N. B. 195, 196. (H).

But if the Writ be in Common there (c).

Form, it shall abate. F. N. B. 195, 196. (H.) in the Notes

6. And H. 13 H. 3. Itin. Suff. The *youngest Brother* had a Mortdancestor against a Stranger, and shall recover where the *eldest* went beyond Sea, although he were not dead, because 18. Years passed since the eldest went beyond the Seas. Ibid.

And H 13 E. 2. It was adjudged accordingly, where the younger Brother

recovered in Assise of Mortdancestor, where the eldest went beyond the Seas, and was alive. Ibid. — If my younger Brother enters after the Death of my Father, I shall (not) have a Mortdancestor against him, nor any other Action but Entry; and if he disturb me, I may have an Assise. F. N. B. 196. (L) in the Notes there. (a).

7. The Aunt and Niece shall join in Assise of Mortdancestor, and that is by the Statute of Gloucester. cap. 6. F. N. B. 195. (H).

8. A Mortdancestor doth not lie for Lands devisable by Will, because the Title may fall to another, who is not Heir, by the Will of the Ancestor

tor

tor &c. and yet the Writ is true, that he was seised the Day he died; quod vide 23 E. 3. Lib. Ass. F. N. B. 196. (I).

And so in
Gavelkind,
one Brother
shall not
have a Mort-
dancestor a-
gainst the other
Sister against
the other &c. Ibid.

9. And if the Ancestor dieth seised, and hath two *Sisters* his Heirs, one of them shall not have an Assise of Mortdancestor against the other; for this Writ lieth against Strangers, and not against Privies in Blood. F. N. B. 196. (L).

10. By the Purview of the Statute of *West. 2. 13 E. 1. cap. 4.* If the *Wife*, having no Right to be endowed, brings a Writ of *Dower against the Guardian* in Chivalry, and by Favour the Guardian in Chivalry do yield Dower, or make Default or plead faintly, by Means whereof the *Wife* recovereth her Dower in Prejudice of the Heir, the *Heir* after he cometh to his full Age shall have a *Writ of Mortdancestor* against the *Wife*, as he might have against the other Deforceour. 2 Inst. 352.

11. If *A.* had *Issue B. a Son*, and his *Feme* died, and after he took another *Wife*, and *Land* was given to *A.* and his *second Wife*, and the *Heirs* of their two *Bodies* begotten, and they had *Issue C. another Son*, and the *Feme* died, and then *A.* died, and a *Stranger* abated; In such Case, *C.* the Son before the Statute *De Donis* could not have had Mortdancestor. For one Point of the Writ is to enquire if the Demandant be Propinquier Hæres to his Father, and this *C.* is not, but *B.* his eldest Brother is next Heir, and so should have had Formedon in Descender, which was a Writ founded upon his Case. Pl. C. 239. b.

12. If *A.* be *Tenant for Life*, Remainder to *B.* for Years, Remainder to *A.* in Fee, who dies seised, and a Stranger abates, the Heir shall have Mortdancestor; per Powel J. Lutw. 733. Trin. 8 W. 3. in Case of Bates v. Bates.

(E) Lies. In what County or Place.

* See (A)
pl. 1.

1. **M**ortdancestor was brought in *C. B.* of Land in another County; Laicon demanded Judgment if the Court will take Conscience; For the Statute of * *Magna Charta cap. 12.* is, That Assise shall not be taken but in its County, and the Statute speaks as well of Assise of Novel Disseisin as of Assise of Mortdancestor; quod nota; But per Copley Prothonotary, a Man may bring this Action & Juris utrum in Bank if he will, or in the proper County at his Election. But the Law is contrary as it seems; For the Statute is in the Negative. And after, per Cur. if the Statute be in the Negative, the Bank shall not hold Plea; and see the Statute; For it is in the Negative. Br. Mortdancestor, pl. 22. cites 38 H. 6. 18.—And See S. P. 39 H. 6. 19. Where it was awarded per Prisor, that the Defendant go sine Die, nota. Ibid.

F. N. B. 177.
(B) (C)

2. But if Assise of Mortdancestor be brought in the same County where *C. B.* sits it shall be returned in the same Bank. Br. Mortdancestor, pl. 60. cites the Register, Fol. 196.

F. N. B. 177.
(B) (C)

3. And if *B. R.* sits in another County than where *C. B.* sits, then the Assise of Mortdancestor of Land in this County where *B. R.* sits shall be * returned in the same *B. R.* Ibid.

* Orig. (re-
cov').

F. N. B. 177.
(B) (C)
says, that
Mortdan-

4. And so see if any of the Banks are in the County where the Mortdancestor is to be brought, this shall be returned in the Bank; but if both the Banks are in one and the same County, then it shall be brought in *C. B.* For this

this is a common Plea as it ſeems, and ſo of Aſſiſe of Novel Diſſeiſin. Ibid.

ceſtor ſhall be brought in like Man

ner as the Aſſiſe of Novel Diſſeiſin ſhall be before the Juſtices of C. B. or B. R. and in (B) ſays, that if both the Benches are in one Coun ty, the Uſage is to bring the Aſſiſe of Novel Diſſeiſin in the C. B. or B. R. at Pleaſure, but that, he thinks, is againſt the Rule in the Register.

(F) Writ. And Proceedings.

1. **M**ortdanceſtor againſt ſeveral by ſeveral Summons's, and all vouch- ed to Warrant ſeverally, and all the Vouchers granted for Term of Life, which was counter-pleaded That none &c. by the Statute; and the Demandant prayed that it be tried by the Aſſiſe, which the Court denied; For they ſaid, that they would not take the Aſſiſe by Parcels notwithstanding the ſeveral Summons's. Br. Mortdanceſtor, pl. 22. cites 10 Aſſ. pl. 3. and pl. 17. accordingly, but contra in Itinere North.

2. In Mortdanceſtor the Writ was of 3 Meſuages, 40 Acres of Land, 10 Acres of Meadow, 10 s. Rent, and of two parts of a Meſuage, and of two parts of a Moiety of a Mill &c. And in the Clause of, et Interim &c. the Writ was Meſuag' Pred' Terras Prat' Molend'; But neither the two parts of the Meſuage, nor the two parts of the Moiety of the Mill were put in View; & non allocatur; For the Form of the Chancery is to put the whole in View notwithstanding that Parcel only be in Demand; and after it was challenged becauſe he demanded two parts of the Moiety of the Mill, which is the third part of the whole, and ſo ſhall be demanded, & non allocatur. Br. Faux. Latin &c. pl. 67. cites 11 Aſſ. 20.

3. Commiſſion to take Aſſiſes extends as well to Mortdanceſtor as other Aſſiſes, and ſo of Aſſociation, and where the one is put without Day the other is likewise, and when the one is put to Re-attachment, the other is put to Re-ſummons; but note, that at this Day the Commiſſions make expreſs Mention of Aſſiſe of Mortdanceſtor. Br. Mortdanceſtor, pl. 55. cites 12 Aſſ. 2.

4. Writ of Mortdanceſtor was Si J. Obiit Scilicet de Octo pedibus terræ in Longitudine & ſex pedibus in Latitudine & duabus partibus unius Meſuagii, & de Medietate duarum partium unius Meſuagii in Villa de D. & interim Meſuagia Terras & Tenementa videant &c. And the Writ was challenged, becauſe it was de Octo pedibus terræ &c. where it ſhould be of a Place containing Octo pedes &c. & non allocatur; And it was challenged, becauſe the Land was in Villa D. and the Viſne was demanded de Villa de D. & non allocatur; For in Villa & de Villa is all one; And it was alſo challenged, becauſe Land was demanded before Meſuage, & non allocatur; For a thing intire ſhall be demanded before a Thing parted; and note, that two Vills oftentimes ſhall be intended one and the ſame Thing, and the reaſon that in the Clause of the View, the Meſuage was before the Land, which was intire, was, becauſe where part of a Meſuage is in Demand, yet the whole Meſuage ſhall be put in View, and a Man cannot have Writ of other Form; Quod Nota bene. Br. Faux. Latin &c. pl. 117. cites 16 E. 3. & F. N. B. tit. Mortdanceſtor.

5. In Mortdanceſtor in Pais by diverſe Summons's the Tenant as to one Summons vouched in the ſame County, which was counterpleaded by the Statute, and to another he prayed Aid, and to the third he vouched foreign, and the Voucher granted; and becauſe Aſſiſe cannot be taken by Parcels all was ad- jorned into Bank, and he who prayed Aid made Default, by which the Aſſiſe was awarded againſt him; and as to him who vouched in a foreign County, the Vouchee warranted him and entered into the Warranty and vouch- ed over, and the ſecond Vouchee came and demanded the Lien, and the other

shewed Deed of his Ancestor, bearing Date where the Tenements lay, and the second Vouchee denied it, and they were at Issue. And per Green, all those Issues shall be tried by the Assise in Pais; But per Shard, Assise shall not be taken by Parcels, and this Issue of the Deed denied is out of the Point of the Assise, and triable by Enquest, and neither the Demandant nor the Tenant are Parties, but the two Vouchees, by which this Inquest shall be first taken and tried here, & concordat in Juris Utrum M. 17 E. 3. contra H. 10. E. 3. where it is said, that Assise of Mortdancerfor and Juris Utrum may and ought to be taken by Parcels, and in such Case H. 9. E. 3. the Assise after such Issue tried was taken of Damages. Br. Mortdancerfor, pl. 30. cites 17 Aff. 9.

6. Mortdancerfor against an Infant, who pleaded [that for] Estoppel which was no Estoppel, and because the Tenant was an Infant, the Assise was awarded at large, and Re-summons awarded as well against the Jury as the Party, and at the Day the Tenant cast Essoign which was quashed by Award, and the Assise remained for Default of Jurors, and at the next Sessions the Justices did not come, by which Re-summons was sued, and the Tenant was essoigned, and this was adjudged and adjourned; For this Re-summons is to revive the Plea, and the other was only Mesne Procefs. Br. Mortdancerfor, pl. 41. cites 30 Aff. 46. 51.

7. In Assise the Writ was Post primam traffretationem where it should be transfretationem scil' (f) for (ns) & Nomina eorum inbrevari for inbrevari scil' (n) for (m) and passed for the Plaintiff, and those Matters alleged in Arrest of Judgment, and yet it appeared by the Title of the Plaintiff, that this was done in the time of R. II. so that it appears that it was after the Limitation, and yet the Plaintiff recovered. Br. Faux. Latin &c. pl. 22. cites 13 H. 4. 17.

8. And per Hank. where those Words in Assise of Mortdancerfor (*Propinquior Heres ejus sit*) are omitted, the Writ shall abate; For it wants Matter. Ibid.

9. But Fretationem suffices without (*trans*) & inbrevari & inbrevari are all one, and therefore well and no Jeofail. Ibid.

But if many Sisters are Demandants, and some are within Age, and some of full Age,

10. If the Heir brings Assise within Age, he shall not find Pledges, and the Writ shall not say, *Si A. fecerit te securum &c. nor Si obiit post Coronationem &c.* because it appears by the Demandant's Age. F. N. B. 195. (H)

and some of full Age, then the Writ shall be in the common Form, as if all were of full Age. F. N. B. 195 (H) — Ibid. in the Notes there (b) cites 13 E. 3. pl. 677. 9 E. 2. Brief, 852.

11. The Order of setting the Parcels in the Writ shall be as in a Writ of Right. F. N. B. 196. (C)

12. A Man shall have a Certistate upon this Writ, and also Writs of Association, & si non omnes, as he shall have in Assise of Novel Disseisin. F. N. B. 196. (D)

13. The Procefs in Mortdancerfor is Summons against the Party, and if he make Default at the Day of the Assise return'd, then the Plaintiff ought to sue a Re-summons; and if he make default again, the Assise shall be taken by his Default. F. N. B. 196. (G)

Where the Tenant vouched a Foreigner in order to remove the Plea,

14. And if a Man vouch in Assise of Mortdancerfor, and at the first Day the Vouchee make Default, then the Re-summons shall issue forth against him. Ibid.

and the Vouchee was returned summoned, and made Default, the * Parol was remanded F. N. B. 196. (G) in the Notes there (a) cites 3 Aff. 10. 28 Aff. 29.

* S. P. And no Re-summons was awarded against the Vouchee, as it should be in the Mortdancerfor against the Tenant himself; Quod Nota. Br Procefs, pl. 92. cites 3 Aff. 10.

The Tenant was essoign'd at the Day, and afterwards made

15. And so if the Tenant or Vouchee at the first Day be essoigned, and afterwards at the Day given by the Essoign, the Tenant or Vouchee make Default, a Re-summons shall be awarded Ibid.

Default, * no Re-ſummons was, but the Jury taken by Default. 10 E. 2. 7. 45 E. 2. 23. 4 H. 6. 23. 18 E. 4. 8. Note, It was a *Common Effoign*, yet ſee † 8 Aff. 13. a Re-ſummons granted, and ſee 22 Aff. 79. F. N. B. 196. (G) in the Notes there (b)

* S. P. For Re-ſummons does not lie but immediately upon the Default at the Summons. Br. Mortdanceſtor, pl. 11. cites 4 H. 6. 23.

† Br. Mortdanceſtor, pl. 18. cites S. C. accordingly. But Brook ſays, Note that the *Effoign* is not any *Appearance*, and ſo Nota Bene.

16. But if the Tenant at the firſt Day be eſſoigned *as in the King's Service*, and afterwards make Default at another Day, the Aſſiſe ſhall be taken by his Default &c. Ibid.

(G) Pleadings.

1. **M**ortdanceſtor was brought of a *Bailywick without ſaying in Dominico ſuo* &c. upon which the Writ was challenged, and alſo that Aſſiſe is not given but by Statute of ſuch a Thing; For it was not accounted Franktenement at Common Law, but it was ſaid there that this is not the Cauſe, and that Nuper Obiit has been ſeen of a *Corody De libero Tenemento*. Br. Mortdanceſtor, pl. 23. cites 10 Aff. 11.

2. Mortdanceſtor was brought of a *Rent-charge*, and the Aſſiſe was taken *without ſhewing thereof any Deed or Specialty*; quod Nota. Br. Mortdanceſtor, pl. 53. cites 11 Aff. 29.

3. Mortdanceſtor of *Meadow and of Rent*; *as to the Meadow the Tenant ſaid that the Demandant himſelf leaſed to him for Term of Life*; this is a good Bar *without ſaying that it was after the Death of the Anceſtor, and without ſhewing Specialty* &c. The Demandant ſaid, *that after the Death of his Anceſtor the Tenant had nothing of his Leaſe*; & non allocatur, *unleſs he confeſs'd the Demiſe, and that his Anceſtor died ſeiſed after*; and *as to the Rent ſaid that Hors de ſon Fee* &c. Judgment, if without ſhewing Title &c. & non allocatur; becauſe the Defendant was Tenant of the Rent and not Tenant of the Land out of which &c. Br. Mortdanceſtor, pl. 29. cites 12 Aff. 38.

4. In Mortdanceſtor the Tenant diſclaimed by Attorney and well; and per Huſſey it is no Plea, * that the Writ bore date before the laſt *ſeſſions* in the County which was not arraign'd; Judgment of the Writ; but Brooke makes a Quære. Br. Mortdanceſtor, pl. 54. cites 12 Aff. 25.

* All the Editions of Brook are (car le br' Port date devant le dar' 25 the 12 Aff.

ſeſſions encount' quel il ne fuit arraigne &c.) but the Year Book is as here, but it is 22 Aff. 25. being another Point, and ſo all the Editions miſ-printed.

5. In Mortdanceſtor the Tenant vouch'd and pray'd that he be ſummon'd in another County, the Demandant counterpleaded the general Counterplea, and the Aſſiſe awarded and found for the Tenant, by which it was awarded that the Voucher ſtand. The Demandant ſaid that the Vouchee has *Aſſets in this County*, and pray'd that he be ſummoned in this County, and could not have it, by Reason of the Iſſue above found againſt him. Br. Mortdanceſtor, pl. 45. cites 36 Aff. 6.

6. In Mortdanceſtor the Tenant ſaid that *F. N. was ſeiſed in Fee, and the Land is devisable* &c. and that he deviſed to the Defendant in Fee and dy'd, and he enter'd; this is a good Plea *without ſhewing the Teſtament*; For this belongs to the Executors; quod nota bene. Br. Mortdanceſtor, pl. 57. cites 40 Aff. 2.

7. In Aſſiſe it was ſaid, that in Mortdanceſtor by an Infant he need not make mention that the Anceſtor died after the Limitation; per Grey; For it appears by the Age of the Infant; Norton ſaid this is true where it is brought upon the *ſeiſin of the Father or Mother*, Contra where it is brought upon the *poſſeſſion of another Anceſtor*; and it was agreed where thoſe Words *Propinquior Heres ejus ſit* are omitted in Aſſiſe of Mortdanceſtor, that the Writ

Writ ſhall abate ; For it wants Matter. Br. Mortdanceſtor, pl. 8. cites cites 12 H. 4. 26. & 13 H. 4. 17.

8. Where an *Abatement* is alleged, the *Entry in the Roll* is no other, but *Quod Preſ' tenens ſe intruſit* ; per Littleton J. *Quod nullus negavit*. Br. Mortdanceſtor, pl. 10. cites 15 E. 4. 22.

(H) *Plea good ; what is ; In Abatement or in Bar.*

1. **A.** And B. brought Mortdanceſtor of the *Seiſin* of E. Uncle to one and Couſin to the other, and was compelled to ſhew *How Uncle and How Couſin* ; and it was pleaded in Bar by the next of Blood, and Baſtardy was alleged e contra ; and it was awarded that Baſtardy tho' it be in the Right, is a good *Plea in Action Poſſeſſory*, as here. Br. Mortdanceſtor, pl. 13. cites 1 Aff. 15. & H. E. 3. accordingly in Writ de Aiel.

2. In Mortdanceſtor laſt *Seiſin* was alleged in the *Demandant* as of *Fee*, and of *Right*, in *Abatement of the Writ*, and it is ſufficient without ſhewing how he came to it, and well ; by which the *Demandant* ſhew'd that it was by *Diſſeiſin* to the *Tenant*, upon which the *Tenant* recovered againſt him in *Aſſiſe*, and the *Tenant* could not deny it, and therefore the *Aſſiſe* was taken, quod Nota ; and Note that laſt *Seiſin* in Writ of *Poſſeſſion* without *Title* is to the Writ, and by *Title* is to the *Action* in every Writ but in Writ of *Right*. Br. Mortdanceſtor, pl. 16. cites 5 Aff. 1.

3. In *Aſſiſe* it was ſaid that Mortdanceſtor was brought of the *Office* of *Bailiff* of the *Forest* of P. without ſaying in the Writ *cum Pertinentiis*, and the Writ awarded good ; quod Nota of an *Office*, and without *Cum Pertinentiis*. Br. Mortdanceſtor, pl. 17. cites 7 Aff. 12.

4. In Mortdanceſtor of *Rent* againſt two the one pleaded *Hors de ſon Fee* and the other *Ancient Demefne*, and all found for the *Plaintiff*, by which he recover'd ; and ſo ſee *Ancient Demefne* try'd per *Patriam*, as it ſeems there, without taking the *Aſſiſe* upon the *Points* of the Writ. Br. Mortdanceſtor, pl. 19. cites 8 Aff. 35. & 10 E. 3. & M. 9 E. 2. accordingly.

5. In Mortdanceſtor by two of the *Seiſin* of A. *Father* to the one and *Grandfather* to the other the *Couſin* was *Nonſuited* and *ſummoned* and *ſevered*, and after was vouch'd to *Warranty*, and enter'd into the *Warranty* and ſaid, That thoſe *Tenements* and others were in the *Seiſin* of the *Common Anceſtor*, who gave thoſe *Tenements* to the *Mother* of the *Tenant* by the *Warranty*, and of other *Tenements* dy'd ſeiſed in *Fee*, which descended to his *Siſter* and another *Daughter*, and did not ſhew other *Name*, and that thoſe *Tenements* were put in *Hotchpot* with other *Tenements*, and *Partition* was made between them of the whole, ſo that theſe *Tenements* and others were allotted to his *Mother* in *Allowance* of others allotted to another *Siſter*, and pray'd *Aid* of her. And the *Aſſiſe* was taken becauſe he ſhew'd that the *Anceſtor* did not die ſeiſed ; and it was ſaid that the *Plea* was in *bar* of the *Action*, and ſo it cannot be taken for cauſe to have the *Aid* per *Cur*. And after the *Tenant* pleaded in *bar* of *Aſſiſe*, and the *Demandant* was put to answer to it notwithstanding the *Demife* of the *Common Anceſtor* ; For when the *Tenements* are put in *Hotchpot* between other *Parties*, they are become in the ſame *Course* as other *Tenements* of which the *Common Anceſtor* died ſeiſed. Br. Mortdanceſtor, pl. 24. cites 10 Aff. 14.

6. In Mortdanceſtor the *Tenant* Vouch'd, the *Vouchee* made *Default*, which was recorded, and the *Demandant* pray'd the *Aſſiſe* ; and by *Award* he ſhall only have *Re-ſummons* ; and ſo in *Attaint* the *Tenant* ſaid *Quod Aſſiſia non* ; For my *Father* leaſed to you for *Term* of *Life* and dy'd, and you ſurrendered to me becauſe the *Land* was not of as great *Value* as the *Rent* reſerved upon the *Leaſe* ; and held a good *Bar*, and the other travers'd the *Surrender*. *Brooke* ſays he wonders at this *Pleading* ; For if the *Plaintiff* had only for *Term* of *Life* he could not upon this *Title* have *Aſſiſe* of *Mortdanceſtor* ; but he ſays it ſeems that the *Book* is ill Reported, and that it ought to be two

Cases, and that this Bar is in Assise of Novel Disseisin as Bar and Title. Br. Mortdancestor, pl. 34. cites 28 Aff. 29.

7. In Mortdancestor *against the Baron and Feme and S. the Baron disclaim'd for him and his Feme, and S. vouch'd to Warranty the Baron, who came and pleaded Recovery in * Dum fuit infra etatem by himself against one S. and the Estate of the Ancestor of the Demandant Mesue between the Title and the Recovery*; and the Truth was that the Baron recovered against S. named in the Action of Mortdancestor, pending the Action of Mortdancestor, by Action try'd; to which the Demandant said that the Vouchee after the Death of his Ancestor enfeoffed S. with Warranty, of which Estate he was seised at the Time of the Recovery had, and so the Recovery false and faint in Law; and the Vouchee Demurr'd upon the Plea, by which the Demandant released his Damages and pray'd Seisin of the Land, and had it per Judicium; because by this Plea and Demurrer all the Points of the Writ were confes'd, and not per Visum Juratorum; because the ‡ Demand is comprised in the Writ in certain; Quod Nota; Upon which tho' the Baron recover'd by elder Title, yet the Ancestor of the Demandant died seised, and then the Demandant ought to recover by this Action Possessory, tho' the said S. Feoffee of the Baron had the better Right. Br. Mortdancestor, pl. 38. cites 30 Aff. 10.

* Orig. (done fait)

‡ Orig. (Demandant.)

8. Assise of Mortdancestor in B. R. by one within Age was challenged because the Writ was *si talis fecerit &c. tunc sum. &c.* and those Words (*si fecerit*) should be left out, inasmuch as the Plaintiff was within Age, and therefore shall not find Surety by which to be summoned &c. And also inasmuch as the Writ was *si Obiit post Coron' &c.* which Clause should not be in the Writ; because it appears to the Court by the Nonage &c. And notwithstanding the two Challenges the Writ was awarded good. By which it was said that the Prioress of St. Elin leased to him against whom &c. for Term of 300 Years, so she is Tenant of the Franktenement, Judgment &c. Et protulit Factum &c. and of the Rent [pleaded] Feoffment with Warranty of the same Ancestor &c. and the Demandant pray'd the Assise and had it. 30 Aff. 25.

Br. Mortdancestor, pl. 39. cites S. C.

9. In Mortdancestor *Deed of the same Ancestor was pleaded in Bar of a Gift in Tail saving the Reversion, and it was adjudged no Plea; but per Thorp otherwise it is of a Lease for Term of Life, the Reversion &c.* Br. Mortdancestor, pl. 40. cites 30 Aff. 33.

10. In Mortdancestor the Defendant said that the Prior of E. was seised in Fee and leased the same Land to the Ancestor of the Demandant for 300 Years of whose Seisin he demanded, and after the Lessee reciting this Grant granted the same Land to the Defendant, which Term yet continues, Judgment if Assise; and a good Bar; For the Grant of the Ancestor shall bind the Heir till he shews how his Ancestor came to the Fee; And it is admitted there that the 300 Years make only a Chattel and no Franktenement. And it is a good Bar in this Action that the Ancestor of the Demandant leased to the Tenant for 40 Years, which Term yet continues, inasmuch as the Tenant affirms the Franktenement in the Demandant; and the Opinion of the Court was that the Demandant shall answer to the Deed of his Ancestor. Br. Mortdancestor, pl. 42. cites 32 Aff. 6.

So if he pleads that his Ancestor or himself leased to the Demandant for 10 Years, Judgment if without Title shewn &c. This is a good Bar. *Ibid*

11. Mortdancestor of the Seisin of J. the Tenant said That H. Father of the Demandant, whose Heir &c. by Testament, which he shew'd, devis'd it (and shewed the Custom to devise &c.) to A. his Feme for Term of Life, the Remainder to the said J. in Tail, and for Default of Issue of J. that his Executors should sell it and distribute &c. and the Devisor died and after A. died and J. entered and died seised without Issue, by which the Executors sold to the Tenant, Judgment if Assise; and a good Bar. Br. Mortdancestor, pl. 44. cites 35 Aff. 1.

12. In Assise of Mortdancestor the Feoffment of the same Ancestor is no Plea in Bar but to the Assise; For the Action is taken of later Time, viz. of the dying seised after, Absque hoc that * he enfeoffed &c. Br. Mortdancestor, pl. 49. cites 43 Aff. 20. per Thorp.

* Orig. (il demitta &c.)

13. In Mortdancestor by the Heir of a Feme inasmuch as his Mother had entered into Religion it is a good Plea, that before the Entry into Religion she took W. N. to Baron who is yet in full Life; For if he be alive she may be deraigned; Contra if he was dead; Quod Nota. Br. Mortdancestor, pl. 50. cites 5 E. 4. 3.

14. If I bring Mortdancestor it is a good Plea that it was found by Office that the Father of the Demandant died seised of the Land and held of the King, the Demandant being within Age, and that the King granted the Ward to him, and a good Plea without saying that he died seised in Fact; because he claimed by the King, and Office suffices for the King. Br. Mortdancestor, pl. 51. cites 5 E. 4. 3.

(I) Pleadings. Reviver of Action; what is.

As in Mortdancestor of the Seisin of his Brother &c. the Tenant said that

1. **I**T seems that where the Ancestor dies seised and there is a Descent by Tort after, and the Heir enters, and the other recovers by Assise of Novel Disseisin, this shall revive the Mortdancestor again; Quod Nota. Br. Mortdancestor, pl. 25.
 he himself brought Assise of Novel Disseisin against the Demandant and others, and recovered by Verdict against him &c. because he was found Disseisor, and the Estate of his Brother Mesne between the Disseisin and the Recovery of the Demandant, Judgment if Assise; to which the Demandant said that he was not disseised in Life of his Brother, nor any time before his Death, Prift, & non allocatur; For the Record stands in force against him; and after he said that the Disseisin was after the Death of the Brother, and the others e contra. Br. Mortdancestor, pl. 25. cites 10 Aff. 16.

2. Mortdancestor was brought in Suffex and adjourned into Bank; the Tenant demanded Judgment of the Writ, because the Defendant himself was seised after the Death of the Ancestor; the Demandant said that after the Tenant had recovered the same Land by Writ of Entry ad terminum qui preterit of the Lease of his Father, supposing that the Father of the Tenant leased &c. and recovered by Default, and so the last Seisin void; and therefore this Writ is maintainable by all the Justices, and the Demandant is not put to his Writ of Right notwithstanding the Recovery was by Default. Br. Mortdancestor, pl. 27. cites 11 Aff. 17.

(K) Pleadings over.

Br. Mortdancestor, pl. 14. cites S. C. but all the Editions are

1. **I**N Mortdancestor the Tenant pleaded Nontenure in Abatement of the Writ of Parcel of the Demand, and * if it be found &c. he is ready to bear the Recognizance and was received to this Plea. 2 Aff. 10.

* Si (ne) foit trove &c.

2. In Mortdancestor Nontenure of Parcel was pleaded in Bar, and the Court compelled him to plead over to the Assise by & si trove ne foit &c. and so see that it goes only to the Writ; but note that at the Common Law it was to the Writ for all; but now by the Statute 25 E. 3. of Treasons, cap. 15. it shall not abate the Writ but for Parcel. Br. Mortdancestor, pl. 28. cites 12 Aff. 8.

(L) Issue

(L) *Issue.* What good. And where, and when tried.

1. **I**N Mortdancerfor the *Tenant* vouched one who entered into the *Warranty*, and said that the *Ancestor* did not die seised &c. And notwithstanding this the *Affise* was charged upon all the *Points* of the *Writ*; *Quod Nota*; and quære, if this shall be a good *Issue*, That he *did not die seised*; For the *Writ* is, *Si fuit Seisitus in Dominico suo ut de feodo Die quo obiit*; and therefore it seems that the *Issue* shall be, that he *was not seised ut de feodo* and *die quo obiit*. Br. Mortdancerfor, pl. 20. cites 9 Aff. 3.

2. In Mortdancerfor if the *Tenant* vouches, and the *Demandant* counterpleads it, and so to *Issue*, the *Issue* shall be tried immediately by the *Affise*, and so it was; *quod Nota*. Br. Mortdancerfor, pl. 33. cites 26 Aff. 43.

(L. 2) *Tried How.* Where there are several *Tenants*.

1. **I**F the *Writ* of Mortdancerfor be brought by several *Summons's* against several *Tenants*, in such Case the *Affise* may be taken one against one *Tenant*, and another against the other *Tenant*; *Quod vide.* 3 E. 3. Itin. North. F. N. B. 196. (H)

(L. 3) *Evidence.*

1. **I**F the *Tenant* saith that he is ready to bear the *Recognizance* of the *Affise*, he cannot give in *Evidence* That the *Demandant* is a *Bastard*, but he ought to have pleaded it. 2 Inst. 400.

(M) *Verdict.* And * what shall be inquired.

* See (A)

1. **I**N Mortdancerfor the *Tenant* vouched, which was counterpleaded by the *Statute*, and the *Affise* was charged upon the *Counterplea*, and over upon the *Points* of the *Writ*, and the *Counterplea* was found for the *Demandant*, and the *Affise* said further, that the *Ancestor* went out of the *Country*, so that they did not know if he was dead or alive, and they were charged to * say precisely upon the *Points* of the *Writ*, and so they did. Br. Mortdancerfor, pl. 26. cites † 10 E. 3. 21.

* Orig (adire prise).

† It should be 10 Aff. 21.

2. In Mortdancerfor it was not inquired of the *Time* of the *Death* of the *Ancestor*; For this appears to be within the *Limitation* by the *Nonage* of the *Heir*. Br. Mortdancerfor, pl. 43. cites 34. Aff. 10.

(N) *Judg-*

(N) *Judgment.* Given *where*, and *how*. And of *what*.
Damages &c.

1. By Stat. of Gloucester, **I**T is provided, that where before this Time Damages were not awarded in a Plea of Mortdancestor, (but in Case where the Land was recovered against the chief Lord) that from henceforth Damages shall be awarded in all Cases where one recovers in an Assise of Mortdancestor.

2. In Mortdancestor in Paris, the Tenant vouched Foreign, and the Voucher granted, and the Parol was adjourned into Bank to try the Voucher, and Writ issued to summon the Vouchee returnable &c. at which Day he made Default, and immediately the Parol was remanded, and so note that the Vouchee was not re-summoned, and no Re-summons awarded against him, and if the Assise passes for the Demandant, Judgment shall be given before the Justices assigned, and after the Tenant shall cause the Record to come into Bank to have Judgment over in Value. Quod Nota. Br. Mortdancestor, pl. 15. cites 3 Ass. 10.

3. In Mortdancestor the Tenant vouched J. who said, that the Ancestor of the Demandant had an elder Son who was attainted of Felony, and abjured in Life of his Father, and vouched Record of the Attainder, and failed at the Day, and the Plaintiff prayed Judgment, and released his Damages, and was not suffered, because he was an Infant; and the Assise was awarded at large notwithstanding the Failure of the Record, which found that the Ancestor died seised, and had an elder Son who was attainted in the Life of his Father, and went out of the Country, and did not come back, and whether he survived the Father or not, or whether the Demandant is next Heir they know not; and because those things were not denied of the Vouchee, by reason that he pleaded that the Demandant had an elder Brother, which implies that the Demandant is Son of the Father, and also he failed of his Record; therefore the Demandant recovered the Land and Damages against the Vouchee; The Reason seems to be, in as much as the Vouchee failed of his Record; For otherwise it is not found if the eldest Son survived his Father or not. Quære &c. Br. Mortdancestor, pl. 36. cites 29 Ass. 11.

4. In Mortdancestor; a Man had Issue two Daughters by diverse Venters, and died seised, and A. abated; the one Daughter released within Age, and died without Issue, and the other brought Mortdancestor, and recovered; For she shall recover the whole of the Seisin of her Father; because she who released was never seised, and the Release is void by Reason of the Infancy; Contra if she had made Feoffment; Note the Difference; For then it had been good for one Moiety, and the one cannot be Heir to the Ancestor by Reason of the several Venters; and the Demandant shall recover Damages; and therefore it was inquired of the Time of the Death of the other who released; For the Demandant shall not recover Damages for the time of him who released. Br. Mortdancestor, pl. 43. cites 34 Ass. 10.

For more of Mortdancestor in General, See Assise, and other proper Titles.

Mortgage.

Mortgage.

(A) *What it is.*

1. **A** Mortgage is when a *Feoffment* is made upon such *Condition*, that if the *Feoffor* pay to the *Feoffee* at a certain *Day* &c. 40 l. that then the *Feoffor* may re-enter &c. In this Case the *Feoffee* is called *Tenant* in Mortgage; And it seems, the Reason why it is called Mortgage is, because it is doubtful whether the *Feoffor* will pay at the *Day* limited or not; And if he does not pay, then the *Land* which is put in *Pledge* is taken from him for ever, and so dead to him upon *Condition* &c. And if he does pay the *Money*, then the *Pledge* is dead as to the *Feoffee* &c. Co. Litt. S. 332.

2. A Mortgage is *not merely a Trust*, but a *Title* in Equity. Per Hale Ch. B. Hard. 467. Trin. 19 Car. 2. in Case of Pawlet v. the Attorney General.

It is only a Trust till the Equity of Redemption is released.

or foreclosed. Per Ld. Cowper. 2 Vern. 450. Pasch. 1706. Attorney General v. Hesketh.—Hill. 1702. Ch. Prec. 215. S. C.—It is only *Tenancy at Will* to the Mortgagee, the Mortgagor paying the Interest. Carth. 101 in Case of Smith v. Pierce.

3. A Mortgage is looked upon but as a *personal Contract*, and the Mortgagee has no Interest beyond his *Money*. Per Ld. Sommers. Mich. 1699. Ch. Prec. 99.

(B) *What is a Mortgage, and what a Purchase.*

1. **A** Mortgage *must be to a Principio*, either by a *Condition* in the Deed it self, or by another *Collateral Deed* made at the same Time; For the *Condition* ought to be made and conceived at the same time with the *Conveyance*, and a subsequent *Agreement* is but a *Nude Agreement*. Arg. Per Churchill. The Matter was referred. 2 Chan. Cafes. Trin. 12 Car. 2. in Case of Copleston v. Boxwill.

An absolute Conveyance is made for 1000 l. to B. and instead of entering and receiving the Profits, de-

mands Interest for the Money which is paid him; This will be admitted to explain the Nature of the Conveyance. Ch. Prec. 526. Mich. 1719. in the Case of Maxwell v. Lady Montague.

2. *Absolute Conveyance* of a *Reversion of Leafes* was made by A. to B.—B. dies; C. the Son of B. denies *Redemption*. On reading a *Bill* which was exhibited by B. against A. to have the *Lands or Money*, and which makes it appear a *Mortgage* a *Redemption* was decreed paying *Principal* and *Damages*. 1 Chan. Rep. 222. 13 Car. 2. Bowen v. Edwards.

3. A. bargains and sells *Lands* for 1000 Years to B. in Consideration of 5000 l. on Condition to be void on *Re-payment* of 5000 l. on any 10th Day of August during the Term, and 400 l. per Ann. till paid. This is a *Mortgage*, and the 400 l. per Ann. is *Interest Money* after the Rate of 8 l. per Cent. and not a *Rent-charge*; and Interest being now reduced by Statute 12 Car. 2. 13. to 6 l. per Cent. A. shall account for no more. Tr. 27 Car. 2. Fin. R. 226. Dandy v. Read.

A Mortgage was in Wales by Lease and Release for 300 l. Profits to be redeemed on Payment of 300 l. on any Michaelmas Day.

but there was no *Covenant to pay the Money*. Ld. Cowper thought this in Nature of a conditional Purchase, and redeemable even at Law to the End of the World. Ch. Prec. 423 Mich. 1715. Howell v. Price.

4. A. surrendered a Copyhold to B. and his Heirs *without any Condition* mentioned in the Surrender, but it was in Consideration of 100*l.* lent by B. to A. and for further Security whereof A. gave B. a Judgment for 200*l.* And by a *Note sign'd by A. and B.* dated before the Surrender it was agreed, that B. on Payment of the Money should surrender back the Copyhold, and acknowledge Satisfaction on the Judgment. B. was admitted and devised it by his Will to several Persons, and they afterwards disposed of the same. Decreed a *Redemption.* Fin. R. 376. Trin. 30 Car. 2. Clench & Wife v. Witherly & Hubert.

Jefferies C. inclined that the Plaintiff should redeem, but proposed, that whereas the Master had reported B. to be 60*l.*

5. A. in 1657. conveys to B. subject to Redemption on Payment of 380*l.* in 1688. and Possession is immediately delivered at the Time of Conveyance. The Estate was but 15*l.* per Ann. but by the Decease of two old Lives became 45*l.* and a Rent was reserved of 5*s.* per Ann. on the Conveyance, which was constantly paid by B. Ld North decreed a Redemption before the Day of Payment in the Proviso, and an Account of the Profits. Vern. 183. Tr. 1683. Talbot v. Braddil.

overpaid, and B. since that received two Years Profits. The Plaintiff should waive the Benefit of the Account, and B. forthwith deliver Possession, and gave B. a Week to consider of it. Vern. 395. Pasch. 1686. Talbot v. Braddil.

6. Where there is a *Clause* or Provilion to re-purchase by the Vendor, the Time limited ought to be precisely observed. And upon an absolute Conveyance from A. to B. it was insisted that B. declared, if A. would repay B. his Money within one Year, and give B. (who was a Serjeant at Law) 100*l.* for his Pains, that A. should repurchase his Estate; but Bill dismissed per Ld North. Vern. 268. Mich. 1684. Barrel v. Sabine.

In Case of Welch Mortgages, the Master of the Rolls thought, that if the Value was exceed-

7. A. conveys Land to B. who is put into Possession; the *Deed was absolute*; but there was an Agreement, that if A. pays the Money in 10 Years, B. shall reconvey. The Profits appearing to be much more than the Interest, upon a Bill by the Heir to redeem it was decreed that B. account for the Profits, and not be permitted to set the Profits against the Interest. Vern. 476. Mich. 1687. Fulthorp v. Foster.

8. A. borrows 200*l.* of B. and surrenders a Copyhold of Inheritance to be void on Payment of the 200*l.* and Interest in April following. A. gives Bond to B. at the same Time, that if the 200*l.* and Interest should not be paid at the Day, that if B. should pay to A. &c. 78*l.* more within 10 Days after in full for the Purchase of the Premises, the Bond should be void. A. died before the Mortgage was forfeited; the 200*l.* was not paid at the Day; B. pays the 78*l.* the Day after to A's Administrator. This was no absolute Purchase; and ordered the whole 278*l.* to be repaid, and Coits, discounting the Mesne Profits. Vern. 488. Mich. 1687. Willet v. Winnell.

9. A. for 550*l.* makes an absolute Assignment of a Lease to B. and B. by Writing under his Hand agrees that if A. pays B. at the End of the Year 600*l.* B. will reconvey. B. dies, leaving C. his Son and Heir; two of the Lives die, and the Lease is twice renewed, and now it was 25 Years after the first Conveyance. Yet Master of the Rolls decreed a Redemption on Payment of the 550*l.* and the two Fines paid for the Renewal with Interest, and during B's Life the Profits to be set against the Interest, but C. to account for the Profits since. 2 Vern. 84. Mich. 1688. Manlove v. Ball & Bruton.

10. A. for 80*l.* conveys absolutely to B.—A. brings a Bill to redeem.—B. insists that the Grant was absolute, but confessed it was a Trust, that after the Principal and Interest paid, B. should stand seized for A's Wife and Children. Plaintiff replies to the Answer, but no Proof of the Trust, and therefore it was insisted that the Husband should redeem; but decreed

a Trust for the Wife and Children. 2 Vern. 288. Pasch. 1693. Hampton v. Spencer.

11. If a Mortgage afterwards *gets an absolute Deed, but suffers Possession to go sometime contrary to it*, it will again make it but a Mortgage. G. Equ. R. 11. Mich. 7 Annæ in Case of Harris v. Horwell.

12. A. a Jointenant with her Sister made an absolute Conveyance to B. in Fee for 104*l.* which was intended only as a Mortgage. After in 1708. those Deeds were cancelled; and then A. in Consideration of 184*l.* (including the 104*l.*) paid by B. convey'd the Premises as before; but with a farther Covenant, *Not to agree to any Partition without B's Consent.* The Sister was in Possession till 1710, at which Time B. ejected her out of the Moiety, and enjoy'd it quietly till 1726. when A. brought her Bill for Redemption, to which B. pleaded himself an absolute Purchaser. The Receipts given for the Money mentioned it to be Purchase Money. In 1710. there was an Agreement that A. might have the Estate again, if desired, paying Principal, Interest, and Charges. The Cause was first heard before the Master of the Rolls, who dismissed the Bill; And afterwards coming on before the Ld Chancellor, who took Notice that the Case was very dark, but that the said Agreement shewed it was not redeemable at first; and that upon considering what, upon Proof, he took to be the Annual Value of the Estate, and the other Matters, he was inclin'd upon the whole to think it an absolute Conveyance at first. Had A. continued in Possession any Time after executing the Deeds, he should have been clear that it was a Mortgage; and the *long Acquiescence [of 15 Years] under B's Possession was a strong Evidence of its being an absolute Conveyance*; For otherwise the Length of Time would not have signified; Because they who take a Conveyance of an Estate as a Mortgage, without any Defeasance are guilty of Fraud, and no Length of Time will bar a Fraud, and disapproved the Practice in the North of making Mortgages absolute, and the Defeasances by a separate Deed, as carrying a Face of Fraud. Sel. Ch. Cases, in Ld Talbot's Time. 61. Hill. 3 Geo. 2. Cotterel v. Purchase.

13. *A. being indebted to J. S. and threatened to be sued by him proposed to assign a Term which he was in Possession of, which J. S. agreed to, but whether absolutely in Discharge of the Debt, or by Way of Security only was not mentioned*; However, J. S. got an absolute Assignment drawn, which occasioning Disputes, B. the Brother of A. interpos'd, and it was at length agreed, that B. should give his Bond to J. S. for the Debt, and that the Name of J. S. should be struck out of the Assignment, and B's inserted without any other Alteration in the Deed, and the same to be executed by A. but that there should be an Indorsement purporting that the Deed was to indemnify B. against the said Bond; all which was done. Two Days afterwards A. by a Writing directed the Tenants to attorn to B. which they did, and then (as B. swore in his Answer) *A. and B. agreed that the Assignment should be absolute and without Redemption.* A. became afterwards Bankrupt, and a Bill was brought against B. for a Redemption. Parker J. who sat for the Chancellor, said, it could not be doubted, but this at the Time of Execution was intended only as a Mortgage; For tho' it had the Appearance of an absolute Deed under Hand and Seal, yet the Indorsement, tho' under the Party's Hand only, was sufficient to shew that in Equity at least it was only a Mortgage. And that what was done two Days after the executing the Deed did not alter the Nature of it, nor amounted to a Release of the Equity of Redemption, but only to a Direction to the Tenants to attorn to the Mortgagee; and decreed a Redemption accordingly. Barn. Chan. Rep. 30. Pasch. 1740. Franklyn v. Hern.

(C) *Disputes between Mortgagor and Mortgagee.*

1. **T**HE Money upon the Mortgage being paid the Mortgagor sued to have the Deed again, and not admitted, because then he may charge the Mortgagee for Profit paid. Toth 229, 230. cites 4 Eliz. and 38 & 39 Eliz. Langford v. Comit. Salop.

The Mortgagee in Fee after a Forfeiture may cut down
2. If Mortgagee commits Waste, the Mortgagor has no Remedy, unless there is a Covenant not to commit Waste. Cro. J. 172. Trin 5 Jac. B. R. in Case of Evans v. Thomas.

Timber at Law, as the legal Estate is in him; but not in this Court, unless it be a scanty Security, in which Case Chancery will not restrain it, as it will if it be an ample Security; For as the Mortgagee is only a Trustee for the Mortgagor, the Timber when cut down must be apply'd to ease the Estate, and not for his own Benefit. Arg. And Baron Price who sat in the Ld Chancellor's Absence said, That Mortgagee in Fee may at Law commit Waste, but never in Equity, unless it appears a defective Security. Select Cases in Chan. in Ld King's Time. 51. Trin. 11 Geo. 1. in Case of Witherington v. Banks & Coffetworth.

But he shall not account for more than
3. The Mortgagee was decreed to account for the Profits received, and for the Use of those Profits. Toth. 230. cites 13 Jac. Holman v. Vaux. he actually made of the Land, or Might have made had it not been for his wilful Default. As if he turned out a sufficient Tenant that held it at so much Rent, or refused to accept a sufficient Tenant that would have given so much for it. Vern. 45. Pasch. 1682. Anon.—Chan. Cases 258. Hill. 26 & 27 Car. 2. Chamberlain v. Chamberlain.

The Profits were set against Interest in an old Mortgage. MS. Tab. cites 25 June 1715. Bail (als. Basil) v. Acheson.

If the Mortgagor makes Proof that the Estate was set at such a Price while in the Hands of the Mortgagee, that shall be deem'd the Rate at which he let for the whole Time, unless he shews the contrary, which is in his Power as being let by him. Sel. Ch Cases in Ld King's Time 53 November 17, 1725. Blacklock v. Barns.

4. Lease by way of Mortgage; if the Money be paid tho' after the Day, 'tis void in Equity against a Purchaser, or a Charity. Chan. Rep. 18. 1 Car. 1. Emanuel College v. Evans.

Mortgagee before Foreclosure cannot make a Lease for
5. Leases made by Mortgagee at Rack and improved Rents are to be allowed, and stand good; otherwise not. Chan. Rep. 172. 1656. Welden v. Rallison.

Years of a House &c. in Mortgage to bind the Mortgagor, unless to avoid an apparent Loss and merely in Necessity; per Lord Chancellor, Pasch. 1722. and so reversed a Decree at the Rolls. 9 Mod. 2. Pasch. 8 Geo. Hungerford v. Clay.

6. Mortgagee demises to Mortgagor the Land for Years; this Demise does not suspend the Condition; For the Payment of the mortgage Money does not arise from the Profits of the Land; and this Condition is Collateral. Jenk. 254. pl. 46.

7. If Lands be mortgaged to one, the Interest in Law in these Lands is in the Mortgagee before the Forfeiture of them; For he hath purchased the Lands upon a valuable Consideration as the Law will intend; and tho' the Mortgagor may redeem in the respect of the Agreement betwixt the Parties, yet it is not known whether he will do it or no; and if he do it not, then the Estate in Law is absolute in the Mortgagee, without any other Act to be done to pass the Estate; but the Mortgagor hath an equitable Right of Redemption. 2 L. P. R. 203. cites Mich. 23 Car. B. R.

8. Where a Mortgage is forfeited, the Mortgagee may bring an Ejectment without an actual Entry; For he is in Possession upon the executing of the Conveyances. 2 L. P. R. 203.

9. Mortgagee refusing to receive his Money upon Tender after Forfeiture, shall lose his Interest from the Tender. Chan. Cases 29. Mich. 15 Car. 2. Manning v. Burges.—Another like Case cited there between Peckham v. Legay.

10. Mortgagee *renews a Church Lease*, the Mortgagor shall be relieved. 2 Chan. Rep. 59. 20 Car. 2. Darrel v. Whitchcott.

11. An *Agreement* that the Mortgagor should pay off so much Money for lessening the Debt, and that *part of the Lands* in Mortgage should be left out of the Mortgage was decreed. Fin. R. 138. Mich. 26 Car. 2. Ld. Vaughan v. Morgan & Moneux.

12. After a Statute acknowledged and a Mortgage of a Term the *Term expires*; the Conufor's Trustees *renew* the Leases in their own Names; yet decreed the whole Estate of the Mortgagor (he having other Estates) liable to the Statute. 2 Chan. Rep. 113. 28 Car. 2. Lucking v. Rushworth.

The renewed Lease decreed to the Mortgagee. Fin. R. 392. S. C. Trin. 30 Car. 2.

13. If a Mortgage be for 100*l.* with a Proviso to be void on Payment of 106*l.* at the end of a Year and *no Covenant for the Mortgagor to take the Profits* till default be made in Payment, so that in ittrickness the *Mortgagee is intituled to the Interest and Profits*, yet the not expressing it does not make the Agreement Usurious. 2 Mod. 307. Pasch. 30 Car. 2. C. B. Ballard v. Oddley.

14. Where an Heir or Trustee *buys in* an Incumbrance, he shall be allowed only so much as he paid, unless he bought it in to *protect an Incumbrance* to which himself is intituled; but if a Stranger or Mortgagee buys in an Incumbrance, he shall be allowed all the Money and Arrears of Interest due, tho' purchased for less. Vern. 49. Pasch. 1682. Darcy v. Hall.

15. Mortgagor is only Tenant at Will to the Mortgagee paying the Interest, and tho' he makes *under Leases*, or a *Settlement on Marriage of his Son*, and thereupon Levies a *Fine*, and *five Years pass* without any Claim, yet if he continues to pay the Interest, this Fine shall not affect the Mortgagee. Carth. 101. Mich. 1 W. & M. B. R. in Case of Smith v. Pierce.

Mortgagee is but a Trustee for Mortgagor till the Equity of Redemption is released or

foreclosed; per Lord Cowper. 2 Vern. 450. Pasch. 1706. Attorney General v. Hesketh and al. Ch. Prec. 215. S. C. Hill. 1702.

16. *Mortgagee entails* the Lands by Fine; Mortgagor sues for Redemption, which is decreed and the Money paid and no mention of the Entail in all the Proceedings; the *Issue of Mortgagee brings Ejectment* and Recovers; but Mortgagor was *relieved* having paid his Money pursuant to the Decree, and having been in no Fault; and Lds. Commissioners decreed the Issue to convey, and Plaintiff to enjoy in the mean Time, and a perpetual Injunction against the Judgment. 2 Vern. 142. Trin. 1690. Chapman v. Duncomb.

17. A Mortgagor covenants after *Default to make further Assurance* for the absolute sure-making &c. Per Holt Ch. J. The further Assurance must be absolute, because the Estate is to be absolute; but this shall not oblige him to release his Equity of Redemption; and he said a Warranty is not to be inserted in such further Assurance. Cumb. 318. Hill. 6. W. 3. B. R. Atkin v. Urton.

18. Tho' there be *no Covenant to pay the Money*, yet if the Mortgagor had the Money, because it was his Debt, he is bound to make it good, tho' the Land be a *defective Security*. 2 Salk. 449, 450. Cope v. Cope in Chancery.

S. P. by Ld. C. King. 2 Wms's Rep. 455. Pasch. 1728. in Case of Balsh v.

Hyham — A defective Security is a good Agreement in Equity to *charge the Land*. 2 Vern. 151. per Commissioners 1690. Dale v. Smithwick — In such Case if afterwards the *Mortgagee proves Insufficient* to answer the Money lent, yet is not the Money lost; For for as the Residue the Mortgagee is a Creditor by Simple Contract; per Harcourt Ch. G. Equ. R. 110. 1 Geo. 1. Thomas v. Terry. — Where there was no Covenant to pay the Money either express or implied in a Mortgage in Fee, but only a Covenant for quiet Enjoyment, and that the Estate was free from Incumbrances, and the Mortgagee was in Possession, and it was made *redeemable on Payment of 200*l.* at any Michaelmas-day* Lord Cowper held that no Action lay for the Money by Mortgagee, and that it was redeemable for ever. Ch. Prec. 425. Mich. 1715. Howel v. Price.

19. Bill was brought to *redeem*, and Account decreed and 240*l.* was reported to be due; Exceptions were taken to the Report, and *pending the Exceptions Mortgagee burns the Wainscot and commits Waste*; Ld. Wright on a Motion and Affidavits ordered Possession to the Plaintiff, who was a

Pauper he giving Security to abide the Event of the Account 2 Vern. 392. Mich. 1755. *Hudson v. Darby*.

20. *Bail* shall be put in on an *Action of Debt* brought by Mortgagor a Mortgagee for the Mortgage Money; per Holt. Farr. 139. Hill. 1 Ann. B. R. *Gidden v. Drury*.

21. *Heir of Mortgagor pretends an Entail* and endeavours to overthrow the Mortgage, by which Mortgagee was at a great Expence but prevail'd at Law.—After the Heir *sues to redeem*. Per Cur. The Mortgagee shall not be held down to the Taxation of his Coſts at Law but on the Account, but *shall be allowed all be laid out or expended*, and where, fearing his Mortgage would have been defeated at Law he took *Administration as Principal Creditor*, he shall be allowed the Coſts of that too. 2 Vern. 536. Hill. 1705. *Ranfden v. Langley*.

2 Vern. 564
11 Novem-
ber 1779
S. C.

22. Tho' a Surrender of a *Copyhold* be void in Law for want of a *Preſentment*, and that might be the Laches of the Mortgagee in not procuring it, yet the Surrender was a Lien and bound the Land in Equity; and the Surrenderor, or if he become Bankrupt, the Assignee who ought not to be in better Case than the Bankrupt, is plainly bound in Equity by this defective Conveyance. (Et come moy Semble ſays the Reporter, he became a *Trustee for the Purchaſer*.) Mich. 8 Ann. 2 Salk. 449. *Taylor v. Wheeler*.

23. That a Mortgagee cannot *present* on an Avoidance of a *Chanc* was admitted, becauſe it doth not leſſen his Debt. 9 Mod. 2. Paſch. 8 Geo. in Caſe of *Hungerford v. Clay*.

24. A. the Mortgagee brought a *Bill to forecloſe*, and B. the Mortgagor brought a *Croſs Bill to redeem*, and it was decreed to *pay Principal, Intereſt and Coſts, or elſe to be forecloſed and on Payment to be let in*. B. died; and the Account being taken, the Plaintiff finding the Eſtate inſufficient brings a new Bill of *Reviver and partly a Supplemental Bill*, both to review the former Decree and Proceedings, and likewiſe to *have an Account of the aſſets of B.* and thereout to have Satisfaction for a Bond which was given as a *Collateral Security* with the Mortgage. To this Bill the Executor of B. pleads the former Decree in Bar that the Plaintiff *deſied his Satisfaction, and had not ſo much as ſuggeſted that that Satisfaction was deficient, ſo that* it does not appear but that *he may receive a double Satisfaction* for his Debt, and that it was plain that he *had not wai'd the Mortgage by his Bill of Reviver*. A. inſiſted that it was the Practice of the Court that taking out of Proceſs or making Uſe of any Counter-ſecurity was in itſelf a *Waiver of the forecloſure*, and that a Mortgagee had always his *Election to waive* and open the Forecloſure and have Recourſe to his Bond or Covenant if he thought proper. But per Cur. the Plaintiff by his Reviver has not wai'd the Mortgage or ſo much as ſuggeſted a Deficiency; ſo that the Plea muſt ſtand for an Answer without Liberty to except. G. Equ. R. 186. Hill. 12 Geo. 1. *Birch's Caſe*.

(D) Diſputes between Mortgagor, Mortgagee and Mortgagee.

AN Agreement between Mortgagor and ſecond Mortgagee and the Assignee of a firſt Mortgagee, decreed to be performed by the Mortgagor and the Assignee of firſt Mortgagee. See Fin. R. 138. Mich. 25 Car. 2. *Ld. Vaughan v. Morgan, Monoux and Finch*.

2. *Firſt Mortgagee forecloſes an after Mortgagee, and by Will deviſes the Lands to Mortgagor*. Upon this the After-mortgagee brings a Bill to ſet aſide the firſt Mortgage, and to be let into a Satisfaction of his Money.

The

The Defendant pleads the former Suit and Decree of Foreclosure, but was ordered to answer. 2 Vern. 235. Trin. 1691. *Cook v. Sadler*.—The Court compared it to the Case of *Wray and Smith*, that the Trust should revive. *Ibid*.

(E) Disputes between *Mortgagor and Assignee of Mortgagee.*

1. **A**N Old Mortgage assigned to another ought to be taken as a New Mortgage from the Time of the Assignment. 2 L. P. R. 206. cites Chan. Rep. 218.—[But Quere if this Point be there.]

2. Assignee of a Mortgage that comes in at an old Hand shall not account but so far only as goes in Discount of his Money, and not for the Surplusage. Ch. Cases 102. Pasch. 20 Car. 2. *Pearson v. Pulley*.

3. On Assignment of a Mortgage by A. to B. the Debt was stated between A. and B. and some of the Cohers that were look'd on to have a Right to the Redemption. This Account shall not conclude a Coheir that was not Party to the Account; per Ld. North. Vern. 169. Pasch. 1693. *E. Macclesfield v. Fitton*.

4. A mortgaged to B. for 450*l.* Principal Money payable at 5 Years End and Interest half yearly in the mean Time. About 2 Months before the 5 Years were expired, no Interest being paid, Mortgagee assigned to D. in Consideration of 360*l.* being so much due for Principal and Interest. Lds. Commissioners decreed the 360*l.* to be paid with Interest from the Time of the Assignment; For the Mortgage was forfeited long before by Non-payment of Interest. Hill. 1690. 2 Vern. 135. *Gladman v. Henchman*.

S. P. do. ed. Pasch. 1683. Vern. 168. E. of Macclesfield v. Fitton—
all Money really due and paid by the Assignee

to the Mortgagee shall be taken as Principal against the Mortgagor from the Time of the Assignment. 2 L. P. R. 204. cites Chan. * Rep. 68, 258.—[* It should be Chan. Cases.]

5. The Original Covenant for the Mortgagor to enjoy 'till Default of Payment governs all the subsequent Assignments; For he covenants for himself, his Executors, Administrators and Assigns, that the Mortgagor shall hold till default of Payment, which creates a Tenancy at Will upon all the Above Assignments; per Eyre J. to which Holt Ch. J. agreed and said it was well observed. Cumb. 249. Pasch. 6 W. & M. B. R. *Smartle v. Williams*.

S. Lin. 424. Per Eyre J. And New- port C. J.

(E. 2) Disputes between Mortgagor and Assignee of Mortgagee, the *Mortgagor not joining.*

1. **A** Mortgage being forfeited Mortgagee assigns his Interest to another on Payment of the Money, Tho' it was intited for the Mortgagor that this was a breach of 'Trust' in the Mortgagee. The Court was of Opinion that Mortgagee should account for all the Profits both before and after his Assignment and pay himself in the first Place, and the Surplus to the Mortgagor, and that he should convey and procure all Persons claiming under him to convey the Lease to the Mortgagor free from Incumbrances done or committed by him or them.—Afterwards the Assignee (who was Son of the Mortgagor) claiming the Original Lease by a Title Paramount to the Mortgagor, and it appearing that he had such a Title the Mortgagee was discharged against him. 13 Car. 2. N. Ch. R. 60. *Venable v. R.*

2. Assignee

Per Finch K.
Contra Hill.
26 & 27 Car.
2 Chan.
Cases, 258.
Chamberlain
v. Chamber-
lain.—* N.
Ch. R. 157.
S. C. —154.
S. P.—7 Ch.
Cases 67 S.C.

2. Assignee of a Mortgagee shall not be in a *letter Condition* than the Mortgagee, and so would not allow the Interest paid to the Mortgagee by the Assignee to be taken as Principal and to carry Interest; per Ld. Chan. Shaltesbury upon Appeal against a Decree of Ld. Keeper Bridgman's. Hill: 1672. 3 Ch. R. 73. * Porter v. Hobart.—But if the *Mortgagor came into the Assignment* it is otherwise. ut ante 79.—Cases cited to support Bridgman's Decree were *Warder v. Sayer*, Mich. 13 Car. 2. per Master of the Rolls. *Diamond v. Conningsby*, Mich. 18 Car. 2. Ld. Chan. and Master of the Rolls. † *Smith v. Pemberton*, Pasch. 17 Car. 2. Ld. Chan. Chan. Cases 67.

3. A. the Mortgagee covenants that Mortgagor shall quietly enjoy till Default of Payment. A. assigns his mortgaged Term to B. *without the Mortgagor's joining in the Assignment*; After Assignment Mortgagor, who before was *Tenant at Will*, is now only *Tenant at Sufferance*, but his continuing in Possession does not turn the Term to a Right. 1 Salk. 245. Pasch. 6 W. & M. B. R. *Smartle v. Williams*.

* Skin 423.
Andrew
Newport's
Case.

4. Upon executing the Deed of Mortgage, the Mortgagor by the * *Covenant to enjoy till Default of Payment*, is *Tenant at Will*; and the Assignment of the Mortgagee to the Assignee, and the Assignee's assigning it over again *without the Mortgagor's joining*, can only make the Mortgagor *Tenant at Sufferance*; but his continuing in Possession can never make a *Disseisin*, nor *deveesting* of the Term mortgaged. Otherwise, if the *Mortgagor had died and his Heir had entered*; For the Heir was never *Tenant at Will*, but his first Entry was tortious; Or if the *Mortgagee had entred on the Mortgagor, and the Mortgagor had re-entred*; For the Mortgagee's Entry had been a Determination of the Will, and the Re-entry of the Mortgagor had been merely tortious. Per Holt Ch. J. 1 Salk. 246. Pasch. 6 W. & M. B. R. *Smartle v. Williams*.

3 Lev. 388.
S. C. and P.
—Skin.
423. S. P.
Andrew
Newport's
Case.

5. The bringing an *Ejectment* by Assignee of Mortgagee (in which Assignment the Mortgagor did not join, nor was the Mortgagee in actual Possession) cannot admit an actual *Deveesting*, so as to turn the Term to a Right; For that was not brought to *recover* the Mortgage Term, but the *actual Possession only*, and the Court will take Notice that an *Ejectment* is only a fictitious Proceeding. Per Holt Ch. J. 1 Salk. 246. Pasch. 6 W. & M. B. R. *Smartle v. Williams*.

1 Salk 245.
S. C. — 3
Lev. 387. S.
C. and Holt
Ch. J. and
Eyre J. held
all the As-
signments

6. The first Assignment of the Mortgagee may be good by Determination of his Will, but *subsequent Assignments* made when *out of Possession* are void, unless *sealed upon the Land*. Per Levins. Arg. who said he had been nonsuited on that Point; But Holt Ch. J. said Obiter he had had hard Luck then. Cumb. 249. Pasch. 6 W. & M. B. R. *Smartle v. Williams*.

good though the Mortgagee was out of Possession, and the *Mortgagor did not join* in any of the Assignments. — 1 Salk 245. S. C. and P. — Skin. 423. Pasch. 6 W. & M. B. R. Andrew Newport's Case.

See Fraud
(Q)—In-
cumbrances
(C)

(F) Disputes between *Mortgagee* and Mortgagee.

See Ibid. 67.
Bovey v.
Shipwith.
Pasch. 1671.

1. **C** Brought a Bill against B. to be let into A's Estate after prior Incumbrances to B. satisfied. B. pleaded that there were *prior Incumbrances* to him of all the Lands which C. claimed, and that he had a *puisne Incumbrance* to C. of *part of a Statute for Collateral Security*. The Question was, if B. should hold all, both to satisfy the prior Incumbrance, and what was his own Security, or only to satisfy his own Money? And he having a Statute *extended*, it was by Bridgman K. and Judges Assitants adjudged for B. the Defendant on Demurrer. 3 Ch. R. 62. Mich. 1670. *March v. Lee*.

2. A. seized of two Manors called W. and M. mortgaged part of W. to B. for 1000 l. and afterwards acknowledged a Statute to B. of 800 l. for Payment of 400 l. Afterwards A. mortgaged both Manors, W. and M. to C. for 7000 l. and after mortgages W. for 2000 l. to D. who had no Notice of the former Mortgages. But after Notice of the Mortgage to C. D. purchased in the Mortgage and Statute to B. The Ld. Keeper, assisted with Hale Ch. B. and Rainsford J. held, that D. might make Use of these Incumbrances to defend his own Mortgage; For they said, that he had both Law and Equity. And they held that Part only of W. being mortgaged to B. but the whole Manor of W. being now mortgaged to D. that yet the first Mortgage should protect only that part of W. first mortgaged to B. 2 Vent. 337. Trin. 22 Car. 2. Marth v. Lee.

3. If a Man mortgages Lands by a defective Conveyance, and afterwards mortgages to a second Person by an Assurance that is good and effectual without Notice, the second shall prevail; because that carries the legal Title, and Equity will not interpose when both are equally upon a valuable Consideration. Abr. Equ. Cases 320. (E) pl. 1. cites Mich. 1670. Burgh v. Francis.

4. An After-Mortgagee of a Ship who had got Possession of her, tho' he was decreed to be postponed to the first Mortgagee as to his Debt, yet as to Money laid out in preserving the Ship by Calking, Pitching, Oker &c. it was ordered to be paid in the first Place out of the Monies arising out of the Sale of the Ship. Pasch. 27 Car. 2. Fin. R. 206. Degelder v. Depeiter.

5. An Account settled before a Master by Direction, between Mortgagor and Mortgagee, shall bind a second Mortgagee if there be no Fraud or Collusion, and if he deny the Fraud and Collusion it is enough; and in charging Fraud to open the Account the second Mortgagee must charge Particulars. Per Finch C. Chan. Cases 299. Trin. 29 Car. 2. Needler v. Dibble.

by Decree, C. A. and B. shall be bound by the Account which A. made in his Suit, and contribute to the Charges of Suit, if made without Fraud or Collusion. 2 Chan. Cases 32. Trin 32 Car. 2. Anon.

5. A. mortgages Land to B. and after mortgages the same to C.— B. having Possession by Attornment of the Tenants, shall be charged with the Profits (by whomsoever they were received after the second Mortgage made, but not before) upon Redemption by the second Mortgagee. 2 Chan. Rep. 209. 32 Car. 2. Maddocks v. Wien.

6. A. took a Statute for 200 l. lent, but finding a former Incumbrance for other 200 l. purchased in that, and also another Mortgage for 500 l. to C. The Plaintiff had a Mortgage which was precedent to all but the 200 l. purchased in. The Plaintiff cannot be let in without Payment of all, unless he, that purchased in, had Notice. Trin. 32 Car. 2. 2 Chan. Cases 35. Anon.

rice must be express, though it be a Judgment on Record, and though at Law it charges the

7. A Mortgagee has Notice of subsequent Incumbrances, and there is one of which he has no Notice. He purchased an absolute Conveyance for a considerable Sum of Money. He shall be liable to those Debts of which he had Notice, but no Relief for the other. 2 Chan. Cases 170. Hill. 1 Jac. 2. Grefwold v. Martham.

8. Mortgagor for further Consideration released the Equity of Redemption to B. the Mortgagee absolutely, and afterwards mortgaged to C. for 1000 l. Second Mortgagee shall protect himself by an old Statute. Per Rawlinson Commissioner. 2 Vern. 160. Trin. 1690. in Case of Hitchcox. v. Sedgewick.

9. Bill by second Mortgagee to foreclose first Mortgagee, who had been at great Expence in foreclosing the Mortgagor; Per Cur. his Costs shall not

Lard is mortgaged to A. then to B. then to C. If A. sued to redeem and try his Debt

pay or contribute to the Charges of Suit, if made without Fraud or Collusion. 2 Chan. Cases 32. Trin 32 Car. 2. Anon.

N. Ch. R. 01. 15 Car. 2. S. P. in Case of Churchill v. Grove — And held that this No- Land. Ibid

be taxed as in an adversary Suit but *shall be all allowed*, as in the Case of a Solicitor who lays out Money for his Client, and the Profits of the Estate shall first pay off those Costs and Disbursements, before it is apply'd to sink the Principal. 2 Vern. 185. Mich. 1690. Lomax v. Hide.

10. *Fine and Non-claim* by Mortgagor to a *second Mortgagee in Fee*, and the Mortgagor being all the time in Possession, and paying the Interest, the Mortgagor is Tenant at Will to the first Mortgagee, and his Mortgage for 500 Years is not *barred* by the Fine and Non-claim. Carth. 414. Trin. 9 W. 3. B. R. Holland v. Hatton.

If a first Mortgagee lends a further Sum to the Mortgagor upon a Statute or

Judgment, he shall retain against a *Mesne Mortgagee*, till both Mortgagee and Statute or Judgment are satisfied; Because it is to be presumed, that he lent his Money on the Statute or Judgment, as knowing that he had hold of the Land by the Mortgage, and in Confidence ventured a further Sum on a Security, which tho' it gave no present Interest in the Land, yet must be admitted to be a Lien thereon. Per the Master of the Rolls. Mich. 1728. 2 Wms's Rep. 494. Brace v. the Dutchess of Marlborough.

11. A. mortgaged *first to B. and then to C.* Afterwards B. lent to A. more Money on a Statute. C. brought a Bill and charged Notice, but B. *denied Notice evasively only*; and because he did not deny it positively, Ld. Wright and Master of the Rolls decreed a *Redemption on Payment of the first Money only.* Trin. 1703. Ch. Prec. 226. Calon v. Round.

13. Land was mortgaged first to A. and then to B. Afterwards the Land was settled subject to these Mortgages on J. S. for Life, Remainder to J. N. an Infant; A. brings Bill to foreclose B. and J. S. Per Cur. B. the *second Mortgagee may be foreclosed, and tho' A. cannot have the like Remedy against the Infant in Remainder*, who cannot be foreclosed, because he is an Infant, yet B. the Defendant must be foreclosed unless he Redeems within 6 Months; and tho' there were *other Incumbrancers not made Parties*, yet A. may foreclose such Defendants as he had brought before the Court; and tho' it was objected that the Infant in Remainder had a Right to redeem all, and therefore to have the first Election and to be first foreclosed, yet it was not allowed. 2 Vern. 518. Mich. 1705. Draper v. Jennings.

14. A. mortgaged the same Land, first to B. afterwards to C. and after that to D. The Mortgage to C. is only between A. and C. but takes Notice of the Mortgage to B. and that after that is satisfy'd, it shall stand charged to C.—A. and B. both join in the Deed to D. which provided that after B. was paid the Estate should next answer D's Debt; *all these Securities were made by the same Scriveners*, who engrossed and witnessed the Deeds and were as Agents to the several Lenders; Decreed at the Rolls and now affirmed by Ld. Cowper, that C. shall be paid before D. For it is plain the Scriveners had Notice, and Notice to the Agent is Notice to the Party; and where there are several Mortgages if they that lend last have Notice of Prior Mortgage they must be paid last. 2 Vern. 574. Hill. 1706. Brotherton v. Hatt, Coy, Sir Edward Hungerford & al.

Fin. R. 409. Shermer v. Robins, Cox & al S. P. —After a Purchase

made under such Decree. Ibid. Hill. 31 Car. 2.—But the Sum computed due on the Decree for Principal and Interest shall be taken as a *stated Account and be reckoned Principal* from the Time of the Decree. Ibid.—3 Chan. R. 83. S. C.—N. Ch. R. 71. S. C.

15. *After a Decree to foreclose* the Mortgagor by the first Mortgagee a second Mortgagee may Redeem the first, tho' the first Mortgagee had no Notice of the second Mortgage before the Decree; per Ld. Cowper. 2 Vern. 601. Mich. 1707. Godfrey v. Chadwell.

16. *If first Mortgagee takes a Release of the Ultimate Equity of Redemption* yet he is not thereby obliged to pay the intermediate Mortgages, provided he will still *wave* such Release; per Cowper C. Wms's Rep. 393. 395. Hill. 1717. Mocatta v. Murgatroyd.

17. An after Mortgagee prays to *redeem the first Mortgagee* paying what was due, and *pending the Suit the first Mortgagee sets up another Mortgage to himself Prior to them all*, but it had some untoward Marks; decreed a

Trial

Trial at Law, whether the Mortgage was executed and if it was, how much Money was paid for it. 9 Mod. 38. Trin. 9 Geo. Douſe v. Rue.

18. If a *Puiſne Mortgagee without Notice buys in a Prior Judgment or Statute*, and that Judgment &c. be extended upon an *Elegit much under the real Value*, the Meſne Mortgagee ſhall not make the Puiſne Mortgagee Account otherwiſe than for the extended Value; nor will the Court relieve againſt the Judgment or Statute, but leave the Meſne Mortgagee to get rid of them as well as he can at Law; Per the Maſter of the Rolls. 2 Wms's Rep. 494. Mich. 1728. Brace v. the Dutchets of Marleborough.

19. A. mortgages two Eſtates, viz. *Black Acre and White Acre to B.* and afterwards mortgages *Black Acre to C.* and after that *White Acre to D.* The Queſtion was, whether the Court can decree a *Redemption of B's Mortgage* (who was the original Mortgagee) *by proportionable Contributions of C. and D.* the two Puiſne Mortgagees? and the Lord Chancellor after Conſideration was of Opinion, that the Court could not Decree ſuch a Redemption; that the *original Mortgage* ought not to be entangled with any * Queſtions that may ariſe among ſubſequent Mortgagees; that he *has a Right to be redeemed intire*, and not by Parcels; that his Right undoubtedly ſtood ſo with regard to the Mortgagor, and conſequently with regard to the ſubſequent Mortgagees, for the Mortgagor could not hurt him by playing his Right into anothers Hands, nor is there any Precedent where ſuch a Redemption was ever allowed. 12 December, 1739. Titley v. Davis.

* If a Man mortgages all his Eſtate to one Perſon, he may not withſtanding ſplit it into two Puiſne Mortgages more; now if all theſe ſubſequent Mortgagees ſhould have a Right to Redeem on Payment of proporti-

onable Contributions, it would be impoſſible for the firſt Mortgagee to come at his Right till all thoſe Proportions are ſettled, which may, and generally does take up a great deal of Time, and often produces Trials at Law; and after all there muſt be ſo many different Redemptions, and Times given for them (either Half-years, or Quarters) before he can come at his Money, or a Forecloſure; which appears at firſt ſight to be very inconvenient, and would much invalidate the Credit of this Kind of Securities; per Lord Chancellor. Ibid.

20. So if thoſe two Eſtates, Black Acre and White Acre are mortgaged to B. and then Black Acre is mortgaged to C. and after that White Acre to D. and C. Redeems B's whole Mortgage, he ſhall hold * both Eſtates, (tho' Black Acre only was comprized in his own Mortgage) till he is repaid all that he has diſburſed in diſcharge of B's Mortgage, and likewiſe all that is due upon his own Mortgage; and D. ſhall not be admitted to Redeem him but upon thoſe Terms; For C. could not have redeemed B. but by an intire Redemption of all that was in Mortgage to B. and having ſo done, he ſtands in B's Place, and has the ſame Right as he had (viz.) to be redeemed intire, both as againſt the Mortgagor and againſt D. a ſubſequent Mortgagee; per Lord Hardwicke, who accordingly was for Affirming an Order of the 22 February, 1736. made agreeable to this Opinion by the Maſter of the Rolls; but made no Decree, the proper Parties not being before the Court. 12 December 1739. Titley v. Davis.—The Cauſe was afterwards revived, and (ut audivi) a Decree made according to this Opinion.

* The chief Objection in this Caſe was, that by this Order, White Acre which was not comprized in C's Mortgage, is not withſtanding charged with his Debt; but the Ld Chancellor ſaid it was no new thing for a Man, by a ſubſequent Acci-

dent, (as by Payment of Money) to gain Lands as a Security for his Debt, more than he contracted for, and which otherwiſe would not be liable to it; and mentioned the Caſes of *Wobey v. Smith*, 1 Chan. Caſes 201. and *Arton v. Pearce* 2 Vern. 480. Ibid.

21. A. by Feoffment mortgaged to B. who assigned to D. in Trust for C. Afterwards C. mortgaged the Premiſſes to E. for 500 Years, and then C. deviſed them to F. in Fee. After C's Death F. entered and mortgaged to R. for 1000 Years, and afterwards to S. after which the Heirs at Law of A. conveyed the Premiſſes to H. and his Heirs; then F. died leaving G. his Heir at Law; H. got an Assignment from R. And S. assigned his Mortgage to T. Afterwards C. assigned all his Intereſt in the Mortgage made to D. to T.—T. brought a Bill againſt G. and R. and H. praying an Account, and that he might Redeem them; Lord Chancellor ſaid, if the Plaintiff had got the legal Eſtate either in himſelf or a Truſtee for him, ſo that he could have brought a

an

an Ejectment, and put the Defendants to have been Plaintiffs here it might indeed have deserved Consideration, whether these Defendants would have been intitled to have redeemed the Plaintiff; but as the Plaintiff has not the legal Estate and is forced to come into Equity he must submit to be redeemed by G. one of the Defendants; *Qui Prior est tempore, potior est Jure*, is a Rule which holds as well in equitable as in legal Rights. In this Case H. had the first equitable Right, and therefore his Mortgage must be paid off in Preference to that of T. the Plaintiff; For T. has no legal Estate for want of taking an Assignment from G. or at least for not having him before the Court in Order to have a Conveyance, and therefore H. who had an Assignment of the Mortgage made to R. previous to any Assignment taken by T. must be preferred before him; and it was *never determined that a Puisne Mortgagee could protect himself against a Prior Mortgagee by purchasing in a Mortgage previous to that, where there is no legal Estate in that Mortgagee from whom he takes his second Assignment, especially without bringing the Trustee of that Mortgagee before the Court; and decreed accordingly.* Barn. Chan. Rep. 457. to 463. Pasch. 1741. Clarke v. Abbot.

(G) Disputes between Mortgagee and Assignee of Mortgage.

1. **T**HE Plaintiff alleges by the Bill that M. W. and K. W. by good and sufficient Conveyance and Assurance in the Law, had granted to him and his Heirs the third Part of the Premises in Question, and prays Relief against the Defendant who was in Possession by Mortgage from the Ancestor. Defendant *demurred* because the Plaintiff set not forth what kind of Conveyance, or Assurance was made to him, so as the Court might Judge if the Plaintiff had any Title, and therefore demanded Judgment, and whether he should be called to Account for any Profits, it appearing that the Plaintiff was never in Possession, but over-ruled. 3 Ch. R. 28. Pasch. 21 Car. 2. Bluck v. Gore.

2. Bill was brought by Mortgagor to Redeem and to have a Reconveyance on Payment of what was due. A Reconveyance was decreed. J. S. advanced the Money which was paid accordingly to the Mortgagee, and the Mortgagor assigned the Equity of Redemption to J. S. and the Mortgagee had Notice thereof; afterwards the Bill was dismissed by Consent of Mortgagor and Mortgagee, and then the Mortgagor for a valuable Consideration released his Interest to the first Mortgagee, which Release and the Dismission signed and inrolled was pleaded to a Bill brought afterwards by J. S. to set aside the Release, and the Plea was allowed, but left the Plaintiff to reply and take Issue if he thought fit. Fin. R. 46. Hill. 25 Car. 2. Madge v. Wheeler and May.

(H) Disputes between Mortgagee and Creditors.

1. **I**F a Man Mortgages by a defective Conveyance, and there are subsequent Creditors, whose Debts did not originally affect the Land, Equity will supply such defective Conveyance against such subsequent Incumbrances, who acquired a legal Title afterwards; For since the subsequent Creditors did not originally take the Lands for their Security, nor had in View an Intention to affect them, when afterwards the Lands are affected, and they come in under the very Person that is obliged in Conscience to make the defective Security good, they stand in his Place, and shall be postponed to
such

such defective Conveyance. Abr. Equ. Cafes 320. (E) pl. 1. cites Mich. 1670. Burgh v. Francis.

2. *Redemption* was deny'd to Creditors becaufe of the *length of Time.* Arg. 2 Chan. Cafes 62. Trin. 33 Car. 2. cites Sir Woollaston's Cafe. —1 Chan. Cafes 220. Hill. 23 & 24 Car. 2. S. P. Rofcarrick v. Barton.

3. A. had *Judgment on a Counterbond* againft the Son and Heir of B. the Debtor, and had extended the Lands which were mortgaged to C. — A. brought a Bill to *discover Incumbrances*, and was decreed to *Redeem*; and the *Devisee* of the Son having *borrowed more Money of A.* on a Statute acknowledged to D. *in trust for A.* he was decreed to Redeem againft A. but fould pay the Statute as well as the Judgment and Mortgage. Fin. R. 51. Hill. 25 Car. 2. Mole v. Franklin.

4. A Purchafor bought Lands charged with a Judgment and bought in Mortgages to protect his Purchase; but it was decreed that the *Judgment Creditor paying Mortgages precedent* to his Judgment fould Redeem. Fin. R. 366. Trin. 30 Car. 2. Bacon v. Ashby.

5. After a Decree to foreclose the Mortgagor and some Creditors whose Debts were charged on the Estate, *a Creditor pays off the Mortgage and agrees with the Rest that they fould redeem him at a farther Day, otherwise he fould hold the Lands absolutely*; This gives the Creditors a new Redemption, and accordingly a Redemption was decreed, tho' after 20 Years Poffeffion and great Improvements made, 800 l. being laid out in Buildings, and directed an Account to be taken, and the Defendant to be *allow'd only neceffary Repairs and lafting Improvements.* Hill. 1682. Vern. 138. Exton v. Greaves.

This Decree was founded principally on the first Mortgagee's not having affigned the Benefit of the Decree for foreclosing the E-

quity of Redemption, but the Mortgage only sold.

6. *Mortgagor becomes Bankrupt*; The Assignees bring *Ejectment*; the Mortgagee refuses to enter, but fuffers the Bankrupt to take the Profits to *fence againft the Assignees with this Mortgage*; per North K. The Mortgagee fould be charged with the Profits from the Delivery of the Ejectment. Mich. 1684. Vern. 267. Chapman v. Tanner.

7. A. mortgaged to B. and then acknowledged 3 *Judgments to C. D. and E.* for other Monies due. — C. and D. gave *Notice* to B. and *desired B. to accept of his Money* due on the Mortgage, which they fould they were ready to pay him, and desired B. to appoint a Time when, and they would pay him within a Fortnight, to the Intent that his Mortgage being set afide they might take Execution on their Judgment, but *proved not any Money actually tendered*; But afterwards B. exhibited a Bill againft A. and had a *Decree to foreclose*, and after took an *Absolute Conveyance from A.* for a confiderable Sum of Money, and now C. and D. had a decree againft B. to pay them their Money; But E. had no Relief becaufe he give *no Notice in Time* of his Judgment. Hill. 1 Jac. 2. 2 Chan. Cafes 170. Grefwold v. Marham.

8. If a Mortgagee after Notice of a fubfequent Mortgage *joins with the Mortgagor in a Sale of the Lands* to a Stranger, the Money receiv'd by either fould sink fo much of the * Purchase-money. Mich. 1691. Ch. Prec. 30. Bentham v. Haincourt.

9. By 4 & 5 W. & M. cap. 20. S. 3. *No Judgment not doggeted according to that Act fould affect any Lands as to Purchafors or Mortgagees &c.*

10. Creditors of a Mortgagor brought a Bill to have the Estate fold for payment of their Debts, pending which Suit the Mortgagee got a *Decree to foreclose* the Mortgagor. The Court decreed the Creditors to redeem on payment of Principal Interest and Cofts to the Mortgagee, and referred to a Master to take an Account thereof, and that the Land fould be fold to pay the Creditors. Trin. 11 Geo. 9 Mod. 153. Soley v. Salisbury.

* [Quere: if the Words Purchase-Money, fould not be Mortgage Money.]

See Fraud
(Q.) &c.

(I) Disputes between Mortgagee and After-Purchasers.

2 Ch. Cases
98. 213.

1. **A** Acknowledged a Statute of 1500 l. for payment of 800 l. and Interest to B. which being forfeited and Lands extended at a certain Annual Value A. afterwards for a good Valuable Consideration settles the same Lands in Tail, and then borrows more Money of B. and it was agreed by Articles between A. and B. that this Statute and Extent should stand a Security for the Money borrowed. A. dies. The Right of Entail descends on the Plaintiff C. and the 800 l. with Interest is satisfy'd by Perception of Profits or otherwise. Per tot. Cur. C. can have no Relief against the Penalty of the Statute; For both the Statute and Settlement in Tail were for Valuable Considerations and the Money borrowed afterwards raises an Equity for B. and the Heir C. has an Equity by the Entail; Yet because B. has both Law and Equity, and C. has only Equity till the Penalty of the Statute is satisfy'd C. shall not be relieved till the Penalty is levied according to the extended Value, or by Casual Profits. But per omnes, B. should not be relieved in Equity for any Money lent since the Settlement upon the Credit of his former Security; For then no Purchaser could be safe. Mich. 14 Car. 2. Hard. 318. Hedworth v. Primate.

2. On a Treaty of Marriage between B. Son of A. and M. Daughter of G. H. there was a Meeting at which was present J. S. who had a Mortgage on Lands then proposed to be settled by A. the Mortgagor on B. his Son and M. his intended Wife. Upon which J. S. called A. out and reminded him of the Mortgage but said nothing of it to G. H. Thereupon J. S. privately consented to A's settling the Estate, and to take his Personal Security for the Mortgage Money, and then A. and G. H. in Presence of J. S. agreed that the Lands should be settled on B. and M. and the Issue of that Marriage, the Remainder to any other Sons which B. should have of any other Wife, the Remainder to A. in Fee. About 12 Years after J. S. brought Ejectment as Mortgagee, whereupon B. and M. exhibited their Bill against J. S. and A. praying a perpetual Injunction, Ld. C. Hardwicke declared that J. S. by concealing his Mortgage was not intitled to any Relief against the Plaintiffs, nor would he make any Decree over for J. S. against A. because both Parties had examined him as a Witness in the Cause. His Lordship decreed J. S. to assign the Mortgage in Trust for the Benefit of the Plaintiffs and the Issue of that Marriage, but would not determine whether it was to be considered as fraudulent or not against the Issue which B. might have by any other Wife, and would reserve the Consideration of that Matter; he order'd J. S. to pay the Costs both at Law and in Equity and also of the Assignment, but without Prejudice to his bringing any Bill against A. Barn. Chan. Rep. 101. Pasch. 1740. Berrysford v. Millward.

(K) Disputes between Tenant for Life and Remainder-man,
&c. of the Lands mortgaged.

1. **T**ENANT for Life must keep down the growing Interest, as is the common Rule in Equity; per Cowper C. 3 Ch. R. 131. in Case of Orby v. Ld. Mohun.

* In a like Case the Heir was decreed by Ld. Somers to pay

2. Land mortgaged for 100 l. was devised to A. for Life, Remainder to B. in Fee, Devisor made A. Executor and left Assets enough to pay the Debts; B. prayed it might go to the Payment of the Mortgage; But the Court took a Difference between * Heir and Devisee, and tho' the Heir should be

be relieved in such Case, yet Devisee shall not; and decreed Tenant for two Thirds, Life to pay 1 Third, and he in Remainder 2 Thirds to Redeem. Chan. and said that to it would Cafes 271. Hill. 27 & 28 Ca. 2. Cornish v. Mew. have been if Mortgagee

had took the Profits during A's Life. Mich. 1696. Ch. Prec. 62. Ballet v. Spranger. — Vern. 70 — 2 Mod. 174.

3. A *Jointress* paid off a Mortgage; it was decreed that she should hold Decreed accordingly. Hill. 27 & Patch. 34 28 Car. 2. Chan. Cafes 271. cited as the Case of Bertue v. Stile. Car. 2. 2 Chan. Cafes

100. Bond v. Bond. — But * *one third Part* was to be her own Proportion. 2 Chan. Cafes 100. — North K. said if the Cause had come originally before him, and there had been *Assets* sufficient, the Husband having covenanted to pay the Money, he would have decreed it clear to the Wife. Hill. 1683. Vern. 214. S. C.

* 13 Car. 2. Chan. Rep. 218. Rowel v. Walley — Mich. 32 Car. 2. Fin. R. 475. Pain v. Bromfal.

4. Lands in Mortgage were *devised to A. for Life, Remainder to B. in Fee*; A. takes an Assignment of this Mortgage in a *Trustee's Name*. B. * paying two Thirds may come in and redeem; but in this Case *A. dying before the Bill* was brought, and having enjoy'd the Estate but one Year only, his Executor (the Defendant) must make Allowance only for the Time that A. enjoy'd the Estate. Trin. 1686. Vern. 404. Clyatt v. Kitson. S. C. cited. Mich. 1696. Chan. Prec. 62. — * Hill. 9 Ann. G. Equ. R. 30. Kitson v. Kitson.

5. A. devised Lands incumbered to *B. for Life, Remainder to C. in Fee*. B. cuts down Timber; decreed *B. to pay two, and C. three Fifths* of the Debts and B. to account for Timber cut, and to be taken as Part of the 3 Fifths to be paid by the Remainder-man. Patch. 1692. 2 Vern. 267. James & al. v. Hales & al. Ch. Prec. 47. S. C. — Upon a like Point Ld. C. Parker said how equitable forever this

might be to allow two Fifths in Case of a *Tenant for Life with Remainder to him in Fee after an Intervening Estate Tail, and to allow the Tenant in Tail only three Fifths*; yet it was not the Practice and would be dangerous and create uncertainty, and Mr. Goldsborough the Register said, he never knew a Life valued at more than one Third. Wms's Rep. 650. Patch. 1-20. Anon. — Or Hubert v. Fetherston — A *Bill to redeem or foreclose* was brought against *Tenant for Life only* of the Equity of Redemption, without making the Remainder-men Parties. The Court directed the Defendant to bring a Bill to have a Sale made and the Mortgage Debt to be paid, and the *Surplus to be distributed amongst the Tenant for Life and Remainder-men in Proportion* according to their several Interests. 2 Vern. 117 Mich. 1699 Thynn v. Duvall.

6. A Remainder-man can only force the Tenant for Life to keep the *Interest down* if the Land is charged, but he cannot *compel him to redeem* directly, tho' *indirectly* he may *by purchasing in the Mortgage*, then to pay but one Third or Part with the Potelion; agreed per Sir Tho. Powis. Arg. Patch. 7 Ann. G. Equ. R. 69. in Case of Hungertord v. Hungertord.

7. Tenant for Life and Remainderman *joined in mortgaging Lands*; they both *Covenanted* and gave Bond *to pay* the Money. Tenant for Life dies; Per Ld. Cowper, If Remainderman pays the Money and takes up the Bond or *gets the Covenant assigned*, he may prefer his Bill against the Executors of the Tenant for Life but not else. Patch. 7 Ann. G. Equ. R. 69. in Case of Hungertord v. Hungertord.

8. A. a Papist seized in *Jure Uxoris*, and being intitled to be Tenant by the Curtesy by his having Issue the Plaintiff joined in a Fine with his Wife, and made a Mortgage with a Proviso, that *on Payment of the Mortgage Money* the same should be re-conveyed to *A. for Life without Impediment of Waste*. A. being afterwards *attainted of Treason*, his Estate was vested in Commissioners for Benefit of the Publick. B. the *eldest Son* of A. and M. his Wife *claim'd the Reversion free and discharged of a Commitment of Waste*, which was allow'd, and then the Commissioners conveyed *A's Estate* with all Privileges thereto belonging to *W. R. and T. S. who afterwards bought in the Mortgage and cut down a large Quantity of Timber*. In this Case it was argued, that to have the Debt diminished by the Sale of Timber, (which belongs solely to the Reversioner) would be to

make his Particular Estate discharge a Debt, to which the Tenant for Life was liable in Proportion. And suppose that the Value of the Timber cut down was equal to the Debt on the Estate, and to be apply'd to the Discharge of it, in that Case the Tenant for Life would be no more charged with Payment of the Interest of the Money, which the Law bound him to, and the Reversioner would have paid the whole Debt when the Law charged him but with a Part; and this by the single Act of the Mortgagor, who in this Case is one and the same with the Mortgagee; and that this was an Artifice to diminish the Charge on the Tenant for Life, and throw it on the Reversioner. *Ibid.* 31.

(L) Disputes between Mortgagee and Assignee of Mortgagee.

1. **M**ortgagee with Notice of a Trust assigns over to the Nominee of a Purchaser, of which Trust the Purchaser had Notice likewise before the Deeds executed, or his Money paid; The Court left the Purchaser at Liberty to bring his Bill against the Mortgagee for the Money paid him on the Assignment of the Mortgage. *Vern.* 437. *Mich.* 1687. *Walley v. Walley.*

2. A. settles Land mortgaged to B. as a Jointure on M. whom he after marry'd, Remainder to the Heirs of his Body by the said M. A. afterwards makes another Mortgage of the same Land to C. and makes Oath it was free of Incumbrances. A. dies intestate, leaving a Son by M. and leaves personal Estate. D. administers during the Son's Minority, and out of the personal Estate of A. pays off B. and takes an Assignment in Trust for the Son. Master of the Rolls decreed C's Debt to be satisfy'd as far as Assets of A. and that D. should not be allowed as against C. the Money paid for the Assignment of B's Mortgage. *2 Vern.* 304. *Mich.* 1693. *Fox v. Crane and Wight.*

(M) Proviso. To make Interest Principal, or to enlarge or lessen it.

S. P. *2 Vern.* 316. *Pasch.* 1694. *Shode v. Parker.* **I**nterest of Money on a Mortgage was made at 5*l.* per Cent. but if not punctually paid, then at * 6*l.* The Interest is very much in Arrear. Defendant was decreed to pay but 5*l.* per Cent. the Retention of 6*l.* being but as a Nomine Pœnæ. *2 Vern.* 289. *Pasch.* 1693. *Lady Hollis v. Court took a Wife.*

Difference where the Reversion of 6*l.* per Cent. was to be reduced to 5*l.* if paid duly; there he must comply with the Times of Payment, and says it was so decreed in * Lord *J. allstar's* Case; but where the Interest is to be increased if not paid at the Day, that is but in the Name of a Penalty, and relievable in Equity. But the Reporter says, *Quære tamen*; For the Agreement of the Parties seems to be the same in either Case,

Cafe, and whether Interest is to be reduced upon Compliance with the Times of Payment, or to be advanced in Default thereof, seems only to be a Difference in the expressing one and the same Thing. Ibid.—* In Ld *Hallifax's* Cafe, the Agreement to take 5*l.* per Cent. was by a distinct Deed; but Quere, How that varies the Cafe. Ch. Prec. 161. in a Note there.

But where a Mortgage was at 5*l.* per Cent. with *Covenant to pay 6*l.* on Default of paying the Interest for 60 Days*, it was decreed, that from Default he should pay 6*l.* and that this Covenant was the Agreement of the Parties, and not to be relieved against as a Penalty. 2 Vern. 134. Hill. 1690. Marquis of *Hallifax v. Higgins*.

* This is not an unreasonable Penalty, and it is the Defendant's own Agreement; and per Wright K. decreed to pay 6*l.* per Cent. Chan. Prec. 160. Pasch. 1701. *Jory v. Cox*.

Tho' the Court will allow a Mortgage in this Manner, viz. That 5*l.* per Cent may be reserved, with a Proviso, that if the Interest be paid within a certain Time after it is due, the Mortgagee will accept 4*l.* per Cent. and that shall be good; yet if a Mortgage is made with Reservation of 4*l.* per Cent. Interest with a Proviso, that upon Non-Payment thereof within a certain Time after it is due, he shall pay 5*l.* per Cent. such Proviso will not be good; and that has been several Times determined; Per Ld C. *Hardwick*. Barn. Chan. Rep. 148. Pasch. 1741. in Cafe of *Walmesley v. Booth*.

2. Proviso was, that if the Interest was behind for six Months, that then that Interest should be accounted Principal, and carry Interest; Per *Cowper* Ch. It is a vain Clause, and no Precedent had ever carried the Advance of Interest so far; and an Agreement made at the Time of the Mortgage will not be sufficient to make future Interest Principal. But to make Interest Principal, it is requisite that Interest should be first grown due, and then an Agreement concerning it may make it Principal. 1707. 2 Salk. 449. *Ld Oflulton v. Ld Yarmouth*.

Ld C. *Parker* conceived, that to make Interest Principal, it is requisite that there should be a Writing by the Parties, for as much

as the Estate in the Land is to be charged therewith. *Wms's* Rep. 653. Trin. 1720. in Cafe of *Brown v. Barkham*.

3. A Mortgage was made by A. to B. at 6*l.* per Cent. Proviso to accept 5*l.* per Cent. if paid within three Months after it is due. Ld. C. *Parker* said, that this is generally looked upon as Penalty, & in Terrorem, and to be relieved against if only a short Time has happened, but not in Cafe of a long Arrear of Interest. But tho' in the principal Cafe, there was a great Arrear, he thought this 1*l.* per Cent. to be a Satisfaction, and a considerable one too, and therefore refused to make it Principal, tho' A. by Letter had allowed the Account desiring Forbearance, and promised Satisfaction; But declared, that if there had not been such Penalty of 6*l.* per Cent. instead of 5*l.* and a great Arrear of Interest incurred, the Court would, on such a Promise in Writing to make a Satisfaction for Forbearance, have given the Mortgagee some Allowance in this Respect. *Wms's* Rep. 652. Trin. 1720. *Brown v. Barkham*.

(N) Payment or Tender. By whom.

1. IF a Feoffment be made in Mortgage upon Condition that the Feoffor shall pay such a Sum at such a Day &c. altho' the Feoffor dieth before the Day of Payment &c. yet if the Heir of the Feoffor pay the same Sum at the same Day to the Feoffee, or tender to him the Money, and the Feoffee refuse to receive it, then may the Heir enter into the Land; and yet the Condition is, that if the Feoffor shall pay such a Sum at such a Day &c. not making mention in the Condition of any Payment to be made by his Heir; but because the Heir hath Interest of Right in the Condition &c. and the Intent was only that the Money should be paid at the Day assessed &c. and the Feoffee hath no more Loss if it be paid by the Heir, than if it were paid by the Father &c. And for this Cause, if the Heir pay the Money or tender the Money at the Day assessed &c. and the other refuses it, he may enter. Co. Litt. S. 334.

In this Cafe the Law enables the Heir, that was not named, to perform the Condition for four Causes. 1st. There is a Day limited, so as the Heir comes within the Time limited by the Condition;

For otherwise he would not do it. 2dly. The Condition descends unto the Heir, and therefore the Law, that gives him an Interest in the Condition, gives him Ability to perform it. 3dly. The Feoffee receives no Da-

mage thereby. 4thly. The *Intent* and true Meaning of the Condition shall be performed. And where it is here said, that the Heir may tender *Al Jour Abiesse &c.* herein is implied, that the Executors and Administrators of the Mortgagor, or in Default of them, the Ordinary may also tender. *And the Law enables the Heir to perform the Condition, lest the Inheritance should be lost.* Co. Litt. 205 b.

A *Stranger* cannot tender the Money to be paid upon the Mortgage; For it ought to be by one who has Interest in the Land. *Ow* 34, Winter v. Loveday.—*Godb* 39 Arg. in Cropp's Case.

2. But if a *Stranger of his own Head*, who hath not any Interest &c will tender the aforesaid Money to the Feoffee at the Day appointed, the Feoffee is not bound to receive it. Co. Litt. S. 334.

But if any *Stranger* in the Name of the Mortgagor or his Heir (*without Consent or Privy*) tender the Money, and the *Mortgagee accepts it*; This is a good Satisfaction, and the Mortgagor or his Heir agreeing thereunto, may re-enter into the Land; For *Omnis Rati habitio retrahitur & Mandato æquiparatur* But the Mortgagor or his Heir may disagree thereunto if he will. Co. Litt. 206. b. 207.

3. If the Mortgagor dies, his *Heir being within Age of 14 Years*, (the Land being holden in *Socage*) the next of Kin, to whom the Land cannot descend, being his *Guardian in Socage*, may tender in the Name of the Heir, because he has an Interest as *Guardian in Socage*. So if the Heir be within 21 Years, and the Land is *holden by Knight's Service*, the *Lord of whom the Land is holden* may make the Tender for his Interest which he shall have when the Condition is performed: For these in Respect of their Interest are not accounted *Strangers*. Co. Litt. 206. b.

Age; but if the Infant is above 14 Years old, and he *assents to the Tender*, such Tender shall be sufficient: *Mo*. 222. Hill. 28 Eliz. *Watkins v. Ashwell*—*Cro. E.* 132. S. C.—And because *no Assent was proved*, but only that he was within Age, it shall not be *intended* that he was under 14. and therefore the Court advised the Party to begin *De Novo*, and that it may be found that he was under 14. *Ow*. 127. *Watkins v. Altwick* S. C.—*The Verdict finding Infancy generally*, and not finding him under 14, the Tender was adjudged not good. *L. e.* 34. S. C.

4. But if the *Heir be an Idiot* of what Age soever, any *Man may make the Tender* for him, in Respect of his absolute Disability, and the Law in this Case is grounded upon *Charity*, and so in like Cases. Co. Litt. 206. b.

(O) Payment or Tender, to whom it may be.

Put the Words of the Condition may be such, as the Payment shall be made to the Heir. As if the Condition were, that if the Feoffor pay to the Feoffee or his Heirs such a Sum, at such a Day &c. There after the Death of the Feoffee, if he dieth before the Day limited, the Payment ought to be made to the Heir at the Day appointed. Co. Litt. S. 339. 5 Rep. 96. b. *Goodale's Case*.—But if the Condition be to pay Money to the Feoffee his Heirs, or Executors. The Feoffor has Election to pay it, either to the Heir or to the Executors. Co. Litt. 210. a.

1. IF the Feoffee in Mortgage before the Day of Payment makes his Executors and dies, and his Heir entereth into the Land as he ought &c. The Feoffor ought to pay the Money at the Day appointed to the Executors, and not to the Heir of the Feoffee; because the Money at the Beginning trenched to the Feoffee in Manner as a Duty, and shall be intended that the Estate was made by Reason of the lending the Money by the Feoffee, or for some other Duty; and therefore the Payment shall not be made to the Heir, as it seemeth. Co. Litt. S. 339.

2. If a Man makes a Feoffment in Fee upon Condition, That the Feoffee shall pay to the Feoffor his Heirs or Assigns 20*l.* at such a Day, and before the Day the Feoffor makes his Executors, and dies; the Feoffee may pay the same, either to the Heir, or Executors; for they are his Assigns in Law to this Intent. But if a Man make a Feoffment in Fee, upon Condition, that if the Feoffor pay to the Feoffee, his Heirs or Assigns 20*l.* before such a Feast, and before the Feast the Feoffee makes his Executors, and dies. The Feoffee ought to pay the Money to the Heir, and

But where the Feoffee made a Feoffment over, and died, the Money should be paid to the second Feoffee, who is

not to the Executors; For the Executors in this Case are no Assignees in Law. And the Reason of this Diversity is this; For that in the first Case, the Law must of Necessity find out Assigns; because there cannot be any Assigns in Deed, For the Feoffor has but a bare Condition, and no Estate in the Land which he can assign over. But in the second Case, the Feoffee has an Estate in the Land which he may assign over, and where there may be Assignees in Deed, the Law shall never seek out and appoint any Assigns in Law. And albeit the Feoffee made no Assignment of the Estate, yet the Executors cannot be Assignees; because Assignees were only intended by the Condition to be Assignees of the Estate. Co. Litt. 210. says, it was so resolved Mich. 23 & 24 Eliz. *Randall v. Browne*.

3. In Case of *Joint Mortgagees*, there shall be no *Survivorship*, where the Money lent appears to be with Intention that each should have his Money and Interest again. Chan. Rep. 57. 17 Car. 1. *Petty v. Styward*.

4. J. S. mortgaged Lands to A. in Fee, to be void on Payment of 1000*l.* and Interest at Michaelmas, and covenanted to pay the Money, and gave a Bond for Performance of Covenants. The Money was not paid. A. died, leaving B. his Heir at Law. Upon a Bill by B. J. S. was decreed to pay the Money at a Day to B. or to be foreclosed of the Equity of Redemption. Some considerable Time afterwards, it was discovered, that A. had made a Will, and C. Executor, and the Mortgage Money given to C.—C. proved the Will. J. S. before the Time of Payment lapsed exhibited a Bill of Review against B. and the Defendants setting forth all this Matter, and that C. the Executor was not Party or Privy to the former Decree, nor was it then known that there was a Will or Executor, praying to be relieved against the Decree, and that the Court would direct to whom the Money should be paid, and that the Bond be delivered up &c. The Defendants plead the former Decree; and on arguing the Plea, the Court held it an extraordinary Case, and that, if C. the Executor had the Right both by the Covenant in the Mortgage, and by the Bond and Will, the Court could not take it from him. And that if B. the Heir should have the Lands in Mortgage by Virtue of a Decree, J. S. the Plaintiff would be likewise liable to C. the Executor for the Money upon the Bond and Covenant, and so to double Payment. And that a Bill of Review would not lie in this Case, because that must always be between the same Parties to the Original Bill. Now C. was no Party to that Bill; And as to the mortgaged Lands, they being forfeited since the Decree, J. S. cannot have them again. And if C. the Executor had any Right to the Money, he might obtain a Decree against B. the Heir of A. for the Land it fell, or for the Price of it, if sold; yet the Court would not put C. the Executor to take that Course, because he had a Remedy at Law upon the Bond and Covenant, which the Court could not hinder him to prosecute. However he was ordered to answer without Prejudice to his former Plea; and it was likewise * ordered, that B. bring the Mortgage Deed and Bond into Court, and that he sell the Land, and bring the Money likewise into Court, there to remain whilst he and C. the Executor inter-plead for the same. Nels. Ch. R. 52. before Lds Commissioners Widdrington, Tyrrel, and Fountaine, Anno. 1659. *Earl of Carlisle v. Gober*.

5. The Question was, whether the Mortgage Money should be paid to the Heir or Executor of the Mortgagee: And it was for the Heir insisted, That it was ruled in a Case between *Cilley and Egerton*, in Michaelmas 1660, heard by the Ld. Chancellor, assisted by the Ld. Bridgman, there being no Defect of Assets in the Executor's Hands, that the Heir should have the Money, who is to convey the Estate; And this was said to be the first Precedent of this Kind. But the Court would see Precedents. And afterwards, about Michaelmas or Hillary Term, 1667, the principal Case was heard before the Lord Keeper Bridgman, where the Order in the Case of Egerton was produced; But in the principal Case there appeared to be a Bond for Payment of the Mortgage Money, which goes to

the Assignees; per Popham Ch. J. and Clench J. Poph. 102. in Case of Goodale v. Wiart.

3 Chan. Rep. 94 S. C. in almost the same Words.

* 3 Chan. Rep. 6. S. C. introduces this Order with Saying thus, viz. "Afterwards "at another "Day, the "Plaintiff "moved to "be admitted to a "Bill of Review. Ordered &c."

Ibid. says it was adjudged by the Lord Keeper. 11 Car. 1. *Saint John v. Grahham*. That the Heir, and not the Executor should have the Money;

it being payable by the Condition to the Heirs or Assigns of the Mortgagee.

the Executors; And the Condition of the Redemption was upon Payment of the Money to the Executors &c. (without naming the Heir) So it was ruled in the principal Case, That the Money should be paid to the Executor; But the Lord Keeper said, That if the Condition of the Redemption had been to pay the Money to the Heir or Executor, and no Bond were in the Case, nor no count of Assets of the personal Estate, it might have been otherwise. And in the Case of Egerton, in reading the Order it did not appear how the Condition was penned; But the Court now took it, that the Money was payable to the Heir by the Condition. Chan. Cases 88. Hill. 19 Car. 2. Smith v. Smoult.

6. A Mortgage was made *in Fee*, which descended to the Heir at Law, and the Money 10 Years since paid to him. The Executor of the Mortgagee preferred his Bill, and had a Decree for the Money, but without Interest. Though the Proviso was to pay to the Mortgagee, his Heirs, or Executors; yet when the Day is past, it is as much as if no Person had been expressed, and then Equity shall follow the Law, and appoint it to the Executor. 2 Vent. 348. Trin. 32 Car. 2. Turner's Case.

7. A. having a Rent-charge to him and his Assigns for three Lives of 160 l. a Year mortgaged the same to J. S. his Executors, Administrators, and Assigns, To have &c. to him, his Heirs, and Assigns, during the three Lives of the original Nominees upon this special Trust, That J. S. his Executors, Administrators, and Assigns, shall enjoy 100 l. a Year out of it to their own proper Use, till the Mortgage Money satisfied, if the three Lives last so long. J. S. made W. R. Executor, but no Witnesses subscribed the Will. W. R. brought a Bill against T. S. the Heir at Law of J. S. and others to have the Benefit of so much of the Rent-charge as J. S. was intitled to. The Master of the Rolls made two Points: First, What sort of legal Estate J. S. had in this Rent-charge? viz. Whether it would go to his Heirs or his Executors for the three Lives? And if to his Heirs, then, Whether the Trust of it does not belong to his Executors? He said, he could not find one single Authority which would come up to the first Point, this being an Estate Pur auter Vie, That the general Rules as to the Office of an *Habendum* are, that it is to explain, limit, and declare the Quantum of the Estate to pass by the Deed; It has never been disputed but it will carry the Limitation of the Estate further than the Premises of the Deed did. On the other Hand it is clear, that the *Habendum* never abridges the Estate granted by the Premises; It may indeed vary and alter it. As if an Estate be granted to A. and the Heirs of his Body, *Habendum* to him and his Heirs, this is a Fee Simple; Some Books indeed have said, that this is only an Estate Tail with a Remainder in Fee, but he said it is difficult to maintain that Opinion, and he thought it not Law. That the particular Nature of the present Case is such, that a Grant of this Kind to J. S. and his Executors, is the same as to J. S. and his Heirs; For in both these Cases being of an *Estate Pur auter Vie*, the Heirs and Executors do not take as Representatives to the Party, but as special Occupants. And therefore it has been held, that if Lands are granted to A. and his Heirs for three Lives, he may grant it to B. and his Executors for those Lives; So if granted to A. and his Executors for three Lives, he may grant it to B. and his Heirs during those Lives; Whence it follows, that if one of these Limitations is in the Premises, and the other in the *Habendum*, the *Habendum* shall take Place. As if the Premises are to A. and his Executors during the Life of B. *Habendum* to A. and his Heirs during B's Life, the Heirs shall have the Benefit of the Estate. So if the Premises are to A. and his Heirs during B's Life, *Habendum* to A. and his Executors during B's Life, the Executors shall have the Benefit of it; Because the *Habendum* does not attempt to give a less or larger Estate than contained in the Premises, but is merely explanatory. And tho' before the Statute of Frauds and Perjuries no Grant of a Rent Pur auter Vie was good longer than for the Life of the Grantee, because

because it lay not in Occupancy, yet a *Rent is within the Relief of the Statute of Frauds*, as well as any other sort of Inheritance. So that the Matter of the legal Estate depends upon the Habendum, which he thought ought to take Place for the Reasons before mentioned, and consequently, that the legal Estate in this Rent belonged to the Heir at Law; But however, that within the *Meaning of the Trust of this Deed, the Executor of J. S. is intitled* to the Benefit of it, it being expressly declared, that the Mortgage was made upon this special Trust, That J. S. the Mortgagee, his Executors, Administrators, and Assigns, should enjoy the Benefit of 100 l. a Year Part of the Rent-charge to their own Use, till the Mortgage was satisfied, if the three Lives so long continued; That the only Thing that made any Difficulty in this Part of the Case was, that it is pretty hard to conceive how a Man and his Heirs should be Trustees for himself and his Executors, but that this is the Case of every Mortgage that is made in Fee. And he decreed accordingly. Barn. Chan. Rep. 46. to 50. Pasch. 1740. Kendal v. Micefield.

(O. 2) Payment or Tender. *What is Good.*

1. **T**HE Payment ought to be *Real and not in Shew* and Appearance; For if it be agreed between the Feoffor and the Executors of the Feoffee, that the Feoffor shall pay to the Executors but part of the Money, and that yet in Appearance the whole Sum shall be paid, and that the Residue shall be repaid, and accordingly at the Day and Place the whole Sum is paid, and after the Residue is re-paid, this is no Performance of the Condition; For the Estate shall not be devided out of the Heir, who is a third Person without a true and effectual Payment, and not a Shadow and Colour of Payment; And the Agreement precedent doth guide the Payment subsequent. Co. Litt. 209. b.

5 Reg. 96. b.
Goodale's
Case. ———
Poph. 99. S.
C.

3. A. indebted by Mortgage to B. in 100 l. paid the Money. B. order'd his Servant to put it into his Closet, who did so. A. then demanded his Writings, which B. not delivering, A. required his 100 l. again, which the Servant by B's Order re-delivered to A. and A. took and carry'd it away. Resolved that this was a *good Payment* and discharge of the Mortgage, and tho' A. demanded it again as his own Money, yet it shall not avoid that which was absolutely paid; but the Mortgage remains absolutely discharged, and the Money was the Plaintiff's, and being not delivered to B. otherwise or upon any good Consideration, A. received them as B's Money, and is accountable to B. for them. Cro. E. 614. Hewer v. Bartholomew.

(P) Discharged. By what Act.

1. **J.** S. mortgaged Land to A. for 500 Years to secure 3000 l. and a Bond was given for Performance of Covenants. The Writings were left in a third Person's Hands. Some time afterwards J. S. bringing the Box in which were the Mortgage and Bond to A. in the Presence of M. the Mother of J. S. who were Relations, A. put back the Writings with his Hand, and said, *Take back the Writings I freely forgive you the Debt*; and then said to M. "I always told you I would be kind to your Son; now you see I am as good as my Word."—A. died, leaving B. his Son, who brought his Bill as Representative of A. to compel Payment, or that J. S. might be foreclosed. Ld. C. Hardwicke was of Opinion, That in Case A. forgave the Debt in the Manner as sworn by the Defendant, the Plaintiff could not be intitled to Relief, (supposing the Statute

of Frauds to be out of the Case) and that the Bill must be dismissed. And rhet this being a *mortgaged Interest in Land*, he thought *this Evidence allowable consistent with the Statute of Frauds and Perjuries*. That what is there said, That no Interest in Lands any longer than for three Years shall pass without Writing, nor any Trust in them for a longer Time, unless it arises by Operation of Law; and so of a Devise of real Estates admits of a *Difference both in Law and Equity between absolute Estates in Fee, or for a Term for Years and conditional Estates for Security of Money*. In the first Case it cannot be admitted that parol Evidence of the Gift of Deeds shall convey the Land itself. But a Mortgage is considered only as a Security for Money, the Land is the Accident attending upon the other, and when the Debt is discharged, the Interest in the Lands follows of Course. In Law the Interest in the Lands is thereby defeated, and in Equity a *Trust arises for the Benefit of the Mortgagor*. And his Lordship thought that such Evidence as above (so far as any Credit can be given to it) ought to be received, as proving a Gift or Release of the Debt; And if an Obligee delivers up a Bond with Intent to discharge the Debt, the Debt will certainly be thereby discharged; and if the Bond is discharged in the present Case, the Mortgage will be discharged with it; And directed an *Issue, whether the Mortgagee did use such Words or not*. Barn. Chan. Rep. 90. Pasch. 1740. Richards v. Syms.

* And therefore if one Partner makes a Mortgage to another, and the Mortgagor agreed that the other should take a certain Part of the Profits of the Partnership in Discharge of the Mortgage, that of itself would discharge it. Per Ld. C. Hardwicke. Ibid.

2. In *Ejectment* where a Title is made under a Mortgage, if *Evidence is given that the Debt is satisfied*, this is considered as defeating the Estate in the Land which the Mortgagee had, and in such Cases, especially where the Mortgage is ancient, the Court will presume that the Mortgage was paid at the Day, and will direct the Jury to find accordingly, unless it appears clearly that the Money could not be paid at the Day. In these Cases no Writing is necessary, which shews that even the *Law considers the Debt as the Principal, and the Land as an Accident only*. But *Equity goes further, and in all Cases says, That where the Debt appears to be satisfied, there arises a Trust by Operation of Law for the Benefit of the Mortgagor, and this is within the Exception in the Statute of Frauds of Trusts arising by Operation of Law*. And in these sort of Cases the Court receives any * *Kind of Evidence of Payment*. Per Ld. C. Hardwicke. Barn. Chan. Rep. 93. Pasch. 1740. in Case of Richards v. Syms.

(Q) Redemption. By whom.

1. **T**HERE was a *Proviso* in a Mortgage, that the Mortgagor, his Heirs, Executors, or Administrators, should have Power to redeem the Lands; yet a Redemption may be by an *Assignee* of the Mortgagor, tho' he is neither Heir, Executor, or Administrator. Toth. 160. cites 11 Car. Porter v.

Vern. R. 342. Mich. 1685. Hall v. Dunch.—357. S. C. cited Hill. 1685.

2. *Devisee* shall redeem, and not the Heir. Chan. Rep. 190. 12 Car. 2. Philips v. Hele.

3. A *Decree* to foreclose *Tenant in Tail* shall bind his Issue as to an Equity of Redemption, because that is a Right set up only in a Court of Equity, and so may there be extinguished. Per Hale Ch. J. Chan. Cases 220. Hill. 23 & 24 Car. 2. Roscarrick v. Barton.

4. As to the admitting Persons to redeem, Lord Keeper made great Difference between such as come to redeem who are *no Parties to the Mortgage*,

gage, and those that are Parties to the Mortgage. Chan. Cafes 220. 23 & 24 Car. 2. Rofcarrick v. Barton.

5. Voluntary Conveyance was made to A. with Power of Revocation on Tender of 1s. The Tender was made, but not at the Place appointed. Afterwards the Grantor makes a Mortgage to B. for 500 l. of the same Lands, and after that an absolute Assignment for 750 l. more paid to the Grantor. The Grantee laid out Money in Repairs and Building. It was decreed, that A. should redeem paying all the Disbursement of Building and Repairs, and B. to account for all wilful Spoils and Wastes done; but if A. failed of Payment, then B. to enjoy against A. and all claiming under him. This Decree was affirmed. Fin. R. 38. Mich. 25 Car. 2. Thorne v. Newman.

6. A Purchaser bought Lands charged with a Judgment, and bought in Mortgages to protect his Purchase; But it was decreed, That the Judgment Creditor paying Mortgages Precedent to his Judgment shall redeem. Fin. R. 366. Trin. 30 Car. 2. Bacon v. Allby.

7. A Mortgage is made redeemable during the Life of the Mortgagor only, yet his Heirs shall redeem. Per Ld. Nottingham C. Vern. 7. Trin. 33 Car. 2. * Newcomb v. Bonham.

This was made with Intent of a Settlement of his Estate,

besides the Consideration; And in this Case Mortgagor was a near Relation to Mortgagee, and agreed, that if he had no Issue Male, the Mortgagee should have the Land. See Mich. 1683. Vern. 193. in Case of Howard v. Harris. — 2 Chan. Cafes 147. S. C. — But this Decree was reversed by Ld. Keeper North. Vern. 232. Pasch. 1684. — 2 Chan. Cafes 148. the Case of Billington v. Green, cited by Mr. Keck, as decreed so in 1678. — The Reversal affirmed in Parliament. 1 & 2 W. & M. 2 Vent 365. — * 2 Ch. Cafes 58. S. C.

8. Tho' the Redemption be limited to the Mortgagor, and the Heirs Males of his Body, yet this will not exclude the Heir general, but that he may redeem. Vern. 190. Mich. 1683. Howard v. Harris.

2 Chan. Cafes 147. Mich. 35 Car. 2. S. C. — But if a

Deed of Entail is set forth, the Heir General shall not redeem without shewing that the Tail is dock'd. Per Ld. North Vern. 182. Trin. 1683. Lomax v. Bird.

9. He that comes to redeem a Mortgage must shew a Title to the Equity of Redemption. Vern. 182. Trin. 1683. Lomax v. Bird.

10. A Reversion naturally attracts the Redemption; as if a Man marries a Jointress of Houses which are burnt down, and they borrow 1500 l. to rebuild, and levy a Fine for Concessit, and * by Deed between the Husband and Conufee the Equity of Redemption is reserved to the Husband and his Heirs; he lays out 3000 l. in Building and dies, decreed the Wife and not the Heir to Redeem. Vern. 213. Hill. 1683. Brend v. Brend.

* By Parol Agreement between the Husband and Wife the Wife was to Redeem. 2 Chan. Cafes

99. Pasch. 34 Car. 2. S. C. — Vern. 33.

11. One that claims under a voluntary Conveyance may Redeem a Mortgage; Arg. Vern. 193. Mich. 1683. in Case of Howard v. Harris.

S. P. Chan. Cafes 59 Mich. 16 Car. 2. Rand v. Cartwright.

12. It was insisted that the Wife for her Dower is in Law in the Per, by her Husband, and shall be intitled to clear all Incumbrances, as well, and more than the Husband; Arg. 2 Chan. Cafes 172. Hill. 1 Jac. 2. Bodmin v. Vandebenden.

Arg. Vern. 357. S. C. and P.

13. A. is bound with his Father for the Debts of the Father; the Father enters into a Statute to pay the Debts and Indemnify the Son; a Creditor gives up his Bond and takes a Mortgage from the Father; Decreed that the Defendants should Redeem, or be foreclosed and a perpetual Injunction against the Statute; per Master of the Rolls. 2 Vern. 39. Hill. 1688. Legriell v. Barker, &c.

14. Where the Equity of Redemption is on a Mortgage in Fee, there a Bond Creditor shall never be let in, because after the Debt is paid the Lands are vested in the Heir; * but fecus, where a Term is mortgaged; For the Equity

N. Ch. R. 183. Mich. 1683. contra Burgh v. r rants. —

This Difference was admitted
Arg. Vern. 410. Mich. 1686 and said to be adjudged with advice of the Judges in the Case of Bennet v. Box.—* S. P. 2 Ch. R. 360. 1 Jac. 2. Hallily v. Kirtland.

Equity of Redemption of a *Term for Years* comes to the Executor, and in such Case a Bond Creditor shall be let in, because if the Term it self should be reconveyed it would be *Assets* in his Hands; Arg. N. Ch. R. 167. Mich. 1690. in Case of Baden v. E. Pembroke.

15. A. for 80*l.* conveys *absolutely* to B.—A. brings a Bill to Redeem; B. insists that the Grant was absolute, but *confessed it was a Trust* that after the Principal and Interest paid B. should stand seised *for A's Wife and Children*; Plaintiff replies to the Answer but no Proof of the Trust and therefore it was insisted that the Husband should Redeem; but decreed a Trust for the Wife and Children. 2 Vern. 288. Pasch. 1693. Hampton v. Spencer.

16. If a Man enters into a *Bond*, in which he binds himself and his Heirs, and dies, leaving a *real Estate* to descend to his Heir, *subject to a Mortgage for Years*, and the Heir sells the Equity of Redemption; the *Obligee cannot Redeem the Mortgage without first having a Judgment at Law against the Heir.* Abr. Equ. Cases 315. Pasch. 1702. Bateman v. Bateman.

17. *Bond* was given by the Husband to the Wife just before the Marriage to leave her 1000*l.* if she survived him; Baron dies Intestate leaving *Freehold and Copyhold in Mortgage to A.* The Wife administers and brought a Bill against the Heir and Mortgagee to redeem, and Lord Wright decreed her to redeem both; and it was said that tho' on Payment of what is due on the Mortgage, the Heir will have the Copyhold from her, yet the Freehold would be charged till the Bond was satisfied. Ch. Prec. 237. Hill. 1704. Acton v. Acton.

18. *Subsequent Incumbrancers by Judgment*, and other Incumbrancers may Redeem the first Mortgagee, tho' the Mortgagor is *foreclosed by Decree*; And the *Account* taken in the Suit where such Decree was obtained, tho' taken in an Adversary way, will not bind the subsequent Incumbrancers. 2 Vern. 663. Trin. 1710. Morrett and al. Western.

19. A. having *Chambers in Gray's Inn mortgaged them to J. S.*—A. died, leaving B. a Son who was his Administrator but no Member of the Society; B. brought a Bill to Redeem; It was objected that B. was utterly incapable of having the Chambers by the Rules of the Society, which are that none can have Chambers but such as are Members of the Inn; But the Lord Chancellor said, that tho' B. the Plaintiff by the Rules of the House is not capable of Chambers, yet they shall be to him or his Appointee. Select Cases in Chan. in Lord's King's Time 55. Trin. 1726. Rakestraw v. Brewer.

20. Land mortgaged for two several Terms of 1000 Years each was afterwards settled on A. *in Tail*, Remainder to B. *in Tail*, Remainder to A. *in Fee*, by which A. first and B. afterwards had an *Equity of Redemption* incident to their Estates; A. by Will appoints the Mortgage to be paid off, and then the Mortgage Term to be assigned to M. and by the same Will devised all his Lands (being also seised in Fee of other Lands) to C. and his Heirs; by this the Reversion passes of the mortgaged Premises. And the Estate Tail, and the Remainders in Tail, being spent by the Death of A. and B. without Issue the Question was, if the Equity of Redemption, that was incident to the Reversion in Fee of A. passed to M. by the Will, and was thereby severed from the Reversion? and decreed it was not, per King C. Raymond Ch. J. and Denton J. and that the was only in the Place of the Mortgagees and that C. should be let in to Redeem. Gibb. 99. Mich. 3 Geo. 2. Amhurst v. Litton.

21. In the Case of *Franklyn v. Fern* Pasch. 1740. it was said by Parker J. who sat for the Ld. Chancellor; that the Rules laid down in the Case of *Wickley v. Dorrington*, and in that of *Woulk v. Dourfret*, are very Right, viz. that in General *no Person* shall be allowed to come in-

to Equity for a Redemption *but he that has the legal Estate of the Mortgagor*; so if an Executor is willing to get in the Debts of the Testator, there is no Foundation for a Creditor to bring a Bill for that Purpose; and therefore in general, where there are proper Persons to get in the Estate of another, a Court of Equity will not suffer either the Creditors of the Testator, or of a Bankrupt [which was the principal Case, and on which the Question arose] to bring a Bill in Equity in order to get in that Estate; but if an Executor or Assignee, will *collude with* a Debtor, there is no doubt but a Creditor may bring his Bill in order to take Care of that Estate, and charge the Assignees or Executors with such Collusion; That in the principal Case the Creditors of the Bankrupt met to consider it proper for the Assignees to bring a Bill to redeem a supposed Mortgage which the Majority, thought it was not; so that the Assignees could not by the Statute of 5 Geo. 2. bring a Bill; wherefore a Bill brought *by the Minor part of the Bankrupt's Creditors* against the supposed Mortgagee and the Assignees of the Bankrupt's Estate was held to be well brought; and that if the Assignees refuse to bring a Bill which is for the Benefit of the Bankrupt's Estate any Creditor may bring such Bill, under Peril of Costs; and decreed the Assignees to have Liberty to redeem in the first Place, and in their Default the Plaintiffs to do it. Barn. Chan. Rep. 30.

(Q. 2) Redemption. *Against whom.*

- i. **A** Power of Redemption is an equitable Right inherent in the Land, and binds *all Persons in the Possession*, or otherwise; because it is an ancient Right which the Party is intitled to in Equity; per Hale Ch. B. Hard. 469. Trin. 19 Car. 2. in Case of Pawlett v. Attorney General
2. In natural Justice Redemption of a Mortgage lies against *the King*; per Hale Ch. B. Hard. 467. Trin. 19 Car. 2. in Case of Pawlett v. the Attorney General.

(R) Redemption. *In what Cases.*

See Elicheat (K).

1. **M**ONEY secured on a Mortgage *Lease*, tho' *not paid at the Day*, but *after*, yet the Lease ought to be void in Equity, as well as on a legal Payment it would have been void in Law. Chan. R. 20. 1 Car. 1. Emanuel College v. Evans.
2. A. mortgaged Lands to B. and then *articles to sell them to C.* free of Incumbrances for 250 *l.* C. paid A. 50 *l.* of the Money, and afterwards *A. released to B. the Condition of Redemption*; and pending a Bill by C. A. released to B. all his Right in and to the said Lands; But no Money or other valuable Consideration appeared to have been given for either of these Releases. Decreed the Releases to be set aside. Hill. 14 & 15 Car. 2. Hard. 320. Hill v. Worsely and Rogifon.
3. Ld. Chancellor took a Difference between a *Lease to commence after failure of Payment*, and a Mortgage with a Condition subsequent, as to the same being subject to a Redemption. See 2 Chan. Rep. 53, 54. 22 Car. 2. White v. Ewens.
4. A Decree to foreclose *Tenant in Tail* shall bind his Issue as to an Equity of Redemption; because that is a Right set up only in a Court of Equity, and so may there be extinguished; per Hales Ch. J. Chan. Cases 220. Hill. 23 & 24 Car. 2. Roscarrick v. Barton.
5. Mortgagor on taking up more Money on the mortgaged Lands *released the Equity of Redemption* to the Mortgagee and died; but it appearing by Letters, Papers and other Proofs, that the Mortgagee *offer'd* a Redem-

Otherwise a Release and Length of

Time had been a good Plea, and was allowed, tho' the Mortgage Money

tion, and to take his whole Principal and Interest, the same was decreed accordingly on a Bill by the Heir of the Mortgagor, and an *Account* directed. Hill. 29 Car. 2. Fin. R. 284. Seymour v. Tindal & al.

was not more than a Quarter Part of the Value 29 Car. 2. 2 Ch. R. 131. Nance v. Coke.

6. A. surrendered a Copyhold to B. and his Heirs without any Condition mentioned in the Surrender, but it was in Consideration of 100*l.* lent by B. to A. and for further Security thereof A. gave B. a Judgment for 200*l.* And by a Note signed by A. and B. dated before the Surrender it was agreed that B. on payment of the Money should surrender back the Copyhold and acknowledge Satisfaction on the Judgment; B. was admitted, and devised it by his Will to several Persons, and they afterwards disposed of the same; Decreed a Redemption. Trin. 30 Car. 2. Fin. R. 376. Clench and Wife v. Witherly and Hobert.

It was likewise proved that A's Heir at Law had offended him and he had declar'd that she should not inherit him. But Ld. Chancellor decreed a Redemption. 2 Chan. Cases 58, 59. S. C.—Upon this Cause coming before Ld. Keeper North upon a Demurrer to a Bill of Review, he inclined to reverse the Decree; For

7. A. seized in Fee in Consideration of 1000*l.* paid to him by B. who married his Kinswoman, conveys to B. and his Heirs, and takes a Re-demise for 99 Years if he should live so long: And a Covenant therein, that if he should pay 1000*l.* (with the Interest that should be due for the same) at any Time during his Life that B. should re-convey to A. and his Heirs; and that if A. did not pay the Money then, that his Heirs &c. should have no Power to redeem. A. died, the Money not being paid; and his Heirs preferred a Bill to redeem it. Tho' in this Case it was prov'd, that A. had a Kindness for B. as his near Relation, and intended him the Lands after his Death, and that the Clause of Redemption was only put in because A. was a Bachelor, and so might marry and have Issue, but otherwise that B. should have the Land absolutely, and that the 1000*l.* at the Time of Conveyance was the full Value of the Land, tho' by after Accidents it became more valuable, but that had A. lived 30 or 40 Years, the Interest and Interest upon Interest thereby lost would be more than all, and there was no Covenant or other Remedy to compel Payment of the Money, yet Ld. Chancellor Nottingham held, that tho' A. had Time to redeem during Life, yet B. might have compell'd him to redeem or have foreclosed him; and said it was a general Rule, that once a Mortgage and always a Mortgage; and in regard the Estate was expressly redeemable in A's Life-time it must continue so afterwards, and so decreed an Account and Redemption. Vern. 7. Trin. 33 Car. 2. Newcomb v. Bonham.

that *Modus & Conventio vincunt Legem*, and all Conditional Purchases or Bargains must not be turned into Mortgages; And that where there is a Condition or Covenant that is good or binding in Law, Equity will not take it away. Vern. 214. Hill. 1683. S. C.—And upon this Cause coming on afterwards to be heard de Integro before him, his Lordship adher'd to his former Opinion, that there ought to be no Redemption, and Principally, because it was proved to have been A's Design to make a Settlement by this Mortgage, and intended a Kindness and Benefit to B. the Mortgagee in Case he should not think fit to redeem this Estate in his Life-time; and there being an Express Covenant that A. might redeem at any Time during his Life, he thought he could not in Equity have been debarr'd of that Privilege. For by a Bill to foreclose a Man, you shall only bar him of his equitable Title when the Estate at Law is become forfeited; But where he has a continuing Title at Law, as in this Case, by an Express Proviso that he might redeem at any Time during Life, he thought Equity could not debar him of the Privilege; And therefore since B. in this Case could not have compelled A. to redeem, and he might have liv'd so long as to make it an ill Bargain, and now that by a Contingency it happens to be a good Bargain, there is no Reason to raise an Equity thence to take the Estate from B. the Mortgagee, especially there being a Kindness and Benefit intended him by A. and therefore revers'd the Ld. Nottingham's Decree, and dismiss'd the Original Bill for a Redemption. Vern. 232. Pasch. 36 Car. 2. S. C.—His Lordship said, That such Covenant in a Common Mortgage should not be regarded, but this was made with Intention of a Settlement besides the Consideration of the Money paid. 2 Vent. 364, 365. Pasch. 36 Car. 2. S. C.—And it is there said that this Dismission was afterwards affirmed in the House of Lords in the 1 & 2 W. & M.—S. C. cited Wms's Rep. 269. Arg. in Case in Floyer v. Lavington.

Afterwards upon a Re-hearing before Ld. North it was insisted. 1. That Re-

8. A. mortgaged Land to B. and the Proviso for Redemption was thus, viz. *Provided that I myself or the Heirs Males of my Body may red. em.* the Question was, If his Assignee shall redeem it? And decreed that he should; For if once a Mortgage, always a Mortgage. Vern. 33 Hill. 1681. Howard v. Harris.

frictions of Redemption in Mortgages have been *always discountenanced* in Equity, and it would be a Thing of mischiefous Consequence should they prevail. 2. That it was a Maxim here that an Estate *cannot be a Mortgage at one Time and at another Time cease to be so by one and the same Deed*. 3. That it is another standing Rule, that a Mortgage * *cannot be a Mortgage of one Side only*. And that in the Principal Case B. may make it a Mortgage, for he has a *Covenant for Re-payment of his Mortgage money*, and for Precedents, cited the Case of *Hillington v. Gardiner*, who was to redeem at any Time in his Life-time, and Sir † *Robert Jaton's Case*. Ld. North decreed a Redemption, and the rather for that the Defendant had a *Covenant for Re-payment of his Mortgage Monies*. Vern. 191. Mich. 1683. S. C. — Ibid. 215. same Cases cited in Case of *Bonham v. Newcomb* — 2 Chan. Cases 147. Mich. 35 Car. 2 S. C. and there Mr. Keck cited the Precedents of *Hillington v. Green*, as in 1678, where it was decreed that the Heir might redeem. Ibid. 148. — S. C. of *Howard v. Harris*. cited Wms's Rep. 269 Mich. 1714. Arg. in Case of *Floyer v. Lavington*.

* Ch. Cases 2. S. P. Trin. 12 Car. 2. but not decreed. *Copleston v. Boxwill*. — † 2 Chan. Cases 35.

But per Ld. North, if A. borrows Money of his Brother and agrees to make him a Mortgage, and *tho' if he had no Issue Male* his Brother should have the Land, such Agreement proved might well be decreed. Vern 193, 194. in Case of *Howard v. Harris*. Mich. 1683.

9. A. mortgaged Lands to B. the *Equity of Redemption* whereof was *subjected to the Payment of divers Debts*; B. exhibited his Bill against A. and all the Creditors either to redeem or be foreclosed. A *Time of Payment was appointed or else the Defendants to stand foreclosed*. J. S. *one of the Creditors paid the Money and agreed with the others, that if they would pay him the Money at such a Day they should redeem him, otherwise he should hold absolutely*. They did not pay at the Time. After that *J. S. had enjoy'd the Land 20 Years and laid out 800l. in Building*, the Creditors brought a Bill to redeem him. Tho' it was insisted for the Defendants on the Length of Time; and that this was no ways like the Case of Mortgagor and Mortgagee; For that here the *Defendant had no way to compel the Creditors to pay him his Money, and that a Mortgage ought to be mutual*, that as one may compel the receiving so the other may the paying; And that it would have been thought odd for the Defendant to have exhibited a Bill to foreclose these Creditors, yet Ld. Keeper decreed a Redemption; because *by the new Agreement these Lands became a Mortgage in the Hands of J. S. in respect of the other Creditors, by Reason of the Trust and Confidence they had in him, and being all Creditors alike; And Principally because B. assigned his Mortgage only to J. S. and not the Benefit of the Decree for Foreclosure; And his Lordship directed an Account, and J. S. to be allowed only necessary Repairs and lasting Improvements*. Vern. 138. Hill. 1682, Exton v. Greaves.

10. The Rule that where *one Side cannot redeem, the other shall not foreclose*, does not hold in all Cases. For if I lend 100l. upon a Mortgage with a *Proviso to redeem on Payment of 112 l. at the End of 2 Years*, there one Side cannot foreclose till the End of 2 Years; But if the *Mortgagor at the End of the first Year offers to pay the 112l.* he shall be admitted to the Redemption. Arg. Vern. 395. Pasch. 1686. in Case of *Talbot v. Braddell*.

11. Lands were extended in 1 Car. 1. and held in Extent, and a Bill to redeem, and being not redeem'd the Bill was dismiss'd 16 Car. 1. He that had the Extent by Virtue of the said Dismission sold the Premises to the Defendant, but the Plaintiff having since bought the Equity of Redemption seeks a Redemption. This Court, notwithstanding the *Dismission and Length of Time*, ordered an Account from the Time of the Purchase, but the Profits to go against the Interest to that Time 2 Jac. 2. 2 Chan. Rep. 392. *Cloberry v. Lymonds*.

12. A. is bound with his Father for the Debts of the Father; the Father enters into a *Statute to pay the Debts and indemnify the Son*. A Creditor gives up his Bond and takes a Mortgage from the Father. Decreed that the Defendants should redeem or be foreclosed, and a perpetual Injunction against the Statute. Per Master of the Rolls. Hill. 1688. 2 Vern. 39. *Legriel v. Barker &c.*

13. A. for 80 l. conveys *absolutely* to B.—A. brings a Bill to redeem; B. insists that the Grant was absolute, but *confessed it was a Trust*, that after the Principal and Interest paid, B. should stand seised *for A's Wife and Children*; Plaintiff replies to the Answer, but no Proof of the Trust, and there-
fore

fore it was insisted that the Husband should redeem; but 'twas decreed a Trust for the Wife and Children. Pasch. 1693. 2 Vern. 288. Hampton v. Spencer.

14. A. grants a *Rent of 60 l. per Ann. for 300 l. for 7 Years* payable half yearly and secured by Demise and Re-demise. Master of Rolls decreed a Redemption on Payment of what was Arrear of the annual Payment without Interest or Coits. On Appeal the Court took Time to consider of it. Pasch. 1693. 2 Vern. 288. Fawcett v. Bowers.

15. A. mortgaged Land to B. and by another Deed *covenants to convey Ground Rents* issuing out of the mortgaged Estate *to the Value of the Mortgage Money at 20 Years Purchase* if B. should think fit. Master of Rolls decreed a Redemption and the Covenant to be set aside as *Unconscionable*. A Man shall not have Interest for his Money and a *Collateral Advantage besides* for the Loan of it, or clogg the Redemption with any *Bye-Agreement*. Mich. 1705. 2 Vern. 520. Jennings v. Ward.

(R. 2) Redemption. *Of what.*

1. **A**N *Adventure in the E. India Company* was mortgaged and continued for 14 Years. Decreed to be Redcem'd, notwithstanding the Hazard and Contingency to which it was liable was objected. 27 Car. 2. 2 Ch. R. 108. Newton v. Langham.

Such renewed Term has always been ruled to be redeemable with the principal Term, as an *Excrescence out of it, and to go with it*. Per Lord Chancellor. Select Cases in Chan. in Ld. King's Time. 56. Trin 11 Geo. 2. S. C.

2. If *Termor of a renewable Term mortgages the same*, and the *Mortgagee gets a Grant of an additional Term*, it was held by the Master of the Rolls, that this is subject to the same Equiry of Redemption; and decreed accordingly. Hill. 1728. And afterwards affirmed on Appeal to Ld. Chancellor. (12 July 1729) 2 Wms's Rep. 511. Rakestraw v. Brewer.

3. *And this Court has gone so far*, that if a Trustee or Mortgagee has got a *new Term after the actual Expiration of the old one*, yet it shall be a Trust; For it is supposed to have proceeded from the having had the original Term; And tho' there be nothing in Fact in having a *Tenant-Right*, yet as such Regard is had to it in the Estimation of the World, it will be looked upon as the Occasion of the Lease. Arg. said, That it had been so ruled in this Court. Select Cases in Chancery in Ld. King's time. 56. in Case of Rakestraw v. Brewer.

4. *And where a Difference was taken between such former general Rules; and where such renewed Term is granted as a Favour to one of their own Society being the Mortgagee*, as in the principal Case it was of Chambers in Grays Inn mortgaged to one of the Benchers, and an additional Term was granted to him by the Society, and which was said to be done on the Foot of his being a *Bencher*, and not as a *Mortgagee*, yet the same was not allowed by the Ld. Chancellor. Ibid. 56. S. C.

(S) Redemption. *After Foreclosure. In what Cases, by other Mortgagees.*

1. **A**. Mortgages *Black Acre to B. and White Acre to C.* who after Foreclosure assign to D. who brought a Bill, and had a *Decree to foreclose*, which being signed and inrolled, he sold the same to E.—A. had confessed a Judgment to J. S. of 1600 l. to indemnify against a Bond, in which J. S. was bound with A. as A's Surety; And afterwards, but before

before the Foreclosure by D. A. mortgaged *Black Acre and Green Acre* to F. and confessed a Judgment, and also gave a Statute for better Security. The Judgment to J. S. was satisfied, but was kept on Foot on Pretence of a Deed directing it to remain as a Security to indemnify J. S. from other Engagements for A. But what other Engagements were, were subsequent to the Mortgage to F. And after F's Mortgage, A. declared that the Judgment to J. S. should stand a Security to indemnify W. R. as well as J. S. and J. S. assigned his Judgment to W. R. who extended Black Acre, and had a Decree to redeem D. Afterwards W. R. assigned the Judgment and Extent to E. On a Bill by F. it was insisted, That the Assignment of D's Mortgage, and of the Judgment of J. S. ought to be considered separately; And that tho' D's Mortgage being prior in Time to that of F. and so E. has an Equity to be paid what is due thereon, yet tho' A. was foreclosed, F. ought to be let in to redeem the same; But as to the Judgment to W. R. it is otherwise; And decreed accordingly. But the Principal and Interest, from the former Decree of Foreclosure, to be taken as a principal Sum, and Interest to be computed from that Time for the same. Fin. R. 406. Hill. 31 Car. 2. *Shermer v. Robins.*

(T) Redemption. *On what Terms.*See (F)—
(R)—(U)

1. **M**ortgagee purchased the Land mortgaged. The Plaintiff, who had Title of Redemption, shall declare, whether he will redeem or not, before the Validity of the Mortgage shall be tried at Law; And if he will redeem, he must pay principal Money, Damages, and Coits. Chan. Rep. 169. 1655. *Smith v. Valence.*

2. Where Mortgagee lends more Money on his old Security, and a Settlement for Jointure intervenes; if he has no Notice he shall be allowed it against the Jointress. Chan. Cases 119. Hill. 20 & 21 Car. 2. *Coddard v. Complin.*

2 Vent. 345
S. P. —
Not, if he
had Notice.
Fin. R. 197.
Hill. 27 Car.
2. *Jacob v. Thacker.*

3. Where a Bill is brought to redeem two Mortgages, and there is more Money lent on one than the Estate is worth, the Plaintiff shall not elect to redeem one, and leave the heavier Mortgage unredeemed, but shall be compelled to take both or neither. Per Mr. Hutchins. Vern. 29. Hill. 1681. in Case of *Purefoy v. Purefoy.*

S. P. Fin. R.
51. Hill. 25
Car. 2. *Mole*
v. Franklin.
— 2 Vern.
207. S. P.
Hill. 1690.

Mergrave v. Le-hook.—Ibid. 286. Hill. 1602. S. P. *Pope v. Onflow.* — 2 Chan. Cases 23 Hill. 31 & 32 Car. 2. *Bromley v. Hammond.* — If I have several Mortgages upon several Lands for 100 l. each from the said Person, and one of the Mortgages proves a bad Title, and other good, the Mortgagor shall redeem the good one without paying the Money upon the bad one. 12 Mod 559. Mich. 13 W. 3. in Chancery, said at the Bar in Case of *Monger v. Kett.*

4. A. has an Annuity charged on the Manor of S.—B. has Estate within the Manor liable to the Annuity. C. has an After-mortgage. B. having no Notice of the Mortgage, buys in A's Annuity, and for that and Money by A. lent to Reversioner in Fee, B. pays to A. a Sum of Money amounting in all to 900 l. of which the Money due to A. was 500 l. and the Money lent to the Reversioner 400 l. Decreed that B. not having Notice of C's Mortgage, if C. will redeem he must pay B. not only the 500 l. due to A. but likewise the 400 l. lent to the Reversioner in Fee. Secus if B. had had Notice. 2 Chan. Cases 20. Hill. 31 & 32 Car. 2. *Blackstone v. Moreland.*

5. A. was Tenant for Life, Remainder to B. (his Son) in Tail, by Marriage Settlement on great Consideration. A. made Oath that he was seized in Fee, and mortgaged in Fee for 100 l. and dies. B. borrows 100 l. of the same Mortgagee, and mortgages the same Estate. Decreed, that B. (who in this Case is as a Stranger to his Father) shall redeem on Payment of the

Money borrowed by himself, and Damages and Coſts. 2 Chan. Cafes 23. Hill. 31 & 32 Car. 2. Bromly v. Hammond.

2 Chan. Cafes 98. S. C.

6. *Baron and Feme* by Deed and Fine mortgage the *Wife's Land* for 400 l. the Baron pays in part of the Principal, and after borrows the ſame Sum again of the Mortgagee. The Heir of the Wife ſhall not redeem without paying of both Sums. Vern. 41. Paſch. 1682. Reaſon v. Sachevérell.

7. He that comes to redeem a Mortgage muſt ſhew a Title to the Equity of Redemption. Vern. 182. Trin. 1683. Lomax v. Bird.

Vern. R. 342. Mich. 1685. Hall v. Dunch.

8. In Caſe of a Deed of *Entail* ſet forth, the *Heir General* ſhall not redeem without ſhewing that the Tail was docted. Per Ld. North. Vern. 182. Trin. 1683. Lomax v. Bird.

But if a Stranger gets an Affignment of a Mortgage

9. The *Heir* buys in an Incumbrance on an Eſtate charged with Portions, he ſhall be allowed no more than what he really paid. Vern. 335. Mich. 1685. Braithwait v. Braithwait.

for leſs than due, Mortgagee or his Heirs ſhall not redeem without paying the whole that is due. Vern. 336. Mich. 1686. Philips v. Vaughan.——S. P. Defendant demurr'd. 3 Chan. Rep. 23. S. P. 19 Car. 2. Baker v. Kelleſt.

10. *Lands were veſted for a particular Purpoſe* in Truſtees by an Act of Parliament. The Heir, on paying ſo much as had been applied to that Purpoſe according to the Truſt with Interest and Coſts, diſcounting the Profits received by the Mortgagees, ſhall be let in to redeem. Per Jeffries C. 2 Vern 5. Trin. 1686. Cotterel & Holt v. Hampſon, Bill, & al.

12. A. mortgaged *fiſt to B. and then to C.* and then *B. lent to A. more Money on a Statute.* C. brought a Bill, and charged Notice, but B. denied Notice evaſively only; but becauſe he did not deny it poſitively, Lord Wright and Maſter of the Rolls decreed a Redemption on Payment of the *fiſt Money only.* Ch. Prec. 226. Tr. 1703. Caſon v. Round.

13. Mortgage of Lands by A. to B. for 16000 l. And in another Deed at the ſame Time was a Covenant that A. would convey ſo much of the Eſtate at 20 Years Purchase, as ſhould be of the Value of the Money lent. But Maſter of the Rolls decreed a Redemption on Payment of Principal, Interest and Coſts, and ſet aſide the Agreement as unreaſonable; and ſaid a Man ſhall not have Interest for his Money, and a collateral Advantage beſides for the Loan of it, or clog the Redemption with any Bye-Agreement. 2 Vern. 520. Mich. 1705. Jennings v. Ward & al.

Abr. Equ. Cafes 325. S. C. The Difference is between Debts contracted

14. Mortgagee * cannot tack Bond and Mortgage together againſt the Mortgagee himſelf; but againſt the † Heir he may, or againſt a Devifee; For the Heir is chargeable with the Bond even at Law. And the Devifee, ſince the Statute againſt fraudulent Deviſes, is in the ſame Caſe with the Heir. Ch. Prec. 407. Trin. 1715. Challis v. Caſborn.

after or before the Mortgage; For if they had been before they would have been intended to be included in the Mortgage; Per Ld Rawlinſon. Ch. Prec. 18. Hill. 1690. Eccles v. Thawill.

* G Equ. R. 96. S. C. reported contra, that he may tack them together.——If a Mortgagee lends more Money to the Mortgagee on Bond, the Mortgagee ſhall not redeem without paying the Bond Debts as well as the Mortgage. Vern. 244. Trin. 1684. Baxter v. Manning.——S. P. Vern. 174. Tr. 1683. per Ld North, in Caſe of Creed v. Covil.——So where Money was lent on Bond before the Mortgage, which was agreed to be ſecured by the Mortgage, but was not. 2 Ch. R. 247. 34 Car. 2. Windham v. Jennings.

† The Heir ſhall not redeem without Payment of both, in Caſe the Heir is bound Vern. 245. Shuttleworth v. Laywick.——2 Chan. Cafes 164. S. P. Tr. 36 Car. 2. Anon.——The ſame in Caſe of a Mortgage made to a Surety, who ſtands engaged for more Money afterwards. Chan. Cafes 97. Hill. 19 & 20 Car. 2. St. John v. Holford.——Fin. R. 51. Hill. 25 Car. 2. Mole v. Franklin.

And a Bond Creditor of the Heir himſelf ſhall be preferred to a Bond Creditor of his Anceſtor after Alienation made, whether it were voluntary or for a valuable Conſideration. Ch. Prec 512. Hill. 1718. in Caſe of Coleman v. Wince.

But if a Mortgagee in Fee lends more Money to Mortgagee upon the Bond, the Vendee of the Heir of the Mortgagee ſhall redeem without Payment of the Bond Debt; per Ld Somers. Chan. Prec. 89. Hill. 1698. Bailly v. Robſon.——S. P. decreed accordingly per Ld Maccleſfield. Ch. Prec. 511. Hill. 1718 Coleman v. Wince

But

But the Executor of Mortgagor shall not redeem without paying both Debts, tho' there be no special Agreement that the Bond Debt should stand secured by the Mortgage. 2 Vern. 177. Mich. 1696. Anon.—But if the Executor aliens the Equity of Redemption, his Alienee shall redeem on Payment of the original Debt only; per Ld Macclesfield. Ch. Prec. 512. Hill. 1718. in Case of Coleman v. Wince.—S. C. & P. Wms's Rep. 776. 777. Hill. 1721.

Mortgagor may redeem on Payment of what is due on the Mortgage without Payment of a Debt due by simple Contract. Fin. R. 379. Tr. 30 Car. 2. Newby v. Cooper.—But where Mortgagor borrows more Money of Mortgagee on Notes, or becomes indebted to him by simple Contract Per Cowper C. After the Day of Payment lapsed, he must pay the Notes and the simple Contract Debt, but not subsequent Bond Debts. Ch. Prec. 421. Mich. 1715. in Case of Demandray v. Metcalf.—G. Equ. R. 105. S. C. Trin. 1 Geo. 1.

But if Testator being possessed of a Term mortgages it to A and becomes also indebted by simple Contract, and dies, his Executor bringing a Bill to redeem shall pay both the Mortgage and the simple Contract; Because the very Equity of Redemption is Assets to pay simple Contract Debts. But if any Creditor of Testator brings a Bill to redeem this Mortgage, he shall only pay the Mortgage. Wms's Rep. 777. Hill. 1721. in Case of Coleman v. Wince.

If A. mortgage Land to B. for 100l. and A. owes B also 100l. by Contract or Bond. A. shall be admitted to redeem the Mortgage without paying the 100l. by the Contract or Bond, and B is left to his Remedy on his Contract or Bond. 12 Mod. 559. Mich. 13 W. 3. in Case of Monger v. Kett.

15. It is a Rule in Equity, that Mortgagee in Possession, who is sued for a Redemption, shall never be stript of his Possession before Payment. MS. Tab. cites 17 Feb. 1717. Brine v. Hartpole.

16. Where Possession is got against a Mortgagee by Fraud pending a Suit, it must be restored before there can be any Redemption. MS. Tab. tit. Mortgage, cites 18 Jan. 1719. Lant v. Crisp.

17. In the Mortgage was a Covenant that if the Estate was to be sold the Mortgagee should have the Preemption. But he getting the Counterpart into his Hands after the Mortgagor's Death, and pretending an Uneasiness at not being paid his Money, and threatening a Foreclosure, and not claiming the Preemption till after the Estate was sold in order to raise the Money to pay him, he was decreed to reconvey on Payment of Principal, Interest &c. 9 Mod. 2. Pasch. 8 Geo. Orby v. Trigg.

18. A Bill was brought by J. S. (who stood in the Place of the Mortgagor, he being a Bankrupt) to redeem a Mortgage Assignment of a Term made by A. the Bankrupt to B.—B. the Mortgagee insisted that he was not a Mortgagee, but an absolute Purchaser of the Term, whereupon it was urged, that B. had not only forfeited his own, but should likewise pay the Plaintiff's Costs of this Suit by such his insisting on the Mortgage being an absolute Purchase. But Parker J. who sat for the Ld Chancellor said, he thought that would be going too far to make B. pay Costs, but his Opinion was, that B. had forfeited his own Costs; For in the first Place, there was an Indorsement under B's own Hand admitting the Assignment to be a Mortgage; and in the next Place, there was a Witness who falsified his Answer. Barn. Chan. Rep. 30. 33. Franklyn v. Fern.

(U) Redemption. At what Time.

See (R).

1. **A** Ntiquity is a just Cause to deny Redemption. Chan. Cases 220. Hill. 23 & 24 Car. 2. Roscarrick v. Barton.

2. The Heir of a Mortgagee is not to be relieved after several Dismissions and Decrees, unless he can prove an extraordinary Value of the Land. Toth. 169. cites 7 Car. Mitchell v. Chamberlain.

3. A Mortgage not being relieved after 20 Years Forfeiture, and the Estate descending to an Heir, who sells the same, was all pleaded, and held good. Chan. Rep. 206. 13 Car. 2. Clapham v. Bowyer.

The Rule for Redemption within 20 Years should be in-

violably abided by as it is for the Quiet of Men's Estates; and neglecting for so long a Space of Time to pursue their Rights, is a Dereliction of the Pledge, and should not be broke into. For it is a natural Reason to think, that Persons having a Right would pursue it in such a Space of Time, if it was worth while; and by its not being done, as it was their Interest to do so, (about which Men are very sedulous) the Natural Deduction is, that they thought it not worth while. But a Case may be out of the

General

General Rule; as where the Supposal of a Dereliction may be answered, as where the *Right of Redemption* is industriously obscur'd by particular Clauses, (viz. *That the Redemption must be with his own Money, and in his own Life Time &c.*) which would be useless for any other Purposes, but to create an Imagination that he could not do it unless with his own Money, and in his Life; per Ld Commissioner Gilbert. Select Cases in Chancery in Ld King's Time. 11. Pasch. 11 Geo. 1. 1725. Ord v Smith.

* 2 Chan. Cafes 58 S. C.—But this Decree was reversed

4. A Mortgage is made redeemable during the Life of Mortgagor only, yet his Heirs shall redeem; per Ld Nottingham C. Vern. 7. Tr. 33 Car. 2. * Newcomb. v. Bonham.

by Ld North on the special Circumstances. 2 Vern. 232. Pasch. 36 Car. 2. — 2 Chan. Cafes 148. the Case of *Hillington v. Green*, cited by Mr. Keck as decreed so in 1678. — The Reversal affirmed in Parliament. 1 & 2 W. & M. 2 Vent. 305 — See (R) pl. 8.

If a Man borrowed Money of his Brother, and agreed to mortgage Land, and that if he had no Issue Male, the Mortgagee should have the Land; Ld North held, that such an Agreement made out by Proof might well be decreed in Equity. Vern. 193, 194. Mich. 1683. in Case of *Howard v. Harris*.

Tr. 21 Car. 2. Hard. 512. Woollaston v. Aston.

5. Fine levied by Mortgagee, and five Years Non-claim will not bar the Mortgagor of his Equity of Redemption. Vern. 132. Hill. 1682. *Welden v. Duke of York*.

If I lend 100l. upon a Mortgage with a Proviso to redeem on Payment of 112l. at two Years End, tho' one Side cannot foreclose till the End of two Years, yet if the Mortgagor comes at the End of one Year, and offers to pay the 112l. he shall be admitted to the Redemption. Arg. Vern. 395. Pasch. 1686. in the Case of *Talbot v. Braddil*. — Vern. 183. S. C.

6. A. in 1657. convey'd to B. redeemable on Payment of 1000l. in 1688. and Possession is immediately delivered. Redemption was decreed before the Day of Payment in the Proviso. Vern. 394. Pasch. 1686. *Talbot v. Braddil*.

7. A. mortgaged in 1639. In 1663. his Heir brings a Bill to redeem; he dying, the Suit is revived by his Coheirs in 1672. but no Prosecution. B. having purchased the Equity of Redemption of them, brings a Bill now (in 1700.) to have the Benefit of the former Decrees. Ld Wright dismissed the Bill because of the Difficulty of the Account, and the Length of Time; and tho' Infancy may answer the Objection in not coming to redeem, yet where the Time begins upon the Ancestor, it shall run on against his Infant Heir, as in Case of a Fine at Common Law. 2 Vern. 418. Hill. 1700. *St John v. Turner*.

8. A Note was given at the Time of the Release of an Equity of Redemption, that the Releasee should have the Lands reconveyed to him upon Payment of what was given for the Land, within a Year; such Payment having been neglected for several Years, there shall be no Redemption. MS. Tab. cites 10. Feb. 1706. *Endsworth v. Griffith*.

9. No Redemption after 40 Years Possession but on a stated Account for turning Interest into Principal. MS. Tab. cites 15. January, 1710. *Conway v. Shrimpton*.

* Sir Joseph Jekyl cited the Case of Lord *Widdrington v. Jennings* in Ld. Harcourt's Time, where the Court took such a Difference betwixt a Mortgage of a Rent-charge and of Land; and that a Redemption was allowed after a very

10. A. for 800l. paid by B. granted a Rent-charge of 48l. per Ann. upon Condition that if A. should at any Time give Notice to pay in the 800l. by Installments (viz.) 100l. at the end of every 6 Months, and should pursuant to such Notice pay the said Money and Interest at any Time during A's Life, then the Grant to be void; there was no Covenant by A. to pay the Money and the Interest of Money at that Time being 8l. per Cent. did much exceed the Rent-charge, and it was 60 Years since the Grant was made. It was insisted that a Mortgage* of Rent is redeemable at a longer Distance of Time than a Mortgage of Lands, the Income and Outgoings of the former being certain, but that of the later uncertain, and consequently the Account for it the more difficult, that a Mortgage if never so old is redeemable if Interest has been paid, and that in this Case the Payment of the Rent was the Payment of Interest; but Ld. C. Cowper conceived that taking it altogether, the Rent-charge was not redeemable, and decreed the Bill to be dismissed with the usual Costs, it being only upon Bill and Answer; but the Reporter says, it was thought that the length

of Time was the chief Objection to the Redemption. Wms's Rep. 268. to 273. Mich. 1714. Floyer v. Lavington.

11. A Mortgage was redeemable on Michaelmas 1702. or at any other Michaelmas Day following; this Mortgage may be redeemed 1000 Years hence, and that without the Assistance of a Court of Equity, there being no Covenant for Payment of the Money; per Lord Cowper. Ch. Prec. 423. Mich. 1715. Howell v. Price.

very long time, he thought 80 Years.

12. Where by special Agreement Profits are to be set against Interest, whether Length of Time be a Bar to Foreclose? MS. Tab. cites 17 February 1717. Brine v. Hartpole.

If the Mortgagor agrees that Mortgagee shall enter and

hold till he is satisfy'd, Length of Time is no Objection to a Redemption; and in this Case it was 60 Years. Vern. 418. Mich. 1686. Orde v. Heming.

13. Equity will not enlarge the Time for Mortgagor to redeem after 6 Years acquiescence under a Foreclosure by his own Consent, especially if there have been any Improvements on the Estate. MS. Tab. tit. Mortgage cites 18 January, 1719. Lant v. Crisp.

14. There shall be no Redemption after long Possession, Settlements made, and Estate improved. MS. Tab. cites 8 April 1720. Courtney v. Langford.

15. A. in 1679. mortgaged Lands to J. S. for a small Sum of Money by an absolute Conveyance and Defeasance, but the Redemption was expressed to be made with A's own Money, and in his Life Time. Soon after A's Necessities forced him to go abroad, where he died about 27 Years since, and his Heirs knew nothing of the Mortgage. In 1702. J. S. devised that if the Mortgage should be redeemed, the Money should go so and so. About 16 Years after the Will a Bill was filed for Redemption, to which was objected the great Length of Time, and that by the settled Rules of the Court, a Mortgage shall not be redeemed after 20 Years. The Master of the Rolls held, that decreeing a Redemption would be no wrong or hardship to the Party; For he will have greater Interest than the Law now allows, and that the not decreeing a Redemption would be establishing a very great Imposition, and tho' absolute Conveyances and Defeasances were formerly much used in Mortgages, yet the same is left off as dangerous by losing the Defeasance, which is avoided by being in the same Deed; that the Words in the Defeasance however fettered signify nothing, where the Money is to be repaid; For the Borrower being necessitated, and so under the Lender's Power, the Law makes a benign Construction in his Favour; but this was a Fraud in its Creation, and in such Case is redeemable after any Length of Time; For the Words (to be paid with his own Money) were thrown in to no other Purpose but to make A. imagine it could not be done otherwise; whereas any other Person's Money was of equal Value. But if singly considered distinct from the Fraud, there is sufficient for Redemption by the Declaration in the Will, where he calls it a Mortgage; and as A. by those fettering Clauses, would have a Right to redeem, so will his Heir too, who would be equally deceived by them; but here it appears that the Heir knew nothing of this Deed, which is still stronger, and had he known of it, it would have deceived him and led him into an Imagination that he could not redeem; and Lord Commissioner Gilbert was of the same Opinion, and thought this Case out of the General Rule of Dereliction, which ever supposes previous Knowledge of the Right, it being absurd to say a Man relinquishes a Right which he knows nothing of, nor can it be supposed a Dereliction, or a Right neglected, or disregarded, by Reason of the great over Value; and a Redemption was decreed. Select Cases in Chan. in Lord King's Time 9. Pasch. 1725. Ord v. Smith.

16. The Master of the Rolls said, he remembered a Case about 20 Years ago where a Redemption was decreed on a Mortgage made in 1642. and where there was neither Infancy nor Ouster le Mere, but only the Mortgagee having brought a Bill to foreclose, it was an Admission, that he consider-

ed it as a Mortgage, and fo the Mortgagor was let in to redeem. Select Cafes in Chan. in Lord King's Time 10.

17. A. mortgaged his *Chambers in Gray's-Inn* to B. in 1687. but continued Possession till 1700. at which Time an *Order of the Bench* was made to deliver Possession to B.—B. entered into Part, but A. continued Possession of the Rest till 1708.—A. died leaving the Plaintiff an Infant, and B. then being in Possession of the Whole. The Infant came of Age in 1714.—In 1721. B. being a *Bencher* got 11 Years added to his Term by the Society.—In 1726. Plaintiff brought his Bill to redeem. And a Decree was made at the Rolls to redeem, and also to have the renewed Term conveyed on Payment of the Consideration Money with Interest for the Time. In arguing this Case before Ld. Chancellor it was admitted, that where a Mortgagee is in Possession for 20 Years and no Interest paid, the Mortgagor shall not redeem; but where he is in Possession of any Part, the Computation of that Time shall never affect him, but only from the Time the Mortgagee was in Possession of the whole, and shall be admitted to redeem; and Ld. Chancellor was of the same Opinion, and affirmed the Decree, and added, that for Part the Mortgagor may redeem, as being in Possession, and as he cannot do that separately, he shall redeem the whole. That in this Case A. was in Possession till 1708. and that from 1708. to 1714. the Plaintiff was an Infant, and so that Time is accounted for, and that from 1714. to this Time (viz. 1726.) it does not amount to 20 Years. Select Cafes in Chan. in Ld. King's Time 35. Trin. 11 Geo. 1. *Rakestraw v. Brewer*.

18. A Decree of Foreclosure is not to be set aside after 20 Years for Matter of Form only; upon a Demurrer to a Bill of Review. MS. Tab. cites 12 February 1727. *Jones v. Kendrick*.

19. A. seised in Right of M. his Wife mortgaged the Estate in 1692. for 785 l. to J. S. and covenanted on or before Easter Term then next to levy a Fine for securing J. S's Title; But the Fine was not levied till Trin. Term.—J. S. assigned to T. for a valuable Consideration. In August 1695. A. and M. by Deed, in Consideration of about 10 l. released to T. the Equity of Redemption, the Estate being then but 40 l. a Year, and therein covenanted that the Fine levied as aforesaid should be for corroborating this Deed. T. entred and expended large Sums of Money, so that it was improved from 40 l. to 56 l. a Year.—In 1718. A. died.—And in 1727. M. died.—In 1735. M's Heir conveyed all his Interest to F. for 81 l. Ld. C. Hardwicke said, he thought there was no Ground for Relief; that the Purchase was after so great length of Time from making the Mortgage, and then from one who never had been in Possession, and whose Ancestors had not for a great number of Years; that he inclined to think in Point of Law, that the Fine, not being levied by the Time covenanted, could not Operate to strengthen the Mortgage Deed, but that to strengthen the Deed of 1695. it well might, and that that subsequent Deed might well declare the Uses of that Fine; and if so the Defendant was a Purchaser of the Inheritance; but said he would not determine the present Question merely on this Point of Law, but upon the whole Circumstances of the Case. Suppose the Defendant was only the Representative of a Mortgagee, there were strong Objections against the Plaintiff's being allowed to redeem him after so great a length of Time; besides his Lordship thought the 81 l. Consideration Money was not sufficiently proved to have been paid, and dismissed the Bill with Costs. Barn. Chan. Rep. 187. Mich. 1740. *Fleetwood v. Templeman*.

20. On a Decree of Foreclosure 6 Months Time was allowed for redeeming as usual; towards the Expiration of the 6 Months the Mortgagor got an Order for 6 Months more; and afterwards got another for 6 Months more, but part of the Order was that he sign the Register's Book not to ask any further Enlargement; but tho' he had signed the Book according to the Order, yet he moved for 6 Months more, and chiefly upon this Circumstance, that the Estate was of greater Value than the Incumbrance upon it amounted to; and Ld. C. Hardwicke upon that Circumstance thought it reasonable, but made

made it part of his Order, that this last Time should be peremptory. Barn. Chan. Rep. 221. Mich. 1740. Anon.

21. A Decree of Foreclosure having been made, and the 6 Month's Time for redeeming being expired according to the Computation of Lunary Months, it was moved, that Defendant stand absolutely foreclosed; but Ld. C. Hardwicke was of Opinion, that the Computation in this Case ought to be according to the Kalendar, and not according to Lunary Months, and accordingly granted further Time for Payment. Barn. Chan. Rep. 324. Hill. 1740. Anon.

(U. 2) Redemption. *How.* In Cases of Ejectment &c.
By 7 Geo. 2. cap. 20.

1. 7 Geo. 2. ENACTS that, in all Actions at Law relating to Mortgage, or Monies secured by Mortgage, whether on collateral Bonds, or in Ejectment, if there is no Suit in Equity to foreclose, the Tender of principal Interest and Costs by the Person having Right to redeem pending such Action, and upon refusal to accept, the bringing the same into Court shall be deemed a Satisfaction, and the Court may compel the Mortgagee at the Mortgagor's Costs to assign &c. the Premises as Mortgagor &c. shall direct.

S. 2. Where Bills are filed to compel Payment of the Monies due on such Mortgage, together with Money due on any Incumbrance, or Specialty charged or Chargeable on the Equity of Redemption thereof, and for not Payment to foreclose, the Court on Defendant's Request (having Right to redeem and admitting the Plaintiff's Right) may proceed to a Decree at any Time before a regular Hearing, and all Parties shall be bound thereby as if the Cause had been regularly heard.

S. 3. Provided not to extend to Cases where the Party against whom a Redemption is prayed, shall by Writing (to be delivered to the Plaintiff's Attorney &c. before the bringing in the Money into such Court at Law) insist either that the Party praying it has no Right to redeem, or that the Premises are chargeable with other principal Sums than appear on the Mortgage, or shall be admitted on the other side, nor to Cases where the Right of Redemption to the Premises is controverted by, or between, different Defendants in the same Cause or Suit, nor shall be any Prejudice to any subsequent Mortgagee &c. or Incumbrancer.

(U. 3) Equity of Redemption. *Disposible How* &c.

1. THO' a Precedent voluntary Conveyance is fraudulent as to a Mortgage subsequent & Pro Tanto, yet it will pass the Equity of Redemption. Chan. Cases 59. Mich. 16 Car. 2. Rand v. Cartwright. N Ch. R. 101. S. C.

2. An Equity of Redemption is not intailable within the Statute De Donis &c. Arg. Chan. Cases 219. Hill. 23 & 24 Car. 2. in the Case of Roscarrick v. Barton.

3. Equity of Redemption is devisible after Forfeiture; But whether as Land, so that there must be 3 Witnesses to the Will, Non Constat, tho' it was the Point in Dispute. 2 Chan. Cases 8. Mich. 31 Car. 2. Anon.

4. Equity of Redemption is within the Provision of 11 H. 7. 20. per Wright K. 2 Vern. 489. Hill. 1704. in the Case of Clifton v. Jackson.

(W) Account. In what Cases Mortgagee shall Account for the Profits.

13 Car. 2.
N. Ch. R.
60. S. C.

1. **M**ortgagee after Forfeiture assigns without the Mortgagor's joining therein, and is decreed to account for the whole Time, (without the Assignee's being Party) and to convey free from Incumbrances done by him or his Assignee &c. Chan. Cases 3. Trin. 12 Car. 2. Venables v. Foyle.

2. A. Mortgagee of an Estate for Life shall account for no more than the Estate had been worth to have been sold at first, the Mortgage being more than 20 Years old; Decreed in Chancery by Ld. Keeper with the Assistance of Vaughan and Hales. But on Appeal to Parliament ordered otherwise. Chan. Cases 109. Trin. 20 Car. 2. Morley v. Elwes.

N. Ch. R.
70. S. C. says
it was ruled
that it should
not go to-
wards Satis-
faction of
the Mort-
gagee. 24 Car.
2.

3. *Wife of Mortgagee recovered Dower*, and it was paid, the Sheriff having set it out; this shall not go towards the Discharge of the Mortgage, tho' the Heir of the Mortgagor did not prevent her Dower; And it was said that the Heir of the Mortgagor might recover it of the Dowress; But Quære whether the Statute bars it or not? But Note in this Case she was a Party to the Bill, but not brought to Hearing. 1673. 3 Ch. R. 82. Smith v. Hanbury.

4. Baron makes a Jointure of an Equity of Redemption and becomes Bankrupt, the Assignees of Commissioners of Bankruptcy state Accounts with Mortgagee. If the Jointress will be relieved against the Account, she must in her Bill assign particular Errors. Per Ld. North. Trin. 1683. Vern. 179. Knight v. Banphfield & al.

Jefferies C.
inclined that
the Plaintiff
should rede-
m, but
proposed that
whereas the
Master had
reported B.
to be 60 l.

5. A. in 1657. conveys to B. subject to Redemption on Payment of 380 l. in 1688. and Possession is immediately delivered. At the Time of Conveyance the Estate was but 15 l. per Ann. but by the Decease of 2 old Lives became 45 l. and a Rent was reserved of 5 s. per Ann. on the Conveyance, which was constantly paid by B. Ld. North decreed a Redemption before the Day of Payment in the Proviso, and an Account of the Profits. Trin. 1683. Vern. 183. Talbot v. Braddil.

over-paid and B. had since that received 2 Years Profits, the Plaintiff should waive the Benefit of the Account, and B. forthwith deliver Possession and gave B. a Week to consider it. Pasch. 1686. Vern. 395. Talbot v. Braddil.

So where
Mortgagor
becomes a
Bankrupt and
Mortgagee
refuses to

6. When Mortgagee had recovered in Ejectment, and in Combination with the Tenant in Possession refused to enter, he shall answer for the Profits, unless he takes out Execution before the End of the Term. Per Ld. North. Mich. 1684. Vern. 258. Duke of Bucks v. Gayer.

enter, and permits the Bankrupt to continue in Possession and to fence against the Assignees with this Mortgage on an Ejectment brought by them, Mortgagee shall stand charged with the Profits from the Time of the Ejectment. Mich. 1684. Vern. 267. Chapman v. Tanner.—So where he enters, and so prevents the Entry of subsequent Incumbrancers, and yet permits Mortgagor to take the Profits, he shall be charged for all the Profits he might have received after his Entry. Mich. 1684. Per Ld. North. Vern. 270. Coppring v. Cooke.—And Cooke v. Knight & al.—Mich. 1691. Ch. Prec. 30. Bentham v. Haincourt.—But in the Common Case of a Mortgagee's suffering Mortgagor to continue Possession and receive the Rents, he may at any Time after foreclosure, and the Rents received by the Mortgagor shall not go in Part of Satisfaction, tho' other Incumbrances are behind it. Pasch. 1722. Per Ld. Maclesfield. Ch. Prec. 587.

7. Lands were extended in 1 Car. 1. and held in Extent, and a Bill to Redeem, and being not redeemed the Bill was dismissed 16 Car. 1. He that had the Extent by Virtue of the said Dismissal sold the Premises to the Defendant, but the Plaintiff having since bought the Equity of Redemption seeks a Redemption; This Court, notwithstanding the Dismissal and Length of Time, ordered an Account from the Time of Purchase, but the Profits to go against the Interest to that Time. 2 Jac. 2. 2 Ch. R. 392. Cloberry v. Lymonds.

8. A. conveys Land to B. who is put into Possession ; The Deed was absolute, but there was an Agreement that if A. pays the Money in 10 Years B. shall re-convey ; The Profits appearing to be much more than the Interest, upon a Bill by the Heir to redeem, it was decreed that B. account for the Profits, and not be permitted to set the Profits against the Interest. Mich. 1687. Vern. 476. Fulthorp v. Foster.

In Case of *Welch Mortgages*, the Master of the Rolls thought if the Value was excessive in lieu of the

the Court would decree an Account, notwithstanding the Agreement to retain the Profits. Vern. 477. in Case of Fulthorp v. Foster.

9. A. borrows 200 l. of B. and surrenders a Copyhold of Inheritance to be void on Payment of 200 l. and Interest in April following ; A. gives Bond to B. at the same Time that if the 200 l. and Interest should not be paid at the Day, then if B. should pay to A. &c. 78 l. more within 10 Days after in full for the Purchase of the Premises, the Bond should be void, &c. A. died before the Mortgage was forfeited. The 200 l. was not paid at the Day. B. pays the 78 l. the Day after to A's Administrator. This was no absolute Purchase, and ordered the whole 278 l. to be Repaid with Costs discounting the Mesne Profits. Mich. 1687. Vern. 488. Willet v. Winnel.

10. Tho' Mortgagor is foreclosed by Decree signed and Inrolled, and an Account is taken in the Suit where such Decree was obtained, it will not bind the subsequent Incumbrancers that come to redeem the Mortgagee. Trin. 1710. 2 Vern. 663. Morret & al. v. Western.

11. A. and B. his Son in 1654 mortgaged a House in O. by way of Feoffment for 200 l. to J. S.—A. died leaving B. his Heir. B. died leaving C. a Feme his Heir. C. intermarried with J. N.—In 1684. J. N. took an Assignment of the Mortgage in the Name of H. N. in Trust for himself, and laid out great Sums of Money in Improvements.—In 1703. J. N. mortgaged the Premises to E. his Sister, in Consideration of 400 l. by her paid, for 500 Years to secure 30 l. a Year Annuity to her for her Life, and after her decease to secure 400 l. to such Children or Grand-children of J. N. as E. by Will or otherwise should appoint.—In 1707. J. N. having 2 Daughters, the youngest whereof had D. a Son, by Will devised to his Grandson D. and his Heirs all his Freehold Mesuages and Garden Grounds in O.—J. N. had no other Lands in O. but the House above-mentioned. J. N. died and C. survived, and after C. died. The Eldest Daughter and her Husband brought a Bill against H. N. and D. and the other Daughter (her Sister) and her Husband and their Son an Infant for a Redemption of a Moiety of the Premises, insisting that J. N. had only a redeemable Interest, and no Power to give the Inheritance. Upon hearing the Cause 11 May 1715. the Court declared that the Plaintiffs had a Right to redeem a Moiety, and that J. N.'s first Entry ought to be look'd upon as in Right of his Wife who had the Equity of Redemption, and that he so continued in Possession till he took the Assignment of J. S.'s Mortgage in the Name of H. N. in Trust for himself, and therefore during that Time the Rents and Profits were no otherwise to be accounted for than to keep down the Interest of that Mortgage, but that nothing was to be allowed for Repairs, or lasting Improvements during that Time ; And it was refer'd to a Master to take an Account of what Money was laid out in Repairs and lasting Improvements after the Assignment of that Mortgage, and that J. N. should bear one 3d as he had the Benefit of the Estate for Life, but for the other two 3ds he was to compute Interest at the Rate of 6 l. per Cent. from the Time of the Money so laid out ; and from J. N.'s Death to compute Interest for the Principal Money due on that Mortgage, and take an Account of the whole Profits of the Premises, and if it appear that the Money laid out upon Improvements together with the Interest of the Money were unpaid, and that the Mortgage-money and Interest were likewise unpaid, then D. and his Father should refund a Moiety of the Overplus to the Plaintiffs, and that a Moiety of the Premises be assigned to the Plaintiffs.—On Rehearing, the Court directed that it should

be added to the former Order, that if D. was overpaid a Moiety of what was due for Principal and Interest on the Mortgage he should refund the Overplus, and that the *Allowance for Repairs be struck out of the Order*, and the Rest of the Decree be confirmed. Barn. Chan. Rep. 457. cites 11 May 1711. Clarke v. Abbot.

(X) *Allowances to Mortgagee.*

1. **I**N some Cases the Court of Chancery will relieve where the Mortgagee will suddenly bestow *unnecessary Costs* upon the mortgaged Lands on purpose to clog the Lands to prevent the Mortgagor's Redemption. Toth. 231. cites 15 Car. Bacon v. Bacon.

2. *Voluntary Conveyance* was made to A. with Power of Revocation on Tender of 1 Shilling. The Tender was made but not at the Place appointed. Afterwards the Grantor makes a Mortgage to B. of the same Lands for 500*l.*, and after that an absolute Assignment for 750*l.* more paid to the Grantor; the Grantee laid out Money in Repairs and Building. It was decreed that A. should redeem paying all the Disbursements of Building and Repairs and B. to Account for all wilful Spoiles and Wafts done, but if A. failed of Payment then B. to enjoy against A. and all Claiming under him. This Decree was affirmed. Fin. R. 38. Mich. 25 Car. 2. Thorne v. Newman.

3. An *after Mortgagee* of a Ship and who had got the Possession of her was decreed to be postponed to the first Mortgagee as to his Debt, but as to Money laid out in preserving the Ship by Calking, Pitching, Oker &c. it was ordered to be paid in the first Place out of the Monies arising by Sale of the Ship. Fin. R. 206. Pasch. 27 Car. 2. Degelder v. Depeister.

4. *Lasting Improvements* shall be allowed, tho' made pending the Suit. Vern. 487. Mich. 1687. Walley v. Whaley.

5. *Charges at Law* in defending a Suit against the Heir of the Mortgagor, who set up an *Entail*, was allowed, and not only as the Costs were taxed, but the whole Charge the Mortgagee was at; and also his Charge of Administration as principal Creditor. 2 Vern. 536. Hill. 1705. Ramsden v. Langley.

(X. 2) *Allowances to Mortgagor his Executors &c. tho' Redemption denied.*

1. **R**edemption was denied to an Executor of a Mortgagor, because of length of Time; but because there were some Lives expired since the Mortgage, so that the Estate was of better Value than when first Mortgaged, the Court ordered the Mortgagee to allow some Money for the same. N. Ch. R. 34. Gird v. Toogood.

(X. 3) *Interest upon Interest, or how much.*

* 2 Ch. R. 86. 24 Car. 2. S. C.—N. Ch. R. 150. —Where by a general and National Calamity no-thing is made out of Lands assigned for Payment of Interest, it ought not to run on during the Time of such Calamity. MS. Tab. cites 25 June 1715. Basil v. Acheson.

1. **I**nterest was moderated on Account of the *Badness of the Times* between 1642. and 1648. 3 Ch. R. 79. Hill. 1672. * Porter v. Hubbard; cites Mansell v. Jenkins, 21 Car. Master of the Rolls, Lord Cobham v. Lord Ross. 15 Car. 2. Lord Chancellor and Master of the Rolls; Lord Cornwallis and Miller 1668. Earl of Derby's Case where Interest was quite taken away.

2. Where

2. Where a Mortgage is forfeited the Mortgagee shall have *Interest for his Interest*; per Ld. Keeper. And Note, it was always a Rule that, the Mortgagee assigning, the *Assignee* should have Interest for the Interest then due and never was contradicted but in *Patter and Hobert's Case* in Time of Lord Shaftsbury. Chan. Cafes 258. Hill. 26 & 27 Car. per Ld. Finch. Chamberlain v. Chamberlain.

There being a *Deed to let Mortgagee into Possession and enlarge the Time of Redemption*, wherein was mentioned what was due for Principal and Interest, the Question was, whether the Interest then due should carry Interest? it shall not there being *no express Agreement*, that such Interest should carry Interest and the whole Sum being mentioned for another Purpose. MS. Tab. tit. Interest, cites 13 January 1719 Plunket v. Macartney.—Tamen Quære, for there is another Reason given which might be the Cause of affirming the Decree. Ibid.

25 February 1717. Everard v. Aston. MS. Tab. cites

3. Where there is a *great Arrear* of Interest due on a Mortgage there shall be allowed Interest for the Interest referred in the Body of the Deed; per Lord Keeper. Vern. 194. Mich. 1683. Howard v. Harris.

4. Interest shall be upon Interest where it is a *stated Sum*. 2 Chan. Rep. 286. 36 Car. 2. Bradbury v. Duke of Bucks.

5. Interest *Prior to an Act of Parliament of Reduction*, shall continue the same till such Time as the Mortgagee entered on the Land. 2 Vern. 42. Pasch. 1688. Walker v. Penry.

2 Vern. 8. Trin. 1688. S. C. and the former Decree confirmed; per Jeffries C.—But Trin. 1690. per Rawlinson and Hutchins contra Trevor Commission-ers held that the Act of 12 Car. 2. 13. had a Retrospect as to the Interest so that what was received over and above the 6 l. per Cent. should sink so much of the Principal. 2 Vern. 145. Trin. 1690. Walter v. Penry.—But if the Principal and Interest were over paid then the Parties must shake Hands. Ch. Prec. 50. Mich. 1692. S. C.—Mortgagee entered before the Act of 12 Car. 2. the Plaintiff shall pay 8 l. per Cent. only to the Time of the Act, and tho' the Profits could not answer the Interest, yet the Ar-rears cannot carry Interest but the *Costs and Charges* shall. Ch. Prec. 116. Trin. 1700. Proctor v. Cooper.

6. J. S. mortgaged his Estate to the Plaintiff, and died leaving the Defendant his Daughter and Heir who was an Infant, and had nothing to subsist on but the Kents of the Mortgaged Estate; and the Interest being suffered to run in Arrear 3 Years and a half, the Plaintiff grew uneasy at it, and threatened to enter on the Estate, unless his Interest might be made Principal; upon which the Defendant's Mother, with the Privy of her nearest Relations, stated the Account, and the Defendant her self (who was then near of Age) signed it; and the Account being admitted to be fair, it was held by my Lord Chancellor, that tho' regularly Interest shall not carry Interest, yet that *in some Cases and upon some Circumstances*, it would be injustice if Interest should not be made Principal; and the rather in this Case, because it was for *the Infant's Benefit*, who without this Agreement would have been destitute of Subsistence; decreed. Abr. Equ. Cafes 287. Pasch. 1699. Earl of Chetterfield v. Lady Cromwel.—And affirmed by my Lord Keeper Wright Mich. 1701.

7. A Proviso that future *Interest* if not paid shall be taken as Principal and bear Interest is void, but if Interest be first *grown due* then an Agreement concerning it may make it Principal. 2 Salk. 449. 1707. Lord Ossulton v. Ld. Yarmouth in Canc.

(Y) Foreclosure. In what Cases, and of what, &c.

1. **D**EVISEE of a Mortgage of a Dry Reversion, brought a Bill against the Heir of a Mortgagor to foreclose; Decreed that the Heir of the Mortgagor shall pay the Mortgage Money with Damages, or the Lands decreed to the Plaintiff to be sold for Satisfaction of his Debt. Chan. Rep. 32. 4 Car. 1. How v. Vigues.

2 Where

2. Where a Decree is to foreclose, the Money not being paid, the Court in Cases of inevitable Necessity will *enlarge the Time*, tho' the Decree be signed and enrolled. Chan. Cases 64. Hill 16 & 17 Car. 2. Cocker v. Bevis.

3. In a Bill to foreclose the *Heir set forth a Title* in his Examination but the Court would not admit the Mortgagee to debate it on this Bill on which the Court can only take away the Equity of Redemption and leave the Plaintiff to such Title as he has, but not amend it; and this was the true and ancient Course, tho' of late sometimes the contrary has been done and Ld. Finch. agreed thereto and discharged the *Contempt of the Heir for not giving Possession* according to former Orders. 2 Chan. Cases 244. Trin. 30 Car. 2. Anon.

4. A Mortgage was made *redeemable during the Life of Mortgagor*, it was held by Ld Nottingham, that notwithstanding this, the Mortgagee might have compelled him to redeem, or have foreclosed him. Vern. 8. Trin. 1681. Newcomb v. Bonham.

5. An *Annuity* with a Clause of Distress and a Nomine Poenæ was granted out of Lands, and made *redeemable on Payment of 200l.* It was decreed by Ld Nottingham, Ex Parte, that the Grantor be foreclosed even of the Land it self. But, per Ld North, he can only be foreclosed of the Annuity; so that he shall not redeem that, but the Nomine Poenæ shall run upon him, and so reversed the Decree. Vern. 209. Mich. 1683. Carnfew v. Arscott.

6. There being an *Infant* in the Case he cannot be foreclosed without a Day to shew Cause after he comes of Age; but the proper Way in such Case is, to decree the Lands to be sold to pay the Debts, and that will bind the Infant; per Ld North. Vern. 295. Hill. 1684. Booth v. Rich.

But according to the Case of Manning v. Scott, 14 Novemb. 1714. Annuities mortgaged are irredeemable after Forfeiture, unless there be an express Agreement, that the Mortgagee may sell after Forfeiture. Ibid.

7. There is a *Difference* between *Mortgages of Exchequer-Annuities and Common Stock*, the Value of which depends upon Imagination, rather than real Value; but *Annuities* are a certain Security, and carry a constant Interest, and are to be considered as *Mortgages of Lands*, and cannot be sold after Forfeiture without Foreclosure. But Decree was reversed. MS. Tab. cites 1714. Wilton v. Tooker.

See 2 Wms's Rep. 511. S. C.

8. *Chambers in Gray's-Inn* were mortgaged by A. to B. It seems that this Court after Refusal of the Benchers of the Society to determine the Dispute as to this Mortgage, or in Case they consent that the Parties go to Law, in either of those Cases, the Court will decree a Foreclosure. See Select Cases in Chan. in Ld King's Time, 55, 56. Trin. 11 Geo. 1. Rakestraw v. Brewer.

(Z) Foreclosure. Opened in what Cases.

1. A Decree of Foreclosure is not to be opened after several Years, where there has been building upon the Estate and Settlements; nor shall the Mortgagee's calling it a Debt in his Will alter the Nature of it. MS. Tab. cites 9 Jan. 1705. Took v. Bishop of Ely.

After a Foreclosure, the *Mortgagee by Will disposes of the Money on the Mortgage*. Upon this Admission in the Will a Bill was brought to open the Foreclosure. The Court took Time to consider of it, and after the Parties agreed. Cited by the Matter of the Rolls Ld Commissioner. Select Cases in Chan. in Ld King's Time. 10. as in the Case of Stuckville v. Dolben.

2. But a Decree of Foreclosure was opened after 16 Years the Equity of Redemption being worth much more than what would be due upon Account, and

and Mortgagor having been distressed; and an Account was ordered to be taken of what was due for Principal, Interest, and Coists, and Liberty given to redeem. MS. Tab. tit. Mortgage, cites 17 April, 1724. Burgh v. Langton.

3. If a Mortgagee has a Decree of Foreclosure, tho' that Decree he sign'd and inrolled; yet if he after brings an Action of Debt on the Bond given at the same Time for Payment of the Money and Performance of the Covenants in the Mortgage Deed, such Action opens again the Foreclosure, and lets in the Equity of Redemption of the Mortgagor. Abr. Equ. Cases 317 Tr. 1729. Dashwood v. Blythway.

(A. a) Foreclosure. By 4 & 5 W. & M. 16.

I. 4 & 5 W. & M. cap. 16. S. 2. **E**NACTS that If any Persons shall borrow any Money, or for any other valuable Consideration for the Payment thereof shall acknowledge or suffer to be entered against them a Judgment Statute or Recognizance, and shall afterwards borrow any other Sum of any other Persons, or for other valuable Consideration, and for Payment or Discharge thereof shall mortgage Lands to the second or other Lender or Lenders, or to any other Persons in Trust for him or them, and shall not give Notice to the Mortgagee of such Judgment, Statute, or Recognizance, in Writing before the Execution of the said Mortgage, unless the Mortgagor or his Heirs upon Notice given to the Mortgagee under Hand and Seal attested by two or more Witnesses of such former Judgment &c. shall in Writing within six Months pay off and Discharge the same, and cause the same to be vacated by Record, such Mortgagor shall have no Benefit in Equity or elsewhere for Redemption of the Lands mortgaged.

This Statute intended only to recompence honest Mortgagees for the Trouble, Hazard, and Charge they might be put to, and not to cover a Fraud or ill Practice in obtaining an Assignment of a Mortgage, or in upon in the

becoming a Purchaser, and therefore concerns not this Equity, where a Man was imposed upon in the Mortgage it self; As by giving great Premiums, and cheated in the Payments &c. Mich. 1707. Stafford & al. v. Selby. 2 Vern. 591.

S. 3. If any Person who shall mortgage Lands for Security of Money due, or for other valuable Consideration, and shall again mortgage the same Lands to any other Person for valuable Consideration (the former Mortgage being in Force) shall not discover to the second Mortgagee the former Mortgage under his Hand, the Mortgagor shall have no Equity of Redemption against the second Mortgagee.

If more Lands are inserted in the second Mortgage than in the first, that seems to be *Causa Oni. ius*

out of this Statute. This penal Law is to be taken with some Strictness; but the adding one shall not exempt it out of the Statute, but be looked upon as a Contrivance to evade the Statute; per Lord Cowper. 2 Vern. 590. Mich. 1707. Stafford & al. v. Selby.

S. 4. If there be more than one Mortgage at the same Time of the same Lands, the last, or under Mortgagees shall have Power to redeem any former Mortgages.

S. 5. Nothing in this Act shall bar any Widow of any Mortgagor from her Dower, who did not legally join with her Husband in such Mortgage, or otherwise lawfully bar her-self from her Dower.

2. If a Mortgage becomes irredeemable by the Statute, and is assigned over to another in Consideration of what was really due thereon for Principal, Interest, and Coists, yet it remains irredeemable in the Hands of such Assignee, and such Assignee may take Advantage of the Statute against clandestine Mortgages; per Ld Cowper. 2 Vern. 590. Mich. 1707. Stafford & al. v. Selby.

If a subsequent Mortgagee had redeemed such for closing Mortgage, he should have held the

Estate irredeemable; Per Ld Cowper. 2 Vern. 590. Mich. 1707. Stafford & al. v. Selby.

3. A Deed of Trust was for payment of Debts, and securing Portions to Brothers and Sisters, and afterwards a Mortgage; the Mortgagee might have

taken the Advantage of the Act of Parliament, Notice not being given of all the prior Incumbrances; per Ld Cowper. 2 Vern. 590. Mich. 1707. Stafford & al. v. Selby.

(B. a) Equity. *Mortgagee relieved or not against Forfeitures.*

1. **BY** a Marriage Settlement *A. and M. his Wife were Tenants for Life, Remainder to their first &c. Sons successively in Tail Male*; After a Son and several other Children were born *A. and M. by Lease and Release and Fine* make a *Mortgage* to J. S. This is a Forfeiture, and no Relief for J. S. and so he lost all his Money; per Ld Macclesfield. Chan. Prec. 591. Tr. 1722. Lady Whetstone v. Sainsbury.

(C. a) *Pleadings.* In Law and Equity relating to Lands mortgaged.

1. **I**N Pleading, it is sufficient to say, *Quod Clausum prædict. prædicto tempore Confection' script. Obl' præd' pignoratim fuit præd' A. B. &c. without saying how it was mortgaged.* Reg. Plac. 187. cap. 5. cites 3 Cro. 899.

2. *Possession under a Decree of Foreclosure inrolled* is a good Plea. MS. Tab. tit. Mortgage, cites 1713. Whichals v. Short.

[For more of Mortgage in General, See **Fraud, Incumbrances,** and other proper Titles.]

* There is no Letter at Roll. —

† The true Cause of the Name and the Meaning thereof, is taken from the Effects as it is expressed in the Statute it self &c. so as the Lands were said to come to dead Hands as to the Lords; for that by Alienation in Mortmain they lost wholly their Escheats, and in Effect their Knight's-Service for the Defence of the Realm, Wards, Marriages, Reliefs, and the like, and therefore was called a Dead Hand; for that a Dead Hand yieldeth no Service. Co. Litt. 2 b.

* (A) † Mortmain.

1. **W**ILLIAM the Conqueror demanding the Cause why he himself conquered the Realm by one Battle, which the Danes could not do by many; Frederick the Abbot of St Albans answered, that the Reason was, because now the Land which was the Maintenance of Martial men, was given and converted to pious Employments, and for the Maintenance of Holy Dotaries; To which the Conqueror said, That if the Clergy be so strong that the Realm is infeebled of Men for the War, and subject by it to Foreign Invasion, he would aid it. And therefore he took away many of the Revenues of the said Abbot, and of others also. Speed. 418. b.

Fol. 129.

* [2.] In the time of the Saxons it was not lawful to give Possessions to an Abbey without the King's Licence; For Anno Domini 1006, a Minister

Minister of King Ethelred called Ulfrick Spot built the Abby of Bur- This is under the Title **Portuary** in Roll, but seems to be misplaced, and should be under the Title **Mortmain**. — * Orig. (al) — † Orig. (Mancas)

ton in Staffordshire, and endowed it with Possessions, and gave to the King 300 † Marks of Gold for his Confirmation, and to every Bishop 5 Marks, and to Alfrick Archbishop of Canterbury the Town of Dumbleton. The ancient Book of Abingdon cited in Janus Anglorum.

91. 45.

be under the Title **Mortmain**. — * Orig. (al) — † Orig. (Mancas)

(A. 2) Statutes.

1. 9 H. 3. cap. 36. **E**NACTS, that it shall not be lawful from henceforth to any to give his Lands to any religious House, and to take the same Lands again to hold of the same House &c. upon Pain that the Gift shall be void, and that the Land shall accrue to the Lord of the Fee.

Lord Coke, in his 2 Inst. 74 says, this Statute is excellently abridged and

expounded by the Statute of 7 E. 1. [which see pl. 2] — There were two Causes of making this Statute, [as therein appears] 1st. The withdrawing the Services created for Defence of the Realm. And 2dly, The chief Lords losing the Escheats &c. To prevent which Ld. Coke observes, that divers provident Lords at the Creation of the Seigniorie had a Clause in the Deed of Feoffment, viz. *Quod licitum sit Donatori* [so is this Word there, but Quære if it should not be (Donato) viz. the Donee] *rem Donatam dare vel vendere, cui voluerit Exceptis Viris Religiosis & Judais.* 2 Inst. 75. cites Braçt. lib. 1. fol. 13. and says, that he had seen many of those Deeds; But says, that the Ecclesiastical Persons Regular found many Ways to creep out of this Statute, as by purchasing Lands held of themselves, or taking Leases for long Terms of Years &c. And that Bishops, Parsons, and other Ecclesiastical Persons secular took themselves to be out of this Statute, the which Devices the Statute of 7 E. 1. intended to provide against, and therefore enacted, That &c. [as in pl. 2.]

2. 7 E. 1. *Where of late it was provided, that Religious Men should not enter into the Fees of any without Licence and Will of the Chief Lord of whom such Fees be holden immediately, and notwithstanding such religious Men have entered as well into their own Fees as in the Fees of other Men, appropriating and buying them, and sometimes receiving them of the Gift of others, whereby the Services due of such Fees, and which at the Beginning were provided for Defence of the Realm, are wrongfully withdrawn, and the Chief Lords lose their Escheats of the same, It is ordained, That no Person Religious, or * other whatsoever, Body Politick, Ecclesiastical or Lay, Sole or Aggregate, shall buy or sell any Lands or Tenements, or under the Colour of Gift or Lease, or by Reason of any other Title receive the same, or † by any other Craft or Engine shall presume to appropriate them to himself, whereby such Lands may in any wise come into Mortmain, under pain of Forfeiture of the same; and within a Year after the Alienation the ‡ next Lord of the Fee may enter, and if he do not, then the next immediate Lord from time to time to have half a Year; and ¶ for Default of all the Mesne Lords, the King shall have the Lands so alienated for ever, and shall infeoff others by certain Services.*

This Statute does not extend to Gifts to Religious Persons by the King, but that he may give Lands to them as well as to any other without any Forfeiture. Arg Pl. C. 240. b. —

* By the Words (other Person whatsoever) is meant, other whatsoever Aggregate of

of like Quality, as being a Body Politick or Corporate, Ecclesiastical or Lay, Sole or Aggregate of many. 2 Inst. 75.

† These Words were added to prevent all other Inventions and Evasions. But as this Statute extended only to Gifts, Alienations, and other Conveyances made between them and others by Craft &c. they took into a new Method, and pretending a Title in the Land, which they meant to get, brought a *Præcipe quod reddat* against the Tenant of the Land, and he by Collusion was to make Default, and so they should recover the Land and enter by Judgment of Law, Et sic fieret fraus Statuto. And when this new Invention was provided for and taken away by the Statute of H. 2 yet they found out || another Evasion out of all these Statutes; For now [since] they would [could] neither get any Land by Purchase, Gift, Lease, or Recovery, they caused the Lands to be conveyed by Feoffment, and in other Manner to diverse Persons and their Heirs to the Use of them and their Successors, by Reason whereof they took the Profits. But the Statute of 15 R. 2. enacted this to be Mortmain within the Forfeiture of the Statute of 7 E. 1. But the Foundation of all these Statutes was 9 H. 3. Magna Charta cap. 36. 2 Inst. 75. — || S. P. 2 Inst. 429

‡ If there are Lord and Tenant, and the Tenant aliens in Mortmain, and the Lord enters, yet he shall have but such Estate in the Land as he had in the Seigniorie, notwithstanding this Statute; for if he hath not but for Life or in Tail in the Seigniorie, he shall have the greater Estate in the Land; for so is the Intendment of the Statute; but the Lord of the particular Estate shall have Perquisite of Villain in

Fcc.

Fee. But by 18 E. 2. 29. if he has not but in Jure Uxoris, or Ecclesie, he shall not have it but in Jure Uxoris or Ecclesie. Quod Nota. Br. Estates, pl. 42. cites 5 E. 4. 61.

¶ This is to be understood of such Inheritances as may be holden; But of such Inheritances as are not holden, as *Vilains, Rent-charges, Commons &c.* the King shall have them presently by a favourable Construction of the Statute. An *Amnity* granted to them is not Mortmain, because it charges the Person only. Co. Litt. 2. b.

* This Act extends not only to Recoveries by Default according to the Letter, but to all manner of Recoveries

3. *Westm. 2. 13. E. 1. Stat. 1. cap. 32. S. 1. When Religious Men, and other Ecclesiastical Persons do implead any, and the Party impleaded makes * Default, whereby he ought to lose the Land, forasmuch as the Justices have thought hitherto, that if the Party impleaded make Default by Collusion, that where the Demendant, by Occasion of the Statute, could not obtain Seisin of the Land by Title of Gift, or other Alienation, he shall now by reason of Default, and so the Statute is defrauded.*

by Verdict or otherwise, if they be had by Collusion. If it be by Default, then a judicial Writ, called a *Quale Jus* grounded upon this Statute is awarded, consisting of five Parts; 1st. It recites the Recovery. 2dly, The Doubt of the Fraud. 3dly, A Precept to return a Jury ad Recogn. &c. 4thly, *Quale Jus idem Abbas habuit in prædicto Mesuagio &c.* 5thly, *Et quis Prædecessorum fuit inde seiscitus ut de Jure Ecclesie sue præd.* 6thly, *Et quantum illud Mesuagium * valet per Annum* — 7thly, Another Precept to the Sheriff, viz. *Et interim Mesuagium illud in Manum nostram Capias &c.* Et quod de Exitibus ad Scaccarium nobis Respondeas. 8thly, *Et Scire facias Capitalibus Dominis Feodi illius Mediatibus & Immediatis, quod sint ibi audituri Juratam illam, si voluerint.* And if the Jury find that his Predecessor was seised thereof in his Demesne as of Fee in right of his Church, before the said Statute of 7 E. 1 this is a good Verdict for the Demendant without finding of any Licence; For though there were no Licence, the Alienation was good; But if they find that his Predecessor was seised after the Statute, then they ought to find a Licence, or otherwise the Land belongeth to the Lord or King. 2 Inst. 430.

* The Value of the Land is inquired of, because the Issues thereof are to be by this Act, answered to the King. Ibid.

* This is either by Jury upon Trial of the Issue, or by *Quale Jus* if the Tenant makes Default. 2 Inst. 430.

S. 2. *It is ordained by our Lord the King, and granted, that in this Case, after the † Default made, it shall be ‡ inquired by the Country, whether the Demendant had Right in the thing demanded or no; and if it be * found that the Demendant had Right in his Demand, the † Judgment shall pass with him, and he shall recover Seisin; and if he has no Right, the Land shall accrue to the next Lord of the Fee, if he demand it within a Year from the time of the Inquest taken.*

† Hereby it appeareth that the *Quale Jus* should be sued out after the Default, and before Judgment, and so it is said the Use has been; and if the Collusion be found, the Lord &c. shall enter, though Judgment be never given. 2 Inst. 430.

But if Judgment be given upon the Default, yet may the *Quale Jus* be sued out, and so it appeareth by the judicial Register, and many other Authorities, but Execution shall cease until the Collusion be inquired. Ibid.

In a Writ of Right if Judgment final be given for the Abbot &c. the Collusion shall be inquired; For albeit the Judgment shall be given between them, yet the Lord by this Statute shall enter. Ibid.

And so it is of a Recovery by Default in a Cessavit. 2 Inst. 430.

‡ If there be an Issue joined in the Action brought by the Abbot, the Jury shall not only inquire of the Issue, but of the Collusion; but as concerning the Collusion, it is but an Inquest of Office, whereof no Attaint lieth. Ibid.

If a Recovery by Verdict were not within the Purview of this Act, such an Issue of Disadvantage might be joined, and so feint Evidence might be given, as this Statute should be of little Force. 2 Inst. 430.

And if the Jury do not inquire of the Collusion, so as the Abbot &c. recover by Verdict, yet the Collusion shall be inquired of by a special Writ, and not by a *Quale Jus*. Ibid.

If an Abbot bring an Assise, and the Tenant plead a foreign Release, they of the foreign County cannot inquire of the Collusion, but a special Writ shall be granted. Ibid.

If the Tenant appear and confess the Action, or Judgment be given upon a *Nilil dicit*, or a *Departure in Despite of the Court*, these also are within this Statute, and the Collusion shall be inquired; and so if a Recovery be had upon a Demurrer in Law, that Recovery is also within the Equity of this Statute. 2 Inst. 430.

In some Case no Collusion shall be inquired at all; as if a Person bring a *Juris Utrum*, and the Jury find that the Land is the Right of the Church, this sufficeth without inquiring of the Collusion. 2 Inst. 430.

S. 3. *And if he do not demand it within the Year, it shall accrue to the next Lord above, if he do demand it within half a Year after the same Year.*

S. 4. *And so every Lord after the next Lord shall have the Space of half a Year to demand it successively, until it come to the King, to whom at length, through Default of other Lords, the Lands shall accrue.*

S. 5. And to * challenge the Jurors of the Inquest, every of the chief Lords * If any of the Lords mediate or immediate be within Age, of the Fees shall be admitted, and likewise † for the King they that will shall challenge.

the Court in respect of these Words, Quicumque Domini feodorum, will advise whether any thing shall be done to his Prejudice during his Minority. 2 Inst. 430, 431.

† The King is always (in Judgment of Law) present in Court, and therefore any Man may challenge for the King, but by the Statute of 33 E. 1. they which challenge for the King must shew a Cause certain, and the Truth thereof is to be tried. 2 Inst. 431.

S. 6. And after the Judgment given the Land shall remain clear in the King's Hands, until it be dereigned by the Demandant, or some chief Lord, and the Sheriff shall be charged to answer therefore at the Exchequer.

4 By 27 E. 1. *Ordinatio de perquirendis Libertatibus*. To obtain Licence See (D. 2) to amortize Lands a Writ of Ad quod Damnum shall issue out of the Chan- (D. 3) cery to enquire concerning the same.

5. Stat. of amortizing Lands 34 E. 1. Enacts, that Lands shall not be alienated in Mortmain where there be mesne Lords, without their Consent declared under their Seals; neither shall any thing pass where the Donor reserveth nothing to himself, or when the Inquisition is made and returned without Warranty, viz. without the Writ Original returned with the Inquisition; and unless the Original make Mention of every Thing according to the new Ordinance devised by the King.

6. 23 H. 8. 10. If any Grant of Lands or other Hereditaments shall be made in Trust to the Use of any Churches, Chapels, Church-wardens, Guilds, Fraternities, Commonalties, Companies, or Brotherhoods, to have perpetual Obits, or a continual Service of a Priest for ever, or for 60 or 80 Years, or to such like Uses or Intents; all such Uses, Intents, and Purposes, shall be void, they being no Corporations, but erected either of Devotion, or else by common Consent of the People.

held to be a good and Charitable Use, and such as this Act did not extend to take away. 1 Rep. 22. b Mich 34 & 35 Eliz. in the Exchequer, the Queen v. Porter.—Als. Porter's Case.—S. C. cited 11 Rep. 71. b. Pasch. 13 Jac in Magdalen College's Case.—S. P. in B. R. in the same Term; And it was there likewise held, that this Statute extended only to Superstitious Uses, and not to restrain Uses that were in Favour of Learning and Relief of the Poor. Cro E. 288 Martidale v. Martin.—At the End of Porter's Case supra is a Nota of the Reporter, That any Man at this Day may give Lands, Tenements, or Hereditaments to any Person or Persons, and their Heirs, for the finding of a Preacher, Maintenance of a School, Relief and Comfort of maimed Soldiers, Sustenance of poor People, Reparations of Churches, Highways, Bridges, Causeways, Discharging of poor Inhabitants of a Vill of common Charges, to make a Stock for poor Labourers in Husbandry, and poor Apprentices, and Marriage of poor Virgins, and for any other Charitable Uses; and that it is good Policy upon every such Feoffment or Estate, to reserve to the Feoffor and his Heirs, a small Rent, or to express any such Consideration of any small Sum for the Cause before rehearsed.

Lands devised to one and his Heirs on Condition to assure them for Maintenance of a Grammar School for ever was

S. 3. Such Uses and Intents may be made and declared to continue twenty Years from the time of such limiting of them, but no longer.

S. 4. Collateral Assurances made for the defeating of this Statute shall be void, and this shall be interpreted most beneficially for the Destruction of such Uses as aforesaid.

S. 5 This Act shall not prejudice Corporations, where there is a Custom to devise Lands in Mortmain.

S. 6. This Act shall not prejudice the Executors of Jannis and Terry, late Aldermen of Norwich.

7. 17 Car. 2. cap. 3. S. 7. Enacts, that every Owner of any Impropration or Tithes, may give and annex the same to the Parsonage or Vicarage of the Parish Church where the same lie, or settle the same in Trust for the Parsonage &c, or of the Curates there successively where the Parsonage is impropriated and no Vicar endowed, without Licence of Mortmain.

S. 8. *If the settled Maintenance of any Parsonage or Vicarage with Cure shall not amount to 100 l. per Annum, it shall be lawful for the Incumbent to purchase to him and his Successors, Lands, Rents, Tithes, or other Hereditaments, without Licence of Mortmain.*

8. 22 Car. 2. cap. 6. S. 10. Enacts, that it shall be lawful for Bodies politick to purchase any Fee Farm Rents &c. and the same to retain, any Statutes of Mortmain notwithstanding.

9. 7 & 8 Will. 3. cap. 37. S. 1. Enacts, that it shall be lawful for the King to grant to any Person Licence to alien in Mortmain, and to purchase and hold in Mortmain any Lands or Hereditaments.

S. 2. *Lands so aliened, or acquired and licensed, shall not be subject to Forfeiture.*

10. 2 & 3 Ann. cap. 11. S. 1. Enacts, that it shall be lawful for her Majesty by Letters Patents under the Great Seal, to incorporate such Persons as her Majesty shall appoint, to be one Body Politick and Corporate; and by the same or any other Letters Patents to grant to the said Corporations and their successors for ever all the Revenue of first Fruits, and yearly perpetual Tenths of all Dignities, Offices, Benefices, and Promotions Spiritual whatsoever, to be applied to the Augmentation of the Maintenance of such Persons, Vicars, Curates, and Ministers officiating in any Church or Chappel in England, Wales, or Berwick, where the Liturgy and Rites of the Church of England, as now by Law established, shall be used, with such Powers, Rules, and Restrictions as shall be therein expressed.

S. 2. *And every Person having in his own Right any Estate or Interest in Possession, Reversion, or Contingency, in any Lands, Tenements, or Hereditaments, or any Property in any Goods or Chattels, shall have Power by Deed inrolled according to the Stat. of 27 H. 8. for Involment of Bargains and Sales, or by his last Will and Testament duly executed, to give, grant, and vest in the said Corporation and their Successors, all such his Estate, Interest, or Property in such Lands, Tenements, and Hereditaments, Goods and Chattels, for the Augmentation of the Maintenance of such Ministers as aforesaid, to be applied according to the Will of the said Benefactor in and by such Deed inrolled, or by such Will as aforesaid expressed; and in Default of such Appointment in such Manner as by her Majesty's Letters Patents shall be directed as aforesaid; And such Corporation shall have Ability to purchase, take, and enjoy for the Purposes aforesaid as well from such Persons so charitably disposed, as from all other Persons willing to sell or alien to the said Corporation, any Manors, Lands, Tenements, Goods, or Chattels, without any Licence or Writ of Ad quod Damnum, notwithstanding the Statute of Mortmain &c.*

11. 9 Geo. 2. cap. 36. S. 1. *No Manors, Lands, Advowsons, or other Hereditaments, nor any Money or other personal Estate to be laid out in Lands &c. shall be given to any Bodies politick or otherwise, or any ways charged in Trust for Charitable Uses, unless such Gift (other than Stocks in the publick Funds) be made by Deed indented, in Presence of two Witnesses, twelve Kalendar Months before the Death of such Donor, and be inrolled in Chancery within six Kalendar Months after Execution, and unless such Stocks be transferred six Kalendar Months before the Death of such Donor; and unless the same be made to take Effect in Possession immediately from the making, and be without Power of Revocation.*

S. 2. *Nothing herein relating to the Sealing and Delivery of any Deed twelve Kalendar Months before the Death of the Grantor, or to the transfer of Stock six Kalendar Months before the Death of the Grantor, shall extend to any Purchase for a full and valuable Consideration.*

S. 3. *All Gifts of Lands &c. or of any Charge affecting Lands, or of any Stock or personal Estate to be laid out in Lands &c. for Charitable Uses, which shall be made in any other Manner, shall be void.*

S. 4. *This Act shall not make void Dispositions of any Lands to either of the Universities, or the Colleges or Houses within either of them, or to the Colleges of Eaton, Winchester, or Westminster, for the better Support of the Scholars upon the Foundations.*

S. 5.

S. 5. No such College or House which shall hold so many Advowsons as are equal in Number to one Moiety of the Fellows, or where there are no Fellows to one Moiety of the Students upon the Foundation, shall be capable of purchasing any other Advowsons, the Advowsons of Benefices annexed to the Headships of Colleges or Houses not being computed.

S. 6. Nothing in this Act shall extend to Scotland.

(B) What is Mortmain.

1. **I**F a Tenant gives his Land to a Religious House to hold by lesser Services of him than he holds over by, it is Mortmain, and the Lord may enter by the Statute of Magna Charta. Br. Assise, pl. 456. cites 23 H. 3. and Fitzh. Assise 436. Br. Mortmain. pl. 36. cites S. C.

2. In Assise, it appear'd that one Abbot cannot alien to another Abbot without losing their Land by the Statutes of Mortmain, and therefore the Collision was enquired between them as between Religious and Secular. Br. Mortmain, pl. 19. cites 16 Aff. 1.

3. In Quare Impedit the Plaintiff made Title as Lord, because an Abbot was Patron of an Advowson and presented such a one, who was received &c. and after the Abbot by Licence of the King and the Ordinary appropriated the Advowson to himself without Licence of the Lord, by which he seized within the Year, and so it belongs to him to present; and per Cur. this is not Mortmain, because it is a spiritual Thing, and the Abbot had it before; For before he was Patron only, and now he is Parson and Patron, viz. Incumbent and Patron, and therefore no Mortmain; Quod Nota. Br. Mortmain, pl. 12. cites 21 E. 3. 5.

But per Shard, where there is Lord, Mesne, and Tenant, and the Mesne is Abbot and purchases the Tenancy, it is Mortmain, and the Lord may enter; Wilby Ibid.

4. In Writ of Customs and Services the Lord released to the Abbot Tenant 5 s. Rent in Fee, and the Court said that the Fine was receivable, because it was not as a Parake of the Rent, but Extinguishment in the Hands of the Tenant, and so the Fine receivable tho' he was a Man of Religion; and therefore it seems that it is not Mortmain; For when it is extinct none may enter into it; but no Word of Mortmain is expressed there; But see New Nat. Br. 233. per Fitzh. it is Mortmain, and Writ of Ad quod Damnum shall Issue upon Licence of Alienation of such Rent by Release. Br. Mortmain, pl. 16. cites 21 E. 3. 18.

S. P. Br. Mortmain, pl. 31. cites S. C. accordingly, & New Nat. Br. contra. And Brook says the Law seems to be with Fitzh. For the Land Arte vel Ingenio.

5. An Abbot was impeached in the Exchequer, for that he had purchased a Release of certain Rent of the King's Tenant who was Mesne between the King and him, and was put to answer why he should not be attendant of these Services to the King, and that he should make Fine; The Abbot said that he who is supposed to release enfeoffed his Predecessor in Frankalmoign, and so was he Tenant to the King as before &c. Brooke makes a Quare if it shall be intended Mortmain by the Release, and says it seems it shall not, by Reason of the Fine; For by Mortmain the Land is forfeited, and where the Land is forfeited no Fine is used to be paid. Br. Mortmain, pl. 20. cites 38 Aff. 17.

6. Note, it appears in Juris Utrum 40 E. 3. that where a Man aliens to a Parson and his Successors it is a Mortmain; For it is said there, that it cannot be without Licence. Br. Mortmain, pl. 3. cites 40 E. 3. 28. So to a Vicar and his Successors; and by such Alienation they have

it in Right of the Church, by Reason of these Words, Parson or Vicar and Successors; Contra if it was to their Heirs. Ibid.

Office was found that 4 Acres of Land were devised to a Man in Fee, so that he and his Heirs should pay yearly 6 l. to maintain a Chaplain to celebrate yearly for ever in the Church of St. Leonard in Eastcheap, and that the Rector and 4 Parishes for the Time being should levy the aforesaid Rent whensoever, and as often as it should be Arrear, and this Matter confessed in Chancery was adjudg-

ed Mortmain, by which Execution was awarded to the King; Quod Mirum! For here was not any Corporation which may take the Rent; Br. Mortmain, pl. 24. cites 43 Aff. 33.

7. Office was found before A. B. Mayor and Escheator of London, that R. of E. was seised of Tenements in Woodstreet London in Fee, and devised the Tenements by Testament to H. D. in Fee to pay annually 12 l. and to find two Chaplains to chaunt for his Soul for ever in the Church of St. Alban's in Woodstreet, by these Words, viz. To find 12 l. for two Chaplains, and devised to the Rector of the Church there 6 s. 8 d. a Year to find for the same Chaplains Vestments, Calice, Candle, and other Necessaries for celebrating the same, and died, and Sene facias for the Mortmain issued to the two Chaplains as Tenants of the 12 l. if they had any Thing to say why the King ought not to have that 12 l. and the Parson was warned for the 6 s. 8 d. Rent. And it was held by the best Opinion, because the 2 Chaplains are not perpetual, scil' as it seems they are not incorporated, that therefore the 12 l. for the 2 Chaplains is not Mortmain; by which Lud said that by the Usage of the City upon such Devile, it is leviabie by the Ministers of the City at the Suit of him who is Parson and of the Parisoners, and because it is leviabie in Perpetuity, therefore it is Mortmain; by which Knivet J. awarded that because the Defendant had not deny'd that the Rent was devised to find a Chaplain, and in the Testament is comprised that the Parisoners and the Parson of the Church may distrain for the Rent perpetually when it is arrear, which is maintained by the Usage, which Usage you have not deny'd, and the Parson of the Church is perpetual and therefore Amortisement in Law; so the Court awarded that the King have Execution of this Rent, but in the one Chantry was not comprised Distress, and therefore in this no Mortmain. Br. Mortmain, pl. 21. cites 40 Aff. 29. [but it should be 26.]

8. And by the same Testament 6 s. 8 d. a Year was devised for the Sustainance of a Lamp in the same Church, which was adjudged per Cur. to be no Mortmain; and of this the Defendant went quit; quod Nota. Ibid.

The Bishop cannot enter without the King's Licence, and if he do it is Mortmain. And it seems that the Law is such, because there is a Writ of Ad quod Damnum in the Register to inquire to whose Damage the same is. F. N. B. 224. (B)——* It should be 41 E. 3. 16.

9. In Præcipe quod Reddat it was agreed, that if the Villain of a Bishop purchases and the Lord enters it is Mortmain; yet he may retain against the Villain. Br. Mortmain, pl. 4. cites * 4 E. 3. 116.

9. But if a Villein of a Bishop purchases Land and dies, and his Heir enters, and the Bishop enters upon the Heir by Reason of the Purchase by his Villein, and the Heir ousts him, and the Bishop brings Assise and recovers, it is no Mortmain; For Covin cannot be intended, inasmuch as the Lord permits the Villein who purchased to die seised and his Heir to enter; Contra if the Lord had entered upon the Purchasor. Br. Mortmain, pl. 32. cites 41 Aff. 4.

It was found by Office that A. B. devised certain Land and 2 s. Rent to maintain a

Chaplain in the Church of C. yearly for ever to celebrate, and Will'd that his Executors should appoint the aforesaid Chaplain, and it was found that the Executors did nothing, but that J. who was the next Heir entered and aliened the Land and Rent, and so several Alienations, and nothing was done, and now W. T. is seised by Feoffment, and because no Chaplain was found, nor the Executors did any Thing, therefore no Mortmain, and so was the Opinion of the Court. Br. Mortmain, pl. 25. cites 43 Aff. 34.

12. Where an Abbot has Right to Land, but the Entry is not lawful, and he enters and the Tenant ousts him and he brings Assise and recovers by false Verdict, & Quale jus illues, which finds that the Abbot had Right but

but cannot enter upon the Possession, the King shall seize; Quod Nota; For tho' he has Right to the Land by Writ of Right, yet if there be Co-
vin in the Recovery by the Assise, which is an Action possessory, the King
shall seize, and the Abbot shall sue to the King by Petition of Right;
per Cur. Br. Mortmain, pl. 33. cites 44 Aff. 26.

13. In Præcipe quod Reddat it was awarded that *Abbot may vouch and re-
cover in value upon true Warranty, and shall have Execution*, and so not
within the Statute. Quod Nota. Br. Mortmain, pl. 43. cites 45 E. 3.
18, 19.

14. If a *Rent-charge* be granted to an Abbot and his Successors for 80
Years, it is Mortmain; For the Statute de Religiosis Anno 7 E. 1. is that
they shall not appropriate Lands nor Tenements under Colour of Terms &c.
Quære. Br. Mortmain, pl. 15. cites 4 H. 6. 9.

15. If an Abbot has a Rent out of my Land, and I grant to him that he
may distrain for the same Rent out of other Land this is not Mortmain;
For he has nothing but the ancient Rent. Br. Mortmain, pl. 30. cites 9
H. 6. 9.

16. And it was agreed per tot. Cur. that of Common Right a Man
cannot distrain for Rent but in the same Land out of which it issues; but
by Grant of the Party himself he may distrain in other Land as here;
and it was held that it is not Mortmain, because it is no New Rent, but the
Ancient Rent. Br. Mortmain, pl. 30. cites 9 H. 6. 9.

by his Deed that they and their Successors shall distrain for that Rent in other Lands, it appears by
the Register that he ought to have the King's Licence to make such Grant; And a Writ of Ad quod
Damnum shall be to inquire what Damage or Prejudice the same shall be to the King or others &c.
and yet it is hard to prove how that shall be taken to be within the Words of the Statute of Mort-
main; because such Grant is a good Grant of a Rent in Fee; tho' there were not such Rent before to
the Abbey, or Dean and Chapter. It seems that the Grant made without Licence shall be as a new
Grant in Law. Tamen Quære.

17. If an Abbot recovers in Writ of Annuity, Quare jus shall not issue;
for it is not Mortmain; Because nothing is charged but the Person. Br.
Mortmain, pl. 1. cites 20 H. 6. 7. per Patton and Newton.

18. Exchange with a Religious is Mortmain. Br. Mortmain, pl. 41.
cites F. N. B. 223.

19. Lord and Tenant; the Tenant makes a Feoffment in Fee to the Use of
A. B. for Life, and after to the Use of an Abbot and his Successors; this is not
Mortmain till the Tenant for Life in Use dies, and he in Remainder
takes the Profits; and so it was adjudged in C. B. in the Time of Bru-
denell; and Appropriation of Advowson without Licence is Mortmain. Br.
Mortmain, pl. 37. cites M. 25 H. 8.

20. If a Man leases to a Religious Person for 100 Years, and so from
* 100 Years to 100 Years, until 800 Years are incurrd, it is Mortmain.
Br. Mortmain, pl. 39. cites H. 29 H. 8.

(shall buy &c.) Br. Mortmain, pl. 39. cites 29 H. 8. — So of a Lease for 400 Years &c. Ibid. —
* S. P. 2 Le. 8;

21. But Brook makes a Quære, if a Lease for 100 Years be Mortmain,
and says, it seems that it is * not; For it is a usual Term; but 99 Years
is not Mortmain; For is it very usual. Ibid.

For it is not an usual Term, but &c.) or to make it consistent with what follows, it may be thus, viz.
(That it is not; For it is a usual Term. But (however) 99 Years is not &c. — Per Neale, *Lease*
for † 100 or 200 Years is Mortmain for the Length of Time; For Colour of a Term &c. Br. Mort-
main, pl. 27. cites 3 E. 4. 13, 14.

† S. P. Contra Per Warburton J. Arg. viz. That a Lease for 100 Years is Mortmain 2 Brownl 19;
in Case of Rowles v. Mason

22. But if a Man leases for 100 Years or the like, and covenants that
he or his Heirs at the End of the 100 Years shall make another Lease for
100 Years and so on, it is not Mortmain; For it is not but a Lease for 100
Years, and the rest is only Covenant, but otherwise in the first Case; For

that is for 800 Years at first in Effect, and all by one and the same Deed. Ibid.

23. A *Vicaridge* may be endowed without Consent of the King, and it is not Mortmain; per Jones J. Palm. 427. Pasch. 2 Car. B. R. in Case of Cope v. Bedford,

(B. 2) What is. *By Estoppel.*

So of a Rent-charge confessed by a Receiver to an Abbot. Ibid.

1. **N**OTE, it was agreed Arguendo in *Cessavit*, that if the *Tenant in Cessavit* by a Bishop comes and confesses the Tenure, and tenders the Arrears as the Demandant counted, where in Truth the Land is held of another Man, he shall gain the Seigniorie upon the Tenant by Conclusion, which is forfeited to the King by Mortmain. Br. Mortmain, pl. 9. cites 50 E. 3. 22. 23

(B. 3) What is. *By Covin.*

This was on a Sci Fa. brought by the Bishop, and Part of the Judgment was, that the Land be seised into the Hands of the King. 17 E. 3. 59 b. pl. 58.—Fitzh. tit. Petition, pl. 21.—

And tho' this seemed to be a Work of Piety and Charity to provide an Habitation for them who had none before, and were of Profession of Religion, yet it was observed, that it was contrary to the Rule of *Non Facias malum ut inde fiat Bonum*; and also that this Charter was adjudged to be repealed by the Common Law. 11 Rep. 74. a.

1. **T**HE King purchased 10 Acres of Land held of the Bishop of W. of M. the Bishop's Tenant, and this was for a Habitation for the Friars Carmelites, (they having no Place to inhabit in) and because M. could not grant the said Land by Reason of the Statute of Mortmain, the said M. and the Friars (to toll the Seigniorie of the Bishop, which stood in their Way, and so evade the Statute of Mortmain) granted the 10 Acres to the King, his Heirs and Successors, by which the Seigniorie of the Bishop would be extinct, with Intent that the King should grant it over to the Friars, which he did accordingly; and because this was by Covin before, and to toll the Bishop of his Seigniorie, it was adjudged that the Charter be repealed, and that the Friars be distrained to deliver up the Charter to be cancelled. 11 Rep. 73. b. 74. a. Pasch. 13 Jac. B. R. in **Magdalen College's Case**, cites 17 E. 3. 59. b.

2. In *Affise* against the Bishop of E. the Seisin and Disseisin was found, and that Alice purchased the Land in Fee, and took to Baron J. who was Villein of the Bishop, and had Issue A. and died, and A. entered, and had Issue B. and died, and B. entered, and had Issue C. and died, and S. enter'd, upon whom the Bishop entered as in the Land of his Villein, viz. Upon the third Descent; and by some, because it has continued by three Descents, and was purchased by a Frank-Feme, and not by the Villein; this is no Collusion, but the Entry of the Bishop good, and the Lord cannot enter for the Mortmain; quære; For Adjournatur.. Br. Mortmain, pl. 5. cites 41 E. 3. 21.—But 41 Aff. 4. Judgment was given for the Bishop. Ibid.

(B. 4) Prohibited. *In what Cases. To whom.*

A Dispensation within this Statute may be made

1. **Q**uia Emptores Terrarum &c. 18 E. 1 cap. 3. Enacts that by the Sales or Purchases of Lands or Tenements, or any Parcel of them [within the said Statute] such Lands or Tenements shall in no wise come into Mortmain,

main, either in Part or in whole, neither by Policy nor Craft contrary to the Statute [7 E. 1.] thereupon of late.

mediate and Mediate. And the Licence of the Lords immediate and mediate in this Case shall enure to two Intents, viz. To a Dispensation both of the Statute of *Quia Emptores terrarum*, and of the Statutes of *Mortmain*, because their Deeds shall be taken most strongly against themselves. But it is a safe and good Policy in the King's Licence to have a *Non obstante* also of the Statutes of *Mortmain*, and not only a *Non obstante* of the Statute of *Quia Emptores terrarum*. Co. Litt. 98. b. 99. a.

2. He who aliens in *Mortmain* ought to leave sufficient in his Hands to pass in *Juries*. Br. Ad quod Damnum, pl. 1. cites F. N. B. 221. Otherwise it is a Damage to the Country. F. N. B. 222. (B).

3. So where a Priest or Feme aliens in *Mortmain*. Ibid.

Quod Damnum shall be this Clause, viz. Et quod iidem &c. in Assis, Juratis & aliis Recognitionibus quibuscunque poni possint By which it appears, that they ought to have sufficient Lands besides to descend to their Heirs. F. N. B. 222. (B). And in the Writ of Ad

4. A Fine of Lands to be amortis'd to St John's College in Oxon by Sir Thomas White was refused to be ingrossed, pro Defectu Brevis inde directi Justiciariis de Banco to pass such Fine. D. 188. pl. 9. Mich. 2 & 3 Eliz. —cites likewise Cardinal Wolsey's Case, as to Christ-Church College's and also Queen's College's Case in Cambridge, where such a Fine was rejected for the same Reason.

(C) Forfeiture; and to whom.

1. WHERE a Rent-charge is granted in *Mortmain*, the King shall have it, but no other Lord; For there is no Tenure of it; and so see that the King shall have it, and yet the Statute says, that the Chief Lord shall immediately enter. Br. *Mortmain*, pl. 12. cites 21 E. 3. 5.

2. In Assise, if Tenant in Tail aliens in *Mortmain*, and dies, his Heir shall not be barred; quod nota, per Gascoine; For the Statute of West. 2. de Donis Conditionalibus, is after the Statute of *Mortmain*; For the Statute of *Mortmain* is Anno 7 E. 1. and the Statute of West. 2. de Donis &c. is Anno 13 E. 1. Br. *Mortmain*, pl. 10. cites 8 H. 4. 9.

(C. 2) Entry for Forfeiture. In what Cases.

1. IN Assise, where the King licenced the Prioress of Kilborne to purchase Land to her and her Successors notwithstanding the Statute of *Mortmain*; there, if she purchases Land which she holds of two, where several Mesne Lords are Mesne between the Tenant and the King, and the Lords neglect their Title of Entry, yet the King by this has no new Title to enter, but is excluded by his Licence; quod nota. Br. *Mortmain*, pl. 22. cites 43 Aff. 19.

2. In Quare Impedit, per Norton, if Tenant, who has no Right in the Land, by Licence of the King and Chief Lord gives the Land to *Mortmain*, if the Abbot gets a Release or Confirmation from him who has Right, the King cannot enter; For this Release is Extinguishment of Right, and the Abbot is in by the first Feoffor. Br. *Mortmain*, pl. 18. cites 11 H. 4. 88. And hence it follows, as it seems, that if Disseisin is in *Mortmain* by Licence of the King,

and the Chief Lord, and the Disseisee releases to the Abbot all his Right, the Chief Lord or the King cannot enter; For this does not counterail Entry and Feoffment. Ibid.—S. P. For the Tenant is in by the first Feoffor by Licence; For Release to him who is in by Title goes by Extinguishment of Right. Br. *Mortmain*,

Mortmain, pl. 38. cites S. C. ——— *But where the Abbot is disseised, and the King or Chief Lord releases or confirms to him, and after the Disseisee releases to the Abbot all his Right, it seems that the King or Chief Lord may enter; For this counterwaits Entry and Feoffment, and then it is a new Mortmain; quære inde.* Br. Mortmain, pl. 18. cites S. C.

* So are all the Editions but it should be 15 E. 4. and this Point is there at fol. 13. a.

3. If he in *Remainder aliens* in Mortmain the Lord may enter; per Litton. Br. Prerogative, pl. 25. cites 15 * H. 4. 11.

4. No *Charter of the King* will bar the Entry of the next immediate Lord which is given by the Statute for an Alienation in Mortmain to a Corporation; and this seems always to have been agreed, because it is a settled Rule, that the King cannot prejudice the Interest of the Party. 2 Hawk. Pl. C. 390. cap. 37. S. 29.

See (A. 2) pl. 2. and in the Notes there.

Br. Taile and Dones &c. pl. 18. cites S. C.

S. P. Br. Entre Cong. pl. 17. cites 50 E. 3. 21. and Br. Mortmain, pl. 8. cites 50 E. 3. 21. 22. For they are but one and the same Estate; quod nota Arguendo. Br. Quare Imp. pl. 40. cites S. C. and 18 E. 3. 121. —S. P. Br. Mortmain,

pl. 6. cites 47 E. 3. 10, 11. but *contra of him who has a Right of Entry* and may have Action. ——— And where a Man *aliens an Advowson in Mortmain*, and the *Alienee presents diverse Times*, yet the King or other * next Lord may present at the next Avoidance if it be *within the Year*, because *there is no Right to have Writ of Right, but only a Title which may be taken any Time within the Year*; quod nota. Ibid.

* S. P. tho' the Church be full by 6 Months before his Quare Impedit brought, so that he brings it within the Year; quod nota. Br. Mortmain, pl. 13. cites 21 E. 3. 27. ——— Br. Quare Impedit, pl. 70. cites S. C.

(C. 3) Entry for Forfeiture, at what Time.

1. **A** *Seigniorie is granted to a Man in Tail, the Remainder to B. in Tail; the Tenant aliens in Mortmain, the first Tenant in Tail does not enter within the Year, by which the next Lord enters; the Tenant in Tail dies without Issue; he in Remainder enters within the half Year; the Lord reousts him, and he brings Assise and is barred, because the Tenant in Tail and he in Remainder had only one Seigniorie, and are but one Lord, and both shall have but one Year by the Statute, and therefore the Laches of the Tenant in Tail shall prejudice him in Remainder; and the Law seems to be the same of the Issue in Tail.* Br. Mortmain, pl. 17. cites 39 E. 3. 38.

2. If there be *Tenant for Life Remainder over* of a Seigniorie, and the *Tenant of the Land aliens in Mortmain*, they both shall have but one Entry, viz. *but one Year and Day to enter.* Br. Done &c. pl. 6. cites 40 E. 3. 9.

3. *Descent within a Year after Alienation in Mortmain* does not take away the Entry within the Year; for it is *but Title of Entry and not Right of Entry*; For upon Right of Entry he may have an Action. Br. Entre Cong. pl. 13. cites 47 E. 3. 11.

4. Where a *Lease is made for Life, the Remainder over in Fee*, there if *he in Remainder aliens in Mortmain*, the Lord shall have a Year to enter; but it seems that he *cannot enter till after the Death of the Tenant for Life, but he may claim it before* as it seems. Br. Mortmain, pl. 14. cites 15 E. 4. 13.

5. The Year to enter for Mortmain shall be *accounted the next Day* after the Alienation, and where the King dies one Day, and another King is made the same Day, this Day shall be the Day of the old King; quod quære; For otherwise it is computed 1 E. 6. and if he mistake his Day this shall be at his Peril in Mortmain; but it was said that it was not greatly argued by the Court nor adjudged. Br. Jours. pl. 49. cites 7 H. 7. 5.

6. *Lord and Tenant, the Tenant leases for Life to J. S. the Remainder to an Abbot and his Successors, the Lord need not make Claim till the Tenant for Life be dead*; For if he will *wave the Remainder*, it is not Mortmain. Br. Mortmain, pl. 37. cites Mich. 25 H. 8.

(D) *Licences to Alien in Mortmain, granted How, and to whom.*

1. **C**HARTER of Pardon of Mortmain, or the *Licence of Mortmain*, ought to Accord in Quantity of Land, Vill or Value; For if Variance be, and it be presented for the King, the King's Serjeant shall maintain the Presentment, and the King shall have a new Fine, if it varies in Quantity and in Value; quod nota: Br. Variance, pl. 95. cites 22 Af. 26.

2. The King and all the *Mesne Lords may Licence the Tenant to give in Frankalmcign*, and reserve a Tenure at this Day; For the Statute of Quia Emptores &c. was made only in Advantage of Lords, and therefore they may dispense with it; per Fitzh. *Quere.* Br. Licences, pl. 21. cites 40 E. 3. 27.

3. If the King grants to a Corporation to purchase Land the Statute of Mortmain notwithstanding, this is good against the King, tho' there are several Mesnes between the Tenant and the King. Br. Patents, pl. 40. cites 43 Af. 19.

4. The King and the Mesne Lords may give Licence to the Tenant to alien in Mortmain; For the Statute was made in Advantage of the Lords, and they may dispense with it. Br. Mortmain, pl. 40. cites F. N. B. 211. per Fitzh. J.

5. The Usage at this Day is to have Clause in his Licence, when he aliens in Mortmain, that he may alien without suing any Writ of Ad quod Damnum, viz. without any Writ of Ad quod Damnum or any other Writs or Mandates thereupon to be had, made, or prosecuted &c. Br. Ad quod Damnum, pl. 1. cites F. N. B. 222.

6. And one and the same Writ of Ad quod Damnum shall serve for several Purchases. Ibid. F. N. B. 222.
(G) S. P.

7. And Licence of one King shall serve to alien in the Time of another King for Mortmain. Ibid. Br. Licences,
pl. 22. cites
S. C. F. N.

B. 223, (G) S. P.—Co. Litt. 52 b. at the End.—Wats. Comp. Incumb. 8vo. 695. cap. 38

8. There needeth not any *Non-obstante* by the King of the Statutes of Mortmain; for the King shall not be intended to be Misconusant of the Law; and when he licensed expressly to alien to an Abbot &c. which is in Mortmain, he needs not make any Non-obstante of the Statute of Mortmain; for it is apparent to be granted in Mortmain, and the King is the Head of the Law, and therefore præsumitur Rex habere omnia Jura in Scrinio Pectoris sui for the Maintenance of his Grant to be good according to the Law. Co. Litt. 99. a. Wats. Comp.
Incumb. 8vo.
694 cap. 28.

(D. 2) *Licence, or Ad quod Damnum. Necessary in what Cases.*

1. **I**F a Man sue to the King for a Licence to give an Advowson to two Chaplains, and to their Successors to hold to their proper Use, and that they may hold the same to them and their Successors appropriate for ever to say Divine Service &c. he shall have a Writ of Ad quod Damnum to inquire what Damage such Grant would be to the King or others, and that Writ appeareth in the Register. F. N. B. 223. (c)

2. The Writ of Ad quod Damnum lieth where a Man will give Lands, or Tenements in Mortmain, as to a Religious House, or to a Body Politick in Fee-Simple, then he ought for to have the King's Licence, and the Licence of the Chief Lords to make such Gift or Grant, and before such

Licence be granted; and the *Course* is to sue unto the King to have a Licence to sue that Writ out of the Chancery directed unto the Escheator to inquire what Damage it would be to the King, or unto other Persons, if the King do grant such Licence, and upon the Return of that Writ certified in the Chancery, the King ought to give Leave that he may alien or give in Mortmain, and that *Inquisition* ought to be certified into the Chancery *under the seals of Escheator and of the Jurors*, by whom the Inquisition was found. F. N. B. 221. (O)

3. If the King will give Licence to one to grant a Rent unto an Abbot and his Successors, yet he ought for to sue forth a Writ of Ad quod Damnum, if he have not these Words in the Patent, viz. and this without any Writ of Ad quod Damnum &c. F. N. B. 223. (B)

S. P. for neither an Abbot nor others, who have Advowson can appropriate it to themselves, nor to others without Licence. Br. Licences, pl. 23. cites F. N. B. 223.—So if it be to exchange Lands for Rent. F. N. B. 224. (D)

4. And if a Man will exchange Lands, Tenements, or Rents with another Abbot, or Body Corporate, upon the Licence granted he ought to sue forth a Writ of Ad quod Damnum. F. N. B. 223. (E)

But if he releases the Rent, saving to himself the Services, or if he releases to hold of him in Frankalmoinne, it is not Mortmain. F. N. B. 223. (I) in the Notes there (a) cites 10 E. 3. 5. 21 E. 3. 18. Quere, 10 E. 3. Mortm. 17. 1 Bro. Mortm. 31.—For the former Services are extinct, and nothing is reserved but that he holds of him and so he did before. Co. Litt. 99. a.—And this it seems without other Licence. Wats. Comp. Incumb. Svo. 695. cap. 38.

5. If an Abbot holdeth of another Man by a certain Rent-Service, the Lord cannot release unto the Abbot that Rent without the King's Licence; and if he do, it is Mortmain and the King shall have the Rent. F. N. B. 223. (I)

6. And if a Man do purchase a Licence to found a House with Lands, or to make a Prebendary, and to give Lands to the same &c. he ought to have a Writ of Ad quod Damnum upon the same. F. N. B. 224. (E)

7. If a Man devises Lands or Rents to his Executors and to their Heirs, to dispose according to his Will, and after he makes his Will, that they give the same in Mortmain; they ought to have the King's Licence, and a Writ of Ad quod Damnum upon the same, as appears by the Register. F. N. B. 224. (F)

And if the King seizeth Lands aliened in Mortmain, and afterwards will give them

8. If a Man will give Lands unto the King in Fee, unto the Intent that the King shall give them to a Religious House, yet a Writ of Ad quod Damnum shall be directed to the Escheator to inquire what Damage that shall be to the King, or others, if the King should accept thereof, and give the same to the Religious House. F. N. B. 226. (A)

again to the Abbot &c. in Fee, yet a Writ of Ad quod Damnum shall be awarded, to inquire to whose Damage it shall be &c. F. N. B. 226. (B)—And so if an Abbot purchaseth Lands without Licence, and afterwards the King will pardon him for the Purchase, and grant that he may retain and keep the Lands, yet an Ad quod Damnum shall issue to inquire &c. F. N. B. 226. (B)

(D. 3) Writ of Ad quod Damnum. *How the Writ shall be.*

It appeareth by the several Forms of Writs of Ad quod Damnum which are in the Register, that the Writ ought to be made according to the Letters Patent of Licence, because it ought to rehearse the Effect of the Letters Patent therein; and therefore the Forms of the Writs of Ad quod Damnum do vary as the Letters Patent themselves do vary. F. N. B. 224. (C)

2. In the Writ of Ad quod Damnum for Exchange of Lands, both the Lands which are given and the Lands which are taken in Exchange ought to be mentioned. F. N. B. 223. (E)

(E) Pleadings

(E) *Pleadings.*

1. **T**HE Plaintiff in Replevin shall not be suffered to disclaim against Abbot, or other Religious, nor against their Bailiff, by Reason of Mortmain; per Afcough J. quod non contradicitur. Br. Mortmain, pl. 2. cites 28 H. 6. 10.

2. If a Man pleads Entry for Alienation in Mortmain, he ought to shew that he entred within the Year. Br. Pleadings, pl. 69. cites 3 H. 7. 2. The Day of Alienation in Mortmain shall be shewn certainly, so that it may appear if he entered within the Year after the Alienation according to the Statute. Br. Mortmain, pl. 26. cites 7 H. 7. 5. — Br. Jours. pl. 49. cites S. C. — Br. Pleadings, pl. 80. cites S. C.

[See more of Mortmain in General at **Charitable uses**, and other proper Titles.]

* Mortuary.

(A) Mortuary. *The efficient Cause.*

1. **T**HIS it is due de Jure to the Parson in recompence of his personal Tithes and Offerings not duly paid in the Life of the Owner. **Linwood fo. 12. Constitutiones Simonis Langham cap. de Consuetudine.**

of the Records) 1. Optimum Equum sine Palfidum ipsius Episcopi cum sella & freno. 2. Unam chlamydem sine clocam cum capella. 3. Unum ciphum cum coopertorio. 4. Unum pelvem cum lavatorio sine aquar. 5. Unum annulum aureum. 6. Necnon mutam canum, cuæ (saith the Record) ad dominum regem ratione Prærogativæ suæ spectant, & pertinent. And there is a special Writ that Issueth out of the Exchequer after the Decease of the Bishop for answering of the same; and in the Records this is called, Multa Episcopi, or Multura Episcopi, derived a Mulcta, for that it was a Fine, or final Satisfaction given to the King, that they might have Power to make their last Wills and Testaments, and to have the Probate of other Mens Testaments, and the granting of Administrations; so as this Duty which the King hath after the Death of Archbishops and Bishops, is not any Mortuary. 2 Inst. 491.—Mortuarium hath been sometimes used in a Civil as well Ecclesiastical Sense, being payable to the Lord of the Fee; Debentur Domino Manerii de Wrechwike nominibus Heriotti & Mortuarii due Vacce pret. 12 fol. Jac. Law Dict. Verbo Mortuarium cites Paroch. Antiq. 475

† Spelm. Gloss. verbo Mortuarium.—Lord Coke says, it is a Gift left by a Man at his Death for Recompence &c. 2 Inst. 491.

2. Mr. Selden tells us that the Usage antiently was to bring the Mortuary along with the Corps when it came to be buried, and to Offer it to the Church as a Satisfaction for the supposed Negligence and Omision the De-funct had been Guilty of in not paying his personal Tythes, and from thence is was called a Corfe-Present. Wats. Comp. Incumb. 8vo. 1053. cap. 53. cites Selden Hist. of Tythes 287. 2 L. P. R. tit Mortuary cites S. C.

(A. 2) *Statutes.*

1. 13 Ed. **E**NACTS that a Prohibition shall not lie for Mortuaries in There is no Mortuary due by Law, but only by Custom which is proved by the Words of this Act, viz Ubi Mortuarium dari consuevit. 2
 1. St. 4. Inst 491.

Watf. Comp. Incumb. Svo. 1040. cap. 53. says, This Law was made to the Prejudice, rather than to the

2. 21 H. 8. cap. 6. S. 2. Enacts that *No Spiritual Person, his Bailiff or Lessee, shall take or demand more for a Mortuary than as is hereafter expressed, nor shall convent any Person before any Ecclesiastical Judge for the Recovery of more for the same than is hereafter declared, in pain to forfeit so much as he takes or demands more, and likewise 40 s. to the Party grieved, to be recovered by Action of Debt, wherein no Fissogn &c. shall be allowed.*

Advanc'd of the Church, and at a Time when divers other Laws were made for lessening the Power and Interest of the Clergy to the great Abatement of that Reverence which People had to the Clergy and Centures of the Church — To the Prejudice rather than the Benefit of the Clergy. Ibid. 1050. cap. 53. — Before this Statute was made, if a Doubt arose whether there was a Custom in a Place to have such Things for a Mortuary, this was merely triable in the Spiritual Courts by the Statute of *Articuli Cleri*, which says that *where a Suit is for a Mortuary, Prohibition shall not be granted.* Watf. Comp. Incumb. Svo. 1057. — This Act does not take away the Jurisdiction of the Spiritual Court, unless it be suggested that the Mortuary was of less Value. 2 Keb. 367. Wood v. Jelferies.

A Prohibition was moved for, because a Vicar said in the Spiritual Court for a Mortuary upon a Suggestion that it was not due to the Vicar but to the Impropiator, and that this Statute of H. 8. takes away all Mortuaries unless where Custom allows them, because Custom shall be tried by the Common Law and not in the Spiritual Court; but the Court would not grant Prohibition; For they said, that the Spiritual Court shall hold Plea of Mortuaries notwithstanding this Statute; Because the Statute only takes away such as were due by Custom; and here it is admitted that it was due by Custom, but differ as to the Person to whom it shall be paid. Sid. 263. Trin. 17 Car. 2. B. R. Marke v. Gilbert. — A Prohibition was moved for on Denial of any Custom for a Mortuary and Suggestion that such Plea was refused; and it was granted Nisi. 2 Keb. 835. Mich. 23 Car. 2. B. P. — But it being afterwards insisted that the setting the Sum of Money to be paid for a Mortuary by this Statute does not take away the Jurisdiction of the Spiritual Court, the same was agreed to, per Cur. unless it be suggested that the Mortuary was of less Value, and the Plea disallowed. The Rule was discharged Nisi. 2 Keb. 867. Hill. 23 & 24 Car. 2. Wood v. Jelferies. — Where the like Suggestion was of there being no Custom to pay a Mortuary in that Parish, the Court was for granting the Prohibition (it being a doubtful Point) to have it settled, and that the Being of Cests seem'd to be a notable Inconvenient in the Case; and this Statute provides that they shall demand no more than they had by Custom, which tho' it be restrictive of their Jurisdiction, yet shews that they have Jurisdiction of Mortuaries. But the other Side offering Affidavits of uninterrupted Possession, Holt Ch. J. said, that might be something; for tho' there was a good Suggestion made, yet, if it appeared to them to be merely for Delay, they would not grant a Prohibition, and that that was the Reason of requiring Affidavits of the Truth of the Suggestion. 12 Mod. 326. Mich. 11 W. 2. Oldham v. Righton. — The Plaintiff died before any Trial had. Lutw. 1066. Pasch. 13 W. 3. S. C. by Name of Johnson v. Wrightson.

It was suggested that by this Statute no Mortuary shall be paid but in such Places where it ought to be paid before the making the Statute, yet he was drawn into the Spiritual Court; and a Prohibition was granted. Cro. E 151. Mich. 31 & 32 Eliz. B. R. Whites Case. — And it was said to have been so adjudged in 16 Eliz.

S. 3. *None shall take or demand for a Mortuary any Thing at all where (by the Custom) they have not been usually paid.*

S. 4. *Nor upon the Death of a Woman Covert, a Child, a Person not keeping House, a Wayfaring Man, one not residing in the Place where he happens to die, nor where the Goods of the dead Person (Debts deducted) amount not to the Value of 10 Marks; nor above the Sum of 3 s. 4 d. when they exceed not 30 l. not above 6 s. 8 d. when they exceed 30 l. but not 40 l. nor above 10 s. when they amount to 40 l. or above; and if the Person die in a Place where he or she dwelleth not, their Mortuary shall be paid in the Place where they had their most Abode.*

S. 5. *This Act shall not abridge Spiritual Persons to receive Legacies bequeath'd unto them or to the High Altar.*

S. 6. *No Mortuaries shall be paid in Wales, Calais or Berwick, or in any of their Marches, save only in Wales and the Marches thereof where they have been accustomed to be paid; and such as are there paid shall be regulated according to the Order prescribed by this Act.*

S. 7. *The Bishop of Bangor, Landaff, St. David's and St. Asaph, and the Arch-Deacon of Chester shall take Mortuaries of the Priests within their Jurisdiction as hath been accustomed, notwithstanding this Act.*

* The Bishop of Chester sued in the Consistory Court before

the Commissary for a Mortuary after the Death of J. S. a Priest of the said Diocess, surmising a Custom to have the best Horse or Mare, Saddle, Bridle, Spurs, best Gown or Cloak, best Hat, best Upper Garment under his Gown, his Typpet, his best Signet or Ring, as to the Bishop de del'iro continet. fore suppu-

natur.

nitur. Whereupon a Prohibition was moved for by Reason of this Statute, and *averr'd* that there is *no such Custom* there, and that she had paid a Mortuary to the Parson of C. Jones and Whitlock J. held that a Prohibition ought not to be granted, it being a Suit for a Mortuary, and they conceived that by this Proviso Mortuaries should be paid in the Archdeaconry of Chester as before accustomed, and so out of the Statute, and the Custom for Payment of Mortuaries is triable in Court Christian. But Richardson and Croke J. held that no Consultation ought to be granted; For the Surmise in the Prohibition is good, viz. That there is no such Custom to have such Goods for Mortuaries as surmised, and that it may well be tried at Common Law; For now this Statute appoints what shall be paid for Mortuaries, and that in the said Places in Wales and Archdeaconry of Chester, such Mortuaries shall be paid as have been accustomed, which is issuable and triable at Common Law, especially as this Case is, where the Plaintiff surmisseth that she paid a Mortuary to the Parson of C. in which Parish the said Priest inhabited; and that there is no such Custom that she should pay it to the Archdeacon. The Defendant was ordered to plead or demur, and then the Court would give Judgment upon the Record before them. Cro. C. 237. Mich. 7; Car. B. R. Hinde v. Bishop of Chester.

Less Mortuaries already settled by Custom shall not be increased by this Act; and there also Persons exempted by this Act shall not hereafter be chargeable.

3. 12 Ann. Stat. 2. cap. 6. Abolishes all Customs of paying Mortuaries upon the Death of any Clergyman within the Dioceses of Bangor Landaff, St. David's and St. Asaph, and Enacts that no Mortuary or Corse-present or Sum of Money in Lieu or Name thereof shall be payable to any Bishop of the said Dioceses or other Person claiming under them, and gives Recompence to the Bishops of those Sees in Lieu thereof.

(B) *In what Cases it ought to be paid.*

1. **I**F he who dies has 3 Animals a Mortuary ought to be paid. Linwood 7. Constitutiones de Simon Langham, cap. de Consuetudine & Linwood. fol. 110. Constitutiones de Robert Winchelsea. See (A 2) pl. 2. S. 3. 4. Spelm Gloss. Verbo Mortuarium.
2. But if he who dies has but 2 Animals, no Mortuary shall be paid as is ordained by the Constitutions of Simon Langham, cap. de Consuetudine in Linwood, fol. 7. Spelm Gloss. Verbo Mortuarium.

(C) *Who ought to pay it.*

1. **I**F a Feme Covert dies, no Mortuary shall be paid. Linwood, fo. 7. This was ordained by the Constitution of Simon Langham, cap. de Consuetudine. See (A 2) pl. 2. S. 4. 7.
2. But if a Feme survives her Baron and lives in the House by one Year only, with the Government of a Family, and after dies, she shall pay a Mortuary. Linwood. fo. 7. This was ordained by the Constitution of Simon Langham.

(D) *To whom it shall be paid.*

1. **I**T ought to be paid to the Parson of the Parish where the Party who is deceased received the Sacraments during his Life. This appears in Linwood. fo. 7. by the Constitution of Simon Langham, and by the Constitution of Robert Winchelsea. Linwood. fo. 110. See (A 2) pl. 2. S. 7. & pl. 3.

See (A. 2) pl.
2. S. 4.

(E) *How* it ought to be paid.

Spelm Gloss.
Verbo Mortu-
rarium.

1. **I**F he who dies has 3 Animals, the Lord ought to have the Best for a Heriot, and the Parson the 2d Best for a Mortuary. **Linwood. fo. 7. Constitution of Simon Langham, cap. de Consuetudine. Linwood. fo. 110. Constitution.**

See (A. 2) pl.
2. S. 2. & in
Notis.

(F) *Remedy* at Common Law, and now.

1. **I**T has been held that such a Right was vested in the Parson to have the 2d best Beast for a Mortuary (where by Custom it was due) that he might *seize it* where ever he could find it. **Watf. Comp. Incumb. 8vo. 1053. cap. 53. cites 7 H. 6. 26. 16 H. 7. 5.**

2. It is said by some, That since the Statute of 21 H. 8. cap. 6. by which Mortuaries are reduced to a Certainty to be paid in Money, that an *Action of Debt* will lie upon the said Statute in the Courts of Common Law for Recovery of the Sum due for a Mortuary, tho' before that Statute Mortuaries were only recoverable in the Spiritual Courts; For tho' the Statute be only in the Negative, yet it implies an Affirmative that those Rates set down in the Statute may be taken where by Custom Mortuaries are due, so that the Statute has made it a Duty fix'd in the Party, and then by Consequence the Law will give a proper Remedy for the Recovery of it. **Watf. Comp. Incumb. 8vo. 1053. cap. 53. cites Parson's Counsellor 359. But says as he has never heard of any such Action of Debt brought, so he very much doubts whether such Action is maintainable, and rather thinks it is not, but that it still remains as a Matter suable only in the Spiritual Court, and refers to 5 Rep. de Jure Regis Ecclesiastico. 40.**

3 Mod. 268.
S. C. by
Name of
Proud v. Pi-
per ———
Per Cur.
There is no

3. The Court was doubtful, whether a *Prohibition* would lie for a Mortuary, and therefore for settling this Point they advised the Defendant to accept of a Declaration upon the Prohibition, and thereupon to demur that the Matter might be solemnly debated. **Carth. 97. Mich. 1 W. & M. B. R. Broad v. Piper.**

Colour for a Prohibition since you have *not pleaded* a Custom; For a Mortuary is a Thing within their Jurisdiction, and if there were any Room for a Prohibition, it would be for want of a Custom; and then that ought to have been pleaded: And he compared it with a *Modus decimandi*, for which there is no Remedy but in the Spiritual Court; And the Case in **Cro. Car. Hind v. Bishop of Chester**, is not like this; for the Statute excepts a Mortuary, and a Mortuary is a *meer Ecclesiastical Right*, for which there is no Remedy but in the Spiritual Court; and Rule for Prohibition was discharged. **12 Mod. 416. Mich. 12 W. 3. Johnson v. Ryson.**

[For more of Mortuary in general See **Motion** (D) pl. 1. -and other proper Titles.]

* Motion.

* Motion.

* A Motion is a Prayer or Request Ore Tenus of the Party to the Court, either in Person or by Counsel. P. R. C. 245.

(A) Motion in Court. *What may be done upon Motion, &c.*

1. ONE ought *not to move* the Court for a Rule for a Thing to be done, *which may by the Common Rules of Practice of this Court be done without moving the Court for it*; much less ought the Court to be moved for the doing of that which is against the Common Rules and Practice of the Court. 2 L. P. R. 209. cites 24 Car. B. R.

For the Court is not to be troubled, nor the Client put to the Charge of needless

Motions, nor of Motions not to be granted, and the former Sort of these Kinds of Motions do favour of Ignorance, and the later of too much Presumption; the former are to put the Court to needless Trouble, and the later are moved against the Honour of the Court. 2 L. P. R. 209.

2. The Court was moved for an *Attorney* of the Common Pleas that was sued in this Court *to allow his Writ of Privilege*. But Roll Chief Justice bid him plead his Privilege, for we cannot allow it upon a Motion and his Shewing of his Writ of Privilege. Sti. 373. Trin. 1653. B. R. Anon.

3. It was said by Roll Ch. J. If there be a *Judgment against 3*, and one of them is taken in Execution and be afterwards set at large by the Plaintiff's Consent, if either of the other two be afterwards taken in Execution upon the same Judgment *he may have an Audita Querela*, but he cannot be relieved upon a Motion in Court, though grounded upon an Affidavit. Sti. 387. Mich. 1653. B. R. Price v. Goodrick.

4. The Court was informed that in an Action of Accompt brought there was a Verdict, that the Defendant should *account before Auditors*, and that Auditors were assigned, and the Parties were now before the Auditors, and thereupon it was moved on the Defendant's Part, that this Court would grant him time to accompt, for the Reasons alleged. But Wild answered, that it was not proper to move here; for the Auditors are now Judges of the Matter, and may give Time if they see Cause. To which Glyn Ch. J. agreed, and said *the Auditors are Judges by the Statute*, and thereupon move before them, and trouble not us with it. Sti. 464. Mich. 1655. B. R. . . . v. Le Gay.

5. A *Statute lost* is not to be certify'd or help't on Motion, but Bill must be exhibited against all that are concerned in the Land; per Lord Keeper. Chan. Cafes 270. Mich. 27 Car. 2. Anon.

6. Where *Franchises* have been once allowed on Plea, and are on Record in Court, there they may be allowed upon Motion ever afterwards, but where they have not been allowed, it is otherwise. Per Cur. 2 Salk. 450. Hill. 9 W. 3. B. R. Hinton v. Hern.

12 Mod.
165. S. C.

7. The *Merits of a Cause* shall not be tried on a Motion for Bail. In an Action of Debt upon a Bond, the Defendant says, it was per Dureffs; that will not excuse him from Special Bail; For the Court will not determine the Merits upon such a Motion, nor put a Slur upon the Plaintiff's Cause, which ought to come down fairly to Trial without Prejudice; so if he says it was usurious. Per Holt Ch. J. Salk. 100. Hill. 11 W. 3. B. R. Anon.

8. Where a Fine is set for *Forcible Entry*, Conviction cannot be quashed on Motion, but the Defendant must bring his Writ of Error; but if no Fine be set then it may be quashed on Motion; per Cur. 2 Salk. 450. Pasch. 4 Ann. B. R. the Queen v. Layton.

9. After

9. After Motion in Arrest of Judgment, no Motion shall be for a *new Trial*, but after Motion for a new Trial, one may move in *Arrest of Judgment*. 2 Salk. 647. *Turbervill v. Stamp*.

10. The Court cannot hold *Plea of an Agreement* upon a Motion. 1 Salk. 400. Mich. 10 W. 3. B. R. Anon.

11. *Scire facias* recited a Judgment in *Time of the King*, which in Truth was in the *Time of the King and Queen*; and to no Judgment to warrant it; and Judgment was upon Return of *Nihils*. Per Cur. in *Strictness* we ought to put them to *Audita Querela*, but we generally relieve them upon *Motion*; and the Judgment on the *Sci. Fa.* was set aside, and ordered that the Money levied by a *Fi. Fa.* thereupon should be *refunded*. 12 Mod. 351. Pasch. 12 W. 3. v. *Watts*.

For the Court will be satisfied by the Record, whether the Matter of the Record, upon which the Motion is grounded, be so as is suggested by the Counsel, and will not rest upon Suggestions made at the Bar; For the Court judges not upon *Allegata* only, but upon *Allegata & probata*. 2 L. P. R. 208.

12. If any Thing be moved to the Court upon a *Record*, but the *Record* upon which the Motion is made *be not in Court* when the Motion is made, the Court will make no *Rule* upon such a Motion. 2 L. P. R. 208. cites *Hill*. 22 Car. B. R.

13. One ought not to move the Court for a *Thing* against which they have delivered their *Opinions*. *Trin.* 22 Car. B. R. But ought to rest satisfied with the Judgment of the Court, and to submit thereunto. 2 L. P. R. 208.

14. In the Case of one *Copleys v. Bag*, *Hill*. 1657. B. S. It is said, that one ought not to move for *several Things* in one *Motion*; and therefore upon a Motion, that one in an *Ejectment* might be made *Party* to defend his Title, and that he might also *impart* to the next Term; the Party was admitted to be made a *Party*, and ordered to move again at another Time for an *Imparance*. To move two Things in one Motion, the Court calls *grafting upon a Motion*; but such Motions have been oftentimes allowed. 2 L. P. R. 210.

15. Every Person who makes a solemn Argument at the Bar, is allowed by the Court a *Motion* for his *Argument*. 2 L. P. R. 210.

16. Many Motions are now made touching the *regular issuing forth, and Execution of Commissions, Procefs, and other Matters of Course*, which heretofore were commonly referred to four of the six Clerks not in the Cause, who hearing the other two Clerks concern'd in the Cause did easily determine the Question without Delay or Charge to the Suit. P. R. C. 249.

17. It has been said, That there is seldom Occasion for more than one *Motion* in a Cause, (*viz.*) For an *Injunction* for quieting Possession, or *staying Suits at Law*; other Motions being for the most Part needless, or not tending to end but perplex the Cause; and a Cause would be soon ready for hearing, if it went on in an orderly Course by Pleadings and Proofs, without being crossed by frivolous Motions. Wherefore the Solicitor ought to be very careful not to lead his Client into needless and expensive Motions. P. R. C. 249.

(B) *By whom* it may be made.

1. THE Clerk of the Errors in the Common Pleas attended here upon a Rule of this Court; whereupon a Clerk of the Court gave Notice of it to the Court, and prayed he might be heard. But the Court answered, that Counsel ought to move, and not he. *Sti.* 135, Mich. 24 Car. B. R. Anon.

2. It

2. It is against the Course and Practice of the Court for any Person to make a Motion *in his own Cause*. 24 May Pasch. 1650. B. S. So said in Case of one **Thruston v. Mason**, viz. For a Counsellor to do it. 2 L. P. R. 209.

(C) Time. At *what Time a Motion may be made* for what.

1. **M**onday is a Special Day for Motions in this Court by the ancient Course. I suppose it is so, because the Court and Counsel cannot be so well prepared to speak in solemn Matters on that Day, in regard of the Lord's Day, which immediately precedes. Mich. 22 Car. B. R. Yet Motions are made *upon any Day, as the Business of the Court, or the Day will permit*. 2 L. P. R. 208.

2. Where a Motion hath been denied, the same Matter ought not to be moved again by another Counsel without acquainting the Court thereof, and having their Leave for the same. 2 L. P. R. 208.

3. It is not usual to move for a Trial at the Bar upon the last Day of the Term. 2 July, 1650. B. S. Nor for the Secondary to make a Report, nor for a Prohibition, nor to vacate a Judgment, nor such like Cases of Dispute, except both Parties be in Court, and are contented with the Motion, and prepared to speak in it; and if such Motions be made, the Court will make no Rule upon them. 2 L. P. R. 210.

4. It is against the Rule and Practice of this Court, to move for an Attachment or any Matters in Law upon the last Day of any Term, except it be where the Case is peremptory, or of Necessity to be moved then. 2 L. P. R. 210. cites Pasch. 23 Car. B. R.

Because the other Party cannot have Time to make his Defence by answering the Motion; and that Day is a Day appointed chiefly for Motions, to prepare Business against the Assizes, or the Term next to come. 2 L. P. R. 210.

5. The three last Days of the Term, if it be an issuable Term, are appointed to hear Motions, and no other Business but Motions and Crown-Office Causes, except upon special Occasions; But if it be not an issuable Term, then the two last Days are only for the hearing of Motions; For in those Terms there is less Occasion for Motions, than in issuable Terms. 2 L. P. R. 210. cites 30 January 1650 B. S.

6. By Glynn Ch. J. It is not the Custom or the Practice of C. B. for a Serjeant at Law to move for a Clerk of the Court, and afterwards for his Client. 2 L. P. R. 210. cites Mich. 1655. B. S.

For it seems it is not intended there, that he doth move without a Fee for the Clerk of the Court, and therefore if he should be so heard, he would have a double Motion at one Time, which no Court doth allow; but in this Court it is usually done, so that it seems the Counsel here are more civil to the Clerks of the Court, than they are in the Common Pleas. 2 L. P. R. 210.

7. During the Term every Thursday is a Day for Sealing and Motions only, except it happens to be the second Day of the Beginning, or the last Day save one of the End of the Term. And so are Tuesdays and Saturdays. So the first and last Days of the Term are also Seal Days, and Days of Motion. P. R. C. 248.

8. In Vacation, Seal Days are only Days of Motion, and are appointed by the Lord Chancellor. Yet the Morning after the Term Motions are always made at the Rolls, upon Supposal (I guess) That some may probably remain, which should have been moved, but could not the last Day of the Term, P. R. C. 248.

9. No Motions are heard after the last General Seal after Term, till the first of the Term next. L. C. G. R. C.

General Seal before the ensuing Term; But Things which require Dispatch may be petitioned for, and Right will be done; For this Court is always open. P. R. C. 249.

10. A *Plaintiff in Error* cannot move to *quash his Writ of Error before Error assigned*. 12 Mod. 602. Mich. 13 W. 3. Anon.

See Indictment (S. 2)

(D) *Quashed on Motion. What.*

1. **S**UIT was in the Spiritual Court for a *Mortuary*, and a *Prohibition* was granted, and in debating thereof, a *Question* was, Whether *Consultation* should be granted upon a *Motion without answering to the Prohibition*. And it was argu'd by Noy, that it should, because the Suit being for a *Mortuary*, there is no Cause of *Prohibition*, and therefore *Consultation* should be granted; And of that Opinion was Jones and Whitlock J. But Richardson and Croke J. held, That as this Case is, no *Consultation* ought to be granted without answering to the *Prohibition*, the Plaintiff having shewn in her Declaration upon the *Prohibition*, that the Defendant had *sued her after the Prohibition*, which is a *Contempt*, and ought to be answered; But, perhaps in some Cases where the *Prohibition appears in it self to be unduly granted*, the *Defendant before Appearance having committed no Contempt* in prosecuting thereof, may move to have a *Consultation*. Cro. C. 237. Mich. 7 Car. B. R. *Hinde v. the Bishop of Chester*.

2. The Court was moved for a *Superfedeas* for the Earl Rivers, who was arrested by a Bill of Middlesex, and is in Custody of the Marthal of this Court, because he is a *Peer of the Realm*, and ought not to be arrested. The Court answered, you must plead your *Privilege* if it be so; for we cannot take *Notice* of it upon a *Motion*. Sti. 177. Mich. 1649. B. R. Anon.

3. *Indictment for selling Bread under the Assise* was denied to be quash'd upon *Motion*, because oppressive of the Poor. 12 Mod. 242. Mich. 10 W. 3. the King v. Flint.

4. *Indictment for a Cheat* denied to be quashed on *Motion*. 12 Mod. 499. Pasch. 13 W. 3. the King v. Orbevill.

(E) Done. *What must be done, or will be required, in order to obtain what is moved for.*

* S. P. That the Court may be informed upon what Grounds the Rule was made, and whether there be Cause shewn upon the *Motion* sufficient to induce them to set aside the Rule. 2 L. P. R. 209. cites 22. Feb. 1649. B. S.

1. **I**F there be *divers Rules* of the Court made in a Cause, and the Party intends to move upon these Rules, he *must produce the Rule* that was *last made* in the Cause, and move upon that. Pasch. 23 Car. B. R. Yet it is *necessary also to have the Rules and Copies of the * Affidavits made in the Cause*, to satisfy the Court how the Cause stands in Court, and how it hath been proceeded in from Time to Time, and how the Rules depend upon one another; but the last Rule is the most material. 2 L. P. R. 209.

2. One Party ought not to surprize another by a *Motion* in Court, but he ought to *move in such convenient Time*, that the other Party against whom the *Motion* is made may have Time to be heard, and to make his Defence. And this the Court will grant. 2 L. P. R. 209. cites Pasch. 23 Car. B. R.

(F) Done.

(F) Done *without Motion* what.

1. **B**Y Roll Ch. J. a *Matter entred upon Record cannot be altered without a Motion made*, and the Consent of the Court first obtained, tho' the Attornies on both Sides consent to it. Sti. 386. Trin. 1653. B. R. Anon.

2. If *Rescous* be returned, *Attachment* shall go of Course without Motion; per Cur. 12 Mod. 247. Mich. 10 W. 3. Anon.

(G) Notice. *In what Cases it must be given, and at what Time.*

1. **W**HEN a *Thing questionable* between the Parties is to be moved to the Court for settling thereof; he that intends to move it, must give the adverse Party * *timely Notice of the Day* (as near as he can) when he will move it; Mich. 1650. B. S. *and upon what* he intends to move, that he may be prepared to Answer the Motion at the Time when he moves, for the quicker dispatch of *Business*, and for the saving further Charges. 2 L. P. R. 209.

* Every Notice of Motion must be given two Days at least before the Day on which it is to be made; as if the Motion is to

be on Thursday, the Notice must at least be on Tuesday. P. R. C. 247.

2. Some Motions are of *Course* (that is) where by a standing Rule, or the known Course of the Court, a *Thing desired* is to be granted without hearing the other Party; in these there needs no Notice of the Motion to the other Side, nor ought Council to oppose them. P. R. C. 245, 246.

3. There are others would be of Course upon *Supposition of the Facts standing single*; but because there may probably be some other Fact or Circumstance resting in the Knowledge of the Parties, and which the Court cannot at present see, which yet oppugns the Reason of the Motion, they are granted only *Nisi &c.* if there be not Notice of the Motion, or if there be, yet all are not absolutely granted. P. R. C. 245.

4. There are others *not founded on such general Rule or Usage*, and sometimes besides or against it, which are granted or denied, as the Court sees fit, upon the Weight and Reason of the Matters, as it appears upon the Motion, or upon hearing of both Sides. P. R. C. 246.

5. Some of these of *small Moment and frequent* are generally granted without Notice; if less frequent, and of more Weight, then only *Nisi*, if no Notice. P. R. C. 246.

6. Such of them as are *very rare, and upon extraordinary Occasions*, will seldom be granted in any sort without Notice. P. R. C. 246.

7. Before you move, *Affidavit* must be made of the Service, and the Manner of it, and the Affidavit filed, and a Copy taken thereof, if you think you shall need to prove Notice. P. R. C. 247.

8. Where Notice is necessary, *every Thing* the Party moves for should be expressed; For the Court will not ordinarily extend the Order beyond the Notice. P. R. C. 247.

As where Notice was, that the Court would be moved,

That the Plaintiff might be put into Possession, and a Receiver appointed; the Court would not Order that nothing should be received by the Defendant in the mean Time, tho' the Defendant did not defend the Motion. P. R. C. 247. — So, Notice was given of a Motion to *subside an Excommunication Copiando*, because the Bishop's Seal was not to the Significavit; which upon the Motion happening otherwise, the Counsel would have insisted, That the Excommunication was before the last general Pardon; but the Court would not hear them to that, till another Day; because there was no Notice given of the Exception, which there ought to have been, tho' there needed none of the other, which any one, in Ancient Courts, might have shewn had it been true. P. R. C. 247, 248

9. It was laid that if a Party gives *Notice 3 Times that he will move a Matter, and yet does it not* he shall ordinarily pay the other 10s. *Costs*: But if it be a Matter of Weight, and many Counsel are feed, the Court will order *Costs to be taxed by a Master*. P. R. C. 248.

10. Upon Motion to *efreat a Recognizance*, the other Side ought to have Notice. 12 Mod. 494. Pafch. 13 W. 3. Anon.

(H) Notice. *To whom it must be given, and How.*

1. NOTICE of a Motion, must be given *in writing signed* with the Name of the Party, his Clerk, or Solicitor that gives it. It must be delivered *to the other Party, or his Solicitor*, (or at least left at one of their Houses, tho' I have heard it said, that this is not ordinarily good Service;) or which is more Usual, it must be delivered *to the Clerk in Court, or left at his Seat* in the Office with his Clerk or Servant. P. R. C. 246, 247.

2. Notice of Motion *to take Money out of Court*, must be to the Party himself, except the Court upon a previous Motion have ordered so many Days Notice to the Clerk in Court &c. as may be time enough to send the Client Notice, and to have his Answer if he be in the Kingdom; but hard to be found, or the like, shall be sufficient. P. R. C. 248.

3. Where by Reason of the *Absence of a Counsel*, who should have defended a Motion, the Court thinks fit to *put it off* for that Time, the former Notice is often ordered to be continued; so as the Matter may be moved another Day upon *Notice to such absent Counsel only*. P. R. C. 249.

[For more of Motion in General See **Indictment**, (S. 2) **De creas Regno**, and other proper Titles.]

Murder or Manflaughter.

(A) *What is*, and of the ancient Punishment thereof.

1. MURDER is when a Man of *sound Memory*, and of the *Age of Discretion*, unlawfully killeth within any County of the Realm any reasonable Creature in *Rerum Natura* under the King's Peace with Malice fore-thought either expressed by the Party, or implied by Law, so as the Party wounded, or hurt &c. die of the Wound, or Hurt &c. within a Year and a Day after the same. 3 Inst. 47.

* Hawk. Pl. C. 78. cap. 31. S. 1. says that the word Murder anciently signified only the Private killing a Man for which by Force of a Law introduced by

2. The English and German Laws for *punishing* Murder and Manflaughter by *Pecuniary Mulcts* were alike, except only that they differed in the Sums or Penalties imposed. In some of the German Laws the killing of a Man is called *Mordritum*, in others *Mordrido* or *Mortando*, but in the German-Saxon Laws Tit. 2. S. 6. it is called *Mordrum*, which Word, nor any thing like it is to be found in our English-Saxon Laws, tho' it occurs often in William the Conqueror's Laws, and the Laws of H. 1. The Word is from the German *Ermorden*, or *Morden* to * kill a Man basely as Thieves use to do; *Si quis Hominem occiderit & absconderit*, quod *Mordritum* vocant; the *Mulct* commonly for the Death of a Man *was his Weregild*, viz. the Value of his Head or Life, out of which if he were a Servant,

Servant, his *Maſter or Patron had a Part, or Compensation for his Loſs*, which was called *Manbote*. Brady's Comp Hiſt. of England 62. (D) (E) (F). cites as above and Ll. Inæ. cap. 69. Ll. Fris. tit. 1. S. 3. 6. 9. 10.— And Ibid. 119. in Anno Domini 924. ſays that King Athelitan by a Law eſtabliſhed the *Price of Murder or Man-killing from the King to the Peaſant* the Punishment whereof was at that Time Pecuniary, and not Capital or by Death; and there ſets down the ſeveral Prices or Valuations.

K. Canutus for the Preſervation of his Danes, the Town or Hundred, where the Fact were done, was to be amerced

to the King, unleſs they could prove that the Perſon ſlain were an Engliſhman, (which Proof was called Engleſhire) or could produce the Offender &c. and in thoſe Days, the open willful killing of a Man through Anger or Malice &c. was not called Murder, but voluntary Homicide. Hawk Pl. C. 78. cap. 31. S. 1.—But the ſaid Law concerning Engleſhire having been aboliſhed by 14 Edw. 3. 4. *the Killing of any Engliſhman, or Foreigner through Malice prepense, whether committed openly or ſecretly*, was by degrees called *Murder*; and 13 Ric. 2. 1. which reſtrains the King's Pardon in certain Caſes, does in the Preamble, under the General Name of Murder, include all ſuch Homicide as ſhall not be pardoned without ſpecial Words; and in the Body of the Act expreſſes the ſame by Murder, or Killing by Await, Aſſault, or Malice prepense. And doubtleſs the Makers of 23 H. S. cap. 1. which excluded all wilful Murder of Malice prepense from the Benefit of the Clergy, intended to include open, as well as private Homicide within the word Murder. Ibid. S. 2.—By Murder therefore at this Day we underſtand, the wilful Killing of any Subject whatſoever, through Malice fore-thought, whether the Perſon ſlain, be an Engliſhman or Foreigner. Ibid. S. 3.—This Diſtinction between Murder and Manflaughter only, is occaſioned by the Statute of 23 H. S. and other Statutes that took away the Benefit of Clergy from Murder committed by Malice prepense, which Statutes have been the Occaſion of many nice Speculations. The word Murder is known to be a Term, or a Deſcription of Homicide committed in the worſt Manner, which is no where uſed but in this Iſland, and is a Word framed by our Saxon Anceſtors in the Reign of Canutus upon a particular Occaſion; per Holt Ch. J. Kelyng. 121. Hill. 5 Annæ. B. R. in Caſe of the Queen v. Mawgridge.

Homicide againſt the Life of another, amounting to Felony, is either with or without Malice. Hawk. Pl. C. Abr. 82. cap. 30.—That *without Malice, is generally called Manflaughter*, which is ſuch a Killing as happens either on a ſudden Quarrel, or in the Commiſſion of an unlawful Act, without any pre-meditation or deliberate Intent of doing Miſchief; and therefore there can be no Accellories in it. Hawk. Pl. C. Abr. 83. cap. 30. S. 1.

3. 52 H. 3. cap. 25. *Murder from henceforth ſhall not be judged before our Juſtices where it is found Miſfortune only; but it ſhall take Place in ſuch as are ſlain by Felony, and not otherwiſe.*

The Miſchief before this Statute was, That he that kill'd

a Man by Miſadventure per Infortunium, as by doing any Act that was not againſt Law, and yet againſt his Intent the Death of a Man enſued, this was adjudged Murder; as if a Man had caſt a Stone over an Houſe, or ſhot at a Mark, and by the fall of the Stone, or glance of the Arrow a Man was ſlain, the Party ſhould ſuffer Death; and ſo it was at the Common Law, if a Man had killed a Man ſe defendendo, he ſhould be hanged and forfeit in both Caſes, as in Caſe of Murder; ſo tender a Regard had the Law to the Preſervation of the Life of Man. And with the Common Law was agreeable the Judicial Law; before the Cities of Refuge were appointed, he that killed a Man by Miſadventure &c. was put to Death, to the end that Men ſhould be ſo provident and wary of their Actions, as no Death of Man, Woman or Child might enſue thereupon. 2 Inſt. 148.

This Statute doth remedy both Points; for the later Clauſe is General, that it ſhall not be Murder, but where it is done per Feloniam is ſelleo Animo, and by Malice prepense; and albeit his Life in neither of theſe Caſes is now loſt, yet the Forfeiture of his Goods and Chattels remain'd in both Caſes; and ſo if a Man kill a Man by Miſadventure, if he eſcape, the Town ſhall be amerced &c. which is alſo a Mark of the Common Law. 2 Inſt. 149.

Holt Ch. J. ſays a Miſtake upon the Statute of Marlebridge may be reſtify'd; For it was not made upon a Suppoſition that he, that killed the Perſon ſlain by Miſfortune, ſhould be hang'd, but only to Explain, or rather to take off the Rigor of the Conqueror's Law, that the Country ſhould not be compelled to find out the Manflayer, or if he were found out, he ſhould not undergo the Penalty of that Law; For as the Law ſtood, or was interpreted before that Statute, if a Man was found to be ſlain it was always intended 1. That he was a French Man, 2d. That he was killed by an Engliſhman, 3d. That killing was Murder. 4. If any one was apprehended to be the Murderer, he was to be tryed by Fire and Water, tho' he killed him by Miſfortune, which extended beyond Reason and Juſtice in Favour of the Normans. But if an Engliſhman was killed by Miſfortune, he that killed him was not in danger of Death, becauſe it was not Felony; For ſaith Bracton (who wrote the later end of H. 3.) fo. 136. he that killed a Man by Miſfortune was to be Diſcharged 5. If the Malefactor was not taken then the County was Amerced; but by the Statute of Marlebridge if it was known that the Perſon ſlain was a Frenchman and was killed by Miſfortune, then the Country ſhould not be Amerced if the Manflayer was not taken, or if he were taken he ſhould not be put to his Ordeal Trial; this ſeems to be the true Meaning of the Statute; but ſecondly it will appear to a Demonſtration, that before the Statute he that killed an Engliſhman per Infortunium was never in Danger of any Death; For this Statute of Marlebridge was made 52 H. 3. the Statute of Magna Charta was confirmate 9 H. 3. and that Directs, that every one imprifoned for the Death of a Man and not thereof indicted might of Right purſue the Writ de Odio et Atia; and if it was found that the Perſon imprifoned killed him ſe Defendendo, or per Infortunium, and not per Feloniam, then he was to be bailed which ſhews that he was not in Danger of

Death; For if he had, he would not have been let to Bail. Kelyng. 122, 123. Hill. 5 Annæ. B. R. in Case of the Queen v. Mawgridge ———cites 2 Inst. 24

[It seems this word (Feme) does not intend a Wife, as Mr. Nelson translates it, for that would be Petty Treason, if any Thing]

S. C. cited by Jones I by the Name of *Luttrell's Case*, but it is reported there that the Servant going to the Door to let out the Chare-Woman, thought she heard Thieves trying to break in, upon which she ran to her Master and Mistress, and told them of it, but put the Woman into the Buttery, where the Wife espying her, and not knowing her, cry'd out to her Husband, who went in and being in the Dark thrust his Sword before him and killed the Woman; and that the Chief Justice and himself and the Recorder resolv'd, that it was not Manlaughter; For it was done ignorantly without Intention of Hurt to the Woman. Cro. C. 558.

4. A Man and his Feme having long Time lived incontinent together, the Man having consumed his Subitance and growing into Necessity said, that he was weary of his Life, and that he would kill himself, and the Feme said that then she would also die with him; whereupon the Man prayed the Feme to buy Ratsbane and they would drink it together, which she did, and put it into the Drink and they drank it, but afterwards she took Sallad Oyle and so vomited and recovered, but the Man died. And the Question was if this was Murder in the Feme; Mountague the Recorder cauted the special Matter to be found; Quære the Resolution. Mo. 754. pl. 1041.

5. Lovell had two Maid-servants, and one of them without his Knowledge, had received into the House a Chare-Woman, who (all being in their Beds) by her Negligence let a Thief into the House, and afterwards called out Thieves, Thieves; and afterwards Lovell came out of his Bed with a Sword in his Hand, and the Chare-Woman calling to Mind that she was there without his Privity or his Wife's bid herself behind the Dresser, and Lovell's Wife espying her there cried out Thieves, Thieves, upon which Lovell came and ran her into the Breast with his Sword; and the Opinion of the Justices at the Old-Bailey, and also of all the Justices of the King's Bench was, that it was neither Murder nor Manlaughter; not Murder, because there was no Fore-thought Malice; nor Manlaughter, because he supposed her to be a Thief; and if she had been a Thief, then it was clear that it was not Manlaughter. Mar. 5. Pasch. 15 Car. cites Lovell's Case.

A Boy climb'd a Tree in a Park to cut

7. Barbarity will make Malice in many Cases; per Holt Ch. J. Comb. 408. cites Cro C. 131. Holloway's Case.

Boughs and the Woodward seeing him bid him to come down which the Boy did, and then the Woodward ty'd him with a Rope about his Waist to the Horse's Tail and struck both the Boy and the Horse, by means whereof his Shoulder was broke and he died immediately; this was held to be Murder, tho' the Woodward had no Intention to kill the Boy; but being killed, without making any Resistance, by one who had no Authority to correct him in that Manner, and tho' the cutting the Boughs was an unlawful Act, yet the Law in such Case implies Malice prepenſe. 5 Mod. 290. Arg. cites Holloway's Case. ———S. C. Palm. 545. Mich. 4 Car. B. R. adjudged Murder, but says the Court did not declare their Reasons openly. ———Jo 198. S. C. adjudged, and says that all the 4 Justices and all the Barons of the Exchequer were of Opinion that it was Murder ———Cro. C. 131. S. C. by Name of Holloway's Case adjudged, and says that the Opinion of all the Barons (except Hutton who doubted) was that it was Murder and that all the Justices delivered the Reasons of their Opinions; and Holloway was hang'd ———S. P. tho' it cannot reasonably be thought that he designed more than the Chastisement of the Boy; and the Horse running away in that manner was a Surprise to Holloway; yet in regard the Boy did not resist him, his tying him to the Horse-tail was an Act of Cruelty, the Event whereof proving so fatal, it was adjudged to be Malice prepenſed, tho' of a Sudden and in the Heat of Passion. Kelyng. 127, 128. Hill. 5 Annæ. cites S. C. ———Ibid. 132. S. C. cited by Holt Ch. J. who says that if one Man be Trespassing upon another, breaking his Hedges or the like, and the Owner, or his Servant shall upon sight thereof take up an Hedge-stake and knock him on the Head, that will be Murder; because it was a violent Act, beyond the Proportion of the Provocation.

So if a Man sees another stealing his Wood, he cannot Justify beating him, unless it be to hinder him from stealing any more (that is) that notwithstanding he be forbid to take any, he doth proceed to take more, and will not part with that which he had taken; but if he desists, and the Owner off Woodward pursues him to beat him, so as to kill him, it is Murder; per Holt Ch. J. Kelyng. 132. Hill. 5 Annæ. in Case of the Queen v. Mawgridge. ———So if a Man goes violently to take another Man's Goods, he may beat him off to rescue his Goods. 9 E. 4. 281. b. 19 H. 6. 31. but if a Man hath done a Trespass, and is not continuing in it, and he that hath received the Injury shall thereupon beat him to a Degree of killing, It is Murder; For it is apparent Malice; For in that Case he ought not to strike him, but is a Trespassor in so doing. Ibid. per Holt Ch. J. ———S. C. cited Hawk. Pl. C. 83. cap. 31. S. 39. and says, it seems, that he who upon a sudden Provocation executes his Revenge in such a cruel Manner as shews a cruel and deliberate Intent to do Mischief, is guilty of Murder, if Death ensue.

7. Not only he who by a Wound or Blow, or by Poisoning, Strangling, or Famishing &c directly causes another's Death, but also in many Cases, he

he who wilfully and deliberately doing a Thing which *apparently endangers another's Life*, thereby occasions his Death, shall be adjudged to Kill him. Hawk. Pl. C. 78. cap. 31. S. 4.

8. And such was the Case of him who *carried his sick Father, against his Will, in a cold frosty Season*, from one Town to another, by Reason whereof he died. Hawk. Pl. C. 78. cap. 31. S. 5.

9. Such also was the Case of the *Harlot*, who being *delivered of a Child, left it in an Orchard covered only with Leaves*, in which Condition it was struck by a Kite, and died thereof. Hawk. Pl. C. 79. cap. 31. S. 6.

(B) *Of what Persons it may be.*

1. **A** Man was *Outlawed of Felony*, and *J. N. killed him*, and he was arraigned of it, notwithstanding the Deceased was Outlawed of Felony at the Time &c. Br. Corone, pl. 67. cites 2 Aff. 3.

2. If a Man *kills an Infant in Ventre sa Mere*, this is not Felony; because he shall not be * named a Person slain, nor was he in rerum Naturæ. Br. Corone. pl. 91. cites † 27 Aff. 55.

The causing an *Abortion* by giving a *Potion* to, or striking a

Woman big with Child was Murder; but at this Day it is said to be a *great Misprison only*, and not Murder unless the Child be born alive and dies thereof, in which Case it seems clearly to be Murder notwithstanding some Opinions to the Contrary; and in this Case the Common Law seems agreeable to the Moral. Hawk. Pl. C. 80. cap. 31. S. 16 ——— 3 Inst. 50. cap. 7. ——— * Orig. (Nominatur Occisus.) ——— † It should be 22 Aff. 94.

3. If a Man be *adjudged to Death* it is not lawful for any in pain of S. P. and * Felony to kill him, unless it be the Officer by way of Execution, and that the Marshal, Sheriff, &c. who does the Execution may Justly, but the Justice who judges him cannot justify but plead Not Guilty. Br. Corone. pl. 7. cites 35 H. 6. 58.

where *Judgment is to be hanged*, and the Officer cuts off his Head this is

Felony. Br. Appeal, pl. 5. cites S. C. ——— * S. P. that the killing of him is Felony. Br. Corone. pl. 196. cites 24 H. 8. per omnes in Domo Parliamenti ——— *Of whatsoever Crime* he is attainted, the killing him is Murder. Hawk. Pl. C. 80. cap. 31. S. 5.

But if a Man *Kills one who is attainted by Premunire*, this is not Felony; For he is out of the King's Protection, which is the same as if he was out of the Realm and Power of the King. Br. Corone. pl. 196. cites 24. H. 8. per omnes in Domo Parliamenti.

4. The malicious Killing of any Person of *whatsoever Nation or Religion*, Jew, Heathen, Turk, or other Infidel *being under the King's Peace*, is Murder. 3 Inst. 50. cap. 7. Hawk. Pl. C. 80. cap. 31. S. 15.

(C) *By what Persons it may be.*

1. **H**E who *kills a Man* when he is *Mad* shall remain in Prison. Br. Corone. pl. 101. cites 26 Aff. 27.

A *Woman that was Mad killed her*

Husband, and forfeited nothing; For the Intent makes the Felony; and a Person that is Mad has neither Wit nor Intention. But Note for another Reason she cannot forfeit any thing; For a Feme Covert has no Goods, and see also that it is not Felony in a Person that is Mad. Br. Corone. pl. 160. cites 12 H. 3. Fitzh Forfeiture 33 ——— If a *Lunatick* kills a Man, it is not Felony; because Felony must be done Animo felonico. Hob. 134 in Case of Weaver v. Ward.

2. So of him who *cannot hear nor speak*. Ibid.

3. If an *Infant murders an Infant*, which is found accordingly, he shall go quit; Quod Nota Bene. Br. Corone, pl. 61. cites 3 H. 7. 1. & 21 H. 7. 31.

It was * said, that by the ancient Law, none were Hanged

(D) Of

within Age, nor suffered Judgment of Life or of Members; But before Spygurnel it was found, that an *Infant* within Age killed his Companion, and after † *hid him*, and therefore he caused him to be hanged immediately; For by the Hiding he could discern good and ill; *Quia Malitia supplet aetatem*. Br. Corone, pl. 74 cites 12 Aff. 30. — * Orig. (demanded) but in the Year Book it is as here. — † Original is (Moucha) and the Word (Mouch) in the West of England signifies when a Boy plays Truant or absents himself from School.

So where an *Infant* of nine Years of Age killed another *Infant* of nine Years, and confess'd the Act, and it was found that after the Act he hid him, and excus'd the blood upon his Cloaths by bleeding of his Nose, it was held that he should be hanged, and this for Example of others. But per Forlicue, *Infant* or a Man who has no Discretion shall not be hanged. Br. Corone, pl. 132. cites 3 H. 7. 1.

So where an *Infant* between 10 and 12 Years of Age was indicted of the Death of another *Infant*, and was appoal'd, who said that he kept Sleep with the other and they differ'd, by which he struck the other in the Throat, and after in the Head, and in the Body to Death, and draw'd the Body into the Corn, and the Justices respited Judgment for the tender Age, and because they had not the Matter fully, and several Justices said that he was worthy of Death. Br. Corone, pl. 135. cites 3 H. 7. 12.

(D) Of Officers, and Pleadings.

S. P. 4 Rep. 40. b. Trin. 28 Eliz. Young's Case. — S. C. cited in Kel. 66. in Thomson's Case. — But it is necessary, to

1. IF any Sheriff, Under-Sheriff, Serjeant or Officer, who hath Execution of Process, be slain in doing his Duty, it is Murder in him who kills him, although there was not any former Malice betwixt them; For the executing or Process is the Life of the Law, and therefore he who kills him shall lose his Life; For that Offence is contra potestatem Regis & Legis; and therefore in such Case there needs not any Inquiry of Malice. Resolved, Nullo Contradicente. Cro. J. 280. Pasch. 9 Jac. B. R. John Mackaley's Case.

make it Murder, that such Officer tell him that he does arrest him; For else, if he says nothing, but falls upon the Man and be killed by him, this is but *Manlaughter*, unless it appears that the Person arrested did know him to be a Serjeant &c. and that he came to arrest him; For as the Case is there put, if one seeing the Sheriff or a Serjeant whom he knows has a Warrant to arrest him, and to prevent it before the Officer come so near as to let him know he does arrest him, he shoots at him and kills him, this is Murder. Kel. 66, 67. cites Mackaley's Case.

S. P. Kel. 66. — S. P. through the Murderer

2. The Law is the same if any Justices of Peace, Constable, or any other Officer, or any, who comes with them in their Assistance for the Preservation of the Peace, be slain in executing their Office, it is Murder. Ibid.

did not know the Party who was killed, and though the Affray was sudden; because the Constable and his Assistants came by Authority of the Law to keep the Peace, and to prevent the Danger which might ensue by the breaking of it, and therefore the Law will adjudge it Murder, and that the Murderer had Malice prepenſe, because he oppos'd himself against the Justice of the Realm 4 Rep. 40. b. Trin. 28 Eliz. Young's Case.

But per Holt Ch. J. if a sudden Quarrel happens between several Persons whereby the Peace is broke, and a Constable comes to part them, and they continue on for a Time and will not obey the Constable, and the Constable is killed in the Fray, yet if they did not know that he was a Constable, and that he came to keep the Peace, so that they might take Notice of his coming, it will be but *Manlaughter* in him that kills him, and no Offence in the rest. 12 Mod. 651. Hill. 15 W. 3. in Case of the King v. Plummer.

S. P. Kel. 66 cites S. C. — S. P. 4 Rep. 40. b. Yong's Case.

3. So if a Watchman be killed in staying Night-walkers, it is Murder. Cro. J. 280. Pasch. 9 Jac. B. R. in John Mackaley's Case.

4. They resolved also, that if there were Error in awarding of Process, or in the Mistake of one Process for another, and an Officer be slain in the Execution thereof, the Offender shall not have the Advantage of such Error, no more than a Sheriff who suffers a Prisoner to escape, shall take Advantage of any Error thereby; But the resisting of an Officer when he comes to make an Arrest in the King's Name is Murder. Ibid.

5. When an Officer is slain, as the Case abovementioned, there needs not a special Indictment upon all the Matter to be drawn, as in this Case was done, but a general Indictment, that such a Party ex Malitia sua Praecogitata

cogitata percussit &c. And although there be not Proof made of any in any precedent Malice, yet the Indictment is good; For the Law presumes Malice. Wherefore Judgment was given accordingly, and Mackaley was executed. Ibid.

6. J. S. a Bailiff having a Warrant to arrest A. and in coming towards him A. drew his Sword, and J. S. making towards him without using any Words of Arrest, A. said, *Stand off, come not near me, I know you well enough, come at your Peril*; And J. S. taking hold of him, he thrust him with his Sword, that he died immediately; It was held by all the Court that it was Murder; For he coming as an Officer to arrest, and not offering any other Violence or Provocation, although he used not the Words, *I arrest you, or shewed him any Warrant*, because peradventure he had not time, nor was demanded the Cause, the Law presumes it to be Malice and Murder in him that so kills one being an Officer and coming to execute Process. Cro. Car. 183. Pasch. 6 Car. B. R. Thomas Pewes Case.

7. A. was arrested for Debt, and N. his Servant, in seeking to rescue him as was pretended, killed S. the Bailiff, But because the Warrant to arrest him was by the Name of Henry Ferrers Knight, and he never was a Knight, it was held by all the Court, That it was a Variance in an Essential part of the Name, and they had no Authority by that Warrant to arrest Sir Henry Ferrers Baronet; so it is an ill Warrant, and the killing of an Officer in executing that Warrant cannot be Murder, because no good Warrant. But upon the Evidence it appeared clearly, That Sir Henry Ferrers upon the Arrest obeyed, and was put into an House before the Fighting betwixt the Officer and his Servant; wherefore he was found not guilty of the Murder and Manslaughter. Per omnes J. Cro. Car. 372. Trin. 10 Car. B. R. Sir Henry Ferrers's Case.

Jo. 346. S. C. the King v. Sir Henry Ferrers.

8. The Sheriff granted his Warrant on a *Ca. Sa. against C. and D. to M. and others*, who in the Night hid themselves near D's House, and in the Morning came to the House, which was shut and lock'd, and said that they had Process against C. and D. who were both in the House, and required them to obey. C. having a Gun in his Hands told them, that if they attempted to break the House he would discharge it at them. M. and the other Bailiffs broke one of the Windows, and tried to force open the Door, and broke one of the Hinges, whereupon C. shot and killed M. This was agreed not to be Murder; For it was not lawful for the Officers to break the House; And tho' the killing an Officer in the Execution of Justice be Murder, yet upon a Recovery at the Suit of a common Person, the Bailiffs cannot lawfully break the House, so that the Act being illegal, this was Homicide only and not Murder. Jo. 429. Pasch. 15 Car. B. R. Cooke's Case.

Cro C. 537. to 539 S. C. and says, that after Argument at the Bar, all the Justices seriatim delivered their Opinions, that it was not Murder. But they all held that it was Manslaughter; For he

resisted him without killing him; But because he seeing and knowing him shot at him voluntarily, and slew him, therefore they held clearly that it was Manslaughter; whereupon they all resolved that it was not Murder but Homicide only.

9. In Hill. 1659. a Latitat issued out to arrest T. returnable Pasch. 1660. and he was arrested there upon the 29 May, and upon the Arrest the Bailiff was killed. Afterwards an Act was made to confirm all judicial Proceedings, which related to the first Day of the Parliament, which was 25 Apr. 1660. The sole Question was, whether by the Relation of the Act, which makes the Proceedings legal, and the Arrest good, which otherwise had been void and without Authority, this Killing be Murder? It was argued for the King, That by Relation all the Process is made good; because it shall relate to the first Day of the Parliament; And for the Defendant it was agreed, that the Act shall relate to the first Day of the Parliament, but not to such Intent as to make that a Murder *Ex post Facto*, which was not so when the Fact was done. Curia nil dixit. Lev. 91. Hill. 14 & 15 Car. 2. B. R. the King v. Thurston. — But the Reporter adds, that Pasch. 16 Car. 2. he heard that Thurston pleaded his

Pardon of this Murder, whence he infers, that the Opinion of the Court seemed to be against him. *Ibid.*

10. Sir Ch. S. and A. were indicted in B. R. for Murder of a Bailiff who arrested Sir C. S. near Charing Cross; And the Court directed the Jury, 1st. That all that were present and assisting the said S. knowing of the Arrest, were principal Murderers. 2dly, That tho' the Truth of the Case was, that Sir Ch. S. was arrested and carried out of the Company by some of the Bailiffs before the Stroke given, yet Sir Ch. was the principal Murderer. 3dly, That if any *not knowing the Cause of their struggling, but seeing Swords drawn, and to the Intent to prevent Mischief (which by what appeared was the Case of A. here) will come in and defend the Party arrested, this is not Murder in him. The Jury acquitted A. but found Sir Ch. S. guilty of Murder. Sid. 159. Mich. 15 Car. 2. B. R. the King v. Sir Charles Stanley and Andrews.

Way goes in Aid of the Person who is arrested, and draws his Sword &c. here if any of the Bailiffs be killed, that Person who joined in Aid against him, though he did not know of the Arrest, yet is guilty of Murder; For a Man must take Heed how he joins in any unlawful Act, as Fighting is; For if he does he is guilty of all that follows: And it being Murder to kill those who come to execute the Law, every one who joins in that Act is guilty of Murder, and his Ignorance will not excuse him, where the Fact is made Murder by the Law without any Malice precedent.

11. A Trial at Bar was had upon an Indictment of Murder. The Case appears to be thus: Goffe (being a Collector of the King's Duty of Chimney Money) came with a Constable to the House of one West of Southwark to demand Money due upon that Account, and entered the House, there being only a Maid-Servant at Home; who telling them, That her Master was from Home, and that she could not tell where to find him, or come at any Money to pay them, they presently distrained a silver Cup which stood by. The Maid thinking to prevent the carrying of it away stands against the Door where they were to have gone out, and Goffe took her by the Arm and beat her Head and Back against the Door-post divers times, of which she died within three Weeks after. The Court was of Opinion, that this was but Homicide, and directed the Jury to find it so; for hindring their Passage out to go away with the Distress was a Provocation; And it was found accordingly. Vent. 216. Trin. 24 Car. 2. B. R. Goffe's Case.

(E) How. *By Malice fore-thought, and what shall be said such.*

1. **B.** Royley Son of A. Royley fighting with C. and the said C. beating him so as his Nose bled, B. thereupon went to his Father, complaining unto him of that Battery; whereupon A. instantly went into the Field, being a Mile distance, and finding him, called him Villain, and other opprobrious Terms, and struck him with a little Cudgel, of which Stroke he afterward died. All the Court resolved that it was but Manslaughter; for he going upon the Complaint of his Son, not having any Malice before, and in that Anger beating him, of which Stroke he died, the Law shall adjudge it to be upon that sudden Occasion and stirring of Blood, being also provoked at the Sight of his Son's Blood that he made that Assault, and will not presume it to be upon any former Malice unless it be found. And although the Distance of the Place, where his Son complained, was a Mile, it is not material, being all upon one Passion. Wherefore it was adjudged, that it was not Murder; and being before the general Pardon, was discharged thereby. Cro. J. 296. Hill. 9 Jac. B. R. John Royley's Case.

2. Malice

2. Malice is a Delign formed of doing Mischief to another ; Cum quis data opera Male agit, he that designs and useth the Means to do ill is malicious. 2 Inst. 42. Odium signifies Hatred, Atia Malice, because it is Eager, Sharp, and Cruel. He that *does a cruel Act voluntarily*, does it of Malice prepenfed. 3 Inst. 62. By the Statute of 5 H. 4. If any one out of Malice prepenfed, shall *cut out the Tongue or put out the Eyes of another*, he shall incur the Pain of Felony. If one does such a Mischief *on a sudden, that is Malice prepenfed* ; For my Lord Coke says, If it be voluntary, the Law will imply Malice. Therefore when a Man shall *without any Provocation stab another with a Dagger, or knock out his Brains with a Bottle*, this is exprefs Malice, for he designedly and purposely did him the Mischief. This is such an Act that is malicious in the Nature of the Act it self, if found by a Jury, though it be sudden ; and the Words (*Ex Malitia Præcogitata*) are not in the Verdict. Kelyng 127. Hill. 5 Ann. B. R. in Case of the Queen v. Mawgridge.

S P. Hawk.
Pl. C. 80.
cap 3 r. S. 18,
19.

3. A. quarrelled with B. and C. and in the Affray A. was hurt. C. came by A's Shop three Days afterwards, and made a wry Mouth at him, upon which A. came out of his Shop and cut him on the Calf of his Leg with a Sword, whereof he instantly died. Now here being a former Quarrel, which had continued three Days, the Court, upon the whole Matter, directed this to be found Murder ; But if there had been no precedent Quarrel, and the Wound had been given upon a sudden Provocation by making a wry Mouth without any Intention of killing at that time, it had been otherwise. 5 Mod. 295. Mich. 8 W. 3. in Case of the King v. Keat.

This was the
Case of
Watts v.
Brains.
Cro. E. 77 S.
Mich 42 &
43 Eliz. B.
R. and
there the
Defendant's
Counsel in-
sisted strong-
ly, that this

was a new Cause of Quarrel, and so the Stroke is not upon any precedent Malice. But all the Court severally delivered their Opinions, that if one make a wry or distorted Mouth, or the like Countenance on another, and the other immediately pursues and kills him, it is Murder ; For it shall be presumed to be Malice precedent ; And that such a slight Provocation was not sufficient Ground or Pretence for a Quarrel, and so delivered the Law to the Jury, that it was Murder, altho' what was insisted upon had been true. And tho' at first the Jury brought in their Verdict Not Guilty. yet after much Examination &c. they went out again, and brought in their Verdict Guilty ; and the Defendant was hanged. Noy. 171. Watts v. Brynes. S. C.

4. Malice imply'd is prepenfed as much as if there had been a Proof of Malice or Hatred for some considerable Time before the Act ; For the Stroke given, or an Attempt made by Malice imply'd, is as dangerous as a Stroke given upon Malice expreffed, therefore may be as lawfully resisted. This very Point was also considered by the 12 Judges at Serjeant's-Inn, and by them resolved to be Murder upon the Occasion of my Ld **Morley's** Case. When a Man attacks another with a dangerous Weapon without any Provocation, this is exprefs Malice from the Nature of the Act, which is cruel. The Definition of Malice imply'd is, where it is not expreffed in the Nature of the Act ; as where a Man kills an Officer that had Authority to arrest his Person, the Person who kills him in Defence of himself from the Arrest is Guilty of Murder, because the Malice is imply'd ; For properly and naturally it was not Malice ; For his Design was only to defend himself from the Arrest. Kel. 129. Hill. 5 Ann. B. R. in Case of the Queen v. Mawgridge.

5. If a Man do an Act that apparently must introduce Harm, and Death ensue ; As to run among a Multitude with a Horse used to strike, is Malice imply'd. H. P. C. 44.

And note,
That if it
were with an
Intention to do
Harm, then

it is Murder ; if without such Intention, Manslaughter. H. P. C. 44. — The like of throwing a Stone over a House among many People, the Intention of doing Harm makes it Murder ; Want of such Intention, Manslaughter, because the Act is unlawful ; For an Intention of Evil, tho' not against a particular Person, makes a Malice. H. P. C. 44, 45.

6. Any formed Design of doing Mischief may be called Malice ; and therefore not such killing only as proceeds from premeditated Hatred or Revenge

venge against the Person killed, but also in many other Cafes, such as is accompanied with those *Circumstances that shew the Heart to be perversly wicked*, is adjudged to be of Malice prepenſe, and conſequently Murder. Hawk. Pl. C. 80. cap. 31. S. 18.

(F) *How. By Intention to do a leſs Miſchief only.*

1. **A** Man was indicted for beating his Feme enſient with two Infants, by which the one Infant died immediately, and after ſhe was delivered of the other Infant, who was baptized by the Name of John, and two Days after he died of the Ill which he received, and he was taken and arraigned, and pleaded Not Guilty; and it ſeemed to the Court that this was not Felony, and therefore he was let by Mainprize by Award of the Juſtices. Br. Corone, pl. 68. cites 3 Aſſ. 2.

Ibid. 408.
Holt Ch. J. ſaid, that Mr Turner's Caſe was an unluckly Thing.

2. A Gentleman at the Bar, upon his Wife's Complaint, that the Boy had not clean'd her Clogs, took up a Clog and kill'd him, without other Provocation, and held but Manſlaughter. Comb. 407. cited Arg. in Caſe of King v. Keate, as Mr. Turner's Caſe.

3. Wherever a Perſon in cool Blood by Way of Revenge unlawfully and deliberately beats another in ſuch a Manner, that he afterwards dies thereof, he is Guilty of Murder, however unwilling he might been to have gone ſo far. Hawk. Pl. C. 83. cap. 31. S. 38.

(G) *How. Withont Intention, but in doing an unlawful Act, or an Act not warranted by Law.*

And Proclamation of the King is as the Command of the King. But other Juſtices in the Time of Henry VIII. denied the Opinion of Fineux, and that it is Felony to kill a Man in Juſting &c. notwithstanding the Command of the King; For the Command was againſt Law. Ibid.

If Men tilt or turney in the Preſence of the King, or if two Maſters of Defence in playing their Prizes kill one another, this will be no Felony. Agreed. Hob. 134. Paſch. 14 Jac. in Caſe of Weaver v. Ward.

A. and his Man were playing at Foils, and the Chafe of A's Scabbord fell off unknown to him upon a Thruff, ſo that the Rapier went into his Man's Belly, and killed him. And the Court directed the Jury, that for aſmuch as ſuch Acts are not warranted by Law, the Parties that uſe them ought at their own Peril to prevent the Miſchief that may enſue; for Conſent will not change the Caſe; and therefore tho' there were no Intention of doing Miſchief, yet the Thruff being voluntary, was an Aſſault in Law, and Death enſuing, the Offence was Manſlaughter; yet the Jury found it Chancemedly, but the Court would not accept the Verdict, but charged them if they varied from the Indictment to find it Specially. All. 12 Paſch. 22 Car. B. R. Sir John Chicheſter's Caſe.

2. If the Act be unlawful, it is Murder. As if A. meaning to ſteal a Deer in the Park of B. ſhooteth at the Deer, and by the Glance of the Arrow killeth a Boy that is hiddden in a Buſh; this is Murder, becauſe the Act was unlawful, altho' A. had no Intent to hurt the Boy, nor knew not of him. But if B. the Owner of the Park had ſhot at his own Deer, and without any Intent had killed the Boy by the Glance of his Arrow, this had been Homicide by Miſadventure, and no Felony. 3 Inſt. 56.

Holt Ch. J. ſaid, That in the Caſe of

3. So if one ſhoot at any wild Fowl upon a Tree, and the Arrow killeth any reaſonable Creature a far off, without any evil Intent in him, this is per Infortunium; For it was not unlawful to ſhoot at the wild Fowl: But if

if he had shot at a *Cock or Hen*, or any tame Fowl of another Man's, and the Arrow by Mischance had killed a Man, this had been Murder, for the Act was unlawful. 3 Inst. 56.

killing the Hen my Ld Coke was too large, and that there

must be a Design of Mischief to the Person, or to commit a Felony or great Riot. Comb. 409.—S. C. cited 12 Mod 632. Hill. 13 W. 3. Where Holt Ch. J. says, That it must be intended that he shot the Hen with Intent to steal it; and then because a felonious Intent was at the Bottom, it will be Murder; otherwise that Case cannot be Law—Hawk. Pl. C. 85. cap. 31. S. 41. cites S. P. according to Ld Coke, and makes no Objection to it.

4. If the *unlawful Act* be deliberate, and tend to the personal Hurt of any immediately, or by Way of necessary Consequence, Death ensuing, is Murder. H. P. C. 57.

But if either such Deliberation or Intent of personal Hurt

be wanting, Manlaughter. H. P. C. 57.

(H) How. Without Intention, but in assisting Persons doing an unlawful Act.

1. IF a Master, maliciously intending to kill another, takes his Servants with him without acquainting them with his Purpose, and meets his Adversary, and fights with him, and the Servants seeing their Master engaged take Part with him, and kill the other, they are guilty of Manlaughter only, but the Master of Murder. Hawk. Pl. C. 85. cap. 31. S. 49.

2. And therefore it follows a Fortiori, That if a Man's Servant or Friend, or even a Stranger, coming suddenly, see him fighting with another, and side with him, and kill the other; or seeing his *Sword broken*, sends him another, wherewith he kills the other, he is Guilty of Manlaughter only. Hawk. Pl. C. 85. cap. 31. S. 50.

(I) How. By or of one interposing where two are fighting or Quarrelling.

1. IF two Men combat, and one comes between them to part them, and the one strikes him against his Will, and kills him, yet this is Felony in him who killed him, and he shall be hanged. Br. Corone, pl. 88. cites 22 Aff. 71.

2. Diverse Men playing at Bowles, two of them fell out, and quarrelled the one with the other, and a Third Man, who had not any Quarrel, in Revenge of his Friend struck the other with a Bowl, of which Blow he died; this was held Manlaughter, because it happened upon a sudden Motion in Revenge of his Friend. 12 Rep. 87. Trin. 9 Jac. Anon.

S. C. cited Kel. 136. Hill. 5 Ann. B. R. in Case of the Queen v. Mawgridge.—

And so if two be fighting a Duel, tho' upon Malice prepenfed, and one comes and takes Part with him that he thinks may have the Disadvantage in the Combat, or it may be that he is most affected to, nor knowing of the Malice, this is but Manlaughter. Ibid. Cites Pl. C. 101. John Vaughan v. Salisbury.

A. and B. were fighting in a Field, C. casually riding by, and seeing it, and that A. his Kinsman was one of them, ran in, drew his Sword and killed B. This is clearly but Manlaughter in C. tho' it might be Murder in A. 3 Bull. 206. Trin. 14 Jac. The King v. Cary.

If A has Malice to B. and engages in a Duel with him, and C a Stranger comes by Chance and sides with A. and A kills B. this is Murder in A. and C. who was present abetting and assisting is only Guilty of Manlaughter; because he came there of a sudden and knew nothing of the premeditated Malice; so tho' it was not warrantable for him to meddle in the Quarrel, yet because of his Ignorance of the Malice he was only Guilty of the Manlaughter; Per Holt Ch J 12 Mod. 629. in Case of the King v. Plummer.

S. C. cited by Holt Ch. J. 12 Mod. 631. Hill. 15 W. 3. in Case of the King v. Plummer. And says it was held to be but Manslaughter; because that tho' T. was doing an unlawful Act, and that D. or any other had as much Authority to keep the

Peace as if he actually were a Constable, and the killing of one who comes to command the Peace, tho' he be no Constable, is as much Murder as to kill a Constable, and that if he had declared that he was come to keep the Peace, and commanded them to keep the Peace, whereby they might take notice of the Cause of his coming, and notwithstanding that, they had kill'd him, it would be Murder; yet this not being so, it is only Manslaughter, because the original Quarrel was sudden. But if it had been a deliberate Riot, whether he knew him to be a Constable or not, or that he came to keep the Peace, or not, if he kill any Body whatever that resists him it will be Murder in him, and all that join with him in the deliberate Act.

3. T. was indicted for murdering of D. and the Jury found a Special Verdict to this Effect, viz. that the Day, Year, and Place in the Indictment mentioned T. the Prisoner and his Wife were fighting in the House of the said D. who was kill'd, and the said D. seeing them fighting came in and endeavoured to part them, and thereupon the said T. thrust away the said D. and threw him down upon a Piece of Iron, which was a Bar in a Chimney, which kept up the Fire, and by that one of the Ribs of the said D. was broken, of which he died; and if the Court judge this Murder, they find so or if Manslaughter then they find so. And it was held that tho' the Jury find so, that D. came to part the Man and Wife, yet it doth not appear whether it is found that T. knew his Intent; nor that D. spake any Words whereby he might understand his Intention, as Charging them to keep the King's Peace &c. therefore it was held to be only Manslaughter, which in Law is properly Chance-medley, that is where one Man upon a sudden Occasion kills another without Malice in fact or Malice imply'd by Law. Kelyng. 66, 67. Hill. 16 Car. 2. Thomson's Case.

(K) By Accident or acting only Idly.

* It is only Misadventure. Kel. 40. cites Poulton de Pace 120 where the Case is put, and the Book cited, and held to be Misadventure.

1. **I**F I cut my Tree and the * Branch falls upon a Man and kills him against my Will, this is not Felony; per Catesby, quod Fairfax concessit; For it is not of Malice prepenſe nor Animo Felonico; and also by him, if a Man shoots at Butts, and his Arrow glances, and he kills a Man, this is not Felony; and Pigot to the same Intent. Br. Corone, pl. 147. cites 6 E. 4. 7.

* S. P. So of Shooting an Arrow over a Wall or House with which one

is slain, This is Misadventure. Kelw. 136. pl. 120.—108. pl. 27.—But if a Man knowing that many People come in the Street from a Sermon, throw a Stone over a Wall intending only to fright them, or to give them a light Hurt, and thereupon one is killed, this is Murder; for he had an Ill Intent, tho' that Intent extended not to Death, and tho' he knew not the Party slain. 3 Inst. 57.

† As where a Man unites a House to new Cover it, and in the casting the Tiles to the Ground, the Tile strikes a Man and kills him against the Will of the Caster, this is only a Misadventure. Br. Corone, pl. 228.—But if he casts sportingly, or for his Pleasure, and not in lawful Labour, this seems to be Felony. Ibid.

2. If a Man casts a * Stone over a House and kills a Man this is not Felony, but a Misadventure; per Fineux J. which Brook says does not seem to be Law, unless the Casting be † lawful. Br. Corone, pl. 228. cites 11 H. 7.

3. A. was indicted for the Murder of his Wife; and upon the Evidence the Case was, that he being an Hackney-Coachman found a Soldiers Pistol in the Street, and when he came home he shewed it to his Master, and they took the Gun-stick and put it into the Pistol and it went down into the Muzzle of the of the Pistol, by which they thought it was not charged, and his Wife standing before him he pulled up the Cock and the Pistol went off, and being charged with 2 Bullets wounded her in the Belly and kill'd her, upon which he cried out Oh! I have killed my dear Wife! and called in Neighbours; it was holden by us all, that this was Manslaughter, and not only Misadventure. Kelyng 41. cites Rampton's Case.

(L) How.

(L) How. By *want of Care* and whence Mischief may probably ensue.

1. **H.** Was indicted for the Murder of C. and upon the Evidence the Case was, that there were *several Workmen* about *Building of a House* at the Horse Ferry, which House stood about 30 Foot from any Highway or Common Passage, and H. being a Master Workman (about Evening when the Master Workman had given over Work, and when the Labourers were putting up their Tools) was sent by his Master to bring from the House a Piece of Timber which lay two Stories high, and he went up for that Piece of Timber, and before he threw it down he cry'd out aloud stand clear, and was heard by the Labourers, and all of them went from the Danger but only C. and the Piece of Timber fell upon him and kill'd him, and my Lord Ch. J. Hyde held this to be Manslaughter; For he said he should have let it down by a Rope, or else at his Peril be sure no Body is there: But Wild and Kelyng held it to be Misadventure, he doing nothing but what is usual with Workmen to do, and before he did it cried out aloud Stand clear, and so gave Notice that if there were any near they might avoid it. But they all held that there was a great Difference betwixt the Case in Question, the House from which the Timber was thrown standing 30 Foot from the Highway or common Foot-path, and the doing the same Act in London Streets; For they all agreed, that in London, if one be cleansing a Gutter, and call out to stand aside, and then throw down Rubbish or a Piece of Timber, by which a Man is kill'd, this is Manslaughter; because in London there is a continual Concourse of People passing up and down the Streets, and new Passengers who did not hear him call out, and therefore the casting down any such Thing from an House there into the Street is like the Case, where a Man shoots an Arrow or Gun into a Market-place full of People, if any one be kill'd it is Manslaughter; because in common Presumption his Intention was to do Mischief, when he Casts or Shoots any Thing, which may kill, among a Multitude of People; but in the Case of an House standing in a Country Town, where there is no such frequency of Passengers, if a Man calls out there to stand aside and take Heed, and then casts down the Filth of a Gutter &c. Wild and Kelyng held that to be a far differing Case from doing the same Thing in London. And because my Lord Hyde differed in the Principal Case, it was found Specially; but Kelyng says, he takes the Law to be clear, that it is but Misadventure. Kel. 40. January 13. 1664. Hull's Case.

(M) How. By Event.

1. **T**HERE was a Variance between M. and H. for Wreck of the Sea, in somuch that they appointed to fight; and H. with his Servants came to M's House to fight with him; and a Feme who was Aunt both to M and H. persuaded them to give over this Difference; and one of M's Servants flung a Stone at H. and his Servants and by Chance kill'd the Aunt. This was adjudged Murder by Reason of the Malice which he had to H. Mo. 87. pl. 217. Pasch. 10 Elix. Sir Rd. Mansfield's Case.

D 128. b
pl. 60. Hill.
2 & 3 P.
& M.
seems to be
S. C tho'
differing in
the Year,
the Parties
Names being

there the same. And it was there held by Saunders, Higham Ch. B. Whiddon, Brown, and Dalison Justices, and Brown and Catlin Serjeants, and the Attorney and Solicitor General, that if it had appeared that she came in Defence, or on the Behalf of M. it had then been Murder in H. and all his Companions; But Brook, Stamford, Morgan, Dyer, and Pridaux e contra; For no Malice can be present against the Feme, and Murder cannot be extended further than was intended

Hawk. Pl. C. 84. cap. 31. S. 42. cites S. C. and remarks that not only in such Cases where the very Act of a Person having such a felonious Intent is the immediate Cause of a third Person's Death, but also where it *any way occasionally causes such a Misfortune*, it makes the Offender guilty of Murder.

2. A. had a Wife and a Child of 3 Years old, and gave *Poison* to B. in order that B. might poison the Wife with it. B. put it into a Roasted Apple and gave it A's Wife who was then lying ill in her Bed, and she did eat a little of it and gave the Rest to the Child. A. seeing this chid his Wife for giving any to the Child, telling her that Apples were not good for such Children, but he let her eat it; and after the Wife recovered, but the Daughter died of the said Poison. This was held to be Murder in A. but not in B. For as to A. his Intention was at the first to kill his Wife, and the Killing the Child shall be construed according to that original Intention. But the Act of B. can be extended to the Wife only. Pl. C. 473. b. Hill. 18 Eliz. 473. Saunders's Case.

Jenk 290. pl. 29. S. C. and says, It is otherwise where A. commands B. to kill or rob C. and B. kills or robs C. this is not Murder or Robbery in A. For in this Case the Instrument which A. used might

3. An Apothecary made up an Electuary for A. who was sick, and the Wife put Ratsbane into the Electuary, which A. eating part of made him very sick, as it did others who tasted it on A's Complaint of it; whereupon the Apothecary being questioned, and to clear himself that he had not gone contrary to the Doctor's Prescription, stirr'd it and eat Part of it, and thereof died. By the stirring, the Poison was the more mixed with the Electuary, and that occasioned the Death of the Apothecary, tho' the others who had tasted of it, and A. also survived. It was resolved by all the Justices that the Wife was guilty of the Murder; For the Law conjoins the Murderous Intention of Poisoning A. with the Event of killing the Apothecary. For the putting in the Poison was the Cause, and his Death the Event. And had not the Poison been put in, the stirring could not have caus'd his Death. 9 Rep. 81. Trin. 9 Jac. Agnes Gore's Case.

Non agere, but Poison could not; For that is *Agens Naturale & operatur Necessario*, whereas the other [a Man, as B. for instance] is *Voluntarium Agens*.—Serjeant Hawkins says, the stirring is not material; For inasmuch as such a Murderous Intention, which perhaps in strictness might justly be made punishable with Death, proves now in Event the Cause of the King's losing a Subject, it shall be as severely punished as if it had had the intended Effect, the missing whereof is not owing to any want of Malice but of Power. Hawk. Pl. C. 84. cap. 31. S. 42.

So if A. puts Poison in a Pot of Wine &c. with Intent to poison B. and puts it in a Place where he supposes B. will come and drink of it, and by this Accident C. (to whom B. had no Malice) of his own Head takes the Pot and drinks of it and thereof dies, This is Murder in A. For the Law couples the Event with the Intention, and the End with the Cause. And if C. thinking there is Sugar in the Wine, stirs it with a Knife and drinks of it, this will not alter the Case. Resolved 9 Rep. 81. b. in Agne's Gore's Case.

But if one prepares Ratsbane to kill Rats and Mice or other Vermin, and leaves it in Places for that Purpose, and with no ill Intent, and one finding it eats of it and dies, this is no Felony. Resolved. 9 Rep. 81. b. in Agnes Gore's Case.—Hawk. Pl. C. 84. cap. 31. S. 43. S. P. says, it is Homicide *per Infortunium* only; because the Person's Intentions were wholly Innocent.

(N) How. By Quarrels and Provocations, and what shall be said such.

1. **A.** And B. being Friends were at Bowls, A. upon hot Words killed B. with a Bowl; this was held but Manflaughter. Arg. Comb. 407. cites Mich. 13 Jac. the King v. Newbury.

S. C. cited 12 Mod. 631, 632. Where Holt Ch. J. says, it was held here at the Bar to be only Manflaughter and

2. If a Man upon a sudden Disappointment by another shall resort violently to that other Man's House to expostulate with him, and with his Sword shall endeavour to force his Entrance, to compel that other to perform his Promise, or otherwise to comply with his Desire; and the Owner shall set himself in Opposition to him, and he shall pass at him and kill the Owner of the House, it is Murder; per Holt Ch. J. Kelyng 134. and to that Purpose cited 2 Roll Rep. 460. **Clement v. Sir Charles Blunt.** Where the Case was, That A. had promised a Dog to Sir C. B. and being Requested

requested accordingly to deliver him, refused, and beat the Dog home to his House: At which Sir Charles fetched his Sword and came to A's House for the Dog. A. stood at the Door and resisted his Entry, B. thereupon kills A. The Jury was merciful, and found this Fact in Sir Charles to be but Manlaughter; Doderidge was clearly of Opinion it was Murder, but the Ld. Ch. J. was a little tender in his Direction to the Jury. But Rolls makes this Remark, that it was *not insisted upon* by the Appellant's Council, *that C. was in Defence of his House*, and that Sir C. attacked him to force in: It was without all Question Murder, tho' of a sudden Heat; for there was *no Assault by the Deceased* upon him nor on any of his Friends, but all the Violence and Force was on Sir Charles Blunt's Side.

that the only Reason of this Resolution must be because the unlawful Act in which Blunt was concerned was a sudden one and without Deliberation, and Hales Pl. C. 51.

57. insists very much upon it, that the unlawful Act must be with Deliberation, otherwise cannot be Murder.

3. A. with other *Company was in the Vine Tavern in Holborn in a Room*, and some other *Company*, bringing with them some Women of ill Fame, *would needs have the Room* where A. was, and turn him out, to which A. answered, that if they had civilly desired it they might have had it, but he would not be turned out by Force; and therefore they drew their Swords on A. and his Company, and A. drew his Sword and kill'd one of them, and it was adjudged justifiable. Kelyng 51. cites Mr. Ford's Cafe.

4. *A. and B. quarrelled in a Tavern*, and A. said, that *if we fight now I shall have the Disadvantage of my high-beel'd Shoes*, and they went out and presently after fought in the Fields, when A. killed B. but it was proved by one Witness, that at the Time C. made a Thrust at B whereupon A. closed with B. and killed him; and Depositions of other Witnesses that were read to the same Purpose. The Court directed the Jury that *this was Murder in C. being present and aiding*, tho' A. who was a Peer and had been tried by his Peers was found guilty of Manlaughter only. And that as to the Distance of Time between the Quarrelling and the Fighting to make it Murder, such Time only is sufficient as may make it appear not to be done upon the first Passion, which appeared in this Cafe by A's considering the Disadvantage of his Shoes. But the Jury acquitted C. of the Murder and found him Guilty of Manlaughter only. Lev. 165. Pasch. 18 Car. 2. B. R. Bromwich's Cafe.

S. C. Sid. 277. And the Court in their Direction to the Jury said, that the Difference between Manlaughter and Murder is, that the first is upon a sudden Provocation and the other upon Malice prepen'd,

but what shall be said *sudden Provocation* and what not had been a Doubt; and it seem'd to some of them, that *Words without Blows* is not any Provocation, but to make Provocation to fight there must be Blows; and that if there be Provocation in a House, and they thereupon fight, and after, *before their Reason can get the Predominance of their Passion*, [they fight again and the one kills the other] (the Orig is, et la fight) this is only Manlaughter. *But if after the Provocation in the House they say, that this is not a convenient Place (and so have Reason [enough] to judge of the Conveniency) and appoint another Place*, this will make it Murder, notwithstanding that the Fight is to be immediately; For the Circumstance shews their Temper. But the Jury found C. Guilty of Manlaughter only, and at another Day he had his Clergy.

5. One Bury had *impress'd a Stranger who made no Resistance*, Hopkin Hungate finding the *Preis Master had no Warrant* would rescue him, and drew his Sword and so did the Preis-master, and they pass'd at one another and Hopkin Hungate killed him; held but Manlaughter. Comb. 407. Hill. 9 W. 3. B. R. in Cafe of the King v. Keate cites 1666. Hopkin Hungate's Cafe.

But Holt Ch. J. said, that in *Hopkin Hungate's Cafe he saw the Preis-masters in Possession of

the Man, who made no Resistance, and that Bridgman, Hale and 6 more, (contra Kelyng Ch. J. Windham and Moreton) held that it was but Manlaughter, because the *Resistance without legal Warrant* was a sufficient Provocation to an Englishman, but if there had been no Provocation, then it was agreed it had been Murder, tho' Blows exchanged. Ibid. 408

* S. C. Kelyng. 59. 25 April 1666. by Name of Hopkin Hungate's Cafe. And they said that if a Man be unduly arrested or restrained of his Liberty, altho' he be quiet himself, and do not endeavour his Rescue, yet it is a Provocation to all other Men of England, not only his Friends but Strangers also for common Humanity's Sake, as my Ld. Bridgman said, to endeavour his Rescue; But the three Justices

tices above and Twifden J. were of another Opinion, and held it to be Murder; because there was (as they thought) no Provocation at all.

S. C. cited Kelyng. 137. That 8 Judges conceived it only Manlaughter against the Opinion of the 4 Judges of B. R. but that the Judges of B. R. did conform, and gave Judgment accordingly.

6. G. was a Smith and had ordered his Servant to do some Business, and when the Matter returned they fell to Work; the Master asked him if he had done what he ordered, the Servant said he had not done it; then the Master said, if you be not more diligent I will have you sent to Bridewell; the Servant said, I had as good go to Bridewell as continue in your Service; the Master takes up a Piece of Iron and kills him, and upon a Special Verdict it was adjudged Murder, in Kelyng's Time. Comb. 408. cited by Holt Ch. J. Hill 9W. 3. B.R. in Case of King v. Keate as 10 October 1666.

But Twifden said, There was a Case found before Justice Jones, which was the same with this, only it was found, that

7. A. coming into his House, found B. in the Act of Adultery with his the said A's Wife, and he immediately took up a Stool and struck B. on the Head so that he instantly died. They found that A. had no precedent Malice towards him, and so left it to the Judgment of the Court, whether this were Murder or Manlaughter: The Court were all of Opinion that it was but Manlaughter, the Provocation being exceeding great, and found that there was no Precedent Malice. Vent. 158. Mich. 23 Car. 2. B. R. * Maddy's Case.

the Prisoner being informed of the Adulterer's Familiarity with his Wife, he said he would be revenged of him, and after finding him in the Act killed him, which was held by Jones to be Murder. Which the Court said might be so, by Reason of the former Declaration of his Intent; but no such Thing is found in the present Case. Ibid. 159.——* S. C. by the Name of Spinning's Case, and he had his Clergy at the Bar and was burnt in the Hand, and the Court directed the Executioner to burn him gently; because there could not be greater Provocation than this. Raym. 212.——S. C. cited Kelyng. 157. by Holt Ch. J. Hill 5 Annæ in Case of the Queen v. Mawgride.

8. A. was convicted of Publishing a Libel, wherein he had accused the King (when Duke of York) that he had hired him to kill the late King Charles &c. And on Friday June 20, he was brought to the Bar, where he received this Sentence, viz. That he should pay the Fine of 500l. That he should stand twice in the Pillory, and go about the Hall with a Paper in his Hat signifying his Crime; That on Thursday next he should be whipped from Aldgate to Newgate, and on Saturday following from Newgate to Tyburn, which Sentence was executed accordingly; and as he was returning in a Coach on Saturday from Tyburn, one Mr. Robert Francis a Barrister of Grey's-Inn, asked him in a jeering Manner, whether he had run his Heat that Day, who replied again to him in scurrilous Words, thereupon Mr Francis run him into the Eye with a small Cane which he had then in his Hand, of which Wound the said Mr. Dangerfield died on the Monday following; Mr. Francis was indicted for this Murder, and upon Not Guilty pleaded, was tried at the Old-Baily, and found Guilty, and executed at Tyburn on Friday July 24, in the same Year. 3 Mod. 68. Trin. 1 Jac. 2. B. R. The King v. Dangerfield.——But this should rather be the King v. Francis.

Skin. 666. S. C.——

Comb. 406. Hill 9W. 3. S. C. and there 409.

Rookby J. said, he was not satisfied that the Stroke on the Head was before the using of the Sneyd or Handle of the Scythe,

9. A. the Master sent to W. his Gardiner for the Key of his Garden with Intent to discharge him from his Service; W. refused to send the Key, whereupon A. fetched his Sword, and went and expostulated with W. about the Key, W. said A. should have it if he would; upon this A. drew his Sword, and struck W. and cut him on the Head. W. endeavoured to strike A. with the Handle of a Scythe, but being hindered by the Rack of a Chimney, he punch'd A. with the Handle, and then A. run him through the Body, whereof W. died. One Question was, if this was within the Statute of Stabbing, but that was given up; And then the Question was, if it was Murder. After much Argument, the Court said, that it was justifiable in W. to use the Handle of the Scythe after a Cut made on his Head by his Master; That the Provocation given him was very slender, and might be esteem'd as none at all; because after the Answer sent by W. the Prisoner did expostulate

postulate with him for some Time. Sed Adjournatur. 5 Mod. 287. Mich. and said, 8 W. 3. B. R. the King v. Keare. that in Case of Life he

would not take any Thing by Intendment. — S. C. 12 Mod. 118. Judgment was given against the Indictment on the Statute of Stabbing, that it was vicious, and therefore quashed it. And as to the Indictment at Common Law, it is Nonfense in the Beginning; For it is said, *That A. made an Assault on W. and the said A. prafat W. with a certain Sword of the Value of 5s. which he the said A. in his Right Hand had and held, prafat W. pupugit & percussit*, wherein there is a *prafat W. too much*, and to is *Nonfense*. Then there is another Thing which is very odd, tho' it may not be Error, because it may possibly be a sufficient Description, viz. The Indictment says, that he gave him a mortal *Wound Latitudinis unius Pollicis & Profunditatis in & per Corpus*. And so the Indictment was quashed, and he was bail'd to appear at the next General Goal Delivery for the County of Wilts.

10. C. was the Commanding Officer in the Guard-Room at the Tower, and there was a Woman of C's Acquaintance in Company and others with him, and also there was one M. whom C. had invited hither. M. affronted the Woman, so that angry Words passed between M. and the Woman in Prefence of C. and the rest of the Company, and M. threatened the Woman, whereupon C. desired M. to forbear, saying he must protect her. But M. persisted and demanded Satisfaction of C. with Intent to provoke him to fight; upon which C. told M. that it was not a convenient Place but at another Time and Place he would be ready to give it him, and in the mean Time desired him to be more civil or to leave the Company. Thereupon M. rose up, and was quitting the Room, but as he was going, he snatched up a Glass-Bottle full of Wine and violently threw it at C. and therewith struck him on the Head. Upon which C. immediately rose up and threw another Bottle at M. and broke his Head. But M. immediately after his flinging the Bottle at C. without any Intermiffion drew his Sword, and thrust C. into the left Pap of his Breast over the Arm of one J. S. notwithstanding the Endeavour us'd by the said J. S. to hinder M. from killing C. and gave C. the Wound of which he instantly died. In all this Time C. had no Sword drawn, nor ever spoke after M. had thrown the Bottle. Holt Ch. J. delivered the Opinion of the Judges, that M. was guilty of Murder. Kelyng 119. Hill. 5 Ann. The Queen v. Mawgridge.

11. No Words of Reproach or Infamy are sufficient to provoke another to such a Degree of Anger as to strike or assault the provoking Party with a Sword, or to throw a Bottle at him, or strike him with any other Weapon that may kill him; but if the Person provoking be thereby killed, it is Murder. Cited per Holt Ch. J. Kel. 130. Hill. 5 Ann. B. R. in Case the Queen v. Mawgridge, as a Point positively resolved in the Assembly of the Judges, 18 Car. 2.

Holt Ch. J. says, That he is therefore of Opinion, that if A and B are in Company together, and B. gives A. contumelious

Language, and A is so provoked that he draws his Sword, and makes a Pass at B. (B. then having no Weapon drawn) but misses him, and thereupon B. draws his Sword, and passes at A. and there being an Inter-change of Passes between them, A. kills B. that this is Murder in A. For A's Pass at B. was malicious, and what B. afterwards did was lawful; But if A. who had been so provok'd draws his Sword, and then before he passes, B's Sword is drawn; or A. bids him draw, and B thereupon drawing, there happens to be mutual Passes; If A. kills B. this will be but Manflaughter, because it was sudden, and A's Design was not so absolutely to destroy B. but to combat with him, whereby he run the Hazard of his own Life at the same Time. But if Time was appointed to fight (suppose the next Day) and accordingly they do fight, it is Murder in him that kills the other; but if they go into the Field immediately and fight, then but Manflaughter. Suppose, upon provoking Language given by B to A. A. gives B. a Box on the Ear, or a little Blow with the Stick, which happens to be so unluckly that it kills B. who might have some Impostume in his Head or other Ailment which proves the Cause of B's Death, this Blow, tho' not justifiable by Law, but is a Wrong, yet it may be but Manflaughter, because it does not appear that he designed such a Mischief. Kel. 130, 131.

12. Two strive for the Wall, and one kills the other, this is Manflaughter. H. P. C. 57.

(O) How. *By one in a Company where it is Murder in another.*

In Cafes where the principal Intent is to commit a Breach of the Peace, not intended againſt the Perſon of him that happens to be ſlain, it ſeems clear, that regularly where divers Perſons reſolve to reſiſt all Oppoſers in the Commiſſion of any Breach of the Peace that naturally tends to raiſe Tumults, as by committing a violent Diſſeſſin with great Numbers of People, Hunting in a Park &c. and in ſo doing happen to kill a Man, they are all Guilty of Murder; yet if ſuch Diſſeſſors having Forcible Poſſeſſion of an Houſe afterwards kill the Perſon, whom they ejected, as he is endeavouring in the Night forcibly to re-enter, and to fire the Houſe, they are guilty of Manſlaughter only; perhaps for this Reaſon chiefly, becauſe the Party ſlain is himſelf ſo much in Fault; But in ſuch or any other Quarrel, if a Peace Officer doing his Duty tho' not known, or even a private Perſon, giving proper Notice of his Intention to keep the Peace, be ſlain, it will be Murder. Hawk. Pl. C. Abr. 90. cap. 31. S. 17. — In the Fol. Edit. it is Page 84. cap. 31. S. 46, 47, 48.

S. C. Ke-lyng 87. acc. cites 34 H. 8. Br. [N. C.] Sect. 237. and ſays the Lord Dacres was hanged. — S. C. cited 12 Mod. 630. Hill. 13 W. 3.

2. Lord Dacres and others *agreed to enter into a Park and hunt there, and to kill all that ſhould reſiſt them.* They accordingly entered the Park, and a Perſon [or Keeper] came to one of the Company, and asked him what Buſineſs he had there, and the other killed him, the Lord being a Quarter of a Mile from the Place and knowing nothing of it, yet this was adjudged Murder in him, and in all his Companions. And alſo another went into an Orchard to gather Pears, and one coming to him and rebuking him, he killed him, and this was adjudged Murder. Mo. 86. pl. 216. Paſch. 10 Eliz. Ld Dacres's Cafe.

S. C. adjudged. When the Offenders fled, the Keeper's Servants called to them to ſtand, which they ought to have done, and to have yielded themſelves to the Keepers. 2 Roll. R. 120. Wormal's Cafe. — * S. P. 12 Mod. 630. Hill. 13 W. 3. cited by Holt in Cafe of the King v. Plummer.

3. A. B. C. and D. *with Pikes and other Arms went into Hyde-Park in the Night to ſteal Veniſon.* The Keeper's Servant's assaulted them. They fled; one of the Servants shot off a Gun, and wounded one of them; they returned, and A. wounded one of the Keepers, of which he died about 10 Days after; This was held wilful Murder in * all; becauſe they were about an unlawful Act, and this Event ſhews their Malice and Intent ab Initio to kill all, that reſiſted their wicked Purpoſe, with the Weapons which they carried with them. Palm. 35. Trin. 17 Jac. B. R. War-mole's Cafe.

4. N. coming to an Inn, *J. S. and W. R. quarrelled with his Servants, and beat them, which N. hearing of came into the Room but after the Af-fray was over, and beat them, but one of them threw N. upon the Ground, whereupon one of the Servants drew his Sword in Defence of N. his Maſter, and happened in the Scuffle to wound N. of which he died ſoon after.* The Coroner's Inqueſt found the Servant Guilty of Murder, and acquitted the others. Whereupon the others were indicted and found Guilty of Manſlaughter; and as to the Servant, Keling J. directed the Jury to find the Servant Guilty of Manſlaughter, tho' it appeared that the Hands of the others were upon the Sword at the Time of the Stroke given, and ſo all were found Guilty of Manſlaughter. Sid. 254. Paſch. 17 Car. 2. B. R. The King v. Nevil.

5. If 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 demefine a good Plea in Treſpaſs againſt them; per Holt Ch. J. 12 Mod. 256. Mich. 10 W. 3. Aſton v.

6. *Eight Wool-Runners being met in a Lane by the King's Officers, as they were going with the Wool to the Sea-side, and the Word of Seizure given by the Officers, A. one of the Gang fired his Gun and killed J. S. one of his own Gang, viz. one of the Eight, and now B. another of the Gang was indicted for the said Murder. This Case having been for two Vacations under the Consideration of all the Judges of England, and several Times argued before them, it was at Length unanimously resolved, That this was not Murder in the Rest of the Gang, it not being found that he shot at any of the King's Officers, which, if found, would have made it Murder in all; But the Jury not having found that Fact, the Judges cannot intend it; and it being possible that the Discharge of the Piece might be by Accident or Chance, they must rather intend it to have been fired upon some other Occasion than against the King's Officer; and therefore B. the Prisoner was acquitted.* 12 Mod. 627. 633. Hill. 13 W. 3. B. R. The King v. Plummer. Kel. 109. S. C.

7. It is a general receiv'd Opinion, that if two Persons, viz. A. and B. are engaged in an unlawful Act, and a Stranger is killed by one of them, this makes the other Guilty of Murder, by Reason of their being both originally engaged in the unlawful Act. But this has several Qualifications and Limitations. 1st. *He must know of the other's malicious Design, and which is foreign and different to the original ill Design engaged in, or otherwise he shall not be Guilty of Murder.* 2dly, The Act of one whereby Death doth ensue *must be in Pursuance of the original unlawful Act*; As if several go into a Park to hunt where they have no Right, and immediatly after two of them quarrel, and one kills the other, it is only Manlaughter in him that kills, and no Offence in the Rest; because the killing was not in Pursuance of the unlawful Act which they were all engaged in. 3dly. The unlawful Act *must be deliberate*; For if it be done on a Sudden, the Death occasioned by Pursuance of it will not amount to Murder. 4th. The Act must not only be deliberate, but *must also be to do Hurt to some Body either immediately or consequentially*, or otherwise the killing is not Murder. 5th. Tho' such deliberate unlawful Act tend not to the Hurt of any Person, yet the being unlawful will make it Manlaughter. And further, *tho' it be not with Design to hurt any Person, yet if it be such an unlawful Act as is Felony, and carried on with a felonious Intent, and in Pursuance of such Act a Man is kill'd, such Killing is Murder not only in him by whose Hand the Person falls, but also in all those concern'd in the felonious Intent.* As if divers agree to rob a House, and some are placed in a Passage leading to the House, and a Person coming by is stopped by those in the Passage, and is killed in the Scuffle by one of them, and no Robbery is committed, yet this will be Murder in all those that were by at the Time, and likewise in all those that went to rob the House, and were not actually present. Per Holt Ch. J. in delivering the Reasons of the Resolutions of all the Judges of England. 12 Mod. 627. to 633. Hill. 13 W. 3. The King v. Plummer.

8. Indictment against A. for the Murder of J. S. and also against B. C. D. and E. as Persons present, assisting, aiding, and abetting A. therein. E. being arraigned upon this Indictment pleaded Not Guilty, and upon Evidence it appeared, That the Person slain was a Constable, and in the Execution of his Office with divers other Constables in May-Fair; That E. the Prisoner first drew his Sword, and with divers others, to the Number of 40 Persons, fell upon the Constables; That this Affray continued an Hour after, till in the End one of the Constables, viz. the said J. S. was slain, but by whose Hand it did not appear. It also appeared, that A. had been tried on this Indictment, and acquitted; And per Holt Ch. J. 1st. Tho' the Indictment be against the Prisoner for aiding, assisting, and abetting A. who was acquitted; yet the Indictment and Trial of this Prisoner is well enough; for who actually did the Murder is not material; the Matter is, that a Murder was committed, and the other is but a Circumstance, and *all are Principals* in this Case; therefore if a

Murder be proved, it is well enough. 2dly. If a *Man begins a Riot*, as in this Case, and the same *Riot continues*, and an *Officer is killed*; he that began the Riot, as the Prisoner here did, is a Principal Murderer, tho' he did not do the Fact. 1 Salk. 334, 335. Octob. 14, 1703. the Queen v. Wallis.

9. *Two Men were beating another Man in the Street, and in the Night-time, and a Stranger passing by at the same Time said, he was ashamed to see two Men beat one*; whereupon one of those who was beating the other ran to the Stranger in a furious Manner, and with a *Knife*, which he held in his Right Hand, gave him a *deep Wound of which he died soon after*; and now both the other were indicted as Principals for the said Murder; but the Judges were of Opinion, that because it did not appear that one of them intended any Injury to the Person killed, he could not be Guilty of his Death, either as Principal or Accessary; it is true, they were both doing an unlawful Act, but the Death of the Party did not ensue upon that Act; so he was acquitted, and the other was found Guilty. 8 Mod. 164, 165. Trin. 9 Geo. Anon.

(O. 2) Being in Company with, and *what Privity will make a third Person Guilty of Murder, or Manslaughter.*

1. **T**HE following Questions were proposed by the Peers to the Judges, to which they gave the following Answers.—1st. In Case a Man shall murder another, whether all those in his Company at the Time of the Murder are so necessarily involved in the same Crime, that they may not be separated from the Crime of the said Person, so as in some Cases to be found Guilty only of Manslaughter?—Answer, The Crime of those who are in the Company at the Time of the Murder committed, may be so separated from the Crime of the Person that committeth the Murder, as in some Cases they are only to be found Guilty of Manslaughter.—2dly. *A. conscious of an Animosity between B. and C. A. accompanieth B. where C. happens to come, and B. kills him, whether A. without any Malice to C. or any actual Hand in his Death, be Guilty of Murder?*—Answer, A. is not guilty of Murder; For it appears the Meeting was casual, and there was no Design in A. against C. and therefore tho' A. did know of the Malice between B. and C. yet it was not unlawful for A. to keep Company with B. but he might go with him any where, if it was not upon a Design against C. And therefore as the Case was put, there was not any Offence in A.—3d. Whether if *A. heard B. threaten to kill C. and some Days after A. is with B. upon some other Design, where C. passes by, or comes into the Place where A. and B. are, and C. shall be killed by B. A. standing by without contributing to the Fact, his Sword not being drawn, nor any Malice ever appearing on A's Part against C. whether A. will be guilty of the Murder of C?*—Answer, A. in this Case would not be guilty either of Murder or Manslaughter.—4th. Whether a Person, knowing of the Design of another to lie in wait to assault a third Man, who happens to be killed when the Person who knew of the Design is present, be guilty of the same Crime with the Party who had the Design, and killed him, tho' he had no actual Hand in his Death?—Answer, This is neither Murder nor Manslaughter. But if he that knew of the Design had advised it, or agreed to it, or lay in wait for it, or resolved to meet the third Person with him that killed him, it would have been Murder.—5th. Whether a Person, knowing the Design of another to lie in wait to assault a third Person, and accompanying him in that Design, if it shall happen, that the third Person be killed at that Time in the Presence of him who knew of that Design, and accompanied the other in it, be guilty in
Law

Law of the same Crime with the Party who had that Design, and killed him, tho' he had no actual Hand in his Death?—Answer, If a Person is privy to a felonious Design or to a Design of committing any personal Violence, and accompanieth the Party in putting that Design in Execution, *tho' he may think it will not extend so far as Death, but only beating,* and hath no personal Hatred, *nor doth otherwise contribute to it, than by his being with the other Person when he executeth his Design of assaulting the Party,* if the Party dieth, they are both guilty of Murder; for by his accompanying him in the Design, he shews his Approbation of it, and gives the Party more Courage to put it in Execution, which is an Aiding, Abetting, Assisting and Comforting of him, as laid in the Indiétment.——

6th. If *A. be present when B. said he would stab C. upon which A. said he would stand by his Friend,* and afterwards B. doth actually murder C. and A. is present at the Murder; whether the Law will make A. equally guilty with B. or what Crime is A. guilty of?—Answer, This is rather a Case of Fact than Law; For if A. was *designedly present* with the other that committed the Murder, then it would be Murder in A. and if there was no Evidence to prove upon what Account he was present, it might be presumed he was present in pursuance of his former Agreement; but if it appeared he did not meet in pursuance of that Agreement, then it might not be Murder. That this was all Matter of Evidence, and rested upon the Consciences of those that were to try the Prisoner.——7th. If *A. accompanieth B. in an unlawful Action, in which C. is not concerned,* and *C. happeneth to come in the Way of B. after the first Action is wholly over,* and happeneth to be killed by B. without the Assistance of A, whether A. is guilty of that Man's Murder?—Answer, As this Case is stated, A. is not guilty of Murder. Holt's Rep. 479, 480, 481. cites 31. Jan. 4 W. & M. in the Trial of the Ld Mohun.

(P) *Justifiable.* In what Cases. And Pleadings.

See (N) pl. 5.

1. IF *Thieves come to rob a Man, or to break his House,* he may safely kill them if he cannot take them; per Thorp. Br. Corone, pl. 57. cites 22 Afl. 55.

And every Man may apprehend Thieves, and if they will

not render themselves he may kill them if he cannot otherwise take them. Ibid. per Thore.

If a Thief offers to rob or murder B. either Abroad or in his House, and thereupon Assault him, and B. defends himself without any giving back, and in his Defence kills the Thief, this is no Felony; For a Man shall never give way to a Thief &c. neither shall he forfeit any Thing. 3 Inst. 50.

2. A *Servant* may kill a Man in saving the Life of his Master, if he cannot otherwise escape. Br. Corone, pl. 63. cites 21 H. 7. 39. per Tremaile J.

3. It must be owing to some *unavoidable Necessity,* to which the Person who kills another must be reduced without any manner of fault in himself, There must be *no Malice coloured under pretence of Necessity;* For where-ever a Person, who kills another acts in Truth upon Malice, and takes Occasion from the Appearance of Necessity to execute his own private Revenge, he is guilty of Murder. Hawk. Pl. C. 69. cap. 28. S. 1, 2.

The Rule of unavoidable Necessity admits an Exception when the Law doth intend some Fault or Wrong in the Party that

hath brought himself in the Necessity: so that is *necessitas culpabilis.* This I take to be the chief Reason why *seipsum defendendo* is not Matter of Justification, because the Law intends it hath a Commencement upon an *unlawful Cause;* For Quarrels are not presumed to grow without some Wrongs, either in Words or Deeds on either Part, and the Law, that thinketh it a Thing hardly triable in whose Default the Quarrel began, supposes the Party that kills another in his own Defence not to be without Malice; and therefore as it doth not touch him in the highest Degree, so it putteth him to sue out his Pardon of Course, and punishes him by Forfeiture of Goods; For where there cannot be any Malice or Wrong presumed, as where a Man assaults me to rob me, and I kill him that assaileth me; or if a Woman kill him that assaileth her to Ravish her, it is justifiable without any Pardon. Bac. Elements, 28.

4. According

See (Q) pl. 1 4. According to the Opinion of the Old Books (which in this Respect seem to be contradicted by others more modern) it seems, that one may set forth a Fact amounting to Justifiable Homicide in a Special Plea to an Indictment or Appeal of Murder; and that the same being found true, he shall be dismissed without being arraigned or inticed to plead Not Guilty. And indeed it seems extremely hard that a Sheriff or Judge who condemns or executes a Criminal &c. should be forced on a frivolous Prosecution to hold up their Hands at the Bar for it &c. But it is agreed that no one can plead a Fact amounting to Homicide *Se defendendo* or by Misadventure, but that in such a Case the Defendant must plead Not Guilty, and give the Special Matter in Evidence. And it is also agreed that where a Special Fact amounting to Justifiable Homicide is found by the Jury, the Party is to be dismissed without being obliged to purchase any Pardon &c. Hawk. Pl. C. 69. cap. 18. S. 3.

(Q) Justifiable by Officers or Persons having Warrants.

And there the jury was Charged if he might otherwise have taken the Thief, and if there are others of the same Name of him who was killed, and found all for the Defendant, by which he went quit without Charter of the King. Ibid — Br. Charters de Pardon, pl. 21. cites 22 Aff. 5.

1. A Man was appointed by Precept to take Felons indicted of Felony and showed them the Precept, and commanded them to render themselves to the Peace, and they would not render, but stood to their Defence and killed and wounded diverse Persons, and in his taking he killed N. one of the Thieves and was thereof indicted, and pleaded this Matter and justified by it, and did not intend that the King would impeach him thereof, and well, and was permitted to justify it without being compelled to plead Not Guilty. Br. Corone, pl. 87. cites 22 Aff. 55.

If any Officer or Minister of Justice hath a lawful Warrant, and the Party assaults the Officer or Minister of Justice, he is not bound by Law to give back, but to carry him away: And if in Execution of his Office, he cannot otherwise avoid it but in striving kill him, it is no Felony. And in that Case the Officer or Minister of Justice shall forfeit nothing; but the Party so assaulting or offering to fly away is killed, he shall forfeit his Goods and Chattels. 5 Inst. 56.

2. And Note by Thorp for Law, that in several Cases a Man may justify the Death of a Man, as where a Gaoler who came into the Gaol with a Hatchet and found the Prisoners loose, and they beat him, and he killed two of them with the Hatchet, and it was awarded by the Council well done, therefore it seems that he may justify. Ibid.

(R) Excusable.

1. IF a Parent or a Master be provoked to a Degree of Passion by some Miscarriage of the Child or Servant, and the Parent or Master shall proceed to Correct the Child or Servant with a moderate Weapon, and shall by chance give him an unlucky Stroke so as to kill him, that is but a Misadventure. But if the Parent or Master shall use an Improper Instrument in the Correction, then if he kills the Child or the Servant it is Murder; and so it was resolved by all the Judges in B. R. with the Concurrence of the Ld. Ch. J. Bridgman in a Special Verdict in one Gray's Case, found at the Old Baily 10 Octob. 18 Car. 2. who struck his Servant with an Iron Bar. Kel. 133. Hill. 5 Annæ B. R. in Case of the Queen v. Mawgridge.

2. Excusable Homicide is either * *per infortunium*, or † *se defendendo*. Hawk. Pl. C. 73. cap. 29.

* Homicide per Infortunium, or by Misadventure, is where a Man in doing a lawful Act without any Intent of Hurt unfortunately chances to kill another. Hawk Pl. C. 73. cap. 29. S. 1.

† Homicide

† Homicide *se defendendo* seems to be where one who has no other possible Means of preserving his Life from one who Combats with him on a sudden Quarrel, or of defending his Person from one who attempts to beat him, (especially if such Attempt be made upon him in his own House) kills the Person by whom he is reduced to such an inevitable Necessity. Hawk. Pl. C. 74. cap. 29. S. 13.

(S) *Amounts to Petty Treason.* In what Cases.

1. **A**LICE of W. of the Age of 13 Years was burnt by Judgment, because she had killed her Mistress, and therefore Treason. And so see that for Treason a Feme shall be burnt. And see that Treason may be as well to the Mistress as to the Master. Br. Corone, pl. 74. cites 12 Aff. 30. S. C. cited 3 Inst. 20. and says that the Judgment at this Day of a Woman for Petit Treason is the same.

2. 25 E. 3. Stat. 5. cap. 2. Moreover there is another Manner of Treason, that is to say, when a * Servant slayeth his Master, or a † Wife her Husband, or when a ‡ Man Secular or Religious slayeth his Prelate, to whom he oweth Faith and Obedience. This was Petty Treason at Common Law, as appears by 12 Aff. and says

that with this agrees the 21 E. 3. where Ld. Coke says the Reader must know, that instead of (Mere) in that Case he must read (Master). 3 Inst. 20.

Anciently an Attempt to kill a Husband, Piracy by a Subject, Discovery of the King's Counsel by a Grand-Juror, and many other Offences, came under the Notion of Petit Treason; but now by this Statute it is reduced to three Instances, viz. where a Servant kills his Master &c. [as above] Hawk. Pl. C. Abr. 93. cap. 32. S. 1.

Aiders, Abettors and Procurers of any of these Petit Treasons are within this Law. 3 Inst. 20. And are punishable in the same Manner as before; For the Statute meant only to exclude other Crimes from being accounted Petit Treasons, but not to alter the Law as to these. Hawk. Pl. C. Abr. 94. cap. 32. S. 5.

* A Servant was arraigned for killing his Master's Wife *Proditorie* and he confess'd it, and it was adjudged by Advice of all the Justices of both Benches, that it was Petit Treason: For as well the Mistress as the Master have ‖ Affiance in him; by which it was awarded that he be Drawn and Hang'd and not Hang'd only, *Quod Nota*; and no mention of Beheading; For it seems this is of High Treason. Br. Treason, pl. 8. cites 19 H. 6. 4. — S. C. cited Pl. C. 86. b. Hill. 6 & 7. E. 6. in Case of Croker v. Strange. — S. C. cited 3 Inst. 20. For he is ‖ Servant both to the Husband and Wife. — S. P. Hawk. Pl. C. Abr. 93. cap. 32. S. 3.

If a Child commit *Parricide* in killing his Father or Mother, (which the Law-makers never imagin'd any Child would do) this is out of the Statute, unless the Child *serv'd the Father or Mother for Wages or Meat, Drink or Apparel*; For this is not any of the three Kinds specified in this Act, and yet it is a more Impious Offence in a Child than in a Servant, but the Judges are restrained by this Act to interpret it a Simili, or a Minore ad Majus. And some say that Parricide was *Petit Treason by the Common Law*. 3 Inst. 20. — S. P. Hawk. Pl. C. Abr. 93. cap. 32. S. 2.

† This was adjudged Petit Treason by the Common Law, as it appeareth in our Books. If the Wife procure one to murder her Husband, and he doth it accordingly, in this Case the Wife being absent is but Accessory, and shall be hanged and not burnt, because the Accessory cannot be guilty of Petit Treason where the Principal is not guilty but of Murder: And the Accessory must follow the Nature of the Principal; But if he that did the Murder had been a Servant of the Husband, it had been Treason in them both, and the Wife should have been burnt; and so it is in the Case before of a * Servant, and in the Case hereafter of a Clerk. If the Wife and a Stranger kill the Husband it is Petit Treason in the Wife and Murder in the Stranger, and so it is in the Case of the Servant next before, and of the Clerk next after. 3 Inst. 20. — * S. P. Because the Offence of the Accessory cannot rise higher than that of the Principal. Hawk. Pl. C. Abr. 94. cap. 32. S. 7.

‡ This Clause is to be understood only of an Ecclesiastical Person be he Secular or Regular, if he kill his Prelate or Superior to whom he oweth Faith and Obedience, it is Petit Treason; and so it was at the Common Law. And Petit Treason doth presuppose a Trust and Obedience in the Offender either Civil, as in the Wife and Servant, or Ecclesiastical, as in the Ecclesiastical Person. 3 Inst. 20.

3. A Servant departed out of his Master's Service, and a Year after killed him who was his Master for Malice that he bore against him when he was his Servant, by which he was drawn and hang'd. Br. Corone, pl. 116. cites 33 Aff. 7. 3 Inst. 20. cites S. C. — S. P. Hawk. Pl. C. 88. cap. 32. S. 4.

4. In an Indictment of a Servant for the Murder of his Master, the Word *Preditorie* was emitted, so that the Indictment was only as of a common Murder. And it appearing upon the Evidence that the Offence was Petit Treason, and such Offence being discharged by a general Pardon in

which Murder was excepted, tho' the Defendant was arraigned and found Guilty upon this Indictment of Murder, yet the Judge of Assise reprivied the Prisoner, for which he was blamed by some, but without Reason, as it seem'd to the Justices. D. 235. a pl. 19. Mich. 6 & 7 Eliz. Anon.

S P. Whether the Servant be actually present, or present only in Judgment of Law, as being in the same House, tho' not in the same Room when the Fact was committed; And if a Servant or even a Stranger procure a Servant in his Absence to murder the Master, it seems that he is an Accessory to the Petit Treason. Hawk. Pl. C. Abr. 94. cap. 32. S. 7.

6. If the Killing of a Master be attended with such Circumstances as would have made it Murder, if the Person killed had been a Stranger, it will be Murder in the Servant, but if it were upon such a sudden Affray as would have made it *Manslaughter*, or *Se defendendo* only in the Case of a Stranger, it will be no higher a Crime in the Servant; and it shall never be contriaed to amount to Petit Treason, but where in the Case of a Stranger it would have been Murder; For all Petit Treason includes Murder, and is the highest Degree of it. Hawk. Pl. C. Abr. 94. cap. 32. S. 6.

(T) *Intending and attempting to Murder but not doing it; In what Cases it is Felony.*

1. **A** Boy came to his Masters Bed and Trench'd hard upon his Throat to have strangled him in order to rob him, and was hanged. Quære if it was not Burglary. Br. Corone, pl. 214. cites 15 E. 2.

(U) *What is Murder, and what Trespass.*

1. **W**HERE a Man shoots at Butts and kills another against his Will, or if a Tiler upon a House permits a Stone to fall upon a Man, and kills him against his Will, this is not Felony; For there the Intent is to be construed; but it [the Intent] is not to be construed in Trespass, therefore if such Archer or Tiler strikes a Man and does not kill him Trespass lies; Note the Difference. Br. Corone, pl. 59. cites 21 H. 7. 29.

(W) *Indictment. Good or not.*

The Word *Murdravit* implies *Malitia Præcogitata*, and therefore supplies the Omission thereof, but it does not imply the Word *Felonia* being omitted. Per tot. Cur. Buls. 93. Mich. 8 Jac. in Penraddock and Langford's Case.

1. **A**N Indictment was *apud C. in prædict. B. (who was murdered) Insultum fecit & ipsum quodam Cultello Pretii &c. ipsum B. felonice Percussit Occidit & Murdravit*, without saying * *Ex Malitia sua præcogitata*, or without shewing in certain any Place where the Murder was done, or without the Words *Adtunc & ibidem*. And the Indictment was held void for want of the Place, in as much as the Assault may be at one Place and the Murder at another; For they were of divers Natures; But not for the other Cause, viz. *Ex Malitia sua præcogita*; Because *Murdravit* necessarily implies it. D. 68. b. pl. 28. Palch. 5 E. 6.

The Word *Murdravit* in an Indictment may well stand for *Manslaughter*; Per Croke J. And per Williams J. if the Indictment is *Murdrum*, and does not therein mention *Ex Malitia sua Præcogitata*, this shall

shall be taken only for Manslaughter, and so it has been ruled divers times. Buls. 144 Trin. 9 Jac. in Case of Bradley v. Banks. cites 1 Mar. D. 99. pl. 63.—The Case in D. 99. a. pl. 63. is thus, viz. Item where an Indictment of Murder or Manslaughter ought to have expressly a Stroke supposed, viz. *Tals Die & Anno Felonice & ex Malitia sua Præcogitata Interfecit & Murdrum &c.* without saying *Percussit* — 5 Rep. 122. b. cites S. C. that such Indictment without *Percussit* is not good; For such Indictment ought expressly to have a Stroke to be supposed. And the Court held this to be true in all Indictments of Murder or Manslaughter, unless in the Case of *Poysoning*. And is was there resolved, That an Indictment may say *Percussit* as well of a Stroke given out of a Gun or Bow, as with a Hand Mich. 2 Jac. B. R. in Long's Case — And cites 10 E. 4. S. P. And *ibid.* 123. a. the Reporter says he had seen several Precedents where the Stroke was given by a Bullet out of a Gun, or by an Arrow out of a Bow, and that all of them had the Word *Percussit*.—An Indictment was *Quod &c. Percussit*, and did not say *Felonice Percussit*, and Exception being taken thereto, the Court were clear of Opinion, that the Indictment was insufficient for omitting (*Felonice*) and the same is not supplied by the Word *Murdravit*, and that the Case in D. 68. pl. 28. 5 E. 6. [supra] is not Law. Buls. 95. Mich. 3 Jac. Penruddock and Lanxord's Case.

2. Exceptions were taken to an Indictment, because it was said to be taken *Coram Coronatore in Comitatu præd.* and does not say *Coronatore Comitatus præd.* sed non allocatur. For by reasonable Intendment it shall be taken to be the Coroner of the County.— 2. Because it does not say, That *the Deceased was in Pace Dei & Domine Regine*; sed non allocatur. For those are only Words to amplify the Heinousness of the Act, and are not of Substance, and perhaps he was not in the Peace, but Fighting and breaking the Peace; and many Precedents were shewn where those Words were omitted.— 3. Because it was *Felonice percussit, & dedit eidem* (the deceased) *ad tunc & ibidem* unam Plagam &c. but did not say *Felonice*, nor *Ex Malitia sua Præcogitata dedit &c.* sed non allocatur. For the Conjunction (*Et*) couples the Sentences together, so that the Words (*Felonice & ex Malitia sua præcogitata*) mentioned before refer to all the subsequent Words, and avoids Tautology; Besides, the Words (*ad tunc & ibidem*) makes it clear, that all was done at one and the same Instant.— 5. Because it was said, That *Tempore Felonie & Murdræ prædictæ.* where it should be *Murdræ*; sed non allocatur. For *Tempore Feloniæ præd.* had been sufficient without saying *Murdræ*, and the Addition shall not hurt; because *Murdræ* is an insensible Word, and so no Contrariety appears, and Surplusage never hurts but when it is repugnant or contrariant to the Matter precedent or subsequent.— 6. Because *the Wound was given the 4th Day of August, and the Death was the 19th of December next ensuing &c.* the Indictment was, That the Offenders *Tempore Feloniæ & Murdræ præd. fact. viz. 4th Augusti &c. Feloniæ fuerunt præsentēs &c. ad Feloniam & Murdrum Præd. in forma Prædictæ. faciend.* In answer to which it was urged, that the Death shall have relation to the Stroke; for the Death is but in a Manner the Execution of the Felony. But the whole Court held e contra, and said, That they had often adjudged Indictments insufficient when the Stroke is one Day and the Death on another; But said, that in the Case at Bar the Indictment should have been, That the said Persons present and abetting, *fuerunt Præsentēs & Auxiliantes &c. ad Feloniam & Murdrum in forma prædictæ. faciend.* And it was further urged in Maintenance of the Indictment, That the Office of the Jury is to find *Veritatem Facti*, and of the Judges to declare *Veritatem Juris*; and that the Jury having found the whole Circumstance and Truth of the Fact, tho' they take upon themselves the Office of Judges also to determine when and at what Time the Felony was done, this shall not vitiate that which they have found sufficiently and certainly; For in all Cases where a Jury find a Matter, with which they are charged, at large, and conclude over against Law, the Verdict is good, and the Conclusion ill. And further it was urged in Maintenance of the Indictment, that it sets forth, that they all assaulted the Deceased feloniously, and of Malice prepenſe, and then tho' one only gave the Stroke, yet all are guilty of the Murder, it appearing by the Connection of all parts of the Indictment, that all were present. But the Court on Conference with the other Justices held the 6th Exception repugnant and

and insufficient as to the Persons present; For till the Death no Felony was committed, and none shall be adjudged Felons by Relation, which is only a Fiction of Law. But Wray said, That the Year to bring the Appeal shall be computed from the Death, and not from the Stroke, and that so was the common Experience of B. R. and that the Law was so without Question, contrary to the Opinion of Stamford. But it was resolved, that to conclude that *he did the Murder the last Day was sufficient*; tho' the better Form is to conclude that he did the Murder *Modo & Forma supradicti*. 2. It was resolved, That the Clause of *Præsentis Auxiliantes &c.* was necessary, and the Indictment had been insufficient without it; For it shall not be maintained by Argument or Implication, nor supply'd by Intendment, and that as to this 2d Point, it was so resolved in **Hilborn's Case**. Pasch. 1. Jac. B. R. and because the Indictment wanted the said Clause, he and divers others were discharged. 4 Rep. 41 a. to 42. b. Trin. 28 Eliz. B. R. Heydon's Case.

3. Indictment was alleged to be taken *at C. infra Libertatem Domine Regine Ville sue de C.* but did not set forth whether the Vill of C. was within the Liberty of C. Exception being taken thereupon the Court resolved that it was sufficient. For if an Indictment has a *certain Intent in general* it is enough. 5 Rep. 120. a. 121. a. Mich. 2 Jac. B. R. Long's Case.—And Popham said, that S. P. was resolved in the Case of the Rape of Lewes in Suffex. Ibid.

* The Word *Vulnus* was objected to, and urged, that it ought not to be used in Indictments, any more than *ictus*, but that it ought to have been *Unam Plagam*. But the whole Court disallowed the Exception; For *Plaga & Vulnus* are synonymous, tho' *Plaga* is the more usual Word in Indictments. Ibid. 121. b

4. The Indictment was *dans &c. unum* Vulnus Mortale in & super Anterionem Partem Corporis ipsius H. L. subter Sinistram Mamillam &c.* which Word (*Mamillam*) with a single (m) was objected to as insensible, and that it should be (*Mammillam*) with a double (m) But resolved, the false Latin shall not quash Indictments; however, *Mamilla* is as good Latin as *Mammilla*. 5 Rep. 121. a. b. Long's Case.

* S. P. was resolved. 4 Rep. 42. Trin. 28 Eliz. B. R. in Heydon's Case, where the Pann of the Knee was cut wholly off, and that so it is if a Man's Head be cut off, the Profundity or Latitude of the Wound shall not be shewn.

5. Another Exception was taken for *not shewing the Longitude or Profundity* of the Wound. But this was disallowed by the whole Court; For the Longitude and Profundity ought to be alleged to the Intent it may appear to the Court, that the Wound was mortal, and so the Cause of his Death; but in this Case the Bullet went thro' his Body, so that it was *apparent to be mortal*; and in some Cases the Dimensions * cannot be alleged, as when a Hand, Foot &c. are cut off. 4 Rep. 121. b. 122. a. Long's Case.

6. Another Exception was taken, because the Indictment was *Dans &c. cum Pulvere & Pelletto plumbeo Prædicti. &c. Vulnus Mortale &c. totaliter Penetrans in & per Corpus &c.* which it was insisted could not be; For that *Penetrans* agrees with *Vulnus*, and not with *Pelletto*; for then it should be *Penetrante* in the Ablative Case; sed non allocatur, the Sense and Words being significant, and such as are used by the Lay-Gents. 5 Rep. 122. a. Long's Case.

* See in the Notes at pl. 1.

7. Another Exception was, that the Indictment wanted the Word * *Perussit*. The Words of the Indictment as to this Purpose were, viz. *Prædictus H. D. quoddam Tormentum &c. cum Pulvere & Pelletto plumbeo onerat. &c. in & super ipsum H. L. exoneravit dans eidem H. L. adtunc & ibidem cum Pelletto Plumbeo præd. extra Tormentum præd. per ipsum emissit unum Vulnus Mortale &c.* It was resolved per tot. Cur. that for this Cause the Indictment was insufficient. For the Clause before *Dans eidem &c.* was not sufficient of itself; For tho' H. D. discharged the Gun upon him, yet it may be that he did not strike him by it. And as to the 2d. Clause of *Dans eidem &c.* that cannot make it good; For the Clause *Dans &c.* depends

pend upon the first Clause, describes only the Stroke to shew it to be mortal, which ought to appear by the first Sentence to be given, which it does not, or that any Stroke was given; For (Dans) is a Participle depending upon the Verb Precedent, and that is (Exoneravit) and Exoneravit may be without any Percussion. 5 Rep. 122. a. b. Long's Case.

8. A. was indicted of Manslaughter, and after of Murder; The Indictment was, That *Adtunc & ibidem in Sinistra Parte Collis Percussit*, whereas it should have been (*Colli*) The Court held, that for this Reason the Indictment was not good. Bull. 109. Pasch. 9 Jac. B. R. the King v. Lemman.

9. If the Offender is outlawed upon a Faulty Indictment before the Coroners, as where the Indictment was (*Collis*) for (*Colli*) Exception cannot be taken to the Indictment, and he has no other Remedy but a Writ of Error, and that is his right Course Bull. 109. the King v. Lemman.

10. Exceptions were taken to an Indictment, setting forth the *Assault and Battery* to be on the 12th of February at O. and that he gave him a Blow on the right Side, viz. *Dans eadem A. unam Plagam Mortalem & adtunc & ibidem*, but without shewing any time certain when this Blow was given.—As to this Williams J. said, that here is * no Place laid where the Stroke was given, and for this Omission the Indictment is not good; For that ought to be certainly laid, and that so is Long's Case. 5 Rep. 120, 121. for he may assault him at one Place, and give the Stroke in another, as in *Lacy's Case*. 2 Rep. 49. put in *Bingham's Case*. And Croke J. said, that as to the point of time, the Words *Adtunc & ibidem* refers to all the whole Sentence—2. That A. being thus struck *Languebat a Duodecimo Die Febr. usque ad 13 Diem Febr.* so that the Word (*a*) excludes the 12th Day, and (*usque ad*) excludes the 13th Day, and so no Day at all.—3. *Quo quidem 13 Die Februarii inter Horas quartam & quintam obiit*, which was said to be insufficient, being an Impossibility.—As to the 3d Yelverton said, that there ought to be a perfect Hour between them, being laid to *Inter Horas &c. ejusdem Diei*, and that it is not good. Williams J. held, that in Case of Indictments such Exception is not allowable as to the Uncertainty of the Hour, tho' otherwise in Case of Appeals by the Statute of Gloucester 6 E. 1. cap. 9. so that the Exception as to the Hour is not good. Croke J. held, that by the Words (*Inter Horas*) there is a Distinction of time denoted, as Time past, and Time to come, and that here it is said, that he killed him the 13th Day, which cannot be as it is laid, and so it is a Fault incurable.—4. Because it is said; *And so the said C. did kill and murder the said A.*—It was said by Williams J. and agreed by the whole Court, that the Indictment is not good, but it ought to have concluded, *And so he killed him Modo & Forma prout*; And the Court held the Indictment insufficient for those Exceptions and quashed it. Bull. 203. Pasch. 10 Jac. the King v. Clarke.

11. An Exception was taken to an Indictment, because it was *A Sessione Justiciariorum*, and doth not shew what Sessions this was, and by this Omission it is not certain to the Court, whether they had any Authority or not. Bull. 203. Pasch. 10 Jac. Anon.

12. So where it was, That *Eo Ictu instanter obiit*, it is uncertain, and the Indictment not good. Ibid. 204.

13. So where it was *Eo Ictu dedit* to the Party killed *unam Plagam Mortalem*, but no Place [*part of the Body*] expressed where this was, nor the * *Length or Breadth* of the Wound set down. And the whole Court were clear of Opinion, that for these Exceptions the Indictment was not good, and so they quash'd it. Ibid. 204.

Pectus, and Exception was taken to it for the Uncertainty; Because it might be in the Neck, or the Arm, or the Belly, and that Indictments ought to express certainly in what Part the mortal Wound is, as the Profundity and Latitude of it, that it may appear to the Court to be mortal; And because it said, That *Obiit de Fuchervilus Prædictis*, (the Indictment having mentioned several Wounds before) and one of

So where it was, That *Quodam Gladio Percussit*, but the Time not specified, nor the Place, and for this and other Exceptions the Indictment was quashed.

Bull. 203.

Pasch. 10

Jac. Anon.

* S. P. Ibid in an anonymous Case there

The Indictment was, That he gave the Deceased *Unam Plagam mortalem in inter*

them is uncertainly alleged, this makes the Indictment insufficient as to all; Quod fuit confessum per tot. Cur. 4 Rep. 40. b. Trin. 28 Eliz. Young's Case.

But where the Indictment was, That he struck the Deceased *In Sinistra Parte Ventris circa Umbilicum*, it was retolved per tot. Cur. that the Indictment was good enough; For (In Sinistra Parte Ventris) is of it self certain and sufficient, and the Words (*Circa Umbilicum*) which were uncertain were *surplusage*. But the Case of *Bong* was affirmed to be good Law; For that *had no Certainty before the Circiter*. 4 Rep. 41. a. Trin. 41 Eliz. B. R. Walker's Case.

So where the Indictment laid the Stroke to be *Super Sinistram Partem Lateris &c.* an Exception was taken that it was uncertain by *not shewing in what Part*. But the Court held it to be certain enough; For *Latus is a Place known*. Cro. J. 95. Mich. 3 Jac. B. R. Hall's Case.

* Where it was that she died *de Diversis Plagis*, but does not shew of what Length or Breadth the Wounds were, nor of which of the Wounds she died, and so it is uncertain, and cannot be known whether the Wounds were mortal or not, the Indictment was quashed. Sty. 76. Hill. 25 Car. the King v. Savage. — See pl. 5.

14. In an Indictment of *Manslaughter* the Words *Ex Malitia sua Præcogitata*, which were in a former Indictment of Murder, *must be omitted*. Roll. R. 407. Trin. 14 Jac. B. R. the King v. Sir M. Carew & al.

* So it is in the Original but seems misprinted, for (insufficient.)

15. The Indictment was, that the Defendant *apud W. in Com. S. Insultum fecit & quod ibidem habuit & tenuit a certain Sword in his Right Hand and prædict. the deceased percussit*, and does not say, *Ibidem percussit*, and therefore naught; For it is not a necessary Intendment that the Percussion was at the same Place; and the Indictment further was, *wherof instanter obiit* which is not certain but *Argumentative only*, that he died in the same Place; and for these Reasons, and because it was Body for Body the Indictment was * sufficient. Het. 35. Mich. 3 Car. Gooderidge's Case.

16. The Indictment did not shew on what Part of the Body particularly the Person was wounded, but says only generally, that it was upon the hinder Parts of her Body; the Indictment was quashed. Sty. 76. Hill. 23 Car. The King v. Savage.

17. In an Indictment of Manslaughter it is necessary to say, that he did it *Voluntarily*; tho' if the Fact be found it shall be intended to be done Voluntarily by Reason of Man's being a free Agent, so that what he does must be intended to be done Voluntarily if the Contrary does not appear. 12 Mod. 628. Hill. 13 W. 3. by Holt Ch. J. in delivering the Opinion of the Court in the Case of the King v. Plummer.

(X) Bill found and Verdict How, and Proceedings and Judgments.

1. IF a Man is arraigned of Murder and found Not Guilty, but that he is Guilty of Homicide or Manslaughter of the same Person, he shall be hanged; For this is a good Verdict; For in Murder is comprised Manslaughter, and so it was adjudged in B. R. and in a Case in the Marches of Wales, which was agreed by all the Justices in the Time of H. 8. Br. Corone. pl. 221.

Roll. R. 407. S. C. & P. and that the Course is to make a new Indictment upon such finding, and to leave out the Words *Ex malitia sua præcogitata* in the new Indictment.

2. Upon an Indictment of Murder against A. and B. the Grand Jury found *Billa vera as to A. and Manslaughter as to B.* and Coke Ch. J. said, that this is possible so to be, and it may be good; and it was so held per tot. Cur. And Coke said, that the best way is to have a new Indictment against B. and this to be for Manslaughter; For this finding of the Jury cannot be so indorsed upon this Indictment, and it is best to have several Indictments against them; Doderidge J. said that in one Indictment this may be specially so set down and well enough; Coke and the Rest of the Judges said, that they could not proceed against B. upon this Indorsement, but upon a new Indictment, and a Rule of Court was made to draw a new Indictment against B. and he was bailed. 3 Bals. 206. Trin. 14 Jac. The King v. Cary.

3. It has been adjudged that if the Jury on an Indictment, or Appeal of Murder, find the Defendant guilty of Manslaughter without saying any thing expressly as to the Murder, it is insufficient and void, as being only a Verdict for part; and Serjeant Hawkins says, Quære if the Law be not the same where the Jury upon such an Indictment, find that the Defendant killed the Deceased *Se defendendo*, or *Per Infortunium*, and do not expressly find that he did not Murder him, according to the Generality of the ancient Authorities. 2 Hawk. Pl. C. 440. cap. 47. S. 5.

(Y) Tried; where.

1. **A** PPEAL was brought of striking in one County of which he died in another County, and it was tryed by both Counties; but it was said that the Indictment shall be taken in the one County only. Br. Corone. pl. 140. It is said by some, that the Death of one who died in one County of the

Wound given in another, was not indictable at all at Common Law, because the Offence was not compleat in either County, and the Jury could inquire only of what happened in their own County. But it has been holden by others, that if the Corps were carried into the County where the Stroke was given, the whole might be inquired of by a Jury of the same County; and it is agreed, that an Appeal might be brought in either County, and the Fact tried by a Jury returned jointly from each; and at this Day by Force of 2 & 3 Ed. 6. 24 the whole is triable by a Jury of the County wherein the Death shall happen on an Indictment found, or Appeal brought, in the same County. Hawk. Pl. C. 79, 80. cap. 31. S. 13.

For more of Murder in General See **Accessory**, **Appeal**, and other proper Titles.

Mute.

(A) Punishment thereof by *Paine fort et dure*, or otherwise in what Cases, by the Common Law, or by Statute *Westm. 1. 3 E. 1. cap. 12.*

1. **W**ESTM. 1. 3 E. 1. cap. 12. Provides that Notorious * Felons, and * This Statute extends which † openly be of evil Name and ‡ will not put themselves in Enquests of Felonies that Men charge them with before the Justices || at the King's Suit shall have ** strong and hard Imprisonment, as they which refuse to stand to the Common Law of the Land. But this is not to be understood of such Prisoners as be taken of †† light Suspicion. not to ¶ Treason which is the Highest Offence, nor to ¶¶ Petit Larceny,

which is of all Felonies the lowest; but it extends to † Women as well as to Men, and so it appears by divers ancient and late Precedents, and to that end is the general Word Felons used. 2 Inst. 177.—¶ Portman Ch. J. said that in his Time all the Justices agreed, that he who stands Mute in Case of Treason shall not be put to Penance, and therefore it seems that he shall be drawn and hanged. Br. Pain, pl. 19.—Serjeant Hawkins says, it is clearly settled at this Day, that standing Mute upon Arraignment of High Treason is equivalent to a Conviction by Verdict, or Confession, and consequently subjects the Criminal to the same kind of Judgment and Execution, as such a Conviction would do. 2 Hawk. Pl. C. 329. cap. 30. S. 9.—S. P. Co. Litt. 391. a.—S. P. D. 205. pl. 4 Mich. 3 & 4 Eliz.—S. P. Jenk. 223. pl. 81.—¶¶ If a Man appear to stand obstinately Mute in Petit Larceny, he shall have the like Judgment &c. as if he had confessed the Indictment. 2 Hawk. Pl. C. 329. cap. 30. S. 10.—† S. P. 2 Hawk. Pl. C. 331. cap. 30. S. 17.

† The Matter must be evident or probable, which it is the Judge's Duty to look unto. 2 Inst. 177.—S. P. cited by Serjeant Hawkins, and that Sir William Staundford says, that there ought to be evident

or probable Matter to convince the Party of the Crime whereof he is arraigned, or otherwise that he be a notorious Felon, or openly of bad Fame, and therefore he *advifes the Judge, for the Satisfaction of his Statute* and discharge of his Duty, *to Examine the Evidence which proves the Prisoner guilty of the Fact before he proceed to the Judgment of Paine fort et dure*; yet the Serjeant says he cannot find any Book which takes Notice of any Examination of this Kind; or of any Entry, that the Defendant appeared to be a Notorious Felon before such Judgment given against him upon his standing Mute, whether upon an Indictment or Appeal, but all the Books cited [there] in the Margin seem to intimate, that the standing Mute is of it self a sufficient Ground for such Judgment; yet all that can be inferred from thence seems to be this, that it is not necessary to make any thing of this Kind part of the Record, it being a Matter left to the Discretion and Conscience of the Judge, and to be presumed where it is not expressed. But as to all capital Appeals whatsoever, and all Indictments and Appeals of Petit Treason, perhaps it may be said, that not being within this Statute, but remaining as they were at Common Law, the obstinacy of a Criminal in standing Mute to them may be of it self without more a sufficient Inducement to a Judge to award him to his Penance; but considering those Appeals and Indictments are within the same Reason with those mentioned in the Statute, and it is uncertain how the Common Law stood in relation to these Matters, as appears by the best Authors differing among themselves concerning them, and seeing the Method prescribed by the Statute is very just and equitable, it seems prudent at least in the Judge to observe the same Rules in all Cases of this kind. 2 Hawk. Pl. C. 330. cap. 30. S. 14.

‡ The Act speaks only of Indictments at the Suit of the King; but the Judgment of Paine fort & dure was at the Common Law, both in Appeals and Indictments. 2 Inst. 177.

¶ This Act extends not to the Suit of the Party by * Appeal, because as said before the Judgment of Paine fort & dure was at the Common Law both in Appeal and Indictment.—* S. P. Jenk. 223. pl. 87.

** Some hold from these Words, that the Punishment of Paine fort & dure was given by this Act; others held that at the Common Law for Felony the Prisoner standing Mute should upon a Nihil dicit be hang'd, as at this Day it is in Case of High-Treason, and as they say, in Case of Appeal; Others held, that at Common Law in Favour of Life, he should neither have Paine fort & dure, nor have Judgment to be hang'd, but to be remanded to Prison until he would answer. 2 Inst. 1-8. But in answer thereto Lord Coke, after describing the Severity of the Punishment, observes, that the Party upon the Matter dies three manner of Ways, viz. Onere; Fame, and Frigore; by Weight, Famine, and Cold; and that the Reason of this terrible Judgment is given by the Statute, viz. Because he *refuses to stand to the Common Law of the Land, i. e. lawful and due Trial according to Law*, and therefore his Punishment is more severe, lasting and grievous without Comparison than it should have been for the Offence of Felony it self; and the Felony it self cannot be adjudged without Answer; and denies all those other Opinions. And as to the first he holds that this Punishment was not first instituted by this Act; For that no Court or Judges could upon those Words (have strong and hard Imprisonment) frame such a Judgment consisting of so many divers Particulars; and hence it necessarily follows that this Punishment, because it was to be done in Prison, was before this Act, but sufficiently signified (as ever since it hath been) by those two Epithets *Fort & dure*; so as this Act setteth forth the Quality of this Judgment, and not the Judgment it self. 2d. This Act describes what Persons shall be punished by Paine fort & dure, viz. Notorious Felons, and which are openly of ill Fame, but sets not down (as has been said) what the Punishment is, but provides that it shall not be for light Suspicion. 3d. All Books that held with great Authority, that in Case of Appeal the Prisoner standing Mute shall have Judgment of Paine fort & dure, do prove that such Judgment was before the making this Act; For this Statute extends not to Appeals, which are the Suit of the Subject, but only to the Suit of the King, which is by way of Indictment; and herein the Words of *Fleta* are very remarkable, *si autem Appellatus nihil respondere velit &c. & Appellans inde petierit Judicium, indefensus remanebit, morti tamen non condemnabitur, sed Galea committetur &c.* and there sets down the Penance, which of Necessity must be at the Common Law; and herewith agreeth *Britton*, who wrote soon after this Act; so as the Penance in Case of Appeal is both by ancient and sound Authority. And as to the second Opinion, the Answer to the first Answers this also, and if he should be hang'd by the Common Law, this Statute does not take it away, but ordains, that he should have strong and hard Imprisonment, and therefore that a Felon standing Mute may according to their Opinions be hang'd at this Day is contrary to all the Books and constant and continual Experience. As to the third, it would be entertaining too mean an Opinion of the Common Law should it so far encourage Felons that they by their Contumacy against it should suffer one of the lowest Punishments, viz. Imprisonment till they would answer; and the Answer to the first Opinion is likewise so to this. 2 Inst. 178, 179.

†† Serjeant Hawkins says, that he does not find it said in any Book, what shall be done to a Person who obstinately standing Mute to an Arraignment shall appear to be charged upon very light Suspicion; but says he takes it for granted, that he may be severely fined and imprisoned for the Contempt. 2 Hawk. Pl. C. 330. cap. 30. S. 15.

Br. Corone. pl. 43. cites S. C. but if it had been at the Suit of the King
2. In Appeal at the Suit of the Party, the Defendant stood Mute, and it was found by Inquest that it was for Malice, by which he was hang'd pro non Defendendo, and not put to Penance; quod nota; Quære. Br. Pain, pl. 8. cites 21 E. 3. 18.

he should have been put to Penance; quod nota Diversity between Appeal and Arraignment upon Indictment at the Suit of the King.—Br. Appeal, pl. 40. cites S. C. acc.

In Appeal of Death the Defendant was taken, and would not speak; by which Inquest of Office was taken and charged if he could speak the same Day, who said that he could; by which he was put to Penance; quod nota; as at the Suit of the King. Br. Pain. pl. 13. cites 43 Ass. 30.—Br. Corone. pl. 123. cites S. C.—So in Appeal of Robbery. Br. Appeal, pl. 24. cites 8 H. 4. 1. 2.

It is holden by Sir Matthew Hale that an Appellee of Felony standing Mute shall not have Judgment of Penance, but to be hang'd, but this is made a Quære in Staundford and Brooke, and the contrary Opinion seems to be favoured by Sir Edward Coke, and is expressly holden by Kelynge and sup-

ported by several Resolutions in the Old Books; whereas the Year Book of 21 E. 3. seems to be the only Resolution in favour of the other side; to which it may be answered, not only that three of the above Resolutions to the contrary are much later, but also that the Appellee in this Case appears to have been taken with the Manner, which probably might be a Circumstance of Considerable Weight in the Judgment. 2 Hawk. Pl. C. 329. cap. 30. S. 12.

3. If an * Appellor or † Approver stands Mute he shall be hang'd. Br. Pain. * Br. Corone, pl. 12. cites 26 Atl. 19. pl. 99. cites S. C.—† S.

P. Br. Corone, pl. 22. cites 8 H. 4. 3. by Reason of the Confession of the Felony before.

4. If a Man abjures the Realm, and after is taken and arraigned and stands Mute, he shall be put to Penance. Br. Pain, pl. 12. cites 26 Atl. 19. Br. Corone, pl. 99. cites S. C. acc.—

But Br. Pain, pl. 2. cites 8 H. 4. 3. contra, that he shall not be put to Penance, but shall be hang'd; For he was attainted of Felony before by his Confession.—Br. Corone, pl. 22. cites S. C.

5. See Pain of the Felon for refusing of the Law, and for not concluding of his Plea of Not Guilty ad Patriam; For when it was demanded of him how he would be tried, he said that he would be tried by God, Saint Mary, and Holy Church, and not otherwise, and therefore he was put to Penance. Br. Pain, pl. 14. cites 4 E. 4. 11. and * 7 E. 4. 29. accordingly; For if he will not conclude his Plea, Et de hoc ponit se super patriam, he shall be put to Penance. * Br. Corone, pl. 148. cites S. C.

6. In Appeal the Defendant pleaded Not Guilty and would not put himself upon the Country, and therefore he was put to Penance, as well as if he had been arraigned at the Suit of the King; quod nota. Br. Pain, pl. 13. Br. Peremptory, pl. 86. cites S. C. cites 14 E. 4. 7.

7. J. N. was arraigned of certain Felony and of making Money, who pleaded to all Not Guilty, and upon this Ven. fac. was awarded returnable Immediate, and the said J. N. challenged peremptorily 31 Jurors, by which the Jury remained for Default of Jurors, and 40 Tales were returned 2 Days after, and the Jury appeared, and he was commanded to keep his Challenge, and would not speak, by which 12 Men were charged upon him, and found him Guilty, wherefore he was hang'd, because he pleaded Not Guilty before; quod nota bene. Br. Corone, pl. 51. cites 15 E. 4. 33. Br. Pain, pl. 9. cites S. C.

8. If a Man Challenges above 36 Jurors in Appeal, he shall be put to Penance, by all the Justices; Keble e contra, and that the Statute of Westm. 1. cap. 12. Mentions at the Suit of the King. Br. Pain, pl. 4. cites 3 H. 7. 2. Br. Pain, pl. 5. cites 3 H. 7. 12. contra, that he shall be hang'd and not put to Penance; quod nota; by the Justices of both Benches ——— Serjeant Hawkins says this Point seems to be holden in the second Institute and also in the later Part of Sir Matthew Hales Pleas of the Crown, but says this very Point is made a Quere in another Part of Hales Pleas of the Crown, and also in Kelynge, and the Contrary is holden in the third Institute; neither does it seem easy to assign a Reason, why he who Challenges more Jurors than he ought, shall, in respect of an Implied Refusal of a legal Trial, be thought worthy of a greater Punishment than he who obstinately, directly and expressly refuses it; to which may be added that there seems to be but one full Authority in the Old Books for the Maintenance of this Opinion [which is this of 3 H. 7. 12.] whereas there is a great Number of the other Side. 2 Hawk. Pl. C. 327. cap. 30. S. 3.

9. T. being indicted for Robbery refused to plead, and his two Thumbs were tied together with Whipcord that the Pain of that might compel him to plead, and he was sent away so ty'd and the Minister prevailed on to go to him to persuade him; and an Hour after he was brought again and pleaded. And this was said to be the constant Practice at Newgate. Kel. Hawkins says it is said to be 27. 14 Octob. 14 Car. 2. Thorely's Case. S. C. cited 2 Hawk. Pl. C. 331. cap. 30. S. 18. And Serjeant Hawkins says it is said to be

the constant Practice not to proceed to the Judgment and Penance before all Methods of persuading him to plead are found ineffectual.

(B) *The Manner of the Punishment by Pain fort et dure.*

Br. Appeal, pl. 24. cites 8 H. 4. 1. 2. —† 2 Inst. 178. is that their Head and Feet be uncovered — || Orig. (Velt.) — ¶ So that their Heads touch not the Ground, and that they have no Sustenance but Rye Bread &c. Per Fro-wicke Ch. J. Diet till he be Dead. Quod Nota. Br. Corone, pl. 160. cites 14 E. 4. 8. Kelw. 70.

1. **A** P P E A L at Newgate before the Justices of Gaol-Delivery, the Defendant pleaded Not Guilty, and would not put himself upon the County, by which he was put to Penance, and the Judgment was, That he shall be *remanded to the Prison* where he was before, and after he shall be put into a Chamber, and there shall be *naked without Litter, Ruffes or Cloaths*, or other Thing but the bare Ground, and then he shall be laid upon his Back naked, without anything about him, saving a Cloth to cover his Members, and that his † Head and his Feet be || covered, and that the one Arm be drawn to the one Quarter of the Chamber with a Cord, and the other Arm to another Quarter &c. and that the one Foot shall be drawn to the one Quarter of the Chamber, and the other Foot to the other Quarter &c. And that a Piece of Iron shall be put upon his Body as much as he can suffer and bear upon him and more, and the ¶ first Day he shall have three Morsels of Bread made of Barley, without any Drink, and the second Day he shall drink as much as he can at three Times, of Water which is next to the Door of the Prison, except running Water, without any Bread, and this shall be his Diet till he be Dead. Quod Nota. Br. Corone, pl. 160. cites 14 E. 4. 8.

pl. 4. — Serjeant Hawkins says, that the Manner of inflicting this Punishment may be best found from the Books of Entries and other Law Books, all of which generally agree, that the Prisoner shall be remanded to the Place from whence he came, and put into some low dark Room, and there laid on his Back without any manner of Covering except for the Privy Parts, and that as many Weights be laid upon him as he can bear and more, and that he shall have no manner of Sustenance but the worst Bread and Water, and that he shall not Eat the same Day in which he Drinks, nor Drink the same Day on which he Eats, and that he shall so continue till he die. But that it is said that anciently the Judgment was not that he should so continue until he should die, but until he should answer, and that he might save himself from the Penance by putting himself upon his Trial, which he cannot do at this Day after the Judgment of Penance once given. 2 Hawk. Pl. C. 330. cap. 30. S. 16. — And there in the Margin, the Serjeant, as to the (*remanding him to the Place whence he came*) cites H. P. C. 227. S. P. C. 150. (E) Keilw. 70. a. 4 E. 4. 11. pl. 18. 14 E. 4. 8. pl. 17. Abr. Br. Corone. 160. 2 Inst. 178. Ra. Ent. 385. pl. 17. 8 H. 4. 1. pl. 2. — And as to the Words (*in some low dark Room*). He says, that this Clause is omitted in Keilw. 70. a. 4 E. 4. 11. pl. 18. But is mentioned in all the other Books above cited, but with this Difference, that 14 E. 4. 11. pl. 17. says only that he shall be put in a Chamber, without adding that it shall be low or dark. — And as to the Words (*there laid on his Back &c.*) He says, that in this all the Books above cited seem to agree. And 14 E. 4. 8. pl. 17. and S. P. C. 150. (E) and 2 Inst. 178. add, that he shall lie without any Litter or other Thing under him, and that one Arm shall be drawn to one Quarter of the Room with a Cord, and the other to another, and that his Feet shall be used in the same Manner. But that these Clauses are wholly omitted in all the other Books above cited except H. P. C. which takes notice of the later of them only. And Ra. Ent. 385. pl. 2. adds, That an Hole shall be made for the Head. And Keilw. 70. a. says, That the Head shall not touch the Earth; but none of the other mention either of these Clauses. — And as to the Words (*that as many Weights shall be laid upon him as he can bear and more &c.*) He says, that in this all the Books above cited agree. — And as to the Word (*Bread*) He says, that in 14 E. 4. 8. pl. 17. S. P. C. 150. (E) and 2 Inst. 178. are, That he shall have three Morsels of Barley Bread a Day. Keilw. 70. a. that he shall have only Rye Bread, and Ra. Ent. 385. pl. 2. and 2 H. 4. 1. pl. 2. generally that he shall have of the worst Bread. — And as to the Word (*Water*) he says, that in 14 E. 4. 8. pl. 17. S. P. C. 150. (E) 2 Inst. 178. & 8 H. 4. 1. pl. 2. & Keilw. 70. a. are, That he shall have the Water next the Prison so that it be not current; but Ra. Ent. 385. pl. 5. is general, That he shall have the worst Water. — And as to the Words (*not Eat the same Day in which he Drinks, nor Drink the same Day on which he Eats &c.*) He says, this is omitted in Keilw. 70. a. and in 8 H. 4. 1. pl. 2. — And as to the Words (*till he die*) he says, This is omitted in none of the Books above cited, except 14 E. * 5. 11. & H. P. C. 227. but that neither of those Books give the whole Judgment at large. Hawk. Pl. C. 330. 331. cap. 30. — * This seems to be misprinted and should be 4.

(C) *Avoided*

(C) Punishment *avoided* by Pleading, *at what Time.*

1. **A**nciently the Judgment was not that he should be pressed till he died, but *until he should answer*; and he might save himself from the Penance by putting himself on his Trial, which he cannot do at this Day after the Judgment of Penance is once given. 2 Hawk. Pl. C. 331. cap. 30. S. 16. But we have had a late Instance of one who was actually under this Punishment R. S. L. 199.
- of Peine fort & dure, and yet afterwards admitted to plead. 3

(D) *What shall be said to be standing Mute.*

1. **W**HERE a Man pleads *Not Guilty*, and after stands mute before Trial, it is as if no Answer had been given. Br. Pain, pl. 2. cites 8 H. 4. 3.

2. *Contrary upon Confession*; For this Countervails Verdict. Ibid.

It seems clear that

after a Man hath confess'd himself Guilty, or * pleaded, and put himself upon his Country, he shall not afterwards be demeaned as one that stands mute, in respect of his subsequent Silence; But the Jury shall be charged, and the Trial shall proceed, and the like Judgment shall be given as in Common Cases. 2 Hawk. Pl. C. 327. cap. 30. S. 4.—* Kel. 36. S. P.

3. A Man may stand mute two manner of Ways; First, when he stands mute *without speaking of any thing*, and then it shall be inquired, whether he stood mute *of Malice or by the Act of God*; and if it be found that it was by the Act of God, then the Judges of the Court (who are ever to be of Council with the Prisoner to give him Law and Justice) ex Officio ought to inquire whether he be the same Person and of all other Pleas which he might have pleaded, if he had not stood mute. 2 Inst. 177, 178.

4. And note well the abovefaid Words of our Books; [whether of Malice or by the Act of God] for it may be, the Prisoner in Truth cannot speak, and yet being not mute by the Act of God he shall be forthwith but to his Penance; as if the *Delinquent cut out his own Tongue* and thereby become mute. 2 Inst. 178.

5. Another Kind of Mute is, when the Prisoner can speak, and perhaps *pleads not Guilty* or pleads a Plea in Law, and will not conclude to the Inquest according to the Act of 3 E. 1. cap. 12. or speaks much, but *does not directly answer* &c. For Idem est nihil dicere & insufficienter dicere: To be short, when in the End he will not put himself upon the Inquest; that is, De Bono & Malo to be tried by God and the Country, then that Act is sufficient Warrant, if the Cause be evident or probable, to put him to his Penance; but if he * *demurs in Law*, and it be adjudged against him he shall have Judgment to be hanged: And tho' by his Demurrer he refuse to put himself upon the Inquest according to the Letter of that Act, yet forasmuch as he is out of the Reason of that Act, for that he refuseth not the Trial of the Common Law, the Demurrer being allowed to him by Law, and to be tried by the Judges, he shall not be put to his Penance, but have Judgment to be hanged; 2 Inst. 178.

He who answers impertinently or ineffectually, or refuses to put himself upon his Trial as the Law directs, may as properly be said to stand mute, as he who makes no Answer at all; as

where a Man *refuses to plead a Plea in Chief, or the General Issue*, but insists on some frivolous Defence, or even to plead a good Dilatory Plea, and refuses to plead over to the Felony, in which Case, after such a Plea is found against him, he shall not be admitted to plead in Chief, but shall be adjudged to his Penance in the same Manner as if he had made no Plea at all. And so shall he be who *pleads a good Plea in Chief, or the general Issue, but refuseth to put himself upon the Inquest*, (that is to be tried by God and his Country if a Commoner, or by God and his Peers if a Lord) or to wage Battle where such Trial is allowed. 2 Hawk. Pl. C. 326. cap. 30. S. 1.

* It is clear, that he who *demurs in Law* to an Indictment or Appeal shall not be esteemed to stand mute, nor to be dealt with as such, as having refused a Trial by his Country; For he puts himself upon a Trial by the Court which is the proper Trial of a Matter in Law. 2 Hawk. Pl. C. 327. cap. 30. S. 3.

(E) *Inquiry*

(E) *Inquiry* thereon. In what Cases, and of what, by what Jury, and How.

Br Appeal,
pl 24 cites
S. C.

1. **T**HE Defendant in Appeal stood mute, and it was *inquired* by Inquest of the Marshal's Servants and others, the Time *when he spoke*, and if he was mute for Malice to delay Death, or by Act of God, and if the Goods were the Plaintiff's at the Time of the Robbery, and if he was taken at the fresh Suit of the Plaintiff and all found against the Thief. And therefore he was adjudged to Penance to be preſ'd to death, and the Plaintiff restored. Br. Pain, pl. 1. cites 8 H. 4. 1.

But if a Felon
pleads Not
Guilty, and
the Justices
respite the
Execution for
Cause &c.

2. If a Man *abjures* the Realm, or is *outlawed* for Felony, and after is taken and brought to the Bar, it shall be demanded of him what he can say why he shall not be put to death, and if he stands mute, it shall be inquired if it is by Fraud or by Act of God. Br. Corone, pl. 155. cites 10 E. 4. 19. per Littleton.

and after he is brought before them, if he stands mute it shall not be inquired of him, but if he has Matter to discharge the Execution he ought to plead it at his Peril. Ibid.

And the Diversity is, because he has been always in their Prison, so that it appears that he is the same Person who was attainted; But *contra* of a Man *abjur'd* or *outlawed*, and therefore he may say that he is not the same Person; For it may be that another Person is taken for him. Ibid.

3. It seems agreed, That where a Prisoner wholly stands mute *without making any Answer at all*, the Court shall take an *Inquest of Office* by the Oath of any 12 Persons that happen to be present, whether he do so of Malice or by the Act of God. But after an Issue has been joined, if the Prisoner stand mute when the Jury are in Court, if there be any need for such Inquiry, it shall be made by them and not by an Inquest of Office. 2 Hawk. Pl. C. 327. cap. 30. S. 5.

4. Where a Man *answers*, but not *effectually*, it seems needless to make any Inquiry whether his Refusal be owing to his Malice or not, because it is apparent. 2 Hawk. Pl. C. 327. cap. 30. S. 6.

5. Where one stands mute *by the Act of God*, the Judges of the Court (who are always to be of Counsel with the Prisoner to see that he have Law and Justice) shall not only cause the Felony to be inquired of, but also whether the Prisoner be the same Person, and all other Matters which he might have pleaded in his Defence. And the Serjeant says such Inquiry shall be made as he supposes, *not by an Inquest of Office*, but by a Jury returned by the Sheriff, in the same Manner as if the Defendant had actually pleaded: For since it is no ways his Fault that he did not so plead, there is no Reason why his Trial should be in a more loose or summary Manner, or any way less regular or solemn than if he had. To which may be added, that Sir Matthew Hale says, "That the Felony shall be inquired of &c. in the same Manner as if the Prisoner had pleaded Not Guilty." From which Words it seems plain, the Inquiry ought to be by an Inquest returned by the Sheriff, as in other Trials at the Mife of the Parties, because if the Defendant had pleaded it must certainly have been so. And therefore it seems reasonable, that where Sir William Stamforde having spoken of such Inquiry adds immediately, that it is but an Inquest of Office, ought to be understood not of the Inquiry of the Felony whereof he had last spoken, but of the Inquiry whether the Prisoner stood mute of Malice or by the Act of God, whereof he had spoken in the Sentence next before. And I the rather incline to think that this is his Meaning, because the Books cited by him to this Point relate to this Inquiry only. 2 Hawk. Pl. C. 327, 328. cap. 30. S. 7.

But if a Per-
son so at-
tainted be
retaken after
an Escape or

6. It seems to be settled at this Day, That where one who is attainted either by Judgment on a Verdict, or Confession, or by Outlawry, or Abjuration, it stands mute to the Demand why Execution should not go against him, he shall not be awarded to his Penance but to the same Kind of Execution

Execution, if any, that would have been awarded if he had stood mute; Yet there seems to be this *difference*, that where *one who has always continued in Prison after an Attainder* by Verdict or Confession, stands mute to the Demand why Execution should not go, it shall be awarded against him without any Inquiry whether he stands mute by Malice or otherwise, or whether he be the same Person who is so attainted or not, because it sufficiently appears that he is the same Person, and that is sufficient to justify an Award of Execution against him, where nothing appears to the contrary. 2 Hawk. Pl. C. 328. cap. 30. S. 8.

inquired whether he stand mute of Malice or of the Act of God; and if it be found of Malice, it seems that Execution shall be awarded without any farther Inquiry; but if it be found to be the Act of God, it seems that it ought also to be inquired whether he be the same Person or not, in the same Manner as where one stands mute by the Act of God when first brought upon his Trial. 2 Hawk. Pl. C. 328. cap. 30. S. 8.

* A Felon, that had pleaded to Issue and abjured, shew'd for Cause why Execution should not go against him, that he was *drawn out of the Church of B. and pray'd to be restored*; the King's Attorney travers'd it, and at the Return of Venire Facias he stood mute, and was Hang'd; but first it was inquired if he was drawn out of Sanctuary, who said that he was not, and then the same Inquest inquired of the Covin, which was found. Br. Corone, pl. 22. cites 8 H. 4. 2.

(F) Forfeiture, and Pleadings.

1. A Felon, who stood mute and was put to Pennance, had Goods of his own, which were claimed by J. S. by Grant of the King as forfeited; And it was agreed that *whoever has the Forfeiture, yet the Goods shall be brought into B. R. and shall be claimed and delivered to the Party.* Br. Appeal, pl. 24. cites 8 H. 4. 1, 2.

a Grant from the Crown till he has shewed a good Title to them in the King's Court by sufficient to pass them. 2 Hawk. Pl. C. 331. cap. 30. S. 20. cites 8 H. 4.

2. He that stands Mute *forfeits* no Lands, but Goods, Chattels, Leases, and Debts, except his Offence be *Treason*, and then he forfeits his Lands to the Crown. Bacon's Use of the Law. 39.

feif both Lands and Goods in the same Manner as if he had been attainted any other way; Also Serjeant Hawkins took it for granted, that in the Case of *Felony and petit Treason*, where a Person by standing Mute shall not avoid being attainted for such Crimes, he shall forfeit his Lands and Goods in the same Manner as on other Attainders. But where-ever a Person standing Mute is adjudged to his *Penance*, and thereby prevents that Attainder which otherwise he might have incurred, it seems agreed, that he * forfeits his Chattels only, and not his Lands. 2 Hawk. Pl. C. 331. cap. 30. S. 19. — The Book cites H. P. C. 226 Savil. 56. pl. 121. Kely. 57. D. 205 pl. 4. Int. 177, 178. Br. Pain. 19. Co Litt. 391. 3 Inst. 14. S. P. C. 150 (C) Fitz Coro. 285. 18 E. 3. 26. S. P. C. 150. (D) S. P. C. 250. (D) — * S. P. Br. Appeal, pl. 101. cites 14 E. 4. 7. for the Lands are saved to the Heir — So if he *challenges above 36 Jurors in Appeal*, he shall be put to Penance, and not forfeit his Land; by all the Justices except Keble. For he said, that the Statute W. 1. cap. 12. is at the Suit of the King. Br. Appeal, pl. 82. cites 3 H. 7. 2. — Br Paine, pl. 4. cites S. C.

For more of Mute in General See **Accessory** and other proper Titles.

Necessity.

(A) Necessity. Of what Things it may be an Excuse.

Lex Necessitas est Lex Temporis, scilicet Instantis. 1. **I**D quod alias licitum non est, Necessitas facit licitum & Necessitas inducit Privilegium, quod Jure privatur. Bridg. 30. cites Bracton. And Necessitas legum Vincula irridet Hob. 159 — 2 Buls. 61. — 10 Rep. 51. — Jenk. 19. pl. 35. 207. pl. 38. 280. pl. 5. — 1 Lev. 4. in Case of Manby v. Scott.

2. The Law charges no Man with Default where the Act is compulsory, and not voluntary, and where there is not a Consent and Election; And therefore if either there be an Impossibility for a Man to do otherwise, or so great a Perturbation of the Judgment and Reason, as in Presumption of Law Man's Nature cannot overcome, such Necessity carries a Privilege in it self. Bac. Elem. 25.

3. Necessity is of three Sorts, Necessity of Conservation of Life, Necessity of Obedience, and Necessity of the Act of God or of a Stranger. Ibid.

S. P. But if such his Necessity be

4. And 1st. of Conservation of Life, If a Man steals Viands to satisfy his present Hunger, this is no Felony nor Larceny. Ibid.

owing to his Unthriftiness, surely it is far from being an Excuse. Hawk. Pl. C. 93. chap. 33. S. 20. — So if divers be in Danger of Drowning by the casting away of some Boat or Barge, and one of them get to some Plank, or on the Boat's Side, to keep himself above Water, and another to save his Life thrusts him from it, whereby he is drowned, this is neither Se defendendo, nor by Misadventure, but justifiable. Ibid. — S. P. Hawk. Pl. C. 73. cap. 28 S. 26.

So if divers Felons be in a Gaol, and the Gaol by Casualty is set on Fire, whereby the Prisoners get forth, this is no Escape nor breaking of Prison. Bac. Elem. 25.

So upon the Statute, that every Merchant that setteth his Merchandize on Land without satisfying the Customer or agreeing for it, (which Agreement is construed to be in Certainty) shall forfeit his Merchandize, and it is so that by Tempest a great Quantity of the Merchandize is thrown over-board, whereby the Merchant agrees with the Customer by Estimation, which falls out short of the Truth, yet the over Quantity is not forfeited; where note, that Necessity dispenses with the direct Letter of a Statute Law. Ibid. 8c 26.

So if a Man have Right to Land, and do not make his Entry for Terror of Force, the Law allows him a continual Claim, which shall be as beneficial unto him as any Entry. Ibid. 26.

So shall a Man save his Default of Appearance by Gretain de Eau, and avoid his Debt by Durefs, whereof you shall find proper Cases elsewhere. Ibid.

So one Reason among others, why Ambassadors are used to be excused

5. The second Necessity is of Obedience; and therefore where Baron and Feme commit a Felony, the Feme can neither be Principal or Accessary, because the Law intends her to have no Will in Regard of the Subjection and Obedience she owes to her Husband. Ibid.

of Practices against the State (where they reside, except it be in Point of Conspiracy, which is against the Law of Nations and Society) is, because Non Constat whether they have it in Mandatis, and then they are excused by Necessity of Obedience. Ibid.

So if a Warrant or Precept come from the King to fell Wood upon the Ground whereof I am Tenant for Life or for Years, I am excused in Waste. Ibid.

6. The third Necessity is of the Act of God or of a Stranger; as if I be particular Tenant for Years of a House, and it be overthrown by grand Tempest, or Thunder and Lightning, or by sudden Floods, or by Invasion of Enemies, or if I have belonging to it some Cottage which has been infected, whereby I can procure none to inhabit them, nor Workman to repair them, and so they fall down, in all these Cases I am excused in Waite; but of this last Learning when and how the Act of God, and Strangers do excuse, there be other particular Rules. Bac. Elem. 26, 27.

7. It is to be noted that Necessity privileges only *Quoad Jura privata*; for in all Cases if the Act that should deliver a Man out of the Necessity be against the Commonwealth, Necessity excuses not; For *Privilegium non valet contra Rempublicam*; And as another says, *Necessitas Publica major est quam Privata*; For Death is the last and farthest Point of particular Necessity, and the Law imposes it upon every Subject, that he prefer the urgent Service of his Prince and Country before the Safety of his Life; *As if in Danger of Tempest those, that are in the Ship, throw over other Men's Goods, they are not answerable; But if a Man be commanded to bring Ordinance or Munition to relieve any of the King's Towns that are distressed, then he cannot for any Danger of Tempest justify the throwing of them overboard, for there it holds which was spoken by the Roman, when he alleged the same Necessity of Weather to hold him from embarking, Necesse est ut eam, non ut vivam.* So in the Case put before of *Husband and Wife, if they join in committing Treason, the Necessity of Obedience does not excuse the Offence, as it does in Felony; because it is against the Commonwealth.* Bac. Elem. 27.

8. So if a Fire be taken in a Street, I may justify the pulling down of the Wall or Houe of another Man to save the Row from the spreading of the Fire; But if I be assailed in my House in a City or Town, and distressed, and to save my Life I set fire on mine own Houe, which spreads and takes hold of other Houses adjoining, this is not justifiable, but I am subject to their Action upon the Case, because I cannot rescue mine own Life by doing any thing which is against the Commonwealth; But if it had been but a private Trespass, as the going over another's Ground, or the breaking of his Inclosure when I am pursued for the Sejeeguard of my Life, it is justifiable. Bac. Elem. 27, 28.

9. The Common Case proves this Exception, that is, if a mad Man commit a Felony, he shall not lose his Life for it, because his Infirmitie came by the Act of God; But if a drunken Man commit a Felony, he shall not be excused, because his Imperfection came by his own Default; For the Reason and Loss of Deprivation of Will, and Election by Necessity, and by Infirmitie, is all one; for the Lack of Arbitrium Solutum is the Matter; And therefore as Infirmitas culpabilis excuses not, no more does Necessitas Culpabilis, Bac. Elem. 29.

10. Necessity is a good Excuse in a Cessavit; as where the Lords brought Cessavit against their Tenants in Westmorland and Northumberland, they were excused for the Payment of their Rents and Services, because by their War with the Scots the Lands were laid waste, and they themselves impoverished, so that they could not manure their Lands to raise their Rents. 2 Roll. R. 116. in Case of the King v. Cusack — Cites 7 E. 3.

11. If by the Custom of a Vill the Bailiffs are to have 2 d. for every Hide, of every Beast killed in the Vill, and for Non-payment they distrain a Hide and tan it, and convert it to Leather, as of Necessity to prevent rotting, yet it is no excuse in Trespass; because if it did rot the Owner must bear the Loss, and the Bailiffs may have Action of Debt for the 2 d. Cro. E. 783. Mich. 42 & 43 Eliz. B. R. Duncon v. Reeve.

12. Throwing Goods overboard for Preservation of the Lives of the Passengers in a Barge, one of whom had a Pack with Money in it, is justifiable. Roll. R. 79. the Case of Gravesend Barge.

Bird v. Allcock. — If the Danger was from overloading the Barge by the Ferryman, he is chargeable to the Owners; but not if there was no Sur-charge. 12 Rep. 62. S. C. — 1 Lev. 4. — Jenk 165. pl. 16. — Per Roll Ch. J. Allen. 93. cites Bearcroft's Case contra.

2 Buls. 250.
S. C. cited
per Coke
Ch. J. in
the Case of

13. In Action of Debt upon Bond for Appearance at a certain Day, Imprisonment is no Plea. Per Doderidge and Houghton J. 2 Roll. R. 136. Mich. 17 Jac. B. R. Anon.

14. A Man shall *not* in any Case justify the killing another by a Pretence of Necessity, unless he were himself wholly without Fault in bringing that Necessity upon himself; For if a Man, in Defence of an Injury done by himself, kill any Person whatsoever, he is guilty of Manslaughter at least; as where divers Rioters wrongfully detain a House by Force, and kill those who attack it from without, and endeavour to burn it. Hawk. Pl. C. 72. Chap. 28. S. 22.

15. *Martial Law* is not in Truth and Reality a Law, but something indulged rather than allowed as a Law; the Necessity of Government, Order, and Discipline in an Army is that only which gives these Laws a Countenance; *Quod enim Necessitas cogit, defendit.* Hale's Hist. of the Law 39.

See Infant.
—Judge (A)

(B) *What Things shall be made Valid by it, which would not otherwise be so.*

Ibid. 117 in
Case of Ruffel
v. Pratt.

1. **I**F Money due to Testator on a single Bond be paid to an Infant's Executor, his Receipt is good, Propter Necessitatem, because otherwise the Obligee is not bound to pay the Money. And. 117. in an Anon. Case.

2. If the Steward of a Manor Marries a Copyholder, and after surrenders to himself, yet it is good for Necessity; Arg. Roll. R. 457. cites 41 Eliz. Savage's Case.

3. *Seisin to maintain Assise* ought not to be of a Contrary Nature to the Thing of which Seisin is intended to be given, but in one Case only, and that is where the Sheriff gives Seisin of a Rent by a Twig, or a Clod of Earth, and this is in Case of Necessity; For the Sheriff cannot take the Money out of the Tenant's Purse, and deliver Seisin of that; per Wms's J. 2 Brownl. 237. Pasch. 8 Jac. B. R. in Case of E. Rutland v. E. Shrewsbury.

Note, afterwards
Fleming Ch. J.
said, that
upon Conference
with the Justices
it was re-

4. *Inspection of Infant* was on the Day of Adjournment of the Term propter Pettem in Order to Reverse a Fine, and where the Infant would be of full Age before the Day to which the Term was adjourned, and it was doubted if any Thing could be done the Day of the Adjournment, and the Conusee gave 400*l.* and so compounded and got a Release of Errors. Cro. J. 230. Mich. 7 Jac. B. R. Poynt's Case.

solved, that this Inspection was good notwithstanding the Adjournment. Ibid. — He may be inspected at this Day on which the Adjournment is made; by all the Judges of England; for if the Infant, after the said Day of Adjournment and before the Day to which the Adjournment is made, attains his full Age, the Inspection will fail. Jenk. 317. pl. 8. — 2 Brownl. 278. Mich. 7 Jac. C. B. S. C.

5. The Law in Cases of Necessity, as of Frie, Burning of Houses, Rebellions, or Theives, that destroy Deeds, allows the *Proof of Deeds without shewing them.* Jenk. 19. pl. 35. cites 10 Rep. Leyfield's Case.

6. *Jurors upon a great Tempest after Evidence depart from the Bar* without Licence of the Court, and Eat and Drink, and some Persons before their coming back to the Bar spoke to them to give their Verdict for Defendant, for that the Right was with him; they came back and gave Verdict for the Plaintiff, the Verdict is good. Jenk. 187. pl. 84.

7. A Contract of an Infant for Things Necessary will bind him. Lat. 22. Hill. 1 Car. Stone v. Withipool.

8. The Reason why a Will will pass Personal Estate, but not Lands purchased after the making the Will, is, because the Necessity of Dealing and Traffick in the World would require a Man to make a new Will every Day of his personal Chattels, if he could not dispose of them because of their having undergone some Alteration, and this would create the greatest Perplexity in the World, Personal Estate and Chattels being transient and fleeting, and not fixt, and permanent, as Lands are; and from hence it is that such Wills stand good. See 11 Mod. 125. per Holt Ch. J. in delivering the Opinion of the Court, Trin. 1707. 6 Ann. B. R. in Case of Brunker v. Cook.

Ne Exeas Regnum.

(A) *How considered, and the Force of it.*

1. **I**T is lawful for any to *travel beyond Sea*, if there be not a Ne Exeas Regnum against him; per Montague and Cook J. 2 Roll. R. 12. Hill. 15 Jac. B. R. in Carter's Case.

2. The Ne Exeas Regnum is a Writ *applied to * particular Persons*, and at first chiefly used in Matters of State, and but in late Time applied to Courts of Justice, to hinder such as would avoid it; and that it ought not to be granted without Oath; Arg. Skin. 136. Mich. 35 Car. 2. in Case of the East India Company v. Sandys.

one Man's Will becomes every Man's Misery. Noy. 182. in Case of Darcy v. Thomas
* Mod. 179. Arg. in Case of Sands v. Child.

S. P. Arg.
Chan. Cases
115. Read v
Read.

For if parti-
al Affection
by private
Discretion
do govern
publiek Af-
fairs, there

Allen. ———

3. A Person *in Custody on a Ne Exeat Regnum may be brought to B.* R. to be *charged with an Action.* 12 Mod. 562. Mich. 13 W. 3. Nailor's Case.

4. A Ne Exeat Regnum, *is not an Action* as a *Homine Replegiando* is; per Holt Ch. J. 12 Mod. 563. Mich. 13 W. 3. in Nailor's Case.

(B) *Necessary and Grantable in what Cases and How.*

1. **B**Y the *Common Law* every Man may go out of the Realm to *Merchandize*, or on *Pilgrimage*, or for what *other Cause* he pleaseth, without the King's Leave; and he shall not be punished for so doing; but because that every Man is of Right for to defend the King and his Realm, therefore the King at his Pleasure by his *Writ may command a Man that he go not beyond the Seas*, or out of the Realm without Licence; and if he do the Contrary, he shall be punished for disobeying the King's Command; and it seemeth that this Command may be made by the King's *Writ under the Great Seal, and also under the * Privy Seal, or his Signet*; for by the Law the Subject is bound to take Notice of every of the King's Seals in such Case, as well as of the Great Seal. F. N. B. 85. (A)

ed on behalf of a Subject, it was *formerly reckoned a Writ of Grace*, and used to be granted at the meer Pleasure of the Court on Affidavit, or other Matter, shewing the Party designed to go out of the Realm to the other Party's Damage; yet it was said a *Defendant could not have this Writ on Affidavit* as a Plaintiff might; it is said to have been settled by the late Lord Keeper Wright, that it being a remedial Writ, is as such, upon due Application *by Petition, or Motion*, to be granted the Subject. P. R. C. 250, 251. — * S. P. Lane 29.

Jenk 83. pl.
70. S. P.—
P. R. C. 250.
S. P.— Curs.
Canc. S. P.
454 ———

This Writ,
as the Name
imports, is to
restrain a
Subject from
going out of
the Kingdom,
and when
it was grant-

2. And there are *two Manners, or Forms of such Writs*; *one* is directed *unto the Party*, and the *other unto the Sheriff*, commanding him that he cause the Party *to find security* that he shall not go out of the Realm without the King's Licence. F. N. B. 85. (B)

the Sheriff or Justices of the Peace, or both, but that now it is commonly directed to the Sheriff only
———S P Curs. Canc 455.

P. R. C. 250.
S. P. and
that the
Writ was
sometimes
directed to

Sheriff only

3. And also the King by his *Proclamation* may inhibit his Subjects, that they go not beyond the Seas, or out of the Realm, without Licence, and that *without sending any Writ or Commandment* unto his Subjects; For

In the Notes
there (b) it
is said see
D. 165. &

Rot Clauf.
25 E. 1. M.
25. Dorfo.
Lib. Parl.
204. and
note Dyer
296. accordant.
go beyond Sea,
not triable

perhaps he cannot find his Subject, or know where he is, and therefore the King's Proclamation is sufficient in it self; and if the Subject do contrary thereunto, it is a Contempt, and for so doing he shall be fined to the King. F. N. B. 85. (C)

But till such Proclamation made or Writ issued it is no Contempt for any Person to go beyond Sea, altho' he intends to Live there out of his due Obedience; For his Purpose or Intent is not triable F. N. B. 85. (C) in the Notes there (b).

4. A Ne exeat Regnum was awarded by the Court of Chancery at the Suit of Men in a Suit *between Party and Party*. Toth. 233.

5. Tho' the King may prohibit any Person in some Cases *with some Commodities* to pass out of the Realm, yet this cannot be but *where the end is Publick*, viz. to restrain the Person, because he intends Things Abroad to the King's Prejudice, or to restrain any Merchandizes, either in Time of Dearth or War; For *Necessitas est Lex temporis*. 12 Rep. 33. Trin. 5 Jac. Case of Customs &c.

6. The Writ was granted on Suggestion that he was *indebted*, but on putting in Security, it was *superfeded*. Chan. Cases 116. 15 Car. 2. cites the Case of Crisp v. Bishop.

It was granted to the Wife against her Husband where she had got Sentence for *Alienation* against him in the Spiritual Court, which he refused to Obey and threatened to go beyond Sea; and the Court refused to supercede it Sir Jer. Smithson's Case.

7. Conveying away and *making over his Estate* to others; *standing out an Excommunication*, and *absconding* his Person, and *giving out that he intends to go beyond the Seas* was assigned as *Reasons for granting a Ne exeat Regnum*; and it was granted and ordered to stand. 2 Chan. Rep. 20. 20 Car. 2. Read v. Read.

Chan. Cases 115 Mich. 20 Car. 2. Read v. Read. — 2 Vent. 345.

8. A Writ of Ne Exeat Regnum may be granted in any Case where there is Danger of Subterfuge from the Justice of the Nation, tho' of private Concernment. 2 Chan. Cases 245. Trin. 30 Car. 2. Anon. — Per Fleming Ch. B. the King may inhibit any Man; For the *Cause is not Traversable*. Lane 29.

9. A Ne Exeat Regnum ought not to be granted but *upon great Reason* and Examination, otherwise a *Homine Replegiando* may lie; per Holt Ch. J. Farr. 9. Pasch. 1 Ann. B. R. Anon.

10. A *Solicitor's Bill* being taxed and reported *overpaid 60l.* On Motion, and Affidavit of his going beyond Sea a Ne Exeat Regnum was granted, tho' *no Bill was in Court* whereon to ground this Writ; per Master of the Rolls. Ch. Prec. 171. Mich. 1701. Loyd v. Cardy.

11. A Ne Exeat Regnum lies to prevent ones going into *Scotland*, it being out of the Jurisdiction of Chancery; and the Process thereof not reaching thither is equally Mischievous to the Suitor here as if he actually went out of the Kingdom; and tho' it was *moved for one Defendant against another Defendant*, yet it being in a *Matter of Account* in which both Parties are Actors, and Money being sworn due from the Defendant against whom to the other, Lord Harcourt thought the Motion proper. Wms's Rep. 263. Trin. 1714. Done's Case.

12. Where the Party is to be restrained from going to *Scotland* the *Condition must be not to go out of the Realm or to Scotland*; For if it be only not to go out of the Realm, the Party's going to Scotland will not forfeit his Bond or Recognizance. Wms's Rep. 263. in a Note there.

Mr. Hamilton informed the Court that something of this kind had been in one *Bitchell's Case* in the Lord Cow-

13. It was moved to have a Ne Exeat Regno framed so as to prevent the *Defendant going into Scotland* upon Affidavit of his going to reside there, and having confessed that he had *received 10,000l. as Trustee for the Plaintiffs*. An Order was made at the Rolls and the Writ marked for 10,000l. Bail, but apprehending that the usual Writ would not restrain his going into Scotland, as being now the same Kingdom, and yet as much out of the Reach of the Process of the Court as any Foreign Part out of the King's Allegiance, the same was moved before the Lord Chancellor, who asked

asked what Authority he had to alter an original Writ? Especially as *this Writ was not originally intended to aid the Process of this Court, but was a Mandatory Writ to prevent the King's Subjects from going into foreign Countries to practise Treason with the King's Enemies?* And said that perhaps there was no Foundation for the Doubt whether the common Writ would not prevent the Defendant's going into Scotland as well as any of the King's other Dominions out of the Process of this Court. His Lordship said, it was dangerous to alter old established Forms, and therefore would make no Order in it; but *left the Parties to proceed in the old beaten Path.* Cafes in Chan. in Lord Talbot's Time 196. Pasch. 1736. Hunter v. Mac-cray.

per's Time, who seemed to think that the Writ extended to Scotland notwithstanding the Union. The Registers likewise said, they never knew any other than the Common Order made. Ibid.

14. It is now mostly used *where a Suit is commenced in this Court against a Man, and he designing to defeat the other of his just Demand, or to avoid the Justice and Equity of this Court, is about to go beyond Sea, or however, that the Duty will be endangered if he goes.* P. R. C. 251.

(C) Directed, executed, and discharged. How:

1. EVERY one upon a *Surmise made unto the Chancellor* may sue forth this Writ for the King, and then the *Party against whom it is sued may come into the Chancery, and obtain Licence by Letters Patents, or by Letters under the Privy Seal, or Privy Signet; and the Licences are good, although they be not under the Great Seal, because those Letters will excuse his Contempt; and such Licences are called Pass-ports; and now by the Statute of 5 R. 2. cap. 2. it is ordained, that no Person pass out of the Realm without the King's Leave, but those who are * excepted in that Statute, and therefore see the Statute.* F. N. B. 85. (F)

P. R. C. 251, 252. S. P.—Curf. Canc. 455. S. P.—* The Persons excepted by this Act were Lords and other great Men, notable Merchants

and the King's Solders, but that Statute is repealed by 4 Jac. 1. cap. 1.

2. A *Surety in a Ne Exeat Regnum* was denied to be discharged, tho' the *Answer was put in* by the Defendant; and so again after 19000*l.* was decreed against Defendant, and he committed for Non-payment; per Ld. Wright. Ch. Prec. 230. Trin. 1704. Le Clea v. Trott.

3. If the Writ is prayed, and the Party by Answer or otherwise *satisfies the Court that he is not going beyond Sea*, it will not be granted. P. R. C. 251.

4. It is an Abuse of this Process to *break open Doors* and take the Party in Bed; but yet the Court would not order him for this Cause to be set at Liberty. P. R. C. 251.

5. The Party that sues it commonly Marks on the Back of the Writ in what Sum the *Bond* for yielding Obedience to the Writ shall be, it is generally 100*l.* or some great Sum. P. R. C. 251.

Sometimes the Writ mentions the Sum certain, other Times

it leaves the Sum in which the Party shall be bound to the Sheriff, and in Default of such Sureties he carries him to the Common Gaol of the County, there to be safely kept till he voluntarily gives such Security, and this is to be certified by the Sheriff into Chancery, and there is no way to discharge this but by a Pass-port under the Great, or Privy Seal, or Privy Signet; Arg. and Holt Ch. J said, it was true that if the Sheriff take the Security, he shall return it into Chancery; but that if the Security be taken in B. R. it may be kept there. 12 Mod 562, 563. Mich. 13 W. 3. in Nailor's Case.

6. If the Writ be granted on Behalf of a Subject, and the Party taken, what is generally done is this, The Party either gives *Security by Bond* in such Sum as is demanded, or he *satisfies the Court by answering*, (where the Answer is not already in) or by *Affidavit*, that he designs not to go out of the Realm, and gives such reasonable Security as the Court directs, and then he is discharged. P. R. C. 252.

7. While this was accounted a Writ of Grace, if the Party, to whom the

the Writ was, had answered and denied the Equity of the Plaintiff's Bill, and the Court saw no Cause to the contrary, the Writ would be super-
feded. P. R. C. 252.

Negative.

(A) Negative Things.

There are Propositions Negative, which imply an Affirma-

tion, and those we call *Negative Pregnants*, which we do refuse in all Issues of Trials by Jurors, except in some Cases, where the Necessity of the Cause requires the same, and there are also Propositions merely Negative, which are mere Negations, of which we commonly say, *Negativum nihil Implicat*, a Negative implies nothing; As the *Tenant wages Law of Non-summons*, this does not imply that he was Tenant, neither shall conclude him. Hawks's Max. 132. cites 22 H. 6. 41.—So if one pleads *Ne Chasa pas* he did not hunt in the free Chace of the Plaintiff, this is no granting that the Plaintiff had a free Chace; but he must prove it. Ibid. cites 10 E. 3. 20.

1. *N*egativa nihil Certi implicat; but contra of *Negativa* which includes in it an Affirmative. Br. *Negativa* &c. pl. 39. cites 9 H. 7. 3. per Fineux.

2. *Affirmativum Negativum implicat*; An *Affirmative* includes a *Negative*; For every *Statute limiting any thing to be in one Form*, altho' it be spoke in the Affirmative, yet it includes in it self a *Negative*, as the *Statute of W. 2. cap. 4* of a *Quod ei deforceat* is, that the Demandant shall vouch ac si tenens esset in priori Breve, includes a *Negative*, viz. and not otherwise, for it has been taken since, that if the first Writ was a *Scire Facias*, and the Tenant in the *Quod ei deforceat* maintains the Title of it, the Demandant shall not vouch; for he shall vouch ac si tenens esset in priori breve, which is as much as to say, that he shall vouch, ac si tenens esset in priori breve and in no other Manner, and then in the first Writ (it being a *Scire Facias*) he could not vouch, no more can he now. Plow. C. 206. b. 207. a. Arg. Ubi Plura. in Case of *Stradling v. Morgan*.

3. The Defendant swore an Affirmative, and afterwards an Information was exhibited against him for it; Though a Negative could not 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. 2. B. R. the King v. Comes.

4. *Two Negatives* may be construed as a *Negative* in Grants, but not in Pleas; For they are to be in Latin, and must be construed as Latin ought to be. Per Cur. 1 Salk. 328. Trin. 2 Annæ. B. R. *Dillon v. Harper*.

5. *Negative* may be imply'd by an *Affirmative*, but not necessarily e contra. As the saying, that a Papist, unless he conforms, shall not take by Devise, does not necessarily imply that if he does conform, he shall take by Devise &c. 2 Wms's Rep. 9 Pasch. 1722. in Case of *Hill v. Filkin*.

6. Where a *Trust* of a Term for raising Portions for Daughters directs a particular Method for raising them, it implies a *Negative*, that they shall not be raised any other way. 2 Wms's Rep. 19. Pasch. 1722. in Case of *Ivy v. Gilbert & al.*

7. An *Affirmative Oath* was made to ground an *Attachment* upon; If the Persons against whom the Motion is denies the Charge by Oath positively and fully, the *Negative Oath* shall be preferred, and this is the only Case in which it shall be so. 8 Mod. 81. Trin. 8 Geo. the King v. *Ackworth & al.*

(B)

(B) Pleadings.

1. **T**HE Defendant pleaded that it was the Freehold of *J. S. &c.* and the Plaintiff replied, that His Freehold; he must say also, and not the Franktenement of *J. S.* or, absque hoc that it is the Frankteuement of *J. S. &c.* Heath's Max. 98. cap. 5. cites 11 H. 4. 90.

2. Where the Plaintiff declares in the Negative, that the Defendant sued the Plaintiff in Debt in the Name of *M. absque Voluntate & Notitia M.* it suffices for the Defendant to answer in the Affirmative, that he sued by his Assent, being retained of Counsel, Priest. And well without Traverse; And see Lib. Intrationum, that this makes Issue immediately, and conclude *Quod ponit se super Patriam without more a-do.* Br. Issues joines, pl. 14. cites 7 H. 6. 43.

Br. Dificit, pl. 15. cites S. C. Heath's Max. 98. chap. 5. cites S. C.

3. The Defendant pleaded to the Writ, that he was abiding at Dale; and no Plea, without saying also, And not at B. as the Plaintiff did name him; because the Issue shall always be upon a Negative. Heath's Max. 98. cap. 5. cites 19 H. 6. 1.

And there it appears, that one of the Defendants in Trespass pleaded, that

one of his Companions was dead the Day of the Writ purchased; it is no Plea for the Plaintiff to reply, that he was alive at Dale, but must also say, And not dead; Quod Nota. As to say by way of Replication in the like Case, *Muller and not Bastard, or Frank and not Villein, Et hoc petit quod Inquiratur per Patriam; Quod Nota. Ibid.*

4. Note per Littleton, it was adjudged by Sir John June in C. B. that he who pleads in Avoidance of a Fine, shall say, that * those who were Parties &c. nothing had in the Tenements &c. at the time of the levying the Fine, nor any of them any thing had; but that one *T. D.* then was seized &c. whole Estate &c. et de hoc ponit se super Patriam; and the other shall say *& ipse similiter*, and there is no other Rejoinder to be made; and the reason seems to be in as much as the Defendant pleaded in the Negative, and then this makes Issue immediately, as *Ne dona pas, Nul tort, Non Culp. Nihil debet &c.* Br. Issues joines, pl. 3. cites. 33 H. 6. 21.

But it appears often elsewhere, that where a Plea is pleaded in the Affirmative, as Feoffment, Release, &c. or other Affirmative with a Sans

ceo, there this does not make Issue immediately without a special Replication or Rejoinder. Note the Difference. Ibid.— * Heath's Max. 99. chap. 5. cites S. C.— But 12 Eliz. Dyer 290. In such Plea the Party that pleaded it had his Election to conclude the Issue or not. Heath's Max. 99. chap. 5.

5. And it was said there, that so it is of a Counter-plea, that he who is vouch'd, nor any of his Ancestors any thing had, *Et de hoc ponit se super Patriam. Ibid.*

6. And in Dower, to say, that the Baron *Ne unque Seife que Dower*; there he may [conclude] *Et de hoc ponit se super Patriam*, without other Rejoinder, unless Priest, that he was as above. Ibid.

Heath's Max. 99. cap. 5. cites S. C.

7. In Debt, if the Defendant pleads Arbitrement to pay 10 l. such a Day and Place, which he was ready there to pay at the time &c. and the Plaintiff did not come there to receive it, there it suffices for the Plaintiff to say that he was there ready without Traverse; For the Defendant tendered a Negative before. Quod Nota. Br. Issue Joines, pl. 86. cites 36 H. 6. 15.

Heath's Max. 101. chap 5. cites S. C.

8. In diverse Cases Issue shall be suffered in the Affirmative without a Negative. As in Replevin, if the Defendant avows as within his Fee, and the Plaintiff says, that *Hors de son Fee, Priest*; this is a good Issue; and yet both are in the Affirmative, but the one is contrary to the other. Br. Issues Joines. pl. 36. cites 6 E. 4. 6. per Littleton.

Heath's Max. 99. chap. 5. cites S. C. but says it is somewhat doubted. 32

H. 6. 25.— It was said for Law by divers Counsel, that in Replevin, if the Plaintiff after the Avowry made by the Defendant pleads *Hors de son Fee & Seignior*, and the Defendant says that *Within his Fee, Priest*; he shall say further, and *Not Dehors, or shall take Traverse*; Quære inde; For the Entries are contrary, and this is one of the Cases in which Issue is good in Affirmative without any Manner of Negative. Br. Issues joines, pl. 34. cites 32 H. 6. 25.

And Heath's Max. 98 says, that Issue shall always be joined upon a Negative after an Affirmative alleged before; or, *e contra*; cites 11 H. 4. 19. [But Quære if it be not mis-cited.]

Heath's Max. 100. chap. 5. cites S. C. 9. And in Debt against Executors, if the Defendant says that *Plene Administavit*, and the Plaintiff says that *Assets &c.* this is a good Issue. Ibid.

Heath's Max. 100. chap. 5. cites S. C. 10. And in Writ of Right, if the Tenant says that he has more mere Right to hold as he holds, than the Demandant has to demand in manner as he demands &c. and the Demandant says that he has more Right in his Demand than the Tenant has to hold as he holds, this is a good Issue, and yet all in the Affirmative. *Quod non Negatur*. Ibid.

Br Maintenance de Brief, pl. 14. cites S. C. per Pigot. — 11. Where the Tenant pleads in the Negative, the Demandant may maintain his Writ and answer in the Affirmative, and this shall be a perfect Issue; For in divers Cases, as appears among the Divisions of Lib. Intrationum Placitorum, * Affirmative may make perfect Issue where a Negative goes before. Br. Issues joines, pl. 21. cites 9 E. 4. 36.

Br. Issues joines, pl. 24. cites 36 H. 6. 15.

Heath's Max. 98. chap. 5. cites S. C. — * S, P. Br. Issues joines, pl. 24. cites 36 H. 6. 15.

12. Debt upon an Obligation upon Condition that if the Defendant did not prove that *J. S. was not presented and instituted to the Church of K.* that then &c. and said that *J. S. was not instituted*; and good, per Brian, and Littleton J. For a Negative cannot be proved, therefore it suffices to say in the Negative as above, without saying that he has proved that he was not instituted &c. Br. Conditions, pl. 64. cites 15 E. 4. 25.

13. So of Condition to prove that the Defendant *Nihil debet to the Plaintiff*, it is sufficient to say, *Quod Nihil debet &c.* Ibid.

14. So of a Bond to prove that *my Feme is not guilty of such a Trespass*, it suffices to say, that she is *Not Guilty &c.* But Jenney Serjeant contra, & adjournatur. Ibid.

15. Sometimes Issue shall be permitted with two Affirmatives without any Negative, as where the one Point is to be tried Ouster le mere. Br. Issues joines, pl. 28. cites 6 H. 7. 5. Per Huffle and Fairfax J.

16. *Riens Arrear* is a Negative which includes in it an Affirmative. Br. Confession, pl. 31. cites 9 H. 7. 3.

S C. And. 20. 17. Where the Defendant pleaded in the Negative, (as in an Action upon the Case) he traversed the Sale, and did not conclude, *Et de hoc ponit se super Patriam*, but with *Unde petit Judicium si prædictus Quer' Actionem suam prædictam versus eum habere debeat &c.* and yet good; because a perfect Issue may be joined thereupon; *Quod Nota*. Heath's Max. 99. cap. 5. cites 2 & 3 Mar. Dyer 121, pl. 14.

Ld. Mounteagle v. the Countess of Worcester. The Plea was quod ipsa non vendidit Catenam &c.

18. Custom lies not in the Negative, but it may be in the Negative with Affirmative precedent, as to prescribe to buy and sell without paying Toll; But it is no good Custom to say, That he has not paid Toll. And the same of not paying Tithes. Br. Customs, pl. 23. cites 7 H. 6. 31, 32. and 8 H. 6. 3.

19. In all Pleadings it is unformal and incongruous to aver a Negative. Mich. 1656. Arg. Hard. 81. in Case of Attorney General v. Buckridge.

For more of Negative in General See Attaint. Nil Habuit in Tenementis, Trial, and other Proper Titles.

Negative

Negative Pregnant.

(A) *What* it is.

1. **N**egativa Pregnans, that is, a negative Plea implying also an Affirmative. As if a Man being impleaded to have done a Thing upon such a Day, or in such a Place, denies that he did it *Modo & Forma Declar'*; which implies nevertheless, that in some Sort he did it. Reg. Plac. 94.

Heath's
Max. 101. S.
P.

2. Negative Pregnant is, when two Matters are put in Issue in one Plea, and this makes the Plea to be naught; because the Plaintiff cannot tell in which of these Matters to join Issue, for the Incertainty upon which of the Matters the Defendant does insist. Reg. Plac. 189. cites Pract. Reg. 220.

(B) *What Plea* shall be said to be Negative Pregnant.

1. **I**N Formedon the Tenant pleaded Alienation of the Father of the Demandant before the Statute of Westm. 2. and was compelled to say to whom, who said to J. S. and the other would have said only, That he did not alien before the Statute prout &c. and was compelled to say, That he did not alien before the Statute to J. S. and so the Issue accepted; Brooke says *Quod Mirum!* For this is a Pregnancy at this Day fully, quod Cave. Br. Negativa, pl. 28. cites 24 E. 3. 33.

But in trespass per Brian. 31 E. 3. in Ingressu sine Assensu Capituli the Tenant said that the Abbot did not alien sine Assensu Capituli

sensu Conventus, and it was held no Plea; For it is Negative Pregnant; For he shall say that he did not alien modo & forma &c. Br. Negativa, pl. 25. cites 15 E. 4. 18.

So where the Defendant justifi'd Entry because A. Tenant by the Curtesy, the Reversion to him, alien'd in Fee, the Plaintiff said, That A. did not alien in Fee; it is no Issue; by which he said, that he did not alien, Prist; and then a good Issue; For Alienation in Tail, or for Term de autre Vie is a Forfeiture. Br. Issues joins, pl. 44. cites 4 E. 3. 5.—S. P. For denying that he hath alien'd in Fee seems to confess that he hath alien'd in some other Sort. Reg. Plac. 94. —S. P. Heath's Max. 101, 102. cap. 5.

In a Writ of Entry, Ne Entra pas Contra formam Statuti, or He did not alien within Age, are Negative Pregnants; but the Party may say, he did not alien *Modo & forma*, per Gawdy J. 2 Leon 198. Mich. 29 Eliz. B. R. in Case of Dighton and Clark.

2. The Plaintiff intitled himself to the Land and Charters by Conveyance, that is to say from A. to T. and from T. to J. and from J. to the Plaintiff; the Defendant said that A. never had such Son as T. Father of J. And therefore ill and Pregnant, and as much as to say, that A. had no such Son as T. or that T. was not the Father of J. Nota. Br. Negativa, pl. 13. cites 14 H. 4. 2. 9.

S. P. Br. Charters de terre, pl. 21. cites 14 H. 4. 23, 24. 27. & 12 H. 6 r. —Br. Pleadings, pl. 22. cites S. C.

3. Note, that if a Man pleads that he did not disturb J. F. to Occupy such Land by Command of W. S. this is a Negative Pregnant; by which he took the Disturbance by Protestation, & Pro Placito quod W. S. non Preceptit modo & forma &c. Br. Negativa, pl. 1. cites 9 H. 6. 44.

4. A Man pleaded Deed of the Demandant in Writ of Entry After the last Continuance, and the Demandant said, that Not his Deed after the last Continuance; and this is Negative Pregnant; Quod Nota; by which he said that he made it by Durefs before the last Continuance such a Day, absque hoc that he made it after the last Continuance, and then Issue was taken

Br. Continuance, pl. 26. cites S. C.

taken accordingly Quod Nota by Newton Ch. J. and Paston J. but Ascue J. dubitavit. Br. Negativa, pl. 18. cites 21 H. 6. 9.

5. Trespafs in E. the Defendant said, that the Place where &c. contains 3 Acres, and is called D. which is & tempore &c. was the Franktenement of W. P. by which he as Servant and by his Command did the Trespafs &c. the Plaintiff said, that the Place where &c. is called M. and that D. and M. are one and the same Place, and known by the one Name and the other, and the Defendant said that they are diverse Places and not all one and the same Place, nor known and named by both the Names prout &c. and fo ad Patriam. Quære if it be not Double or Pregnant. Br. Trespafs 142. cites 21 H. 6. 20, 21.

6. In Writ of Entry the Tenant intituled himself by dying seised of R. and the Plaintiff intituled himself by dying seised of one J. after the Death of R. to which the Tenant said, that the said R. was seised in Fee, and died seised as above, and the Land descended to K. &c. who entered and leased to J. for Life, of which Estate he died seised, and K. died, and the Land descended to C. who enfeoffed us, absque hoc, that J. died seised in Fee after the Death of R. and this was held Pregnancy, that is to say, the Dying seised in Fee, and After the Death of R. by which he said as above, absque hoc that J. died seised in Fee, and then well. Br. Negativa, pl. 23. cites 22 H. 6. 23.

* Orig. Nest
que son
Nofme & est
tantum son
Nofme.

S. P. Br. Ne-
gativa, pl.
34. cites 33
H. 6. 22.

7. Trespafs by W. C. and Jane his Feme, the Defendant took Day over, and at the Day said that there was no such Jane Feme of C. in Rerum Natura the Day of the Writ, nor ever after, Judgment of the Writ; and the Plaintiff said that this is Pregnancy; * but per tot. Cur. it is a good Plea; For Jane Feme of C. is not but her Name, and is only her Name; Quod Nota ideo Bene. Br. Negativa, pl. 2. cites 27 H. 6. 8.

8. Debt because the Plaintiff was retained for 8 Years with the Defendant in Husbandry for 20 s. a Year, and for so much Arrear of his Salary &c. and the Defendant because he could not wage his Law, therefore he travers'd the Contract, and said that he did not retain him in Husbandry, and a good Plea and not Pregnant, and shall not be compelled to say Quod non retinuit only; For then if he was retained in any Manner, the Issue shall be found against the Defendant, and it is a good Replication, Quod retinuit ipsum modo & forma prout &c. without saying, Quod retinuit in Husbandry; For it shall have Relation to the Declaration; Quod Nota. Br. Issues joins, pl. 25. cites 38 H. 6. 22.

And there-
fore where
the Plaintiff
in Bar of the
Avowry had

pleaded Gift of the Land by S. by the Deed, and after Time of Memory; (For the Deed as it seems was without Date) and the Defendant said that S. did not give the Land after time of Memory prout &c. and the others e contra, and the Issue was entered accordingly. Quære if Pregnant. Ibid.

9. In Recordare the Defendant pleaded against the Plaintiff, Not the Deed of S. after the Time of Memory, and it was held Negative Pregnant. Br. Negativa, pl. 35. cites 39 H. 6. 7, 8.

10. Trespafs upon S. R. 2. the Defendant said, that before the Entry J. N. was seised and enfeoff'd the Defendant, and gave Colour; the Plaintiff said, that before J. N. any thing had, he himself was seised till by D. disseised, who enfeoff'd the said Defendant, and he entered and was seised quousque &c. Litt. said, before the Plaintiff any thing had, the said D. was seised &c. and enfeoff'd he said N. who enfeoff'd the Defendant, by which he was seised till by the said D. disseised, absque hoc, that the said D. disseised the Plaintiff before the Feoffment made by the said D. to the said N. Prit; and the others e contra; and the Issue was held good by all the Court. Br. Negativa, pl. 52. cites 1 E. 4. 6.

11. Quære Impedit upon a Voidance by Deprivation; the other said, that it did not void by Deprivation, and it was admitted; Quære if it be Pregnant; for it was not argued. Br. Negativa, pl. 47. cites 5 E. 4. 3.

12. In *Trespass* the Party travers'd *absque hoc*, that *J. D.* abated after the Death of *J. H.* and before the Death of *W.* and well, per Cur. quod Nota. And therefore it seems that it is not Pregnancy. Br. *Negativa*, pl. 25. (bis) cites * 5 E. 4. 22. 2.

Br. Traverse, per fans &c. pl. 109. cites 15 E. 4. 22. S. C. ———

* It should be 15 E. 4. 23. a. pl. 1.

13. In *Trespass* after Issue joined, * came the Defendant at another Day and pleaded *Release* after the last Continuance; and the Opinion was, that it is a good Issue, that *Not his Deed* after the last Continuance. Br. *Issues* joins, pl. 71. cites 16 E. 4. 5.

* Orig. (vers) — Heath's Max. 102. cap. 5. cites S. C.

14. In Debt upon an *Obligation* under the *Covent Seal* against Successor of the *Abbot* he said, that *Not the Deed* of the *Abbot* and *Covent*; and per *Judiciarios* it is not Pregnancy; the Reason seems to be inasmuch as all is one Corporation, *Quod Nota Bene*, and see the Book and *Nota Bene*. Br. *Negativa*, pl. 50. cites 21 E. 4. 66.

15. It was presented that the *Prior* of *D.* by Reason of his Tenure in *D.* ought to scowr a Ditch in *D.* and that he and his Predecessors have used to scowr it &c. the *Prior* said, that he and his Predecessors ought not to scowr by Reason of his Tenure in *D.* nor the *Prior* and his Predecessors have not used to scowr it &c. and the Opinion was, that if he had not answered to both Points the Issue had not been good, but it was not argued. Br. *Issues* joins, pl. 43. cites 21 E. 4. 73.

Br. *Negativa*, pl. 45. cites S. C.

16. Debt upon an *Obligation* with Condition to find *J. S.* sufficient Apparel till the Age of 21 Years, the Defendant said, that he found sufficient Apparel during the Time &c. And the Plaintiff said that he did not find him sufficient Apparel during the Time, and the Issue taken upon all the Time and upon no Time certain, and good per Cur. *Quod Nota* that it is not Pregnant. Br. *Negativa*, pl. 40. cites 12 H. 7. 14.

17. Debt upon a Lease for Years made by the Plaintiff, the Defendant said, that *E.* was seised in Fee, and leased to the Plaintiff at Will who leased to the Defendant, and the said *E.* re-entered and made Livery over, before which Entry nothing was Arrear, and the Plaintiff made Title *absque hoc* that *E.* leased at Will, and a good Plea per Cur. Therefore see that it is not Negative Pregnant. Br. *Negativa*, pl. 32. cites 21 H. 7. 26.

18. In *Information* against *J. K.* for buying Cloths of *A. B.* *Contra formam Statuti* de Anno 24 H. 8. he said, that he did not buy of *A. B.* *Contra formam Statuti* prout &c. and no Issue; for it is not Material if he bought of *A. B.* or of *W. N.* or of any other, but if he bought the Cloths *Contra formam Statuti* or not, and therefore the Issue shall be that he did not buy *Modo & forma* &c. Br. *Issues* joins, pl. 81. cites 33 H. 8.

Br. *Negativa*, pl. 54. cites H. 33 H. 8. — Heath's Max. 102. cap. 5. cites S. C.

19. Debt was brought upon an *Obligation*, the Condition whereof was, that *J. S.* shall not disturb the Plaintiff in his Possession by any indirect Means. To which the Defendant pleaded, that he did not disturb the Plaintiff in his Possession by any indirect Means, but by due Course of Law; and it was objected that the Plea was ill, because not shewed how by due Course, viz. what Suit. But agreed the Plea would have been good, if he had only said, Not disturbed by any indirect Means; but doubted if not ill, because he pleads over by lawful Means and says not what, so that it may be tried. Heath's Max. 53. cites 2 Le. 199. *Dighton v. Clark*.

This is 2 Le. 197, 198, pl. 248. Mich. 29 Eliz. B. R. — But if I am bound not to go out of Westminster Hall until Night, but tarry in the Hall till Night, in an Action a-

gainst me upon that Bond I may plead in *Idem* verbis. 2 Le. 198. Mich. 29 Eliz. B. R. per *Gawdy J.* in Case of *Dighton v. Clark*.

So if I be bound upon Condition that I will not return to *Serjeants-Inn* the direct way, but by *St. Giles's*, I shall plead in *totidem* verbis; to which *Godfrey* agreed, for the Matter which comes after the (But) is triable by the Country, but so it is not in the Principal Case. Per *Clench* (But) is but a Word of Surplusage, and if that and all which follows had been left out, it had been well enough. It was adjourned. *Ibid.*

In Debt upon Bond, the Condition whereof was *Not to attorn Tenant to any other Person* 20. A. covenanted that he had not made any former Grant nor would afterwards make any Grant without the Plaintiff's Assent. In Debt on Bond for Performance of Covenants, the Defendant pleaded that he did not grant without the Plaintiff's Assent, and this upon Demurrer was held not good. Cro. J. 559, 560. Hill. 17 Jac. B. R. *Lea v. Luthell*.

without the Consent of Plaintiff his Executors, Administrators or Assigns, the Defendant pleaded, That he did not attorn Tenant without the Consent of the Plaintiff. Exception was taken that this Plea was a mere Negative Pregnant, but was over-ruled and Judgment given for the Defendant. Lutw. 590. Pasch. 9 W. 3. *Keating v. Irish*.

In Debt on Bond to perform Covenants in Indenture of Lease made by the Plaintiff to the Defendant, in which Defendant covenanted not to deliver Possession to any but the Lessor or such Persons as should lawfully exist him, the Defendant pleaded, that he did not deliver the Possession to any but such as lawfully existed him. The Plaintiff demurred, and it was objected that the Plea was ill and a Negative Pregnant and that he ought to have said, That such an One lawfully existed him to whom he delivered Possession, or That he did not deliver the Possession to any. But the Defendant said that the Plaintiff had not alleged any Breach and therefore could not have any Judgment. To which it was said for the Plaintiff, that he having pleaded an ill Plea has forced the Plaintiff to put himself upon the Judgment of the Court upon the Plea, and cited Yelv. 58. 152, 153. And *Wirdham J.* held the Plea ill; but *Twisdalen J.* contra. The Case was argued again in another Term, and then all the Court held the Plea pursuing the Words of the Covenant good being in the Negative, and that the Plaintiff should have replied and assigned a Breach, and for Default thereof Judgment was given against him. Lev. 85. Mich. 14 Car. 2. B. R. *Pullin v. Nicholas*.—Keb. 380. 413. S. C.

21. Lessee covenanted for himself and his Assigns to build a House upon Land demised before such a Day and to keep it in Repair; and after the Day Covenant was brought against Assignee for not Repairing. Defendant pleads the House was not built before the Day, and upon general Demurrer adjudged that the Plea was a Negative Pregnant. 12 Mod. 384. Anon.

22. In an Action of *Trespass* the Defendant justifies by Licence from the Plaintiff's Son. The Plaintiff replies, *Quod non intravit per Licentiam suam*. That is a Negative Pregnant; For he ought to traverse the Licence by it self, or the Entry by it self. Reg. Plac. 189. cites *Pract. Reg.* 220.

(C) Helped by Verdict. In what Cases.

S. P. Br. 1. **W**HERE a Negative Pregnant is found for the Plaintiff it is good, *Negativa*, pl. 42, cites 3 H. 8 46 — 39. cites 12 E. 4. 6.

As in *Trespass ubi Ingressus non datur per legem* by K. against J. and E. and J. died pending the Writ, and E. said that H. gave the Land to R. in Tail and died *Protestando seised*, and the Land descended to one J. as Son and Heir of R. and he entered and died seised, and the Land descended to E. the Defendant as Brother and Heir of J. by which he entered and gave Colour to the Plaintiff, the Plaintiff said that A. was seised and gave the Land to W. in Tail, who died seised and the Land descended to the Plaintiff as Daughter and Heir of the said W. by which she entered and was thereof seised till the said E. with J. named in the Writ, in the Life of J. entered upon her, *ubi Ingressus non datur per legem*, and that J. named in the Writ, and J. who is supposed by the Defendant to die seised, are one and the same Person and not diverse, and the Defendant said, that he did not enter together with the said J. in the Life of the said J. prout &c. and so to Issue, and found for the Plaintiff and he pray'd Judgment. *Pigot* said, the Issue is *Jeofail*, and upon a Negative Pregnant, and therefore Judgment he ought not to have. Per *Catesby* if the Issue was not well joined, yet when it is found for the Plaintiff the Verdict has made the Plea good, and so the Issue above was held good by Reason of the Verdict, and so where the Issue is upon a double Plea if both are found for the Plaintiff. Br. Issues joines, pl. 39. cites 12 E. 4. 6. & 26 H. 6. accordingly.—Br. Repleader, pl. 37. cites S. C.

[For more of Negative Pregnant in General See **Abatement**, and other proper Titles.]

Negligence.

Negligence.

(A) *Advantages lost by Negligence.*

1. **U**PON a Rule given in C. B. for a Prohibition, the Party *laid by his Prohibition and the Ecclesiastical Court proceeded to Sentence.* Afterwards the Party appealed and the other deliver'd the Prohibition 2 Terms after, but having surceased his Time and suffered Sentence to pass he was denied to have Benefit of his Prohibition. And a Difference taken where a Prohibition was granted and the Party not serving it Sentence of Excommunication is pronounced in default of answer, there upon the Matter he may have the Benefit of his Prohibition but not where there is a Sentence definitive. Cro. J. 429. pl. 6. Trin. 15 Jac. B. R. Anon.

(B) *Bar of Right, in what Cases, or only a Postponin*

1. **A**. Grants 1000 Coard of Wood to B. to be taken at the Election of B. If A. or a Stranger cuts any Trees, B. cannot take them but must supply his Grant out of the Residue. 5 Rep. 25. Pasch. 43 Eliz. B. R. Sir Tho. Palmer's Case.

2. A. covenants to stand seised to the Use of himself for Life, and after to the Use of his Daughters that shall be unmarried at the Time of his Death until every one of them successive shall or may have levied 500*l.* Remainder to his Eldest Son.—A. had 4 Daughters. The Land was worth 100*l.* per Ann. The Father died 30 Eliz. The Son enters. The Eldest Daughter enter'd 42 Eliz. She surpats'd her Time and could not enter; per Bridgman. Cart. 78. cites Cro. El. 800. Mich. 42 & 43 Eliz. C. B. Blackburn v. Laffels.

It was held that she should not enter to prejudice the other Sisters so as to prevent their raising their Portions, but she had Re-

medy against the Eldest Son who had received the Profits in Disturbance of hers. Cro. E. 800. S. C. S. P. For it was her folly to suffer the Son to continue Possession. Noy. 53. S. C. by Name of Bradford v. Laffels.—Devise to A. until he shall or may raise such a Sum out of the Profits of the Land. If a Stranger enters after the Decease of the Devisor, tho' the Devisee had no Notice of the Will, yet the Time shall run on as much as if he had the Land in his own Possession. Vent 202. Lady Anne Fry's Case, cites 4 Rep. Sir And. Corbet's Case.—Mo. 550. Rolle's Case.

3. Devise of Lands to Trustees in Fee to pay Debts and Legacies, and after these paid to sell, and if any of the Testators Name would purchase, they to have it for 200*l.* less than the Value. One of the Name brings a Bill for Pre-emption, but delays bringing it till 25 Years after Testator's Death. Bill dismiss'd. Hill. 1685. Vern. R. 362. Huckstep v. Mathewes.

4. If there be a Decree for an Account to which an Executor is Party, and he has a Debt due to him which he does not claim but lies by, and the Account is taken and perfected, he shall not bring a new Bill for his Debt and put the Estate to the Expence of a new Suit to obtain a Satisfaction which he might have had in the Course of the former Proceedings. Per the Master of the Rolls who said, that this is not acting agreeable to his Trust. 2 Wms's Rep. 665. Mich. 1734. Cowper v. Earl Cowper.

And if such Executor has any Claim to any Real Estate of his Testator's if he does not prosecute a Bill by him

brought to make good his Claim, but on the Contrary suffers the Proceedings in the Account, and the Rents of the Lands claimed by him to be accounted for as Part of his Testator's Estate, he is so far barred; But it cannot operate as a Bar to the Realty or as any Extirpation of the Right to the Land. Ibid. 677.

(C) *Relieved*

(C) *Relieved in Equity.*

1. **F**urther Assurance was not demanded within the Time, yet Equity ordered to make further Assurance afterwards. Toth. 76. cites 1594. Kemp v. Palmer.

2. If a Purchaser neglects to enrol his Deed of Bargain and Sale being his only Assurance, and the Bargainor brings an Ejectment against him and hath Judgment. The Bargainee may resort to Chancery and there be relieved, if not for the Land yet for the Money paid. Mich. 13 Jac. 1. Chan. R. 10. in the **Earl of Oxford's Case**, cites Jacques v. Huntley. 13 June 1599. in Chancery.

² Wms's Rep. 15. S. C. And the Reporter says it was afterwards, Feb. 1723, confirmed in the House of Lords, tho' thought a very hard Case. Ibid. 21.

3. A Term was vested in Trustees, upon Failure of Issue Male, to raise 1500 l. for Daughters. And it was, that the Trustees by, and out of the Rents, Issues, and Profits of &c. as well by leasing or demising the same for 21 Years, or three Lives, or for any Term &c. of Years determinable on three Lives not exceeding 120 Years, should raise and pay for Portions &c 1500 l. but no time limited for Payment, nor any Proviso for determining the Term on Payment. The Trustees died. Then the Father died, leaving a Daughter, but no Issue Male, but had conveyed the Remainder to B. for Life, Remainder to his first &c. Sons in Tail, and in Default, Remainder to C. for Life, and after to his first &c. Sons &c. Remainder over. The Daughter took Letters of Administration to the surviving Trustee, and she and B. mortgaged the Land, which was 160 l. per Annum, to J. S. and B. covenanted to pay the Money. B. entered and took the Profits, and paid the Interest, but none of the 1500 l. Principal, and died without Issue. **Ld. Macclesfield** observed, that this was a Power to lease only for 21 Years, or three Lives determinable on any Number of Years not exceeding 120, and decreed, that (the 1500 l. being to be raised out of the Annual Profits as they arose) the Receipt of B. was the Receipt of the Daughter her self as to those in Remainder, and J. S. standing in her Place, who had the legal Estate as Administrator to the surviving Trustee, and was also Cesty que Trust, the Profits received by B. shall go in Satisfaction of so much of the 1500 l. and the Residue to be charged on the Remainder. But decreed further, that what might have been raised by letting Leases according to the Power by way of Fine, if B. had apprehended his Estate chargeable with the Money, and so had taken the Benefit of making such Leases, that they must be accounted for by the Remainder-man the Defendant. Ch. Prec. 583. Pasch. 1722. Ivy v. Gilbert.

[For more of Negligence in General See **Condition, Grants (H a. 2) Mortgage, Presentation**, and other proper Titles.]

Negro.

Negro.

(A) Of what Consideration they are in the Eye of the Law, and what Actions lie for taking them.

1. **I**N *Trover* for 100 Negroes, and upon Not Guilty pleaded a special Verdict found that the Negroes were *Infidels, Subjects to an Infidel Prince, and used to be bought and sold in America as Merchandize* by the Custom amongst the Merchants, and that the Plaintiff had bought them, and was in Possession of them, and that Defendant took them out of his Possession. It was argued, that no Property can be in the Person of a Man whereupon to maintain Trover, and cited Co. Litt. 116. that no Property can be in Villains, unless by Compact or Conquest. But the Court held, that they being usually bought and sold among Merchants as Merchandize, and being Infidels, a Property may be in them sufficient to maintain the Action; And gave Judgment for the Plaintiff *Nisi Causa* this Term. But at the End of the Term, upon the Prayer of the Attorney General to be further heard, Day was given to the next Term. 2 Lev. 201. Trin. 29 Car. 2. B. R. Butts v. Penny.

2. In *Trespass* the Count was, that the Defendant *Vi & Armis unum Æthiopem* (Anglice vocat. a Negro) *ipsius Querentis pretii 100l. apud London &c. took and carried away, and kept the Plaintiff out of Possession* of the said Negro from that Time usque Diem exhibitionis Billæ prædict. per quod he lost the Use of his said Negro. Upon Not Guilty the Jury found, that the Negro had been baptized after the Taking, upon which a Question was made, *Whether tibe Baptism was a Manumission?* As to that the Court gave no Opinion; But held, That *Trespass* lies not; because a Negro cannot be demanded as a Chattel, nor can his Price be recovered in Damages in Action of *Trespass*, as in Case of a Chattel; For he is no other than a slavish Servant, and the Master can maintain no other Action of *Trespass* for taking his Servant, but such only as concludes Per quod *Servitium amittit*, in which the Master shall recover for the Loss of his Service, and not for the Value, or for any Damages done to the Servant. Judgment quod Querens nil capiat per Billam. Carth. 396. Hill. 8 W. 3. B. R. Chamberlain v. Harvey.

shall be real Estates, and descend to the Heir &c. as Lands of Inheritance, by which Means the Plaintiff's Mother became intitled to the said Negro for her Life, and that her after Husband brought this Negro into England, where he continued in his Service several Years till the Death of his Wife, when the said Husband put the Negro out of his Service, who afterwards served several other Masters here, and at the time of the *Trespass* supposed, was in the Service of the Defendant, and had for his Wages 6 l. a Year. The Case was argued & adjournatur; But in Hillary Term after Judgment was given that the Bill abate; For the Court held, That *Trespass* for taking away a Man generally will not lie, but a special Action of *Trespass* might be for taking of his Servant; Per quod *Servitium Amittit*. 5 Mod. 182. to 191. S. C.

3. In *Indebitatus Assumpsit* the Plaintiff declared for 20 l. for a Negro sold by the Plaintiff to the Defendant viz. In *Parochia beate Marie de Arcubus in Warda de Cheape*, and Verdict for the Plaintiff. And on Motion in Arrest of Judgment Holt Ch. J. held, That as soon as a Negro comes into England he becomes Free; One may be a Villein in England, but not a Slave. Per Powel J. The Law took no Notice of a Negro. And Holt said, it should have been averred in the Declaration, that the Sale was in Virginia, and by the Laws of that Country Negroes are saleable; For

the Laws of England do not extend to Virginia, which being a conquered Country, their Law is what the King pleases, and we cannot take Notice of it but as set forth; And therefore directed, that the Plaintiff amend the Declaration, which should be made *That the Defendant was indebted to the Plaintiff for a Negro sold here at London, but that the said Negro at the time of the Sale was in Virginia, and that Negroes by the Laws and Statutes there are saleable as Chattels.* And then the Attorney General coming in said, that they were *Inheritances transferrable by Deed and not without.* And nothing was done. 2 Salk. 666. *Smith v. Browne and Cooper.*

4. *Trover* lies not for a Negro; For Men may be Owners, and therefore not the Subject of Property; And the Court seemed to think, that in *Trespas Quare Captivum suum cepit*, the Plaintiff might give in Evidence that the Party was his Negro, and he bought him. 2 Salk. 667. Mich. 4 Ann. B. R. *Smith v. Gould.*

For more of Negro See *Domine Replegiando*, pl. 5. and other proper Titles.

Ne Unques Accouple.

(A) Good Plea. In what Cafes.

S. P. Br. Appeal, pl. 17. cites 50 E. 3. 25. by the best Opinion. But in Appeal, Dower &c. where she demands by her Baron, it is a good Plea.

1. **W**HERE a Feme has a Baron, and takes another Baron, and she and the second Baron brings *Affise*, or *Cui in Vita &c. de jure Uxoris*, Ne unques Accouple is no Plea; for the Action is good by Baron in Possession. Br. Brief, pl. 91. cites 50 E. 3. 19.

S. P. And whether legal or not legal is no ways material. 2 Salk. 437. S. C.

2. It is an ill Plea *in Debt*, because Marriage De Facto is sufficient to intitle the Plaintiff to this Action, and because it puts it on Trial by Certificate which admits a Marriage, but not *Secundum Leges Ecclesiæ*; He should have pleaded *no Marriage in Fact*, and that would have been tried per Pais. Show. 50. Trin. 1 W. & M. *Allen v. Grey.*

— S. P. 1 Lev. 41. in Case of *Basset v. Morgan.* — So in *Trespas* for taking his Wife, and was so adjudged, and a *Respondeas Ouster* awarded; Because a *Marriage in Fact* is sufficient to maintain this Action; But per Holt, a Plea that they were Not married, or Not Covert in Marriage, would be good. Comb. 131. Trin. 1 W. & M. B. R. S. C.

3. In *Affault and Battery* brought by Baron and Feme, it was held upon Demurrer to be no good Plea; For it cannot be tried at Common Law, the Jurisdiction whereof ought not to be taken away in personal Actions. Comb. 473. Pasch. 10 W. 3. B. R. *Jones & Ux. v.*

4. Case by Baron and Feme for a Cause arising before Marriage; Defendant pleads, that the Plaintiffs *Nunquam legitimo Matrimonio copulati fuerunt.* Plaintiffs replied, that they were married at such a Time and Place; The Defendant demurred, and thereupon Judgment was given for the Plaintiff, because the Plea was naught; For in *personal Actions* you must lay the Matter on the Fact of the Marriage to make it triable by the Country, and not upon the Right of the Marriage

riage as in *Appeals and real Actions*. 12 Mod. 276. Hill. 11 W. 3. Mitchell & Ux. v. Garrett.

For more of Ne Unques Accouple in General See *Dower. Trial* (P) per tot. — (B. a) Pl. 1, 2, 3. and other proper Titles.

(A) Nient Comprife, or not Parcel.

1. **N**ient Comprife is an Exception taken to a Petition as unjust, because the Thing desired is not contained or comprehended in that Act or Deed whereupon the Petition is grounded. For Example, one desires of the Court, to be put in Possession of a House formerly among other Lands &c. adjudged unto him. The adverse Party pleads, that his Petition is not to be granted, because tho' he had a Judgment for certain Lands and Houses, yet the House, into the Possession whereof he desires to be put, is not contained among those for the which he had Judgment. Reg. Plac. 94, 95. cap. 2.

2. In Assise; if the Plaintiff makes Title, in as much as the Land is of the Fee which is Partible between Males &c. the other shall not plead that it is Not partible without shewing that it is not Parcel of this Fee; For if he confesses that it is Parcel of the Fee of E. and that this Fee is departible, he shall not say that this Land is not departible where the entire Fee is departible, but he may say that this is not Parcel of this Fee, or may shew special Matter how that those Lands are other than the Groy's is. Br. Comprife, pl. 11. cites 23 Ass. 12. Br. Customs; pl. 66. cites S. C.

3. In Assise; The Tenant pleaded a Recovery by himself against the Plaintiff in a Writ of Entry Sur Disseisin of the Manor of H. of which these Tenements are and were Parcel, in which Writ the Plaintiff had the View of the Manor, and of these Tenements then Parcel, Judgment if Assise; the Plaintiff said that these Tenements are not, nor ever were Parcel of the Manor in the Possession of the Tenant, Prit; Per Fith, you shall answer to the putting in View. Per Thorp, where I plead in Bar against you by Fine, there it is a good Plea, that Nient Comprife; and where Judgment is pleaded, viz. a Recovery, there it is a good Plea that Nient Comprife, or Not Parcel. But where I allege a Recovery in which the View was made, there Nient Comprife is no Plea, nor to say Not Parcel without answering to the View; and therefore Ludd seeing the Opinion of the Court said, That the Tenements are not, nor ever were Parcel of the Manor, nor ever put in View as Parcel of the Manor, Prit; and the others econtra. Br. Barre, pl. 66. cites 29 Ass. 20. Br. Comprife, pl. 14. cites S. C.

4. In Assise; The Tenant said that the Plaintiff has Writ of Entry in the Post of the same Land pending against him, in which he has had the View, Judgment of this Writ of a more base Nature; the Plaintiff said, that the Tenements now put in View are not Parcel of the Tenements put in View in the first Writ, Prit by the Assise, and the other said, that they are Parcel of the Tenements demanded by the first Writ, Prit by the Assise. Per Thorp, this is a good Answer, and the Assise awarded upon this Point; but by him, it had been greater Advantage for the Tenant to have said, Parcel of the Tenements put in View; For then the Assise had not been taken till Process had been made against the first Viewors. Br. Comprife, pl. 13. cites 29 Ass. 66.

S. P. Br. Comprise, pl. 25. cites 44 Aff. 19. S. P. Br. Record, pl. 14. cites 44 E. 3. 45. * Quære if this is not miscited, and perhaps should be 44 E. 3. 45.

5. In Assise the Tenant pleaded Recovery against the same Plaintiff of the same Tenements in another Vill, and the same Tenements put in View, and the Plaintiff said, Not put in View, and so Nient Comprise; and it was tried by the first Jurors, and yet it was returned before in such Assise, that the first Jurors were dead, and before the same Justices. Quod Nota. Br. Comprise, pl. 4. cites * 45 E. 3.

In Assise of three Acres, the Tenant pleaded Recovery of 12 Acres by Formedon, of which the

6. In Assise of three Acres of Land Perle pleaded Recovery against the Ancestor of the Plaintiff by Formedon of the Manor of D. who had the View, and this Land put in View as Parcel; Judgment if Assise. Cherle said Not Parcel, Prist by the Assise. Perlay said, you shall say Not put in View as Parcel, or Nient Comprise; Et adjornatur. Br. Comprise, pl. 16. cites 45 Aff. 11.

Land in Plaint is Parcel, against a Stranger, and the Title of the Plaintiff Mesne between the bringing of the Formedon and the Judgment in it. The Plaintiff reply'd, that the Land now in Plaint is Not Parcel of the Land recovered by the Formedon. Per Hussey, if the Recovery was of a Manor, then Not Parcel is a good Plea, but one Acre cannot be Parcel of another Acre, and therefore shall say, That the Land put in View was Not Comprised in the Recovery of the Formedon, and then a good Plea; and so there is a Difference; by which the Plaintiff pleaded that Nient Comprise, Prist; and the others e contra. Br. Comprise, pl. 33. cites 1 E. 3. 8.

7. You cannot have a Nient Comprise against an express Thing; per Coke Ch. J. 2 Buls. 319. in the Case of **Wilson v. Welch**, cites 48 E. 3. 11.

8. When a Recovery is pleaded of 4 Acres, of which the Acre in Dispute is Parcel, the Defendant shall not say Not Comprised, but shall say Not Parcel; per Cur. By which he said that it was Not Parcel, and so Not Comprised, and ill; For by the Nient Comprise the Matter of Not Parcel before is waived, Quod Nota, per Cur. By which he said, that Not Parcel at the Time of the Recovery, and Dubitatur if he shall say, Not Parcel at the Time of the Recovery of the Formedon, or at the Time of the Scire Facias of the Execution sued thereupon. Quære. Br. Comprise &c. pl. 22. cites 2 E. 4. 18.

9. Entry in the Quibus; per Danby where Recovery is pleaded, it is a good Avoidance to say that Nient Comprise, but in Recovery per Visum Furatorum or of the Party a Man shall say Not put in View and so Nient Comprise; but in the Case of Kniveton 3 H. 6. 15. where Recovery of a Manor was pleaded, of which the Land after in Variance was Parcel, the Party was compell'd to take Issue, Parcel or not Parcel, And T. 48 E. 3. 11. in * *Avowry for Rent Charge granted by Fine out of the Land, of which the Place &c. is Parcel, the Issue was Not Parcel of the Land charged.* T. 7 E. 3. *Nuper Obiit of Tenements in Dale, the Tenant pleaded Fine levied by the Ancestor of the said Tenements in S. and that D. is a Hamlet of S. The Plaintiff said that D. is a Vill by it self, and the Issue taken, and yet this amounts only to Nient Comprise.* Br. Comprise, pl. 24. cites 9 E. 4. 17.

* S. P. Br. Comprise, pl. 1. cites 3 H. 6. 15.

For more of Nient Dedire See **Fines** (L. b. 2) **Manor. Reversion** (U) **Trial** (N. 2) (F. a) and other proper Titles.

Nient Dedire.

(A) *What amounts to it. And in what Cases Nient Dedire amounts to a Confession.*

Br. Estoppel, pl. 12. cites S. C.

I. **I**N Assise if the Deed of the Ancestor of the Plaintiff whose Heir &c. with Warranty is pleaded in Bar, and the Plaintiff says that he himself is a Bastard, by this the Deed shall not be intended Nient Dedire. But

But Brooke says, the *better Pleading is to take it by Protestation*. Br. Confession, pl. 24. cites 11 Aff. 24.

2. *Trespafs of taking his Horfe* brought by H. S. The Defendant said, that he himself was thereof possessed *ut de Proprio*, till one H. S. of D. took it and gave it to the Plaintiff, and the Defendant retook it; the Plaintiff said, that H. S. in the Bar and H. S. the *Plaintiff are one and the same Person, and not divers, and to the Plea [of] the Defendant demurred. Rogers said, by this Replication the Plaintiff has not deny'd but that he took the Goods of the Defendant, because he says that he is the same Person. But per Littleton J. it is not so; For a *Thing shall not be held Nient Dedist where a Man does not give answer to it*; and here he need not give Answer to it; For when he says, that the one and the other are the same Persons, this destroys the Bar when the Defendant does not deny it but joins to the Demurrer; and this makes the Plea no Plea, and to amount to Not Guilty, and so it is no Bar; by which the Plaintiff recovered; Quod Nota. Br. Confession, pl. 35. cites 13 E. 4. 7.

* All the Editions of Brook are (Defendant) but it should be (Plaintiff) and so is the Year-Book.

3. In *Rescous* the Plaintiff counted upon a Tenure, and that he distrained, and the Defendant made Rescous, and the Defendant pleaded Not Guilty, where the Truth was, that there was no Tenure, but the Defendant was Tenant at Will rendring 10 s. per Ann. the Plaintiff distrained and he made Rescous; and per Fineux, this Plea of Not Guilty is no Confession of the Tenure or Nient Dedire; but if he had pleaded *Riens Arrear*, this had been a Nient Dedire of the Tenure, Contra of the Not Guilty; because *Negativa Nihil Implicat*, but Contra of *Riens Arrear*; For this is a *Negative which includes in it an Affirmative*. Br. Confession, pl. 31. cites 9 H. 7. 3.

4. In *Trespafs* it was agreed, that if the Defendant justify the taking of the Goods by Licence of the Plaintiff to retain it as Pledge till 10 l. Debt be paid to him, and the Plaintiff demurs generally, by this he confesses the Debt of 10 l. to the Defendant; Contra it seems if he had said *Protestando* that he did not owe the 10 l. and Pro Placito demurred. Br. Confession, pl. 61. cites 5 H. 7. 1.

(B) The Difference between Nient Dedire and Confession.
And the Effect of the Nient Dedire.

1. **W**HERE the Tenant in any Action alleges Nonage in one within Age, or vouches one, and says that he is within Age, or prays Aid of one within Age, and prays that the Parol demur, and the Demandant does not deny it, there the Parol shall demur without having Process to try it by Inspection. Br. Confession, pl. 28. cites 29 Aff. 37.

Br. Age, pl. 56. cites S. C.

2. Per June, there is a great Diversity between Confession and Nient Dedire; For in *Præcipe against two*, if the one appears and says nothing, or makes Default, and the other takes the entire Tenancy and vouches, or pleads in Bar, there the Demandant may answer to it without saying any thing to the other, and this Nient Dedire shall not abate the Writ, Contra of his Confession, if he had confessed that the other had nothing. Br. Confession, pl. 41. cites 8 H. 6. 13.

3. Nient Dedire is not so strong as Confession. Br. Confession, pl. 37.

As in Debt upon an Obligation

of 10 l. the Defendant confessed all except 40 s. of which he shew'd Acquittance, and the Plaintiff pray'd Judgment, and said nothing to the Acquittance, and well; For per tot. Cur. if he had confessed the Acquittance the Writ had been abated; For it is ill in Parcel, which goes to all upon Confession, Contra elsewhere upon Verdict Quod Debet 8 l. and to the 40 s. Non Debet. by which he recovered 8 l. and by his Nient Dedire was barr'd of the rest, and amerced. Br. Confession, pl. 57. cites 3 H. 6. 48. — *Ibid.* pl. 63. cites S. C.

4. Debt of 20 l. the Defendant pleaded Bar to 10 l. and to the rest said nothing; by which the Plaintiff recovered the 10 l. immediately, and Damages and Costs remained till the Bar be try'd; and so Note Recovery upon Nient Dedire. Br. Confession, pl. 20. cites 22 H. 6. 47.

(C) Aided by it, Who? Strangers.

As in Writ of Affise against two, the one reversed the Outlawry in the Affise by Writ of Error, and the Plaintiff was warned and appeared, and could not deny the Error, by which the Outlawry was reversed against him inasmuch as the Disseisin was found with Force, and the Defendant outlaw'd by Error &c. and in another Writ of Error by the other upon the same Error, he had the Outlawry reversed without Warning the Plaintiff in the Affise, by Reason of his Nient Dedire against the first; For it was upon one and the same Disseisin; Quod Nota, quia Mirum! Br. Confession, pl. 11. cites 7 H. 4. 39.

For more of Nient Dedire in General See **Estoppel** (D. 2) and other proper Titles.

Night.

(A) What may be done in the Night.

Ibid cites Pasch. 26 Eliz. B. R. S. P. between **Samms** & al. But the Doubt was because the Condition was, Ready to be delivered to the Parties requiring the same; and it was not a seasonable Time to require it in the Night.—S. P. Cro. E. 676. Trin. 41 Eliz. Withers v. Drew. —Ibid cites 33 Eliz. Sparrow's Case acc.

1. **D**EBT upon an Obligation conditioned to stand to an Award, so as it be made before the 9th Day of October &c. and it was made the 8th Day of October at 10 of the Clock in the Night; and ruled good; For dies Naturalis comprehends the Day and Night. Cro. E. 43. in Case of **Green v. Ardene**, cites it to be so adjudged between **Franklin and Davies**, Intratur Mich. 12 & 13 Eliz. Rot. 1330. B. R.

2. If in a Præcipe quod Reddat the Sheriff summon'd the Defendant upon the Land in the Night Time; such Summons is meerly void; per Rhodes. Le. 57.—So in a Formedon in Remainder. Cro. E. 42. Green v. Ardene.

3. Livery made in the Night by Virtue of a Letter of Attorney to deliver Seisin was said per Fleetwood to have been adjudged good. Cro. E. 43. Mich. 27 & 28 Eliz. B. R. in Case of Green v. Ardene.

4. Things done in the Night, where the personal Attendance of another is not requisite, are good. Cro. E. 676. Trin. 41 Eliz. B. R. in Case of Withers v. Drew.

5. Neither upon a Cap. Excom. nor for any other Cause, unless for Treason or Felony, is it lawful for any to break an House in the Night. Cro. E. 741. Hill. 42 Eliz. C. B. Smith v. Smith.

For more of Night See **Distress** (O) and other proper Titles.

(A) Night-

(A) Night-walkers.

1. 13 E. 1. Stat. 2. cap. 4. **E**Nacts, that if any Stranger pass by the Watch, he shall be arrested until Morning; and if no Suspicion be found, he shall go quit.

S. 6. Statute of Winton. **E** Watch, he shall be arrested until Morning; and if no Suspicion be found, he shall go quit.

S. 7. And if they find Cause of Suspicion, they shall forthwith deliver him to the Sheriff, and the Sheriff may receive him without Damage, and shall keep him safely, until he be acquitted in due manner.

S. 8. And if they will not obey the Arrest, they shall levy Hue and Cry upon them, and such as keep the Town shall follow with Hue and Cry with all the Town, and the Towns near, and so Hue and Cry shall be made from Town to Town, until they be taken and delivered to the Sheriff as before is said; And for the Arrestments of such Strangers, none shall be punished.

Serjeant Hawkins says, It is held by some, that this Statute was made in Affirmance of the Common Law, and that any private Person may lawfully arrest a

suspicious Night-walker, and detain him till he make it appear, that he is a Person of good Reputation. 2 Hawk. Pl. C. 77. cap. 12. S. 20.—80. cap. 13. S. 6. S. P.—Br. Trespass, pl. 268. S. P. cites 4 H. 7. 1, 2.—And if a Watchman be killed in staying Night-walkers, it is Murder. Cro. J. 280. Patch 9 Jac. B. R. in Mackaley's Cafe.

2. 5 E. 3. cap. 14. S. 1. Item, whereas in the Statute made at Winchester, in the time of King Edward, Grandfather to the King that now is, it is contained, That if any Stranger pass by the Country in the Night, of whom any have Suspicion, he shall presently be arrested and delivered to the Sheriff, and remain in Ward till he be duly delivered.

S. 2. And because there has been divers Manslaughters, Felonies, and Robberies done in times past by People that be called Roberdesmen, Wasters, and Draw-latches

S. 3. It is accorded, That if any Man have any evil Suspicion of such, be it by Day or by Night, they shall be incontinently arrested by the Constables of the Towns.

S. 4. And if they be arrested within Franchises, they shall be delivered to the Bailiffs of the Franchise; and if in Guildable, they shall be delivered to the Sheriffs, and kept in Prison till the coming down of the Justices designed to deliver the Gaol.

S. 5. And in the mean time the Sheriffs or Bailiffs of the Franchises shall enquire of such Arrests, and at the coming of the Justices return their Enquests before them with that which they have found, and the Cause of the Takings with the Bodies, and the Justices shall proceed to the Deliverance of such Persons arrested, according to the Law.

S. 6. And in Case that the Sheriffs or Bailiffs of the Franchises have not inquired of such Arrests, they shall be amerced, and nevertheless the Justices shall make Enquiry, and further proceed to the Deliverance, as before is said.

3. In Trespass of Assault, Battery, and Imprisonment, the Defendant justify'd as Constable, for arresting him in a suspicious House with a Woman of ill Fame, to make him find Surety of his good Behaviour; and a good Plea by all the Justices, and so of Nightwalkers, and may make his Neighbours aid him to do it. Per Cur. Br. Trespass, pl. 432. cites 13 H. 7. 10.

4. Such as ago abroad in the Night, and sleep in the Day, are said to be indictable in the Sheriff's Torn. 2 Hawk. Pl. C. 67. cap. 10. S. 59.

For more of Night-walkers See **Good Behaviour**, and other proper Titles.

(A) Nil dicit.

1. **N**IL Dicit is a Failing to put in an Answer to the Plea of the Plaintiff in an Action by the Day assigned; And Judgment shall pass against him that fails, because he says nothing to the contrary; And this is always peremptory and Bar to the Action for ever. Reg. Plac. 138, 139. cap. 4.

Br. Confession
pl. 64 cites
8 H. 6 s. S.
C.—Br.
Default, pl.
36. cites S. C.

2. The Plaintiff cannot condemn the Defendant by a Nil Dicit, unless where the Defendant appears, and the Plaintiff declares; For the Defendant is not bound to answer but where the Plaintiff declares, which cannot be without Appearance; For the Answer shall be made to the Declaration; Quod Nota. Br. Confession, pl. 16. cites 8 H. 6, 7.

Br. Confession,
pl. 64.
cites 8 H. 6.
8. S. C.—
Br. Default,
pl. 36 cites

3. And where the Defendant appears, and thereupon disavows his Attorney or Bailiff, as in Assise, and says that he will not appear to the Action, there he cannot be condemned by Nil Dicit. Quod Nota. Ibid.

4. The Court will not reverse a Judgment which is given upon a Nil Dicit, and by the Rules of Court. But by the Consent of the Plaintiff and Defendant, the Court will grant a Repleader in the Case. Reg. Plac. 139. cap. 4.

5. On a Nil Dicit Judgment is to be given *Instanter*. 11 Mod. 2. Pasch. 1 Ann. B. R. Anon.

For more of Nil Dicit See **Amendment, Error, Judgment, (B.a)** and other proper Titles.

(A) Nil Habuit in Tenementis.

Br. Pleadings, pl.
162. cites S.
C.—Heath's
Max. 97.
chap. 5. cites
S. C.

1. **D**Ebt upon a Lease for Years, the Defendant said, that the Plaintiff nothing had in the Land at the time of the Demise &c. and the Plaintiff said, that W. T. was seised in Fee, and infeoffed two in Fee to the Use of the Plaintiff who were seised accordingly, and so seised the Plaintiff made the Lease, & de hoc ponit se super Patriam; Quod vide the Issue where the Plea of the Defendant is in the Negative. Br. Issues joins, pl. 89. cites 2 H. 7. 4.

2. A. grants a Lease for Years to B. and then by Indenture grants a second Lease to begin presently during the first Lease. A. brings Wast against second Lessee, and counted of a Lease made for Years, without speaking of the Indenture. The Court thought it would be dangerous to plead No Wast. Then it was demanded, if Defendant plead that the Plaintiff had nothing Tempore Dimissionis, whereof he had counted, if the Plaintiff might estop the Defendant by the Indenture, tho' he had not counted upon it, and if such Replication be not a Departure; And Periam J. and Leonard

Leonard Custos Brevium, thought not; For it is not contrary to the Declaration, but does rather enforce it. Le. 156. pl. 220. Mich. 31 Eliz. in C. B. Anon.

3. Error of a Judgment in the Common Bench, where G. brought an Action of *Debt for Rent reserved upon a Lease for Years made by him, self*; The Defendant pleaded, That the Plaintiff *Nihil habuit in Tenementis prædict. tempore Dimissionis prædict.* The Plaintiff says, *Quod habuit in Tenementis prædict.* And thereupon being at Issue, and found for the Plaintiff, and Judgment for him, it was now assigned for Error, that this Replication was not good; For he *ought to have shewn* to the Court, *what Estate he had tempore Dimissionis*, so as the Court might adjudge, that he had good Authority to demise; And the replying generally, *Quod habuit &c.* is not good, nor is any Issue, and therefore the Judgment erroneous; And all the Court held, that the Replication was not good, and that the Defendant might well have demurred for that Cause. *But the Defendant having joined Issue, and the Verdict finding for the Plaintiff, it is now an Issue; And the Verdict has made the Replication good*; For the Court is now ascertained that the Plaintiff had good Authority and Estate to demise; wherefore the Judgment was affirmed. Cro. J. 312. Mich. 10 Jac. B. R. Gyll v. Glafs.

S C Yelv. 227. adjudged; and says, That the Lease was not by Indenture. — 2 Buls. 41. S. C. but instead of its being an Action of Debt, it is there reported as an Action of Covenant by the Lessee for not making a Lease, setting forth that the De-

defendant the Lessor *Nihil habuit* whereof to make a Lease according to his Covenant, Defendant pleaded, *Quod habuit unde*; And the Jury found *Quod habuit unde*, and what therein, and so Judgment for the Plaintiff, And Error assigned that no good Issue was joined the Plea being bad, and so the Issue bad too; But the whole Court held it made good by the Verdict, and affirmed the Judgment.—Jenk. 340. pl. 97. S. C. according to Croke and Yelverton, and says, that the Defendant might have demurred.

4. In an Action of *Covenant* upon an Indenture made by the Wife Defendant, whilst she was sole, to the Wife of the Plaintiff, whereby she, reciting that she was seised in Fee of certain Lands, in Consideration of a Marriage to be had between the Plaintiff and her Son, did grant to the Plaintiff a *Rent-charge out of those Lands* to have after the Death of her Son, and covenanted to pay it &c. The Defendant pleaded that she had nothing in the Land at the Time of the Grant, but that a Stranger was seised of it. And upon Demurrer it was adjudged for the Plaintiff, both because the Defendant is *stopped by the Deed*, and that the *Covenant extends to it and is as an Annuity*; *Abique Argumento ad Motionem Mri. Prestwood.* All. 79. Trin. 23 Car. Newton & Ux. v. Weekes & Ux.

S. C. cited by Ventri. J. 2 Vent. 69. — 55. in *Debt for Rent reserved upon a Lease by Indenture*; the Defendant pleaded *Nihil habuit &c.* tempore &c. The Plaintiff demurred

generally; And Judgment upon the first Argument was given for the Plaintiff, per tot. Cur. For this is no Plea against the Estoppel by Indenture. 3 Lev. 146. Mich. 35 Car. 2. in C. B. Heath v. Vermaiden.

5. *Assumpsit*, and declared that in Consideration that the Plaintiff and his Wife at the Defendant's request would convey to C. Cozin and Heir of M. their Estate in certain Lands in H. which were the said M's by such ways as the said C. should appoint, he promised to pay to them 50l. And whereas the Plaintiffs at the Defendant's Request had promised to convey the said Tenements to the said C. by such ways as he should appoint, he promised to pay to them another 50l. and said that they have been always ready to convey; but C. never requested. The Defendant pleaded, that at the Time the Plaintiffs, nor any of them, had any Estate in the Lands, the Plaintiffs demurred; and thereupon the Plaintiffs entered a *Nolle Prosequi* upon the second Promise, and had Judgment upon the first; upon which Error was brought and assigned, that here was no Consideration, the Plaintiffs not having any Estate as is confessed by the Demurrer; but by all the Court, it is good; For the *Bargain was for such Estate as they had*, and they might have a *Right extinguishable by Release*, tho' they had not any Estate; and they affirmed the Judgment. 2 Lev. 33. Hill. 23 & 24 Car. 2. Woolnough and Ux. v. Viridon.

6. In *Covenant upon a Deed Poll*, the Count was of a *Lease rendring Rent and Covenant to pay it*, and assigned the Breach in Non-payment, the

Defendant protestando, that he did not Enter nor Occupy as the Plaintiff supposed, *pro Placito dicit*, that the Plaintiff Nil habuit in Tenementis; the Plaintiff replied, that he *bonum habuit Titulum unde potuit dimittere*; the Defendant demurred generally, and the Court on the first Argument held the Replication ill, *not shewing what Title he had*, according to the Case of Cro. J. 312. [supra] and this notwithstanding that it was not by Indenture, and tho' it was objected that that Case was in Debt for the Rent, but this Case is a *Covenant collateral to the Reservation of the Rent*, whereas in *Gill and Glass's* Case if there was no Lease, there could be no Reservation, but that collateral Covenant to pay may be where no Lease is; but per Cur. it is all one; For if there be not any Rent, there cannot be any Covenant for Payment of the Rent, but *one depends upon the other*, and so it was remembered to have been adjudged, Mich. 13 Car. 2. B. R. in the Case of **Caponhurst v. Caponhurst*; whereupon the Plaintiff perceiving the Opinion of the Court to be against him, prayed leave to discontinue in Order to bring a new Action, and it was granted. 3 Lev. 193. Mich. 36 Car. 2. Aylet v. Williams.

* 1 Lev. 45.

7. In *Covenant* the Plaintiff declared of an Agreement for a Lease for 99 Years of a Mesuage &c. under a certain Rent, and such usual Covenants as in all Demises granted by the Trustees of the Earl of Rochester were used; *Omnium quorum Consideratione* the Defendant agreed to pay the Plaintiff 180l. at Michaelmas following, and tho' the Plaintiff had performed all of his Part the Defendant had not paid the Money &c. The Defendant pleaded that the Plaintiff had nothing in the Premises at the Time; Plaintiff demurred, and Judgment was given by the whole Court for the Plaintiff; For tho' it may be pleaded in Action of *Debt for Rent*, yet it cannot be pleaded in *Covenant for a Sum in Gross*; besides the Agreement does not necessarily import that the Lease should be made by the Plaintiff; it may be understood to be agreed that he should procure a Lease for the Defendant. 2 Vent. 99. Mich. 1 W. & M. in C. B. Clarke v. Peppin.

For more of Nil Habuit in Tenementis See *Trial, Fine*, and other proper Titles.

(A) Nobility.

1. **I**N the Saxon Times the Earls of Counties being Officiary were elected by the Freeholders in their Folkmotes, and were removeable for Male-Administration. 2 Salk. 509. in Marg. cites L. L. Edw. c. 35. L. L. Edgari. c. 5. L. L. Canuti. c. 17. and Saxon Chron. Sub. Anno. 1055.

2. Before the Time of 11th. Edw. 3. there were but two Titles of Nobility, viz. Earls and Barons; Barons were Originally created by Tenure, afterwards by Writ, and last of all by Patent, viz. about the 11 R. 2. As to Earls, they were first created by Letters Patents; and an Earldom consisted in Office for the Defence of the Kingdom. See Braët. lib. 1. c. 8.

‡ 2 Brownl. 339.—Sti. 186

‡ Comites had their Names not from Counties but a Comitando Regem. 9 Rep. 49. it may be intailed as any Office may within Westm. 2.—And Earldoms consist of Rent and Possessions, which were antiently great. See Mag. Chart. the Relief is 100l. per Holt Ch. J. 2 Salk. 509. Trin. 6 W. & M. B. R. King and Queen v. Knollys.

* S. P. But that Aubrey de Vere was the first Mar-

3. At the Time of making Magna Charta 9 H. 3. there was no Duke, Marquess, or Viscount in England; for if there had been, they had (no doubt) been named in this Charter; the first Duke that was created since the

the

the Conquest, was *Edward the * Black Prince*, in 11 E. 3. *Robert de Vere* Earl of Oxford, was in the 8 Year of R. 2. created Marquess of Dublin in Ireland, and was the first Marquess that any of our Kings created; the first Viscount that I find of Record, and that fate in Parliament by that Name, was *John Beaumont*, who in the 18 Year of H. 6. was created Viscount Beaumont. 2 Inst. 5.

cedency; and in old Time none were Earls but only those that were of the Blood Royal, and therefore are called *Con sanguinei Regis*; and at their Creation the King gives them a Robe and a Cap, which signifies Counsel, and a Coronet which signifies the Greatness of the blood and Honour, and also a Sword, ut fit in Utrumque tempus [paratus,] as well ready for Peace as War; per Coke Ch. J. 2 Brownl 339. Pafch. 8 Jac. C. B. in the Earl of Rutland's Case.

outs in 11 R. 2. And that none of these Dignities are above an Earl in Degree, but only in preference, and therefore

4. Per Coke Ch. J. the *Dignities before the Conquest were not Patrimonial to descend*, which Dodderidge the King's Serjeant affirmed, and he said he had seen Charters before the Conquest with the Additions of *Dukes and Earls*. Noy. 147. in Case of Andrewes v. Webb.

5. If the King give Land to one and his Heirs *Tenend' de Rege per servitium Baronie*, he is no Lord of Parliament until he be called by *Writ to the Parliament*. These which are *Earls and Barons* have Offices and *Duties* annexed to their Dignities of great Trust and Confidence, for two Purposes, 1. *Ad consulendum tempore pacis*. 2. *Ad defendendum Regem & patriam tempore belli*; and prudent Antiquity hath given unto them two *Ensigns*, to resemble and to put them in Mind of their Duties; For first they have an honourable and long *Robe of scarlet*, resembling Council, in respect whereof they are accounted in Law, *De magno Concilio Regis*. 2. They are *girt with a Sword*, that they should ever be ready to defend their King and Country; and it is to be observed, that in ancient Records the *Barony* (under one word) included all the Nobility of England, because regularly all Noblemen were Barons, tho' they had a higher Dignity; and therefore of the Charter of King E. 1. the Conclusion is, *Testibus Archiepiscopis, Episcopis, Baronibus, &c.* so placed, in respect that Barons included the whole Nobility; and the Great Council of the Nobility, when there were besides Earls and Barons, Dukes and Marquesses, were all comprehended under the Name *De la Council de Baronage*. 2 Inst. 5. 6.

6. A. the Grandfather was called to Parliament by *Writ* 3 H. 8. A. died and then B. his Son was summoned to Parliament several Times by *Writ*, and after was disabled by *Act of Parliament to claim any Dignity &c.* by Descent, Remainder, or otherwise; B. died leaving C. his Son; C. was afterwards called to Parliament by *Queen Elizabeth by Writ*, and sat as youngest Lord and died, leaving D. his Son; Upon a Petition by D. to be restored to the Seat of A. his Great Grandfather; it was resolved by the Justices, upon a Reference to them by the Committees, 1st. That this being only a *personal and temporary Disability*, and not an *Absolute and Perpetual* one, it being without any Attainder, he may claim as Heir to such disabled Ancestor, or to any Ancestors Paramount him. 2d. That the *Acceptance of a new Creation by C. cannot hurt D.* because C. was disabled at the Time, and in truth was no Lord, but an Esquire only, so that the *Old and New Dignity descending together, the Old shall be preferred*. These Resolutions were approved by the Lords in Parliament, and confirmed by the Queen, and thereupon D. was accordingly conducted to his said Seat. 11 Rep. 1. Anno. 39 Eliz. Lord Delaware's Case.

For more of Nobility See *Decc*, and other proper Titles.

Nonsense.

Nonfense.

(A) The Effect thereof.

And in Assigning the Breach the infensible Words were omitted, and held well.

Cro. J. 358.
S. C.

3 Buls. 153.
S. C.—Mo.
848. S. C.

1. **I** And my Wife now have Heirs and Assigns by these Presents by the Will aforesaid do own full Power, good Right and lawful Authority to sell &c. This is a good Covenant to charge the Defendant; the Words (Heirs and Assigns) are *Surplusage* and so void, and for the Words (*do own*) a Man may be Owner of a Power as well as Owner of Land, adjudged. Roll. Rep. 84. Mich. 12 Jac. B. R. Goodman v. Knight.

2. If the Rent be behind it shall be *lawful for him to restrain and not being sufficient the Ground to re-enter into the said Demises*, and the same to have again in his former Estate; 'tis no good Condition. Roll. R. 367. Pasch. 14 Jac. B. R. Moody v. Garnon.

3. Where a Matter set forth is *grammatically Right but absurd* in the Sense, and Unintelligible, we cannot reject some Words to make Sense of the Rest, but must take them as they are; For there is nothing so Absurd and Nonsensical, but what by rejecting and omitting may be made Sense; but where a Matter is Nonsense by being Contradictory and *Repugnant* to somewhat Precedent, there the precedent Matter which is Sense shall not be defeated by the Repugnancy which follows, but that which is Contradictory shall be *rejected*; as in Ejectment where the Declaration is of a Demise the 2d. of January, and that the Defendant Postea, Scilicet the 1st. of January, ejected him; here the *Scilicet* may be rejected as being expressly contrary to the Postea, and the precedent Matter; per Holt Ch. J. 1 Salk. 324. Trin. 2 Annæ. B. R. Wyat v. Aland.—But per Powel J. *Words unnecessary* might in Construction be omitted or rejected, tho' they are not Repugnant or Contradictory, but in cæteris Omnibus agreed with the Ch. J. Ibid.

Gobd. 434.
S. P.

For more of Nonsense See **Blunders, Mistake of Words, Obligations**, and other proper Titles.

Nonfuit.

(A) In what Actions it may be [and in what Cases.]

S. P. Br.
Error, pl. 11.
cites 20 H. 6. 18.—
Br. Nonfuit, pl. 3. cites S. C.—
D. 262. b. pl. 52.—329. pl. 14.—
See False Judgment (G).

1. **A** Man be nonsuited in a Writ of false Judgment. 20 D. 6. 18. b.

Lat 110.
resolved.
Cole. Case.

2. **A** Man may be nonsuited in Writ of Error; contra † 26 D. 6. 18. b.

† It should be 20 H. 6.—Br. Error, pl. 6. S. P. cites 9 H. 6. 13. but Brook makes a Quere thereof; for it is only a Writ to remove the Record and to Examine the Matter. But in Scire facias *ad audiendum Errores* he may be nonsuited, and then it seems the Matter is at an End.—S. P. Ibid. pl. 11. cites 20 H. 6. 18. but that in a Writ of Error he cannot be nonsuited, because he has *no Day in Court*; quod non Negatur, but it is not expressly ruled. Br. Nonfuit, pl. 3. cites S. C. and says nota, that it was in a Manner agreed for Law, and for that Reason.—Br. Nonfuit, pl. 2. cites 9 H. 6. 13.

Writ

Writ of Error was brought and *Scire facias ad audiendum errores*, and [the Plaintiff] was nonfuit, and after brought another *Writ of Error* and *Scire facias* and had *Superfedeas* of Execution; and so see, and *quare* if the *Nonfuit* be intended to be upon the *Writ of Error*, or upon the *Scire facias*. Br. *Nonfuit*, pl. 15 cites 9 H. 5. 13.—Br. *Nonfuit*, pl. 50. cites S. C. and had *Superfedeas* upon the second *Writ of Error*, because he had no *Superfedeas* on the first.—Br. *Error*, pl. 82. cites 15 E. 4. 18. S. P. That a Man was Nonfuit in a *Writ of Error*—Br. *Nonfuit*, pl. 30. cites 15 E. 4. 18. S. P. and 26 H. 6. 7.—Br. *Nonfuit*, pl. 63. cites 6 H. 7. 16. S. P. but there is no mention of *Scire facias*.

3 If the Plea be returned out of Ancient Demesne, because the Tenant claims to hold at Common Law, and the Demandant in the Original does not come there at the Day, the Tenant shall go quit of this Writ, and it shall be a Nonfuit in the Lord's Court, tho' the Original ne fait eyens. * 27 E. 3. 77. * Quære the Book; For there is no such Page as 77.

4. If at the Day of the Return of an Assise no Pledges are returned for the Plaintiff, yet he may be Nonfuit; For he has Day in Court, and the Writ is served by a Banner. 21 E. 3. 54. b. 21 Aff. pl. 11.

5. In Account the Defendant was outlawed, upon which the Defendant sued Charter of Pardon and *Scire Facias* against the Plaintiff, and the Sheriff returned *Nihil*, and *Sicut alias* issued, and he returned the like, by which it was awarded that the Plaintiff should be Nonfuit. Br. *Nonfuit*, pl. 4. cites 45 E. 3. 16.

6. If a Man be taken upon *Capias Utlagatum*, and they are at Issue upon mistake of the Vill, the Party shall not be suffered to be Nonfuit, for the Interest of the King; per Brown Prothonotary. Br. *Nonfuit*, pl. 23. cites 21 H. 6. 21.

7. If the Plaintiff after that the Defendant is awarded to account in Writ of Account, and is at Issue before Auditors, who certify it to the Justices in C. B. he cannot be Nonfuit; but if he makes Default after he shall be barr'd and the Defendant discharged of the Account. Br. *Nonfuit*, pl. 25. cites 21 H. 6. 26. per Brown. But if a Man be adjudged to Account, who is not present, *Capias ad Computand'* shall Issue, and upon this returned, if the Defendant appears and the Plaintiff makes Default, he shall be Nonfuit. Br. *Nonfuit*, pl. 41. cites 1 H. 7. 2. per Townsend.

8. If *Replevin* be sued by Writ and removed by *Pone* or *Recordare*, [or] if the *Replevin* be by *Plaint*, in both Cases it is said to the Plaintiff, that he be here such a Day &c. in which Case if he does not come he shall be Nonfuit; per Newton. Br. *Nonfuit*, pl. 28. cites 21 H. 6. 50.

9. A Man was outlaw'd by Name of J. G. Husbandman, who came and said, that the Day of the Writ purchased he was *Hesler* and not *Husbandman*, and *Scire Facias* was awarded against the Party, who came and maintained that he was a Husbandman, and so to Issue. And per Cur. the Plaintiff cannot be Nonfuit here; For the Original was determined before; For in this Case the Plaintiff does not declare, and if the Issue be found for him nothing shall be done but award the Defendant to the Fleet, and if it be found against him, it shall be awarded that he shall take nothing by his Writ. Br. *Nonfuit*, pl. 29. cites 21 H. 6. 50. But if the Defendant sues Charter of Pardon and has *Scire Facias* against the Party, in this Case the Plaintiff ought to declare against

him, because by the Charter, the Original is revived, and there if they are at Issue the Plaintiff shall recover or be barr'd, as the Case is; and the Reason why he shall recover upon *Scire Facias* upon Charter upon the Issue found for him is, because by the Statute of 5 E. 3. 12. he pleads upon the Original by the Statute, therefore he shall recover; *Contra* in the other Case which is at Common Law. Br. *Ibid*—Br. *Peremptory*, pl. 29. cites S. C.—But per *Widlad* Prothonotary in such like Case as above, 22 H. 6. 7. upon *Scire Facias* against the Plaintiff in Case as above, and upon *Scire Facias* upon Charter of Pardon after Outlawry if a *Nihil* be returned the Plaintiff shall be demanded, and if he does not appear he shall be Nonfuit. Br. *Nonfuit*, pl. 29.

10. It was agreed, that in *Decies tantum* the Plaintiff may be nonfuit, and then the King shall not have Advantage of this Suit but by Indictment or otherwise; and therefore it seems that he who sues *tam pro Domino Rege quam* &c. may be Nonfuit. Br. *Nonfuit*, pl. 35. cites 37 H. 6. 4. and Book of Entries. Where a Statute gives Action, as Maintenance, *Decies tantum* &c. which were

not at Common Law before, it seems that the Party may be nonfuit and have a new Action; and Traverse is in lieu of Action. Br. *Traverse* de O. h. c. 2. pl. 16.

11. But not in a *Prohibition* if there be no other Process; per Doderidge and Jones J. Lat. 115. Pasch. 2 Car. B. R. in Watkin's Case.—Palm. 422. *Dire v. Brown*, but S. C. and S. R. of Watkins.

12. On a *Certiorari* of Replevin in C. Nonfuit was excepted against here after a Suggestion made; But per Cur. it may be here as well on *Certiorari* as on Recordare &c. and if the Party be grieved by the Writ of Enquiry, he may have a second Deliverance; and the Nonfuit stood. 3 Keb. 563. Mich. 27 Car. 2. B. R. *Harvey v. Harris*.

13. Plaintiff is demandable on the Return of the *Withernam*, and may be Nonfuit for not appearing. 2 Salk. 583. Mich. 12 W. 3. B. R. *Moor v. Watts*.

14. In *Ejectment against several*, if some confess Lease &c. and others do not, the Plaintiff may go on as to the former and be Nonfuit as to the later. 2 Salk. 456. See Pasch. 4 Ann. B. R. *Greeves v. Rolls*.

(B) *What Persons may be nonsuited.* what Persons in Respect [of being Actor &c.]

1. **N**O Person may be Nonsuited, unless he has Action pending in the Court where &c. 22 E. 4. 10.

2. But he who does not bring the Action, but upon pleading becomes Actor against the other cannot be Nonsuited. 22 E. 4. 10.

3. As the Avowant cannot be Nonsuited. * 22 E. 4. 10.

4. Garnishee cannot be Nonsuited yet he is Actor. † 22 E. 4. 10.

5. A Man outlawed has Charter of Pardon, and sues Scire facias against the Party, he is Actor, yet he cannot be nonsuited. ‡ 22 E. 4. 10.

* S. P. Br. Nonfuit, pl. 50. cites S. C. —† S. P. Br. Nonfuit, pl. 50. cites S. C.

—‡ S. P. Br. Nonfuit, pl. 50. cites S. C.

Br. Nonfuit, pl. 50. cites S. C. per Husley and Fairfax; for when a

6. If a Man traverses an Office he cannot be nonsuited, yet he is Actor but has not Original pending against the King. 22 E. 4. 10. But See 3. 4. *Ma. Dy.* 141. 47.

perfect Verdict is given, to which he has taken Traverse, he cannot be nonsuited.

Petition to the King for Land to which he was entitled by the Inquest upon the At-

7. A Nonfuit recorded in this Case, but it is there a Quere, whether receivable. 11 H. 4. 52. b. *Quere*.

8. But in a Petition of Right against the King the Plaintiff may be nonsuited. 11 H. 4. 52. b. adjudged.

tinder of the Lord of Northumberland, and also it was enacted by Parliament, that he should forfeit all his Lands in Use and Possession, and the Plaintiff had Commission to inquire of his Right, and found for him, and upon this the Inquest, which found for the King, was traversed in Chaucery, and the Points in the last Inquest found for him, and when the Inquest upon the Traverse was ready to give Verdict, the Plaintiff was nonsuited, by which the Nonfuit was admitted, and the Inquest was discharged; quod nota; and by the Opinion there, he may have another Traverse. Br. Nonfuit, pl. 12. cites 11 H. 4. 52. — S. P. Br. Petition, pl. 14. cites 4 H. 6. 12. — S. P. Br. Traverse d'office, pl. 16. cites 4 H. 6. 12.

9. In Audita Querela to avoid a Statute the Plaintiff may be nonsuited; For he is Plaintiff in this Action. 47 E. 3. 5. b.

10. If upon two Nihilis returned in Scire facias upon Charter of Pardon Plaintiff does not appear, he shall be nonsuited; For the Statute is that if he had appeared, that he ought to count against the Defendant. 45 E. 3. 16.

(B. 2) For what.

1. **I**N *Præcipe quod reddat* the Demandant appeared by Attorney, and because the Warrant of Attorney and the Writ did not agree, a Nonfuit was awarded. Br. Nonfuit, pl. 5. cites 45 E. 3. 24.

2. A Man brought Debt in Bank, and pending it arrested the Defendant upon Plaint in London, and Corpus cum Causa was awarded and returned, by which the Plaintiff was demanded and did not come, wherefore Nonfuit was awarded and the Defendant to go at large, and was not remanded. Br. Nonfuit, pl. 13. cites 12 H. 4. 21.

3. If the Plaintiff will not proceed upon his Declaration as he ought to do by the Rules of the Court, the Defendant may Nonfuit him. 2 L. P. R. 232. cites Mich. 1649. B. S. Quære.

4. It was moved for the Defendant to have the Rule of Court for the Plaintiff to bring in the Postea, that the Defendant may move in Arrest of Judgment; the Court answered they would make no Rule; for the Defendant may give Rules in the Office to force him to it, and if he will not bring it in, he is to be Nonfuit. Sty. 238. Mich. 1650. B. R. Hunt v. Popham.

5. Upon a Trial to be had at Bar the Plaintiff would not put in his Writ that the Trial might go on, whereupon Roll Ch. J. bid the Crier to call the Attorney of the Plaintiff to appear, and to bring in the Writ upon pain of 20l. and said that if he brought it not in, he should be put out of the Roll, Serjeant Maynard moved, that if he brought not in the Writ the Plaintiff might be called Non-fuit upon the Record, which Roll Ch. J. answered might well be, because the Parties have Day in Court by the Record or Roll; afterwards the Solicitor who had the Writ brought it in; yet Roll Ch. J. said, there shall, notwithstanding the Writ be brought in, be 20l. Fine set upon him for his trifling with the Court. Sty. 449. Pasch. 1654. B. R. Pilkinton v. Bagshaw.

6. One took out a Writ, and the Defendant voluntarily appeared and gave Notice to the Plaintiff's Attorney of Bail filed; the Plaintiff does not declare, Defendant signs Non-Pros. for want of a Declaration, and Holt held it well enough. Farr. 32. Foster's Case.

S. C. and tho' the Process never was returned, yet because Plaintiff did

not declare within 2 Terms it was good. 2 Saik. 455. Trin. 1 Annæ. B. R. Cooke v. Foster.

(C) Who may be nonsuited.

1. **I**F an Infant brings assise by Guardian, tho' the Infant disavows the Suit in proper Person, yet no Nonfuit shall be awarded. 39 Ass. pl. 1.

Infant sues by Prochein Amy and there is no entrance of

the Admission; it is no Error; but if the Defendant had demanded the Plaintiff, he might have been Nonfuit for not coming at first, and such appearance of the Plaintiff is void. Comb. 331. Read v. Waldron.

2. The King cannot be Nonsuited, because in Judgment of Law he is always present in Court. Co. Litt. 139. b.

Fol. 131.

S. P. Br. Nonfuit, pl. 68. cites 25 H. 8.—Br. N. C. 25. H. 8. pl. 50.—S. P. Sav. 56. pl. 119. Weare v. Adamson.—S. P. But the King's Attorney Qui sequitur pro Domino Rege may enter an Ulterius non vult prosequi which hath the Effect of a Nonfuit. Co. Litt. 139. b.—But he who sues as well for the King as himself may be Nonfuit. Br. Nonfuit, pl. 68. cites Lib. Inrat.—pl. 35. cites ut ante.—Br. N. C. 25 H. 8. pl. 50. says that it seemed so to Brook —S. P. Co. Litt. 139. b.

3. The

3. The *King of Spain* hath been Nonfuit in England; Mich. 22 Car. B. R. and this stands with Reason; for if a foreign Prince will take the Benefit of the National Laws here he must proceed and stand to the Rules and Orders of the Court wherein he prefers his Action. 2 L. P. R. 232.

See (E) pl. 3,
4, 5, &c.—
(1)

(D) *At what Time* [a Man] may be nonfuit.

1. **T**HE Plaintiff cannot be nonfuit the same Day that he is seen in Court, 3 H. 4. 2. Contra 23 Aff. 4. Adjudged.

2. If the Defendant wages his Law, [and] is ready to make it immediately, the Plaintiff cannot be nonfuit. H. 41 El. V. R. between Ewar and Barton.

3. But if the Defendant takes a Day over to make his Law, at the Day the Plaintiff may be nonfuit. H. 41 El. V. R.

In Account;
if the Defen-
dant is

awarded to
Account, the
Plaintiff af-

ter this cannot be Nonfuit; For *this Award is a Judgment*, and a Man cannot be nonfuit *after Judgment*. Br. Nonfuit, pl. 17. cites 21 E. 3. — Co. Litt. 139 b. (p) Contra, that he may be nonfuit; and so note a Diversity between an interlocutory Award of the Court, and a final Judgment.

Br. Nonfuit,
pl. 21. cites
S. C. — Br.

Jours, pl.
28. cites S.

C.—The
Reason why
the Plaintiff
was not suf-
fered to be
Nonfuit
was, because
his Appear-
ance was of
Record the
same Term,
but Brook
says, Quod
Mirum after
Imparlan-
ce,

and says, That it seems the Imparlan-
ce was not entered, or that the Imparlan-
ce was to the same Day; For it
is agreed, that if a Man *appears when the Jury appears*, yet he may be nonfuit when he comes * *cuilibet*
dict the same Day; but in *common Recoveries* for Assurance, [if] the *vouchee imparles and is demanded the same*
Day, and makes Default, Judgment is given that he departed in Contempt of the Court, and so he loses
the Land demanded of this Part; But of the Part of the Plaintiff the Case is ruled ** 9 H. 5. 5. that
he shall be *demanded at the Day of Imparlan- ce where it is at another Day though in the same Term*, and
may be nonfuit, and no Difference where the Imparlan- ce is in the same Term, or another Term, so
that it be *at another Day*, but otherwise if it be the same Day; And with this agrees 3 H. 4. 2. if it be
the same Day, and Contra upon Imparlan- ce to another Day, and see above that the Case of the Vouchee
is the same Day: For it seems if it was to another Day, Petit Cape should issue, and it should not be
Departure in Despight. Nota. And so see, that where a Man imparles, and this *to no Day certain*, as
above in the principal Case, *there all the Term is one and the same Day*, [in which] he is not demandable,
and therefore he shall not be nonfuit in this Term. So where he *imparles the same Day, and not to*
any Day certain; But when he imparles to any Day certain, be it to a Day in the same or any other
Term, it is all one, and he is demandable, and then may be nonfuit, and not in other Cases. Br. Non-
fuit, pl. 1. cites 3 H. 6. 13. — * It is (oue) in all the Editions of Brook, but Quere if it should not be (oyer)

A. brings Debt against B. and B imparles till the Morrow, and then A. is demanded, and does not ap-
pear; He shall be Nonfuit. Jenk. So. pl. 58.

** Br. Nonfuit, pl. 14. cites 9 H. 5. 5. — Br. Jours, pl. 23. cites 9 H. 5. 5.

† Br. Nonfuit, pl. 1. cites S. C. — Pl. 52. cites 47 H. 3. 16. and 3 H. 6. 49.

10. But otherwise it had been if the Jurisdiction had been till another Term, 3 H. 6. 50. *Curia*.

11. 12 E. 2. cap. 4. S. 1. Enacts, that the Justices or the Justice, shall have Power to record Nonfuits and Defaults in the Country, at the Days and Places assigned.

S. 2. And that which they shall have done in the Things abovementioned shall be reported in the Bench at a Day certain, there to be inrolled, and thereupon Judgment shall be given.

S. 3. And the King intends not that the said Inquests and Jurors should not be taken in the Bench if they come, nor that this Statute should extend to great Assises.

S. 4. Also one Justice of the one Place and of the other being associate with a discreet Man of the Country, Knight, or other, at the Request of the Plaintiff shall take Inquest upon Pleas pleaded and to be pleaded, that be moved by Attachment and Distress, and shall have Power to record Nonfuits as above is said, and to take Inquests upon Defaults there made.

S. 5. And as to the Inquests to be taken upon Writs of *Quare Impedit* it shall be done as is contained in the Statute of West. 2. and the Justices shall have Power to record Nonfuits and Defaults in the Country, and to give Judgment thereupon, as they do in the Bench, and there to report that which they have done, and there to be inrolled.

S. 6. And if it happen that the Justice or Justices that shall be assigned to take such Inquests in the Country do not come, or if they come into the Country at the Day assigned, yet the Parties and Persons of such Inquests shall keep their Day in the Bench.

12. In *Assise* against two the one pleaded to the Writ, and the other in Bar, upon which they were adjourned into Bank, and there the Defendant who pleaded to the Writ relinquished his Plea, and confessed the Writ good, and the Plaintiff appeared, and said, that he shall not be received to it, and the Court was against him. And the Plaintiff was demanded, and was nonfuit by the Opinion of the Court, and was tulkored notwithstanding that he had appeared before, and demanded Judgment of the Plea as above; *Quod Nota*. Br. Nonfuit, pl. 37. cites 23 Aff. 4.

13. In *Tropas's* at the Day of Exigent, the Defendant appeared by Superedeas by Manpower, and the Sheriff did not return the Writ, and yet the Plaintiff was demanded by the Roll, and did not come, and a Nonfuit was awarded. Br. Nonfuit, pl. 15. cites 33 E. 3. 20.

14. 2 H. 4. cap. 7. S. 1. Item, whereas upon Verdict found before any Justice of Assise of Novel Disseisin, Mortdancesher, or any other Action whatsoever, the Parties before this Time have been adjourned upon Difficulty in Law upon the Matter so found.

S. 2. It is ordained and established, that if the Verdict pass against the Plaintiff, that the same Plaintiff shall not be nonfuit.

Verdict Br. Assise, pl. 32 cites 47 E. 3. 1, 2.—Nevertheless, it seems that it is all one, per Brook, who cites this Statute, and says it is made in *Assurance of the Common Law*. Br. Ibid.

In Entry sur Dissena they were at Issue, and the Jury was sworn, and Evidence given by both Parties, and then the Plaintiff was Nonfuit the same time before that the Jury went from the Bar; *Quod Nota*. *Quod Nota*! For the Appearance was recorded till the Jury went and came back; For then is the Plaintiff deemed a dable gain. Br. Nonfuit, pl. 33. cites 16 E. 4.

* After process issued a Man cannot be Nonfuit. Br. Nonfuit, pl. 50. cites 22 E. 4. 9. per Husley and Baistax — But if an impartial Verdict be given [it is otherwise] Br. Ibid. — As in *Assise*, if they find the Seign and Injuria, but no Damages, there they shall go back, and when they return to give the Verdict, there the Plaintiff may be Nonfuit. Br. Ibid. — 2 Brownl. 219 Arg. cites S. C. accordingly or if it finds a Thing not in Issue, there Nonfuit may be after Verdict.

* 2 Jo. 1 Hill. 22 Car. 2. contra, That the Plaintiff was Nonfuit after Special Verdict, and in the Term in which the Matter in Law was argued at Bar. *Hensent v. Board*.

At the Common Law upon every Continuance or Day given over before Judgment the Plaintiff might have been nonfuit, and therefore before this Statute, when Verdict given, if the Court gave Day to be advised, at that Day the Plaintiff was demandable, and therefore might have been Nonfuit, which is now remedied by this Statute. Co. Litt. 159 b (n) — S. P. for if he did not like his Damages, he might be Nonfuit. 5 Mod. 278. Paich. 3W. 3. *Keat v. Barker*. — But after Demurrer in Law joined, if the Court does give a Day over, at that Day the Defendant or Plaintiff is demandable, and therefore may be nonfuit: For that is not holden by any Statute. Co. Litt. 159 b. (o) — S. P. As well as at the

After dubious Verdict the Plaintiff may be Nonfuit; contrary after perfect

Day given after the Issue joined. Quod Nota bene Br. Nonfuit, pl. 67. cites 3 H. 8. — Plaintiff may be Nonfuited after Demurrer. Le. 175. Mich. 3. Eliz. Beary Underwood — S. P. And after Argument at the Bar thereupon. 2 J. 1. cites Pafch. 18. Car. 2. C. B. Rot. 326. Richfield v. Udal.

15. Hank would not suffer the Plaintiff to be demanded *the first Day* to be nonfuited, but the fourth Day. Br. Nonfuit, pl. 54. cites 14 H. 4. 19. — But see Brook, tit. Jour. that he shall be demanded the first Day, and the Nonfuit shall be recorded *the fourth Day*. Ibid.

16. The Plaintiff cannot be nonfuited *before Pledges to prosecute found*. Br. Nonfuit, pl. 49. cites 22 H. 6. 21.

17. In Trespas they were at Issue upon *Bastardy*, and the Bishop certified *Bastardy*, and the Plaintiff was nonfuited; and well as it seems there, notwithstanding that it be *after Certificate*; For at the Common Law the Plaintiff might have been nonfuited after Verdict, which is now ousted by the Statute of *H. 4.* but this does not speak of Certificate; and by Reason of the Nonfuit the Bastardy is no Estoppel, per Moyle, no more than *after the Discontinuance*. Br. Nonfuit, pl. 44. cites 3 E. 4. 11.

* Orig. set off Nonfuit come in with bien — S. P. Per Little

18. When a Jury is demanded and 8 appear, and the rest not, and at the same Day the Plaintiff is demanded, * he may well be nonfuited; per Littleton. Br. Nonfuit, pl. 46. cites 4 E. 4. 37.

ton, and that he may be nonfuited before *my are sworn*. Br. Nonfuit, pl. 60. cites S. C. — For it is the *Common Clause* to be nonfuited after the Jury is demanded, and † *after that he himself has appeared* alj, and † *et he is not demandable at this Day*. Br. Nonfuit, pl. 46. cites 4 E. 4. 37. — † S. P. Br. Nonfuit, pl. 60. cites S. C.

19. In Debt the Defendant appeared by *Capi Corpus* and prayed that the Plaintiff be demanded to have him nonfuited. Per Cur. if he does not appear sitting the Court we will record a Nonfuit. Br. Nonfuit, pl. 49. cites 22 E. 4. 1.

20. After 2 Justices had delivered their Opinion the Plaintiff cannot be nonfuited any more than after a Verdict. Cro. E. 410. Snelling v. Norton.

The Court cannot compel the Plaintiff to appear and stand a Verdict; but if the Plaintiff appears, or his Counsel or Attorney appears for him, he cannot be afterward nonfuit, but the Jury must deliver in their Verdict. 2 L. P. R. 231.

21. In Debt on Bond, the Plaintiff pray'd he might be nonfuited, but because he had the same Term appeared and argued by his Counsel, and had pray'd Judgment, he could not be nonfuited the same Term. Cro. J. 35. Trin. 2 Jac. B. R. Alderley v. Alderley, cited in the Case of Phillips v. Echard, as adjudged the same Term.

22. Although upon a Trial the Plaintiff be called to hear the Verdict, and does not appear to hear the Verdict when he is called, and thereupon the Court direct the Secondary to record the Nonfuit, yet if afterwards the Plaintiff appears before the Nonfuit be actually Recorded, the Court may proceed to take the Verdict; Trin. 1651. B. S. For it is not a Nonfuit until it be Recorded by the Secondary, and then it is made Part of the Record, and is in the Nature of a Judgment against the Plaintiff. 2 L. P. R. 232.

23. If the Plaintiff be not ready at the Trial when the Jury is called and sworn, the Court may call him Nonfuit; by Roll Ch. J. 1651. B. S. For it shall be intended he will not proceed in his Cause any farther; yet sometimes the Court hath stay'd a while in Expectation of his coming, and making good his Action. 2 L. P. R. 232.

24. Plaintiff in Ejectment was called and nonfuited, and this entered upon the Record before the Venire or Distringas &c. was put in; and this appeared by the Postea now produced; For there is only a Nonfuit entered upon it; And so the Justices of Nisi Prius have no Power to Nonfuit; For their Power is by the Habeas Corpus; And therefore the Court discharged the Nonfuit and gave Leave to the Party to proceed again. Sid. 164. Mich. 15 Car. 2. B. R. Thomson v. Hudsbat.

25. After

25. *After two Assises and two Notices of Trial* in an Information and no Proceeding, on the Defendant's Motion there shall be a Non-prof. Per Cur. 2 Show. 80. the King v. Hide.

26. *Trespass against two Defendants, and Verdict for the Plaintiff; one Defendant being an Infant the Plaintiff took Judgment against the other, and entered a Non-prof. after the Judgment against the Infant: The Plaintiff sued out Execution, upon which Error was brought; and it was objected, that the Execution and Judgment could not vary from the Demand of the Writ: It was answered, that Torts are several, and the Plaintiff may as well enter a Non Pros. quoad one Defendant upon a Trial by Verdict, as if one Defendant had demurred and Verdict against the other; and that a Non Pros. may be enter'd after Judgment as well as before; and for Non Pros entered after Judgment, he cited 15 E. 4. 26. 14 E. 4. 6. Hob. 71. 1 Ro. Rep. 379. 2 Ro. Abr. 100. pl. 5. Holt Ch. J. said, he supposed those were interlocutory, Judgments wherein it might well be, but a final Judgment differed; For that being once wrong a subsequent Entry would not set it right. Adjornatur, 1 Salk. 455. Trin. 12 W. 3. B. R. Lover v. Salkeld.*

27. *Ejectment against two, who enter into the common Rule of confessing Lease, Entry and Ouster; At the Trial before a Judge of Nisi Prius, one of them refuses to confess Lease, Entry and Ouster, and the Plaintiff enters a Retraxit against him, which the Judge of Nisi Prius records, and goes on to Trial against the other, and Verdict for the Plaintiff, and this being moved in Arrest of Judgment, it was held well by Gould and Pows against Holt; and Error was brought before the Lords, and Judgment affirmed. 12 Mod. 651. 657. Hill. 13 W. 3. Gree v. Rolle.*

28. *Where there are several Defendants and they sever in Plea, whereupon Issue is joined, the Plaintiff may enter a Non Pros. as to one Defendant at any Time before the Record is sent down to be try'd at Nisi Prius. 2 Salk. 457. Pasch. 4 Ann. B. R. agreed, in Case of Greaves v. Rolls.*

Cro. Car. 259. Walsh v. Bishop.— 1831. 245. S. C.— See J. p. 10. at

(F) pl. 5. S. C. by Name of Welch v. Bishop.— S. P. adjudged and affirmed in Error. Carth. 21. cites Trebarfoot v. Greenway

(E) *To what Time it shall relate, [and at what Time it may be.]*

1. **T**HOUGH the Plaintiff be in Peace all the Term till the End and then is demanded, it shall have Relation to the Return of the Writ. 2 H. 4. 23. 5.

Copies Pleas returned, the Plaintiff was adjourned, and

the same Term it was tried upon the same Original in another Roll, the Plaintiff jur'd. Record, and it is said that the Record shall relate to the Day of the Writ returned, & Curia Concllta, and the same Day the Exigent shall be laid to Issue. Br. Error, pl. 53. cites 2 H. 4. 23, 24

2. *In Assise against two, if the one pleads in Bar and the other in Abatement, and the Plea is adjourn'd into Bank, and there he who pleads in Abatement relinquishes his Plea and pleads in Bar, and the Plea is demanded Judgment, Whether he shall be received to it after that they are at the Assise and are adjourn'd. And it is answered by the Court, that he may plead in Bar, and the Plaintiff may be after adjourn'd, w^o he had appeared and demanded Judgment the same Day. 23 Aff. 4. adjudged.*

* It seems it should be (Nonfuit) as it is the Year Book.

3. *After Verdict against the Plaintiff, if the Parties are adjourn'd to Westminster to a certain Day, at the Day the Plaintiff may be nonfuit. Tubatur. 47 E. 3. 2. 47 Aff. 1.*

4. *In Assise, if upon a Special Verdict it be adjourn'd for Difficulty [of saying] for whom it is found, at the Day the Plaintiff may be nonfuit;*

* Orig. (Par que eco.)

For

For here the Verdict was not expressly found against him. 17 Aff. 27. 18 E. 3. 35. 17 Aff. 28. 18 E. 3. 35. Adjudged.

5. If Verdict be passed against the Plaintiff at the Nil Prius, at the Day in Bank he may be nonsuited. 47 E. 3. 2. 47 Aff. 1. Agreos.

6. But if Defendant prays that only a Nonsuit be recorded it shall be done. 47 Aff. 1. per Just.

7. In a Quare Impedit after the Defendant has made Title, yet the Plaintiff may be Nonsuited. (But it seems the Plaintiff is a Day; for the other shall have Writ to the Writors.) 14 D. 4. 16.

8. At Common Law, upon every Continuance or Day given over before Judgment the Plaintiff might be nonsuited. Co. Litt. 139. b.

9. And therefore before the Statute of 2 H. 4. after Verdict, if the Court had given Day to be advised, at this Day the Plaintiff was demandable, and therefore might be nonsuited. But this is now remedied by the Statute. Co. Litt. 139. b.

10. But after Demurrer in Law joined, if the Court gives a Day over, at this Day the Plaintiff may be Nonsuited, for he is demandable; For it is not added by any Statute. Co. Litt. 139. b. Hobart's Reports, 111.

Ed. 132

See D) pl. 14 in the Notes there.

(F) What shall be said a Nonsuit.

1. If a Man brings Writ of Error upon a Judgment against him, and for non speedy Prosecution the Recoverer sues Scire Facias against him to have Execution, and because the Plaintiff Exactus suit & non Comparuit, Execution is awarded. This is not any Nonsuit of the Writ of Error, because he Non suit Exactus upon the Writ of Error, but upon the Scire Facias. 9 D. 6. 13. b.

2. If a Man be outlawed, and sues Charter of Pardon and Scire Facias against the Plaintiff, who does not come, he shall be nonsuited. 9 D. 6. 14.

3. In Lebt the Plaintiff counted, and the Defendant was ready to give his Law, by which the Plaintiff held his Case, and no Justice heard the Count, nor recorded it; wherefore the Court demanded of the Plaintiff's Counsel if they would count, by which it was awarded, that the Plaintiff take nothing by his Writ, but be in Misericordia, and therefore it seems it is only a Nonsuit, and no Bar. Br. Count, pl. 33. cites 2 H. 4. 15.

4. It was said, that where a Man traverses an Office, and after waives the Traverse, that then this is not peremptory, and this waiving, as it seems, is a Nonsuit. Quære. Br. Peremptory, pl. 46. cites 4 E. 4. 24.

5. Nonsuit is, when the Jury is ready to appear, or to give up their Verdict; or, when upon a Demurrer a Day is given, and at that Time the Plaintiff or Demandant being called does wilfully make Default, and renounce his Suit after Appearance. Reg. Plac. 64. cap. 2. cites 8 Co. 38. 10 Co. 135.

It seems in Nature of a Nonsuit, at d not aliar. Br. Nonsuit, pl. 9. cites S. C.

Br. Peremptory, pl. 47. cites S. C.

Nonsuit is when a Man brings a personal Action, and doth not prosecute it with Effect,

or else upon the Trial refuses to stand a Verdict; then he becomes nonsuited, which is recorded by the Court, and the Defendant recovers his Costs against him. 2 L. P. R. 230.

A Nonsuit is, when the Plaintiff is demanded and does not appear; but when he comes into Court, and says, that Non vult ulterius Prosecui, that is a *Recessit*. 2 Le. 177. Sands v. Brocas.

Nonsuit is a *Renunciation of the Suit* by the Plaintiff or Demandant, when the Matter is so far proceeded in, as the Jury is ready at the Bar to deliver their Verdict. Reg. Plac. 90. cap. 2. — And tho' after Nonsuit, the Supposal in the Count shall not conclude; yet the Bar, Title, Replication, or other Pleading of either Party, which precisely alleged, shall conclude after Nonsuit. Reg. Plac. 114. cap. 2.

(F. 2) The

(F. 2) The *Difference* between a Nonfuit, Retraxit, Nolle Prosequi, Non-pros and Departure; and the *Nature and Effect* thereof.

1. **T**HE Tenant in Assise pleaded a Retraxit by the Plaintiff in another Assise against him of the same Land, and the Tenant had Day to bring in the Record, and fail'd at the Day, upon which the Plaintiff released his Damages and recovered the Land. And so see that *Retraxit is a Bar. Br. Departure, pl. 13. cites 15 E. 3. and Fitz. Alf. 96. * S. P. Contra of a Nonfuit. Br. Barre, pl. 93. cites 15 E. 3.— Br. Departure, pl. 12. cites 21 E. 4. 45.

2. In an Original Writ, if the Plaint be withdrawn, and a Retraxit entered, and *after the Parties accord in Court in Nature of a Fine*, and the Court accept it 'tis Error; For the *Original is determined* and the *Parties have not a Day in Court*. Co. R. on Fines 10. cites 37 Alf. P. 17. Br. Fines 82.

3. The *first Record is gone by the Nonfuit*, Quod Nota. Br. Examination, pl. 11. cites 35 H. 6. 5.

4. The Difference between a *Nonfuit* and a *Retraxit* on the Part of the Demandant or Plaintiff is thus. A *Nonfuit* is ever upon a Demand made when the Demandant or Plaintiff appear, and he makes Default; A *Retraxit* is ever when the Demandant or Plaintiff is present * in Court (as regularly he is ever by Intendment of Law until a Day be given over, unless it be when a Verdict is to be given, for then he is demandable) and this is in two Sorts, one Privative and the other Positive. *Privative* is upon demand that he made default and departed in despite of the Court. † *Positive*, as when the *Entry is Et super hoc idem querens dicit quod ipse non vult ulterius Placitum suum predictum prosequi, sed ab inde omnino se retraxit &c. ideo &c.* A ‡ *Departure in despite* of the Court is on the Part of the Tenant, and is when the Tenant or Defendant after Appearance, and being present in Court, upon demand makes Departure in despite of the Court; It is called a Retraxit, because that Word is the effectual Word used in the Entry, [which see at N] and it is ever on the Part of the ¶ Demandant or Plaintiff. Co. Litt. 132. b. 132. a.

See (N) — 2 L. P. R. 231.— * S. P. 8 Rep. 58. a. Mich. 6 Jac. in Beecher's Case. — † As if a Plaintiff comes in and says, he will not sue farther it is a Retraxit; and when he will not appear, it is a Nonfuit. Per all the Justices. Hard. 153.

154. Pasch. 1659. in Case of Turner v. Gallilee. — † S. P. 8 Rep. 59. a. — ‡ S. P. 8 Rep. 59. a. in Beecher's Case.

5. Another Difference between a *Retraxit* and a *Nonfuit* is, that a *Retraxit* is a Bar of all other Actions of like or inferior Nature. Qui semel Actionem renunciavit, amplius repetere non potest. But regularly a *Nonfuit* is not so, but that he may commence an Action of like Nature &c. again. For it may be that he hath mistaken somewhat in that Action, or was not provided of his Proofs, or had mistaken the Day, or the like. Co. Litt. 139. a.

2 L. P. R. 231.— A Retraxit is a stronger Case than the Case of a Nonfuit, which is only a Default or Non-appearance;

but a Retraxit is a voluntary Acknowledgment, that he has no Cause of Action, and therefore that he will not sue farther, and to this Cause it is a Bar for ever. 8 Rep. 59. a. Mich. 6 Jac. Beecher's Case.

6. *Nolle Prosequi* is, that the Plaintiff will proceed no farther in his Action, and may be as well before as after a Verdict, and is stronger against the Plaintiff than a Nonfuit; for a Nonfuit is a Default for Non-appearance; but this is a *voluntary Acknowledgment that he hath no Cause of Action*. 2 L. P. R. 218.

In an Information it was insisted, that the entering a Nolle Prosequi was a Bar to the

Offence contained in the Information, or at least, that it was a Discharge from any farther Prosecution for it; But per Cur. it is *neither a Bar nor Discharge.* 10 Mod. 153. Patch. 12 Ann. B. R. the Queen v. Ridpath.

7. The Entry of a Retraxit does *not discharge* the Defendant against whom it is entered *from being Party* to the Issue, till there is Judgment given *Quod eat inde sine die.* Arg. 12 Mod. 652. in Case of Gree v. Rolle.

8. A Retraxit is no more than an Agreement on Record, that he will not prosecute against that Party; and a Retraxit is not a Confession of the Want of Cause of Action. Arg. 12 Mod. 653. agreed per Holt Ch. J. 12 Mod. 655. in Case of Gree v. Rolle.

See (H) pl. 2. 5.

(G) In what Cases the Nonfuit of one shall be of others also. For what Thing, [or in what Actions.]

S. P. Br Superdeas, pl. 6. cites

1 H. 4. 4.

S. P. unless it be in certain particular Cases. Co Litt. 139. a.—If *Attaint upon* personal Action be brought by two, the Nonfuit of one is the Nonfuit of both. Br. Nonfuit, pl. 69. cites 35 H. 6. 19.

Letting going two, the one was at the Distress and the other at the Exigent, and he at the Distress came and demanded the Plaintiff, and he was Nonfuted, by which the other had Superdeas absolutely. Br. Nonfuit, pl. 8. cites 2 H. 4. 4.

So in *Attaint upon* Real or Mixt Actions. Br.

Nonfuit, pl. 69. cites 35 H. 6. 19.

2. [But] in Real and mix'd Actions, Regularly, the Nonfuit of one of the Plaintiffs is not the Nonfuit of the other; But he who makes Default shall be summoned and severed. Co. Litt. 139. [a. (g)]

3. In Scire Facias for Damages recovered by two upon Recovery by them of the Land and Damages, the Nonfuit of one shall not be for both. For the Damages are for the Issues of the Land, and are of the Nature of the Land. 47 E. 3. 6. b. 47 Aff. 3.

See pl. 10.

4. So in Writ of Champerty for Maintenance in a Real Action, the Nonfuit of one of the Plaintiffs shall not be for both, because it enforces the Nature of the first Action. 47 E. 3. 6. b. 47 Aff. 3.

5. If two lose in a Formedon upon a false Return of Summons, and they bring Writ of Disceit, and after the one is nonfuted in it, this shall not be the Nonfuit of the other, because this enforces the Nature of the first Writ. 18 D. 6. 29.

6. If two bring Writ of Right in Ancient Demesne, and after join in Recordare returnable in Bank, and the one is nonfuted, this shall not be the Nonfuit of both, because it enforces the Nature of the first Writ. 18 D. 6. 28.

7. In Formedon brought by two, they sue a Writ of Estrepement against the Tenant, and after one Demandant makes Default in the Estrepement, by which he is nonfuted; this shall not be the Nonfuit of the other also; For it is of the Nature of the Formedon. Contra 18 D. 6. 28. b.

8. If two bring Action of Debt upon Obligation the Nonfuit of one shall be of both. 10 D. 6. 2. b.

9. In Scire facias by two upon Recognizance, the Nonfuit of one shall be of both, because it is but Chattel. 47 E. 3. 6. b. 47 Aff. 3.

10. So in Writ of Champerty for maintaining the Quarrel in Scire facias against one Recognizee, and who had the Land demanded, the Nonfuit of one Plaintiff is of both, because this Action is in Nature of the first, being but Accessary. 47 E. 3. 6. b. 47 Aff. 3.

Fol. 135.

Because it is founded upon *Action personal* Br. Nonfuit, pl. 7. cites S. C.

and

and that it seems there, that it would be otherwise if founded upon Action *Real*; but Brook says that it seems all one; For the Action is Personal, and *nothing shall be recovered but Damages.*

11. In Writ of Ward of the Body the Nonfuit of one Plaintiff shall not be the Nonfuit of the other. 49 E. 3. 27. 30 E. 3. 30.

12. In Writ of Forgery of false Deeds, the Nonfuit of one Plaintiff shall be of both. 18 H. 6. b.

13. In Writ of Right of Ward brought by Baron and Feme, the Nonfuit of the Feme shall be of the Baron also. 21 E. 3. 11. adjudged.

14. In Assise by Baron and Feme the Nonfuit of the Feme by Procurement of the Defendant himself shall not be the Nonfuit of the Baron; for there is no Reason that the Feme shall * act contrary to the Baron. 39 Ass. pl. 1. adjudged.

But in Ward by Baron and Feme, who sued by Attorney, and after the

Feme was perjured, this was awarded the Nonfuit of the Baron and Feme; quod nota bene. Br. Nonfuit, pl. 18. cites 21 E. 3. 12.—* *Orig* (Contrariera)

15. In Personal Actions brought by Executors the Nonfuit of the one shall not be of the other, but there shall be Summons and Severance; because the best shall be taken for the Benefit of the deceased. Co. Lit. 139.

16. In a Trespass brought by Executors as Executors for Goods taken out of their own Possession the Nonfuit of the one shall not be of the other. Co. Lit. 139.

17. In an Account brought by Executors as Executors upon Receipt by their own Hands the Nonfuit of one shall not be of the other. Co. Lit. 139.

18. In an Audita Querela concerning the Personality the Nonfuit of the one is not the Nonfuit of the other; because it goes by way of Discharge and Enlargement of themselves, and therefore the Default of the one shall not hurt the other. Co. Lit. 139.

6 Rep. 25. b. — 10 Rep. 155.

19. In a Quid Juris clamat the Nonfuit of one is the Nonfuit of both; because the Tenant cannot accorn according to the Grant. Co. Lit. 139.

20. 11 H. 7. cap. 21. S. 23 *Where there are one or more Plaintiffs if any die, or be Nonfuit, and albeit all the Tenants or Defendants and some of the petty Jury die, yet shall not the Attaint abate, so that two of that Jury remain alive.*

21. If two be Plaintiffs in a *Natizo Habendo*, and one be nonsuited this is the Nonfuit of both. Co. Litt. 139. a.

22. *But in a Libertate Probanda* the Nonfuit of the one is not the Nonfuit of both. Co. Litt. 139. a.

23. *Trespass by A. against B. and C. and at the Day of Imparance C. did not appear, whereupon a Nihil Dicit was entred against him. B. pleaded in Bar; and thereupon A. replied. Demurrer was joined upon the Replication and Day given over to the next Term, and then adjudged for the Plaintiff, and at the same Term a Nolle Prosequi was entred against C. and a Writ of Inquiry of Damages awarded against B. and upon Return thereof adjudged against him; and thereupon they brought Error, and the Error assigned was, because this Nolle prosequi is against one, where Judgment is entred against both, because a Retrahit against the one is as strong as a Release to the one, the which, being to one of the Defendants, is a good Discharge for both, and then this Judgment against B. is erroneous; and of that Opinion were all the Justices and Barons; wherefore it was reversed. Cro. E. 762. Pasch. 42 Eliz. in Cam. Seacc. Green v. Charnock, &c.*

But the Reporter says, Note, I have heard of another Reason of the Reversal of this Judgment, viz. because there was not any Judgment entred against C. for his non-appearing, nor Day given, and so a Discontinuance of the Suit; and the Nolle prosequi against him came too late; and the Discontinuance against one was a Discontinuance against both, and of the entire Suit, therefore &c. Ibid.

(H) In what Cafes the Nonfuit of the Plaintiff againft one fhall be for others. In what Actions.

Noy. 139. Sir Richard Vernon's
1. In Debt againft divers, if the Plaintiff be nonfuted againft one, he is nonfuted againft both. 2 D. 4. 4. b.

Café. S. P. — In Debt upon Obligation againft three Co-Devs, two confefs Affets, and the third confefs a little Parcel; the Plaintiff replies that the third has more Lands; and illic thereupon; and at Nifi Prius the Plaintiff was Nonfuted; and therefore it was now moved to have Judgment againft the firft two for fo much as they have confefsed; and the third who had nonfuted the Plaintiff offered to confent for Judgment to be given againft him alfo for the firft Parcel; but per Cur. this cannot be; becaufe a Nonfuit as to the third is a Nonfuit as to all, and the Confent of the third cannot bind the firft two, nor himfelf without a new Original; but the Plaintiff ought to have had his Judgment entered againft the two at firft; and fo by this Default the Plaintiff loft his Debt, becaufe there was an Alienation after, and fo a new Original would come too late; and adjudged for the Defendant. Sid. 378. Mich. 20 Car. 2. B. R. Blake's Café.

2. Three Obligors and Obligee deliver the Obligation into an indifferent Hand upon Condition; if the Obligors bring Detinue againft Waitec for the Obligation, the Nonfuit of one fhall be the Nonfuit of the other. 2 D. 4. 16.

But it was held that the others who were not try'd fhould be arraigned upon the Declaration at the Queen's Suit. Cro. E. 460. Curtis v. Savil and three others.
3. In an Appeal againft two, if the Defendants join feveral Ifsues, and after the Plaintiff is nonfuted againft one, this is a Nonfuit againft both. D. 37, 38 El. B. R. adjudged between Curtis and Brown.

Noy. 139. Vernon's
 Café, S. P. —
 * Br. Nonfuit pl. 57.
4. In a Writ againft three by feveral Præcipes, if the Demandant be nonfuted againft one, this fhall be a Nonfuit againft all. * 21 E. 3. 36. b. 7 D. 6. 27. 27 E. 3. 87. b. Co. Lit. 139. in a † real Action.

cites S. C. — S. P. For they find Pledges de Profequendo but once only, and the other Tenants fhall have Advantage of it; becaufe the Writ is intire as to the Demandant, and feveral as to the Tenants; per Ardern J. & non Negatur. Br. Nonfuit, pl. 45 cites 4 E. 3. 33. — † S. P. For as to the Demandant it is but one Writ under one Teftè; note. Co. Lit. 139. a. b. — Præcipe of Debt againft two by feveral Præcipes, Scilicet, Præcipe [the one] quod reddat 20 l. and Præcipe the other quod reddat 10 l. the Plaintiff is nonfuted againft the one, this is a Nonfuit againft both. Br. Nonfuit, pl. 19. cites H. 6. 27.

Fol. 134
5. In a Writ of Quo Jure Communiam clamat &c. brought by two, the Nonfuit of one fhall not be the Nonfuit of the other. 11 D. 3. Rot. 3. in dorfo. between the Prior of Okeburn and Richard de Turry Plaintiff againft Robert Clonmore adjudged.

If a Trespafs be brought againft two, & Non profequitur againft one that is a Retraxit, and may ftand againft the other. Noy. 139. Sir Richard Vernon's Café. — * Hob. 180. S. C.
6. In a perfonal Action againft two, if they plead feverally, and after the Plaintiff is nonfuted againft one before he has Judgment againft the other, he fhall be barred againft both; For this operates in Nature of a Release of all. Hobart's Reports 243. between Aweley and Sloley (Quere if this be not mifprinted.)

But to avoid the Mifchief the Demandant confefsed the Nonfuit of the other; For it was all at one Day, as it feems, and therefore he cannot be nonfuted and recover upon one and the fame Original, and the Time fhall be tried. But by the Reporter, this Matter may be aided by the Entry of the Poftera, and this fhall make a Diversity of Time, and then, if the Nonfuit comes after the Judgment, and not in one Infant, it is well. Ibid.
7. Writ of Entry againft two by feveral Præcipes, and the one was at one Ifsue, and the other at another Ifsue of Fointenancy, and the Inquifit found for the Demandant in the firft Ifsue, by which he had Judgment to recover, and after they were demanded upon the laft Ifsue, and the Demandant would have been Nonfuted; but per Markham he cannot; For by Nonfuit againft one all the Writ fhall abate; and Newton faid that he cannot as it is here; For Judgment is given againft the one, therefore no Nonfuit can be againft him; quod fuit conceffum. Br. Nonfuit, pl. 27. cites 21 H. 6. 42.

8. A. and B. were bound in a Bond jointly and severally, and the Obligee brought Action against A. who pleaded that the Plaintiff brought Debt on the said Bond in the Court of Poole against the said B. and after Impar lance Retraxit Querelam suam, Judgment li Actio. The main Question was, if this was a Bar to the suing of A. The Justices as to this did not deliver any Opinion; but the Retraxit was pleaded in Curia de Recordo de Poole, and it was not alleged that the Court had Power to hold Plea by Patent or Prescription, and therefore the Plea was ill according to the Resolution in **Turner's Case**, 8 Rep. and Judgment was given for the Plaintiff. **451. Hill. 15 Car. B. R. Denys v. Pain.**

in Fact, but only Quasi a Release, and that this Plea is no Bar for A. And Croke J. inclined to this Opinion, that it is neither a Release in Fact, or in Law, but Quasi an Agreement that he will no further prosecute, and said, that it might be, that B. paid the Moiety of the said Debt, and that the Plaintiff agreed to accept it of him, and would not further proceed against him; and that being jointly and severally bound he might make such Agreement and not discharge the Bond; but Berkley J. held the Plea good, and a good Bar, because the Bond is Joint and several, and one of them being discharged, it cannot now be a Joint Bond; and therefore a Discharge Quoad the one is a Discharge also Quoad the other. But no other Justices being in Court it was adjourned. Cro. C. 551. Triut. 15 Car. Dennis v. Payne.—Mar. 95. pl. 105 S. C. but reports that the Obligee brought Debt on the Bond against both. [which perhaps he means (as in Fact it was) at different Times, and by several Actions.]

9. In Trespass against three Defendants, one pleads to Issue, and the other two Demur; Plaintiff has Verdict on the Issue and Judgment, and as to the other two Nolle prosequi is enter'd, yet Plaintiff shall have his Execution against the first; if Nolle prosequi had been entered before Judgment against any of them, this had not amounted to a Release to all, but a *Waiver of suit.* **Jenk. 309. pl. 87.**

Trial both are found for the Plaintiff, and several Damages; the Plaintiff may enter a Nolle prosequi against one, and proceed against the other; and so upon a Demurrer, or Issue and Demurrer. **Reg. Plac. 190. cap. 5. cites 2 Len. 177. Mo. 624. 1 Cro. 239. 243. 2 Cro. 118, 349. And Hob 70.**

10. In Ejectment against two, one confessed the Action and the other pleaded Not Guilty; it was held that he could not enter a Non-pros. against one of them, and have Judgment against the other; and a Difference was taken between Trespass and Ejectment; cited by Holt Ch. J. 12 Mod. 656. in the Case of **Orce v. Roll**, as a Case in the Year 1650.

Pros. against one, or that there was any Difference between Trespass and Ejectment in that Point; he agreed that in Ejectment they could not be Non-suited against one and proceed against the other; but if there be two Defendants, and one of them will not appear, or not confess Lease, Entry and Outter, he may be acquitted, and the Plaintiff proceed against the other; and he who is acquitted is Party to the Record; and if he cannot have a Writ of Error, it is because he is not hurt by the Judgment. *Ibid.*—And he said that in Lord North's Time, if there were several Defendants, and one of them would not confess Lease, Entry, and Outter, the Plaintiff was non-suited against all and had Judgment for the whole against the casual Ejector; and said that that was hard to turn one out of Possession for Default of another, who was willing to defend his Title; and that he never knew a Non-pros. against one, when two had joined in a Plea, enter'd at Nisi Prius, but it might be done above and a *Lispingas* taken out against the other only. *Ibid.* 656, 657.

* Ejectment against several, who all entered into the Rule of Lease, Entry, and Outter; at the Assizes some would confess and others would not; the Plaintiff, as to those that would not confess, entered a Non-pros. and went on against the others, and recovered; upon this a Rule was made, that in like Cases the Plaintiff should go on against those who would confess, and as to those who would not, should be Nonfuit; but that the Cause of the Nonfuit should be expressed in the Record, viz. because those Defendants would not confess Lease, Entry and Outter; and upon the Return of the Pleas, the Court would be informed what Lands were in the Possession of those Defendants, that the Judgment might be entered against the casual Ejector as to them. **2 Saik. 450, 457. Pasch. 4 Ann. B. R. Greaves v. Rolls**

11. In a joint Action against two the Jury sever'd the Damages, 50 l against one, and 1000 l. against the other; Plaintiff enters Non-pros. to the 50 l. The entering the Nolle prosequi as to one Defendant is no Discharge of the other; and Plaintiff had Judgment. **2 Show. 469. Pasch. 1 Jac. 2. B. R. Radrey v. Strode.**

other Defendant cured the Fault in the Verdict. **Cart. 19. S. C. and affirmed in Parliament. Ibid. 21.**

12. Where there are divers Issues joined between the Plaintiff and Defendant, and the Plaintiff enters upon the Roll a Nolle prosequi, id est, Non vult ulterius prosequi, that he will not proceed upon one, or more of the Issues joined, yet he may proceed to Trial upon the rest of the Issues. **Reg. Plac. 190. cap. 5. cites Prac. Reg. 206.**

It was argued that this was a Bar only by way of *Respectare* that Obligor and the Obligee, of which no other could take Advantage, and that it is not a Release

Hob 70. S.C. —Roll R. 233. S. C.— In Trespass against two, who plead several Pleas, and at the

But he said he did not take that to be Law, or that the Writ should abate by a Non-

Jenk 309 pl. 87.—2 Mod. 101 S. C.—And thus entering the Nolle prosequi as to the

L. P. R. Nolle prosequi.

Ibid. 21.

(1) At

(I) At what Time.

See (D)—
(H.) pl. 6.

1. **I**n Debt against divers, if one be at the Exigent, and the Plaintiff is nonsuited against the other, this shall serve for him who is at the Exigent also. 2 D. 4. 4. b.

(K) In what Cases the Nonfuit in one Thing shall be in another Thing.

Because he had Judgment which was confessed before the Nonfuit. But if the Nonfuit had been before any Judgment,

1. **I**n Debt, if the Defendant acknowledges the Action for part, and pleads to Issue for the Residue, and the Plaintiff has Judgment immediately because it is confessed, but Cesset Executio by Reason of the Damages which are to be assessed by the Jury upon the Issue tried, if the Plaintiff be nonsuited in this Issue, this shall not be Nonfuit for the Damages to be given; Because he has Judgment. 18 D. 6. 26. Contra 42 E. 3. 25. b. Adjudged.

then the Nonfuit had gone to the whole Action, so that he should not have Judgment for any Part; but Contra of Nonfuit after Judgment for Part. Br. Judgment, pl. 150. cites 42 E. 3. 25. — Brooke says the Reason appears there plainly to be, because upon the Confession the Plaintiff had Judgment immediately of the principal Debt; For if Judgment had not been demanded of this Parcel before Nonfuit, the Plaintiff could not have recovered for any Part. Br. Nonfuit, pl. 64. cites S. C.

If the Defendant be adjudged to account, and be at Issue before the Auditors, and the Inquest is ready to pass, and the Plaintiff is present and will not sue, he shall be barred in the principal Action; For by the Award of account the Action is not determined; For the Action depends upon the Original, and so the Nonfuit or Discontinuance of Account is a Discontinuance of all the Action, and not like to other Actions where the Plaintiff has Judgment to recover; For there the Action is clearly determined; and when he brings Scire Facias upon it, he may be Nonsuited in it; and yet the first Recovery is good; but it is otherwise here. Br. Nonfuit, pl. 41. cites 1 H. 1. 2.

2. **I**n Writ of Account, if the Defendant be adjudged to account, and then the Plaintiff sues a Capias ad Computandum, in which he is nonsuited, it shall not be any Nonfuit of the first Original; For this was determined by the Judgment to account. 21 E. 3. 7. Adjudged.

3 D. 4. 7.

3. **I**n Action of Debt, if Defendant to part pleads to the Country, and to the Residue wages his Law, (as he may) and after Defendant comes to make his Law, if the Plaintiff be nonsuited upon the Ley Gager, this shall be a Nonfuit for the whole. D. 16 Ja. W. R.

* Where there is but one Defendant and he pleads to Issue as to Part, and demurs to the other Part, the Plaintiff may be Nonsuited as to one Point, and proceed for the other Hob. 15. Trin. 12 Jac. Slowley v. Evely.

4. **I**n a Prohibition, if the Plaintiff declares, that where the Suit in the Spiritual Court is for Tithes of four Mills, that A. was seized of a House and two ancient Mills in the same House, and that he and all those whole Estate &c. have paid 10 s. in lieu of all Tithes issuing out of the House and two ancient Mills, and that after he built in the same House two new Mills, and so by the Law he is to be discharged of Tithes of those two new Mills; A. the Defendant, as to the Custom, takes Issue No such Custom as to the House and two ancient Mills, and as to the two new Mills he demurs in Law; And after at the Nisi Prius to try the Custom the Plaintiff is nonsuited, this is a Nonfuit also as to the Demurrer; for it is but one Original. Mich. 13 Car. W. R. between Gookwin and Smith. Adjudged per Curiam, and a Consultation granted accordingly. Hobart's Reports, 243. Cooley v. Staley.

5. If A. B. has diverse Actions or Assises and Nisi Prius against D. C. there D. C. may appear in Person to one Suit, and be nonsuited as to the other

other, and all at one and the same Day. Quod Nota. Br. Nonfuit, pl. 22. cites 21 H. 6. 20.

6. In Trespass, where several Pleas are pleaded, and the one is at Issue, and to the other the Plaintiff replies, and his Replication is ill, and the Defendant demurs, and the Replication is determined to be insufficient, per tot. Cur there is no Remedy, but the Plaintiff to be Nonfuit in all or barred of this Parcel; Quod Nota; That a Man shall be nonfuit as well upon a Demurrer before Judgment, as upon an Issue before Verdict. Br. Nonfuit, pl. 31. cites 14 H. 8. 23, 24.

7. In Debt for Rent the Plaintiff counted of a Demise of three Chambers and a Cellar at 9 l. Rent and for Rent Arrear brought the Action. The Defendant pleaded as to part Nil debet, and to the Residue, That the Demise was of three Chambers, a Cellar, and another Room. The Plaintiff as to the Plea of Nil debet entered a Nolle Prosequi, and as to the said special Plea he demurred in Law. Saund. 206. Hill. 20 & 21 Car. 2. Salmon v. Smith.

8. In Assumpsit the Plaintiff declared of two several Promises; the Defendant pleaded, and thereupon the Plaintiff demurred. The Plaintiff entered a Nolle Prosequi upon the second Promise, and had Judgment upon the first; And the Judgment was affirmed in Error. 2 Lev. 33, 34. Hill. 23 & 24 Car. 2. B. R. Woolnough & Ux. v. Virdon.—But the Reporter adds a Nota, that no Notice was taken that the Nolle Prosequi was entered upon one Promise before the Judgment upon the other, but says it seems to be good by the Case of Walsh and Bishop. Cro. C.

Lev. 263. S. C. and Raym. 175. S. C. but neither of those Books mention the Entry of the Nolle Prosequi.

In a Declaration there were four Counts; The Defendant demur'd to one of them, and the Plaintiff had Judgment on the Demurrer,

and then entered a Nolle Prosequi as to the other three Counts, but without any Misericordia; and this being assigned for Error, the Court held, That if the Entry of a Misericordia had been necessary at Common Law, there is no Statute of Jeoffails which cures the Want of such Entry; For those Statutes extend to Judgments entered by Confession, Nil dicit, or Non sum Informatus; but the principal Judgment is neither of the'e; for it is a Judgment upon a Demurrer joined. Now at Common Law there was no Need of entering a Misericordia in such Cases, because such Entry is only Pro falso Clamore, and here is no Colour of any false Complaint, because the Plaintiff says Non vult Ulterius Prosequi, so the Judgment was affirmed. 8 Mod. 198. Mich. 15 Geo Anon.

(L) Where it shall be a Bar of other Actions, and peremptory.

1. * Appeal of Felony, Robbery, or Larceny, may be taken before the Coroner, and if the Plaintiff be nonsuited after Appearance, he shall lose his Action for ever; and so the Nonfuit is peremptory. Br. Nonfuit, pl. 59. cites 22 Af. 97.

Br. Peremptory, pl. 31. cites S. C.—* S. P. Br. Nonfuit, pl. 51. cites 47

H. 3 16.—S. P. Br. Peremptory, pl. 8. cites 9 H. 4. 2.—S. P. So of Appeal of Murder and Rape, and this in Favorem Vitae; For if the Defendant be acquitted, and take out Process upon the Statute of Westminster 2. against the Abettors, or if he purchase his original Writ, for that Cause he may be Nonfuit. Co. Litt. 139. a (d)

If the Plaintiff in * Appeal of Maim be Nonfuit after Appearance, this is a good Bar in Trespass, per Knivet Ch. J. clearly; and so it * seems peremptory clearly. Br. Nonfuit, pl. 45 cites 45 Af. 39.—Br. Trespass, pl. 261. cites S. C.—Br. Nonfuit, pl. 66. cites S. C.—Br. Peremptory, pl. 62. cites S. C.—S. P. per Knivet Justice, and he shall not have Trespass or Appeal thereof again. Br. Peremptory, pl. 37. cites S. C.—* S. P. for the Writ says, Felonice Maimavit, and therefore the Nonfuit is peremptory. Co. Litt. 139. a. (e)

In Appeal by Remedy of the Death of her Husband, if the Plaintiff is Nonfuit in Appeal after Appearance, she shall not have another Appeal; per Huils. Quod nemo Negavit. Br. Nonfuit, pl. 11. cites 9 H. 4. 12.

2. In Writ of Error the Plaintiff was Nonfuit, and brought another Writ of Error, and was received to it, and they proceeded to the Examination of Errors, and reversed the first Judgment, notwithstanding the Allegation of the Nonfuit in the first Writ. Br. Nonfuit, pl. 38. cites 23 Af. 8.

Br. Error, pl. 121. cites S. C.—S. P. Ibid pl 14. cites 2 H. 7. 12

But

But if the Party be in Execution, he shall not have Superfedeas. Per Cur.—Br. Nonfuit, pl. 42. cites S. C.—S. P. Ibid. pl. 47. cites 5 E. 4. 2.—S. P. Br. Peremptory, pl. 38. cites 2 H. 7. 12 & 19.

S. P. per Jay. In *Audita Querela* the Plaintiff shall have a *Superfedeas*, but if he be Br. Nonfuit, nonfuit in the *Audita Querela*, yet he may have another Writ of *Audita Querela*, but not a *Superfedeas*. Br. Nonfuit, pl. 32. cites 24 E. 3. 7. pl. 42. cites 2 H. 7. 12. Quod Mor- & 22 E. 3. 4. dant Con-

cessit.—S. P. Br. Peremptory, pl. 38. cites 2 H. 7. 12. & 19.

If a Man *suēs Execution contrary to his own Decd.*, and the other *suēs Audita Querela*, and has *Superfedeas in Chancery*, and after is Nonfuit, and the other *suēs Execution* again, there in *Audita Querela* he shall not oust the Plaintiff of Execution; Per Markam; And per Yelverton, this is because a Man shall have but one *Superfedeas in Chancery*. Br. Nonfuit, pl. 26. cites 21 H. 6. 34.—Br. Peremptory, pl. 18. cites S. C.

Br. Per que 4. Nonfuit in *Per que Servitia* is not peremptory, but he shall have a new Writ. Quod Nota. Br. Nonfuit, pl. 33. cites 24 E. 3. 45. Servitia, pl. 6. cites 24 E. 3. 25.—S. P. per Cur. And so in *Quid Juris Clamat*; contrary in ancient Time. Quod Nota bene Br. Nonfuit, pl. 57. (bis) cites 24 E. 3. 45.

5. In *Scire Facias upon Recognizance* the Plaintiff was nonfuit, and brought another *Scire Facias* in the same Bank, and well; Quod Nota; For there is the Record; but contra where the Tenor of the Record only has been sent, and not the Record it self. Br. Scire Facias, pl. 128. cites 24 E. 3. 73.

S. P. per Pole, and that all the Parties are by this *acquitted and discharged for ever. Quod non Negatur. Br. Peremptory, pl. 29. cites 19 Aff. 13. & 32 Aff. 13. acc.—* Orig. (Assouths)

6. In *Attaint* the Nonfuit is peremptory; For upon this there is a Judgment given. Br. Nonfuit, pl. 39. cites 32 Aff. 13. The Reason why the Nonfuit in *Attaint* is peremptory is, for the Faith that the Law gives to the Verdict, and for the terrible and fearful Judgment that should be given against the first Jury if they should be convicted. Co. Litt. 139. a. (f)

7. *Contra* upon *Discontinuance*; For upon this there is no Judgment given, as upon Nonfuit; note the Diversity. Br. Nonfuit, pl. 39. cites 32 Aff. 13.—and 19 Aff. 13. accordingly.

Br. Nonfuit, pl. 12. cites 11 H. 4. 52. S. C.—A Man may be nonfuit in a *Petition* and have a New *Petition*. Br. Nonfuit, pl. 34. cites 4 H. 6. 12.—So in a *Traverse* and have a new *Traverse*. Br. Ibid.—S. P. Br. *Traverse de Office*, pl. 54. cites Frowike's Readings.

8. *Petition of Right* was traversed and the Party nonfuit in the *Petition*; and the Opinion was, that he may have have a new *Petition*, notwithstanding the Nonfuit. Br. *Petition*, pl. 10. cites 11 H. 4. 52. 67.

9. A. brings *Debt* against B.—B. *imparls till the Morrow*; B. appears; A. is demanded and does not appear; A. shall be Nonfuit. If the *Imparlance* had been *general*, and not at a Day certain, and the Defendant had appeared, and the Plaintiff being demanded had made Default, A. in this Case should be barred; For this is a Departure in despite of the Court, and a *Retrait*, as is used in a Common Recovery, upon the Voucher of the Tenant, the Vouchee appears and imparls to no certain Day, and being demanded makes Default, Judgment is hereupon given against the Tenant, and for the Tenant against the Vouchee to recover in Value. Where the *Imparlance* is general, *both Parties ought always to attend the Court*, and are demandable at the Pleasure of the Court: It is otherwise where the *Imparlance* is to a certain Day, for in this Case the Parties are not demandable till the Day. Jenk. 80, 81. pl. 58. cites 9 H. 5. 5.

Br. Nonfuit, pl. 56. cites S. C. accordingly. Brook says, Quere, 10. A Man brought *Writ of Error and Scire Facias* upon it, and after is nonfuit, and then brings another *Writ of Error and another Scire Facias* thereupon, and the Plaintiff in the first *Action* who recovered prayed *Execution*, and the Plaintiff in the *Writ of Error* prayed *Superfedeas till the Error*

Error was discussed, and had it by Award, because he *had no Superfedes* in the first Writ of Error; and yet by Hongate Chief Clerk, the first Writ of Error is Superfedes in it self, and it is said that it is so where the Writ of Error abates, inasmuch as the Plaintiff is made a Bishop or Knight, he shall have another Superfedes. Br. Error, pl. 55. cites 9 H. 5. 13.

if this Nonfuit shall be referred to the Scire Facias or to the Writ of Error.

If Error is sued with a Scire Facias, and the Plaintiff is nonsuited, there he may have another Writ of Error and Scire Facias. Br. Nonfuit, pl. 63. cites 6 H. 7. 16.

11. Nonfuit after Appearance is peremptory, and *e contra* before Appearance. Br. Faux Judgment, pl. 9. cites 21 H. 6. 34. and says it seems so by that Case.

Br. Peremptory, pl. 18. cites S. C.—Brook says, it seems that

no Nonfuit is peremptory but Nonfuit after Appearance. Br. Nonfuit, pl. 66 — In *Quare Impedit*, Appearance is peremptory. 2 Salk. 559 Mich. 3 W. & M. B R. Berkley v. Hanford.—S. P. If the Plaintiff in Quare Impedit be nonsuited after Appearance, the Defendant shall make Title, and shall have Writ to the Bishop, tho' it be before any Count. Br. Nonfuit, pl. 62. cites 19 E. 4. 9. & 33 H. 6. 1.—

It is a general Rule that Nonfuit before Appearance is not peremptory in any Case; because a Stranger may purchase a Writ in the Name of him that hath Cause of Action. Co Litt. 139. a. (f).—Nonfuit before Appearance is no Bar in another Action. Carth. 173. Globery v. Bishop of Exon.

12. It was said by some of the Court for Law, That if a Man be adjudged to account and is at Issue before the Auditors, and the Inquest is ready to pass, and the Plaintiff makes Default, he shall be nonsuited, and the Action shall not be revived after. Br. Nonfuit, pl. 41. cites 1 H. 7. 2.

13. If a Man be adjudged to account who is not present, a *Capias ad Computandum* shall issue, and upon this returned, if the Defendant appears, and the Plaintiff makes Default, he shall be nonsuited, and yet another Time he shall have Scire Facias ad Computandum; per Townsend, which was not deny'd; and this Scire Facias gives Day to the Parties, upon which they shall plead to the Action. Br. Nonfuit, pl. 41. cites 1 H. 7. 2.

Contra it is upon Capias ad Satisfaciendum; For they have no Day upon this. Br Ibid.

14. Where a Statute gives Action us Maintenance, Decies tantum &c. which were not at Common Law before, it seems that the Party may be nonsuited, and have a new Action, and Traverse is in lieu of Action. Br. Traverse de Office, pl. 16.

15. In Writ de *Nativo habendo* Nonfuit after Appearance is peremptory; For thereby the Villein is enfranchised. Co Litt. 139. a. (c)

16. But in a *Libertate probanda* Nonfuit after Appearance is not peremptory. Co Litt. 139. a. (c)

17. Nonfuit in a Writ of Right where the Issue is joined upon the meer Right is peremptory. Otherwise if the Issue had been joined upon any collateral Point. Goldsb. 90. Trin. 30 Eliz. Heydon v. Igrave.

But if the Nonfuit be before Appearance, in such Case Judgment

final shall not be given; But Contra after Appearance. Br. Nonfuit, pl. 26. cites 21 H. 6. 34. — *Quod est de forceat* in Nature of a Writ of Right was brought, in which the Wife was joined upon the mere Right, and after the Jury was charged, the Demandant upon No suit was barr'd by Judgment, and a new Quod ei de forceat was brought, and the first Judgment pleaded in Bar, upon which there was a Demurrer, and adjudged a good Bar, and Judgment final given; whereupon Error was assigned, that Judgment final ought not to have been given upon this Demurrer; and after Argument, the Opinion of the Court upon Conference with several of the Justices of England was, that the Judgment ought to be affirmed. Mo. 403. pl. 536. Patch. 3. Eliz. Aprichard v. Peiry.

18. After Nonfuit no Motion can be made in Arrest of Judgment; For the Plaintiff is out of Court; per Cur. And tho' the Case was in *Replevin* where the Avowant is Actor, yet it cannot be made. Litt. R. 253. 5 Car. C. B. Lucas v. Heath.

19. When a Plaintiff is Nonfuit, if he will again proceed in the same Cause, he must put in a new Declaration, and cannot proceed upon that Declaration whereupon he did proceed in the Cause and wherein he became Nonfuit: 22 Car. B. R. 16 April 1650. For by his being Nonfuit, it shall be intended that he had no such Cause of Suit as he declared in; and so that Declaration is void; and he hath no Day in Court. 2 L. P. R. 231.

20. The *Declaration on the Nisi Prius Roll* carried from the *Plea Roll*, and Plaintiff at *Nisi Prius* was Nonsuit. *Distringas de novo* was awarded, and the Nonsuit not material. Raym. 38. Mich. 13 Car. 2. B. R. Read v. Grapler.

(M) Of calling for the Plaintiff.

1. NOTE, tho' * the Plaintiff appears when the Inquest appears, yet when they are sworn upon the Issue and are together, and after come back to give their Verdict, he shall be then demanded, and may be nonsuited notwithstanding his Appearance before, and so it is used at this Day. Br. Nonsuit, pl. 65. cites ‡ 50 E. 3. 12.

‡ Quere if this be not misprinted, tho' all the Editions cite as here.

2. *Plaint was removed out of C. B. by Pone by the Defendant*, and at the *Day of Return the Plaintiff did not come*, by which the Plaintiff was demanded thus, [viz.] *ſ. F. thou loſeſt thy Writ*. Br. Nonsuit, pl. 28. cites 21 H. 6. 50.

3. If a *Replevin* be by *Writ or Plaint*, yet the Form to demand the Plaintiff to nonsuit him is, *ſ. F. thou loſeſt thy Writ*, and not, *thou loſeſt thy Plaint*; and the Plaintiff did not come, because Nonsuit was awarded, and that the Defendant may sue Return. Br. Nonsuit, pl. 28. cites 21 H. 6. 50. per Brown.

4. In *Debt* upon Bond they are at Issue, and at another Day the Defendant confessed the Deed when the Inquest appeared, by which they were charged upon the Damages only, and after they come back to give Verdict of Damages, the Plaintiff there shall not be demanded nor nonsuited; For the Judgment shall be now upon the Confession, and not upon the Verdict; For they were not Charged upon the Issue, but only of Damages, as an Inquest to inquire of Damages, and not an Inquest upon Issue; Nota. Br. Nonsuit, pl. 61. cites 16 E. 4. 1.

The Court calls not the Plaintiff for a Nonsuit until the Jury are about to give their Verdict, nor then neither but only for his Advantage; For the Judges of *Nisi Prius* have Authority to take the Verdict without demanding the Plaintiff; and there is no Entry of his being demanded; nor is it Error if he be not. Comb. 351. Trin. 7 W. 3. B. R. Read v. Waldron.

5. Upon a Trial when the Jury comes to deliver in their Verdict, and the Plaintiff is called to hear the Verdict; if he do not appear after he is thrice called by the Cryer of the Court, he is to be nonsuited, and the Nonsuit is to be Recorded by the Secondary, by the Direction of the Court, at the Prayer of the Defendants Counsel. Hill. 21 Car. B. R. For the Court will not order it to be Recorded, except the Counsel pray it for the Client. 2 L. P. R. 231.

(N) Entry thereof; when, where, and how; And Pleadings.

1. THERE are divers Manners of Entries of a *Retraxit*. After both Parties have appeared in Court, the Entry is, *Et postea eodem die revenit hic ad Barram præd' Tenens per Attornatum suum prædictum, & præd' Petens tunc solemniter exactus non venit, sed a Seſſa sua præd' in Contemptum Cur' se retraxit ideo Consideratum est quod petens nihil capiat per breve suum præd' sed sit in misericordia pro sabo Clamore suo inde, & quod præd' tenens eat inde sine die*. 8 Rep. 62. a. Mich. 6 Jac. in *Becher's Case*. ſays this appears Trin. 5 H. 6. Rot. 320.

2. Another

2. Another Form is, *Et super hoc idem querens dicit, quod ipse non vult ulterius Placitum suum præd' prosequi, sed abinde omnino se retraxit &c. Ideo &c. Ibid.*

3. Another Form is, *Quod idem querens fatetur se (seu cognovit se) ulterius nolle prosequi versus præd' def. &c. de Placito præd. Ibid.*

4. *And Entry of a Departure in despite of the Court of the Part of the Tenant is, Et præd' A. licet solemniter exactus non revenit, sed in Contempt' Curie recessit & defaultam fecit*; and, this is when in Judgment of Law he is present in Court, and, being demanded, departs in despite of the Court; this amounts to a Bar in Respect of the Despite and Contempt to the Court. And yet the Judgment is there given upon Default as appears before. *Ibid. & 62. b.*

5. A Man sued Writ of Error in B. R. and permitted the Record to lie, and did nothing, by which the Plaintiff brought Scire Facias of Execution, and the Defendant was twice returned Nihil, by which it was entered that inasmuch as the Defendant was demanded and did not appear, therefore fiat Executio &c. and this Entry was after upon the Scire Facias to have Execution, and not to be a Nonfuit in the Writ of Error, Quod Nota. *Br. Nonfuit, pl. 2. cites 9 H. 6. 13.*

Br. Error, pl. 6. cites S. C.

6. Where the Plaintiff is nonsuited after Issue joined in Second Deliverance, there a Special Entry shall be made, and this by Reason that the Defendant shall have Return irreplevifable. *Br. Nonfuit, pl. 24. cites 22 H. 6. 22.*

7. A Retraxit cannot be by the Plaintiff unless he comes in proper Person, and if it be awarded by Arbitrement that J. N. shall withdraw or retract such Action, there a Discontinuance or Nonfuit will not serve, but he ought to make a Retraxit, per Catesby; and it is said there, that he may do it before his Day comes, and the Entry shall be *Quod Querens in Propria Persona sua venit et dicit quod ipse Placitum suum prædict' ulterius *prosequi non vult*; quod Nota; and Retraxit is a † Bar to the Plaintiff for ever. *Br. Departure, pl. 12. cites 21 E. 4. 43.*

*The Words in all the Editions are (procedere non vult.) — Prosequi non vult, sed abinde omnino se retraxit and if he be present in

Court and demanded, the Entry is, a Secta sua præd' in Contemptum Curie se retraxit &c. or Fatetur se ulterius nolle Prosequi &c. and with this agrees 3 H. 6. 14. a. 21 Ed. 3. 43. a. & 4 E. 3. 23. a. Where the Case was, that 3 Coparceners were Plaintiffs in Writ of Disceit, and 2 of them appeared in Person, and the 3d by Attorney, and said, that they would no further sue; and could not, because the one was by Attorney; by which they were nonsuited. 8 Rep. 58. a. b. Mich. 6 Jac. in Beecher's Case. — S. P. 12 Mod. 652. in Case of Gree v. Rolle.

† *Br. Departure, pl. 13. cites 15 E. 3. and Fitzh. Assise 96.*

8. In Case of Nonfuit after privy Verdict the Verdict which was before given shall be entered on the Back of the Pannel or in the Schedule annexed, and not in the Roll &c. *Kelw. 65, pl. 3. Trin. 20 H. 7.*

9. In Trespass were several Issues, one found for the Plaintiff & super hoc idem Quer' gratis hic in Cur. cognovit se ulterius nolle prosequi versus le Defend. de cæteris exitibus, upon which there is an *Eat inde sine Die*, and the Plaintiff has Judgment for the other. 2 Salk. 456. Mich. 3 Ann. B. R. in Case of Goddard v. Smith. cites *Co. Ent. 650. d.*

10. Issue was for part, and Demurrer for part in an Action of Trespass, and Verdict pro Quer' upon the Issue; upon which the Plaintiff enters a Non Pros. in this Manner, *Et super hoc idem Quer' quoad Materiam prædict. unde partes prædict. posuerunt se in iudicium fatetur se nolle Materiam illam &c. ulterius quovismodo intromittere*; Ideo idem defendens *cat in le sine Die* &c. & superinde idem Querens petit iudicium de damnis prædict. &c. Ideo Consideratum est, that the Plaintiff recover; and that the Plaintiff be amerced pro falso Clamore as to the rest, & quod Defendens eat inde sine Die. *Ibid. cites Co. Ent. 676. &c.*

11. Jury came in with their Verdict, and the Plaintiff was nonsuited, and the Entry is, *Super quo Querens solemniter exactus non revenit nec est profecutus Billam suam, super quo Consideratum est quod nil capiatur.* *Ibid. cites Co. Ent. 28.*

12. Error of a Judgment in B. R. The Error assigned was, whereas the Plaintiff was nonsuited in Trespass after Evidence, The Judgment is, *Quod*

Quod *nihil Capit per Billam*, which is a Bar; whereas it ought to have been only in *Misericordia quia non Prosecutus est* &c. But it was held to be no Error; For all the Precedents of later Times are in that Manner. 2. For that the Judgment is, *Quod Querens & plegii sui sint in Misericordia pro falso Clamore suo*, whereas it ought to have been, *Quia non prosecuti sunt*; For it ought not to be *Pro falso Clamore*, but where it is after Verdict or Judgment upon Demurrer; And for that see F. N. B. 76. a. Book of Entries, 176. And for this Matter it was held to be manifest Error, and the Judgment was reversed. Cro. J. 213. Mich. 6 Jac. B. R. Anon.

13. In Action upon the Case, if the Plaintiff be *Nonfuit*, and after it is entered, that he *reliquit Actionem suam & fatetur se nolle Uterius Prosecui*, this is not any Nonfuit as it is entered. See Error (A) pl. 5. cites Mich. 11 Jac. B. R. between **Coles and Lowe**. Adjudged.

A Latitat was sued out against four Defendants in Trespass; the Plaintiff was Nonfuit for want of a

Declaration, and the Defendant's Attorney entered 4 Nonfuits against him; and it was held to be irregular, because the Trespass is joint, and tho' the Plaintiff may Count severally against the Defendants, yet it remains joint till it is severed by the Court. 2 Salk. 455. Trin. 12 W. 3. B. R. Allington v. Vavafor.

15. In Ejectment to try the Custom of East-brent in Somersethire of Copies for 3 Lives the Plaintiff was Nonfuit, and one of the Defendants being dead Hales Ch. J. advised to enter into Suggestion on the Roll that one was dead, else the Judgment for the Defendants on the Nonfuit will be erroneous as to all; and the Defendant did accordingly. 2 Keb. 832. 833. Mich. 23 Car. 2. B. R. Hawthorn v. Bawden.

16. A. brought Action against the Collector of the King's Tax who brought it down to Trial by Proviso and there the Plaintiff was Nonfuit, and now Defendant moved for Costs in Triplo; Note the Judge could not certify in this Case that Defendants was sued as Collector, because the Plaintiff was Nonfuit before Evidence; Per Holt it must appear then by Affidavits, and there must be a special Entry, Quia super Exam. apparet Curiae &c. Cumb. 322. Sir P. Egerton's Case.

17. A Man may be nonsuited in Term-Time, and the Record made up in the Vacation; but it must be entered on the Roll of the preceding Term; Per Holt Ch. J. 12 Mod. 417. Musgrave v. Efcourt.

18. In Ejectment a Retraxit was entered as to one at Nisi Prius, and Trial against the others, and held well. 12 Mod. 651. Gree v. Rolle.

19. It was agreed in the arguing of this Cause, That where there are several Defendants, and they sever in Plea, whereupon Issue is joined, that the Plaintiff may enter a Non Pros. as to one Defendant at any Time before the Record is sent down to be tried at Nisi Prius. 2 Salk. 457. Pasch. 4 Ann. B. R. in Case of Greeves v. Rolls.

20. Non Pros. ought not to be entered upon an Indictment but upon Motion in Court and Leave thereby obtained. Farr. 86. the Queen v. Parker.

(O) Judgment. 4

I. ACTION upon the Case upon a Promise, in Consideration that he promised to pay 10 l. within six Weeks, the Defendant assumed to do such a Thing, and for Non-performance brought the Action; And upon Non Assumpit pleaded, the Parties being at Issue, the Record of Nisi Prius

Prius was, In Consideration that he promised to pay 10 l. *within six Months*. And for this Variance, being against the Truth, and the former Record, the Plaintiff was nonsuited, and upon Advifement of two Precedents, a *Venire Facias de Novo* was awarded, and the Issue being tried for the Plaintiff, Judgment was given for him. Cited Cro.J. 670. Trin. 21 Jac. in Case of **Young v. Englefield** as Trin. 9 Jac. Farthing v. Dapper.

2. *Trespafs de Clauso fracto* in Parochia de Pancrafs abutting upon *Graves-Inn-Lane*. The Defendant pleaded Not Guilty; and the Record of the *Nifi prius* was *Graves-Inn-Lane*, wherefore by Reason of this Misprifion, because there *was no such Place*, the Plaintiff was nonsuited. But now in regard the *Paper Book and the Roll* were good, viz. *Graves-Inn-Lane*, which was the true Place, and it was but a Misprifion in the Record of *Nifi prius*, which was void being variant from the Record here, a *Venire Facias* was prayed de Novo to try this Issue, and the Case of * **Farthing and Dapper** being shewn in Court, and the Roll thereof well weighed, the Court now held that it was a good Precedent and stood upon good Reason; For the *Record of Nifi prius ought to be warranted by the Roll*, and varying from it is void, and the Nonfuit upon it is not material; wherefore here *they awarded a Venire facias de Novo*. Cro. J. 669, 670. Trin. 21 Jac. B. R. **Young v. Englefield**.

3. W. Keeper of the Gatehouse was sued in an Action upon the *Case* for suffering J. S. to *escape*, who was in Execution upon a Judgment Trin. 2 Car. He pleaded Non Culp. in London, and it was found by *Nifi prius*; and because the *Record of the Nifi prius mentions the Judgment to be Trin. 3 Caroli*, which was a misprifion of the Record, the Plaintiff was nonsuited: And now it was moved for the Plaintiff, That by Reason of this Misprifion the Record of *Nifi prius* is not warranted by the Roll, and the Nonfuit thereupon being Null, the *Postea* shall not be recorded nor entered; For there is no Warrant for this Record of *Nifi prius*; wherefore it was prayed, that a *Distringas de Novo* might be awarded, and upon the shewing of two Precedents in this Court, a *Distringas de Novo* was awarded. Cro. C. 203. Mich. 6 Car. B. R. **Aquila Weeks's Case**.

a perfect Nullity, and it ought not to be entered on the Record. G. Hist. C. B. 158. cap 15. cites Cro. Car. 204 **Week's Case**

S. P. and S. C. cited. But here the Defendant insisted to have Costs, and they directed to search Precedents. And it seems he shall have *Costs* at the Discretion of the Court. Raym. 38. Mich. 15 Car. 2. B. R. **Read v. Grapler**

In an Action upon the Case the Plaintiff at the *Nifi prius* was nonsuit, because the *Nifi prius Roll is*, That the Plaintiff was in such a Benefice in the Year 1662, whereas the *Plea Roll is 1626*, and so the Plaintiff is destitute of his Proof; and now Wild Serjeant, moved to set aside the Nonfuit according to **Wicks's Case**. Cro. Car. 203. and it was adjourned Raym. 73. Pasch. 15 Car. 2. B. R. **Fitch v. Vinor**.

4. In *Trespafs and Ejectment* the Defendant was by Rule of Court, at the Trial which was to be at the Bar, to appear and confess Lease, Entry, and Ouster, and to stand upon the Title only, yet at the Trial he would not appear, upon which the Plaintiff was nonsuit, and yet the Judgment was for the Plaintiff upon the Rule; and he was ordered to pay the Jury. Nota. Sty. 425. Mich. 1654. B. R. **Harvey v. Mountney**.

if every one do not appear at the Trial, the Plaintiff cannot proceed against the rest, but must be Nonsuit. 1 Vent. 355. Trin. 33 Car. 2 B. R. Anon.—S. P. 2 Vent. 195. Trin. 2 W. & M. C. B. **Fagg v. Roberts & al.**

S. C. cited Raym. 38. Mich. 15 Car. 2. B. R. Read v. Grapler.

* See pl. 1.

S. C. cited And the Reason of this is, that the *Nifi prius Roll* being materially different from the *Plea Roll*, is no Transcript; and therefore the *Nonfuit* for not proving what was not in Issue is 15. cites Cro.

In an Ejectment where there are diverse Defendants which are to confess Lease, Entry and Ouster,

(P) Judgment. Costs. In what Cases.

This Statute is confirmed by 19 H. 7. 10. **1.** 3 H. 7. cap. 10. **W**HERE any Person shall bring a Writ of Error to reverse a Judgment before Execution is had, if the Judgment is affirmed or the Writ discontinued, or the Plaintiff in Error is nonsuited, the Defendant in Error shall have his Costs and Damages.

In second Deliverance, the Plaintiff was Nonsuited, and Damages were awarded to the Defendant; For now the Defendant shall have Return irrepleviable, which is in Nature of a Bar to the Plaintiff; and this Statute is, that if it be found &c. Br. Damages, pl. 1 cites 19 H. 8. 6, 7. — S. P. by Saunders, and that this is by the Equity of the Statute, the Intent being to give Damages in like Cases. Pl. C. 32. b. in Case of Partridge v. Strange.

In Replevin the Defendant avowed for Damage feasant, and the Plaintiff and Defendant are at issue, and after the Plaintiff is nonsuited; Quere, if the Avowant shall have his Costs and Damages by the Statute of 7 H. 8. cap. 4. For this Case is clearly by this Statute of Avowry or Conusance made upon the Land, and not upon the Person, which extends as well to Nonsuits in Replevin or second Deliverance, as where the Plaintiff is barred; and also as well where the Avowry or Conusance is for Damage feasant, or a Rent-charge, as Rent-service or Customs. D. 141. b. pl. 46. Patch. 3 & 4 Ph. & M. Anon.

2. 7 H. 8. 4. S. 3. Every Avowant that makes Avowry or Conusance, or justifies as Bailiff in any Replegiare or second Deliverance for Rent, Custom, or Service, if their Avowry, Conusance or Justification be found for them, or the Plaintiff be otherwise barred, shall recover Damages and Costs.

3. 21 H. 8. 19. S. 3. Enacts that In Replevin or second Deliverance for Rents, Customs, Services, or Damage feasant, if the Avowry &c. be found for the Defendant, or the Plaintiff be nonsuited, or otherwise barred, the Defendant shall recover such Damages and Costs as the Plaintiff should have had if he had recovered.

4. 23 H. 8. cap. 15. S. 1. If Plaintiff be Nonsuit after Appearance of the Defendant &c. in any Action, Bill, or Plaint, for Trespass upon Statute of 5 R. 2. or for Debt or Covenant upon Specialty of Contract, Detinue, Account, Charging as Bailiff or Receiver, Case, or upon any Statute * for any Wrong personal immediately supposed to be done to the Plaintiff, the Defendant shall have Judgment to recover his Costs to be taxed by the Discretion of the Judge of the Court where &c. and shall have such Procefs and Execution for the same as the Plaintiff might have had in Case the Judgment had been given for him.

In Case, the Plaintiff was nonsuit, and the Defendant had Judgment of Costs upon this Statute, and upon Error brought the Record was moved into B. R. and after, the Defendant sued an Original in Debt for the Costs in C. B. And adjudged that it lies very well being upon a new Original; and if the Record be denied, it shall come by Mittimus into the Chancery, but the C. B. may write to an inferior Court; And by two Justices against one, altho' the Record be reversed, he shall have the Costs assessed by the Court for the Wrong and Vexation. D. 32. pl. 5. 6. Patch. 23 & 29 H. 8. Anon. — S. C. cited per Haughton J. 3 Bull. 248. Mich. 14 Jac. in Case of Small v. Boyer. — S. C. cited per Gawdy, Mo. 625. Hill. 25 Eliz. in Case of Ladd v. Wright, that if the Plaintiff after Nonsuit pays Costs, and then reverses the Judgment by Error, yet the Costs shall not be restored, because given for the unjust Vexation. — In Action on the Case for Words, the Plaintiff was nonsuited at the Verdict, and he moved that his Declaration is untrue to save Costs, upon the Statute of H. 8. and 4 Jac. but it was adjudged, That for his Vexation he shall pay Costs, tho' in Truth he should never have had Judgment if the Verdict had passed for him. D. 32 b. Marg. pl. 6 cites Patch. 1. Jac. B. R. Elifden v. Bennet. — S. P. And Costs were adjudged; And Hobart Ch. J. said, that the Vexation is the more gross, if there was no Cause of Action; For otherwise one may sue with most Safety where he had least Cause. Hob 219. Drury v. Fitch. — Hutt. 16. Patch. 16 Jac. S. C. and tho' the Action would not have lain, yet the Defendant shall have Costs; For it was such an Action in which the Plaintiff ought to have Costs if he had recovered. — So in an Action on the Case against an Executor on a Promise of his Testator, the Court seemed of Opinion, that Defendant ought to have his Costs upon the Statute of H. 8. tho' the Declaration be insufficient, but the Court desired to see Precedents. Cited 3 Bull. 14 Jac. Smale v. Bowen.

* In an Action upon an Escape, the Plaintiff was nonsuited, and it was held, that Defendant should not have Costs. 4 Le. 182. pl. 280. Mich. 19 Eliz. in C. B. Anon. — And the Reporter says, Nota, The Words of this Statute are, (For any Offence or Tort Personal to be supposed to be done immediately to the Plaintiff). And notwithstanding this Action is Quodam Modo an Action upon the Statute by the Equity of the Statute of H. 1. cap. 11. which gives this Action expressly against the Wardens of the Fleet,

Fleet, yet properly it is not an Action upon the Statute; For in the Declaration in such an Action no mention is made of the Statute, which See in the Book of Entries, 169. 171. and also here is not supposed any immediate personal Offence or Wrong to the Plaintiff: And an Action upon the Case it is not, for then the Writ ought to make mention of the Escape, and that it doth not here, and yet at the Common Law, before the Statute of West. 2. an Action upon the Case lay for an Escape, and so by Dyer, Manwood, and Mounson, Cofts are not given in this Case. 4 Le. 182. Mich. 19 Eliz. C. B. Anon — And by Dyer, upon Nonfuit in an Action upon the Statute of 8 H. 6. the Defendant shall not have Cofts, for it is not a personal Wrong; For the Writ is, *Quod diffidit*, which is a real Wrong. Ibid — If Debt be brought on the Statute of 5 Eliz. of Perjury, and the Plaintiff be Nonfuit, the Defendant shall not have Cofts by the Words (Personal Wrong &c.) because the Statute of 5 Eliz. was made long after the Statute of H. 8. and upon the Statute of Jac. the Defendant shall not recover Cofts, because if the Plaintiff had recover'd, he should have recovered no Cofts; and so no Cofts were given to the Demandant in this Action. Brownl. 66 Trin. 16 Jac. King v. Laws.

If an Infant brings Trespass by Guardian, and afterwards he is Nonfuit, he shall render no Cofts; per Curiam, absente Wray. Cro Eliz. 33. Trin. 26 Eliz. in B. R. Grave v. Grave.

It was agreed, that if one brings an Action of Debt upon this Statute, in which there is a Demurrer upon Matter which goes to the Action, and this Demurrer is adjudged against the Plaintiff, now Cofts shall be awarded for the Defendant by this Statute, and yet it is out of the Words thereof, and so is the Course of the Court, and has been divers Times allowed; but if the Demurrer goes to the Writ, which is adjudged against the Plaintiff, the Defendant shall not have Cofts as was held H. 26 Eli. And. 117. pl. 163. Anon.

Delt against an Executor upon an Obligation made by his Testator. The Plaintiff was nonsuited; the Defendant had Cofts by Order of the Court. *Otherwise* it is where an Executor is Plaintiff, and is nonsuited; For it cannot be intended, that it was conceived upon Malice by him. Cro. Eliz. 533. Mich. 38 & 39 Eliz. B. R. Fetherston v. Allybon.

Where Executors declared upon an Indelittatus assumpsit to them as Executors of J. S. for Money had and received to their Use as Executors. The Defendant pleaded Non Assumpsit, and the Plaintiffs were nonsuited at the Trial. And the Question was, whether they should pay Cofts upon this Statute? And per Cur. the Plaintiffs shall pay Cofts; For the Receipt being since the Death of the Testator, if it was by the Consent of the Executors, it is the Receipt of the Executors. And on the other Side, if it was without their Consent, yet now the bringing this Action is a Consent; That as to the naming themselves Executors, it is only to deduce their Right, and set it forth Ab Origine; yet nevertheless the Cause of Action arises intirely in their own Time, and since the Testator's Death. It is only by Way of Construction that an Executor is out of this Statute; and the Reason is, because he is not privy to the Original Cause of Action, but in this Case he is. 1 Salk. 227. Hill. 2 Anne B. R. Jenkins & Ux. v. Plume — And in either Case, whether the Receipt being since the Testator's Death was by the previous Appointment or Consent of the Executors, or without, yet such Consent in the first Case, and the bringing the Action in the second, makes the Receipt to be in their own Right, Per Holt Ch. J. 6 Mod. 91, 92. Hill. 2 Anne S. C. but adjourned. And Ibid. 181. Trin. 3 Anne B. R. S. C. adjudged.

Executor brought Assumpsit for Money of his Testator had and received by the Defendant to the Use of the Plaintiff as Executor, and was Nonfuit. Defendant shall not have Cofts; For the Plaintiff could not sue but as Executor; and it is not material, whether the Money was received since the Death of the Testator, or before; For if since, it is not Assets till recovered. 1 Salk. 314. Pasch. 2 Anne B. R. Eaves v. Macato — S. C. cited per Holt Ch. J. 6 Mod. 92. in the Case of Jenkins v. Plombe, by the Name of *CHRIS. V. SPICATO*, which Case was then again agreed, because there was no new Cause of Action, but a new Action upon an Ascertaining of an ancient Cause, which Ascertaining leaves it still a Debt of the Testators.

S. 2. *Provided that every poor Person being Plaintiff, which at the Commencement of their Actions be admitted by the Judge to have their Process and Council of Charity, shall not be compelled to pay Cofts by this Statute, but shall suffer either Punishment by the Discretion of the Judge.* The Plaintiff was admitted at the Commencement of the Action in Forma

Pauperis, and before Issue was dispauper'd, and then was nonsuited; The Question was, whether he should pay Cofts within 23 H. 8. cap. 15. and it seems that he shall not, because the Proviso is, that he who is admitted in Forma Pauperis at the Commencement of the Suit shall not pay any Cofts. And Coke and Croke were of the same Opinion; and therefore it was ordered to stay till moved of the other Part; But Coke said, that in this Case the Statute is, that he shall have corporal Punishment. Haughton J. said, that 4 Jac. . . . is, That if the Plaintiff be nonsuited, the Defendant shall have Cofts to be levied as 23 [H. 8.] ordains; by which peradventure this Plaintiff shall pay Cofts; but it seems that he is not within the 23 [H. 8.] but Coke and Dod. e contra; For 4 Jac. refers to all to 23 [H. 8.] Man Prothonotary said, it had been adjudged here that an Execution is not within 4 [Jac.] because it is not within 23 [H. 8.] 1 Roll. R. 83. Mich. 12 Jac. Anon.

The Plaintiff was admitted in Forma Pauperis, and at Nisi prius was nonsuited; and it was moved that Cofts should be spared against him; For at Common Law no Cofts shall be paid; And the Statute 23 H. 8. leaves it to the Justices. And upon Inquiry of the Practice in such Case, it was certified, that the usual Way is to tax Cofts, and if the Cofts be not paid, that the Plaintiff shall be whipp'd. But it is in the Discretion of the Court to spare both upon Consideration of the Circumstances of the Case; But in the principal Case they awarded that the Plaintiff should make his Election, to be whipp'd, or to pay Cofts. Sid 261. Trin. 17 Car. 2. B. R. Munford v. Pitt.

It was moved to dispauper the Plaintiff in an Action of Trespass and Ejectment, because it was proved by Affidavit, that he was a very vexatious Person, and had been thrice Nonfuit in this Action, and would never pay Cofts, or make a sufficient Lessee able to pay them. Roll Ch. J. ordered him to

put in an able Lessee to pay Coſts, or otherwiſe he ſhall not proceed in this Action. Sty. 386. Trin. 1653. B. R. Anon.

A Pauper ſhall not pay Coſts, unleſs he be Nonfuit, but then he ſhall pay Coſts or be whipp'd, per Holt Ch. J. Quere tamen; For afterwards, in another Term, 'twas moved that a Pauper might be whipp'd for Non-payment of Coſts upon a Nonfuit, and the Motion was denied per Holt Ch. J. ſaying he had no Officer for that Purpoſe, and never knew it done. 2 Salk. 506. Mich. 9 W. 3. B. R. Anon

If a Pauper be Nonfuit, there ſhall be Coſts taxed, and he ſhall not after go on without paying the Coſts, or ſhewing according to the Act of Parliament that he was whipp'd.; per Cur. Farr. 114. Mich. 1 Annæ B. R. Anon.

A Pauper Plaintiff having an Eſtate fallen to him ſince his being admitted as a Pauper, and being taken in Execution for the Coſts; it was now moved that he might be diſcharged by this Statute. And the Court was of Opinion, that if the Plaintiff was a Pauper when the Cauſe was tried, he ſhall not pay Coſts, and the Deſcent of Lands to him ſhall not have Relation to that Time; ſo a Rule was made to diſcharge him. 8 Mod. 344. Hill. 11 Geo. Ancell v. Sloman.

5. 24 H. 8. cap. 8. *Albeit that the Plaintiffs ſhall be nonſuited in any Suit commenced to the Uſe of the King, or that any Verdict paſs againſt ſuch Plaintiffs, the Defendants ſhall not recover Coſts againſt ſuch Plaintiffs.*

1 Le. 105. Mich. 30 E- 6. 8 Eliz. cap. 2. S. 3. Enacts that *If any Perſon ſhall ſue forth of the King's Bench any Latuit, Alias & Pluries Capias againſt any Perſon, who thereupon doth appear, and put in Bail, if the Plaintiff do not declare within three Days after, or do after Declaration delay or diſcontinue his Suit, or be Nonſuit, the Judges of that Court ſhall thereupon award Damages againſt the Plaintiff.*

Underwood. See the Notes at pl. 8 — Action upon the Caſe upon Trover, and Conversion of Goods was brought by Adminiſtrator, and declared that J. S. was poſſeſſed of Goods, and died inteſtate, and that Adminiſtration was committed to him, and that the Goods by Trover came to the Poſſeſſion of the Defendant, who converted them; and the Conversion was altered after the Time that the Adminiſtration bore date; The Defendant pleaded Not Guilty, and the Plaintiff, after the Jury ſworn, was nonſuited; The Queſtion in this Caſe was, whether the Defendant ſhall have Coſts by this Statute? And it was held by Jones, Whitlock, and Croke, (abſente Hide) that the Defendant ſhall have Coſts, becauſe Action was brought upon a Tort done to the Plaintiff himſelf, and there was no Occaſion for him to be named Adminiſtrator in this Caſe. 1 Jo. 241. Paſch. 7 Car. B. R. Atkey v. Hearde. — Cro C. 219. Trin. 7 Car. B. R. S. C.

7. If the Plaintiff be nonſuited, by which the Defendant is to recover his Coſts, if the Plaintiff will not enter his Continuances on purpoſe to ſave the Coſts, the Defendant ſhall be ſuffered to enter them, and ſo recover his Coſts. See Continuance (E) pl. 3. Paſch. 8 Jac. B. *Bro's Caſe*, per Curiam.

It was ad- 8. 4 Fac. 1. cap. 3. S. 2. *If any Perſon ſhall ſue in any Court any Action of Treſpaſs or Ejectione Firmæ, or any other Action wherein the Plaintiff or Demandant might have Coſts if Judgment ſhould be given for him, and the Plaintiff's or Demandant's after Appearance be nonſuited, or any Verdict paſs againſt the Plaintiff's or Demandant's, the Defendant ſhall have Judgment to recover Coſts againſt ſuch Plaintiff's and Demandant's, to be taxed, and levied, as by Stat. 23 Hen. 8. cap. 15.*

and is Nonfuit, or Verdict paſſes againſt him, he ſhall not pay Coſts upon this Statute; For the Statute ought to have reaſonable Intendment, and there cannot be preſumed any Default in the Executor who complains, becauſe it touches another's Deed, of which he cannot have perfect Notice; and ſo it was ſaid to be then lately reſolved and adjudged by all the Juſtices of C. B. Quod nota, ſet- tled Judgment by both Courts, contrary to ſome few Precedents which have been in B. R. Quod nota, Yelv. 163, 169. Mich. Jac. B. R. Anon. — S. P. And ſo it is upon the Statute of 8 Eliz. And altho' it was ſaid, that Coſts had been allowed in the like Caſes; they appointed that henceforward it ſhould no more be ſo. Cro. J. 229. S. C. by Name of Haywarth v. David. — Ibid. cites it to be ſo ruled in one Ford's Caſe. — It was ſaid by Hutton, That it had been agreed in C. B. that if Executors are Nonfuit, they ſhall not pay Coſts within the Statute of H. 8. or this Statute, and that ſo is the conſtant Practice; For the Statute ſpeaks of any Contract, or Specialty made with the Plaintiff, or between the Plaintiff and Defendant, and the Executor brings an Action upon the Contract of another, and in the principal Caſe, Judgment was entered, that the Defendant ſhould go without Day, and that he ſhall not have Coſts againſt the Plaintiff. Winch. 70. Hill. 21 Jac. C. B. in Caſe of Treſtern v. Claybrook. — An Executrix brought Treſpaſs, and Counts of her own Poſſeſſion &c. And it was moved, becauſe the Plaintiff was nonſuited, If the Defendant ſhall have Coſts upon the Statute of 23 H. 8. By the Court, the Plaintiff ſhall render Coſts; For ſhe did not bring the Action as Executrix, but of Goods taken out of her own Poſſeſſion: And ſo the naming her Executrix is nothing to the Purpoſe; Ergo within the Statute. Noy. 64 the Lady Digby's Caſe. — In Raviſhment of Ward brought by Executors, they were nonſuited; the Queſtion was, if they ſhould pay Coſts; but not adjudged. Hutt. 78. Hill. 1 Car. Townley v. Steele.

Administrator was nonsuited in Action brought against J. S. and afterwards brought another Action against the same Defendant for the same Matter; It was ruled that Defendant should not have Coſts, becauſe he brought the Action as Administrator; and tho' it be not ſhewn that the Debt was due to the Teſtator, yet when he brings it in the Detinet, it ſhall be intended to be brought in Right of the Teſtator, and then he ſhall not pay Coſts upon Nonfuit; For this is out of the Statute. Cro. J. 361. Mich. 12 Jac. B. R. Barret v. Winchcomb.—And in the Caſe of Laik v. Emme. 2 Bull. 261. Mich. 12 Jac. where the like Matter came in Queſtion, the Court answered, That according to their former Rules the Defendant in this Caſe is not to have Coſts within this Statute; for that this Statute hath Reference to a former Statute made in the Time of Queen Eliz. where in Caſe of an Executor Plaintiff, and becoming nonſuited, no Coſts ſhall be given to the Defendant. And ſo (as Man Secondary informed the Court) hath been the conſtant Courſe, and ſo hath the Opinion been of all the Judges here before this Time; becauſe by the former Statute in ſuch a Caſe the Defendant was not to have Coſts, and ſo not to have any Coſts by this later Statute of 4 Jac. cap. 3. which hath Reference to the former; and ſo by the Rule of the Court, the Plaintiff in this Caſe being nonſuited was not to pay any Coſts to the Defendant.—The Defendant ſhall not have Coſts againſt Administrator upon his Nonfuit, notwithstanding the General Words of this Statute. Per Cur. and all the Clerks. 2 Roll. R. 87. Paſch. 17 Jac. B. R. Valden v. Hunt.—But where Executor brought Trover, and counted of Trover and Conveyſion after Death of Teſtator, and after Iſſue join'd was nonſuited, the Defendant prayed Coſts and had it; For the Court held, that the naming the Plaintiff Executor in this Caſe, is only Surpluſage. Lat. 220. Mich. 30 Car. Worfield v. Worfield.—S. C. cited and admitted by the Court. Lat. 214. in Caſe of Hudſon v. Hudſon.

Nonfuit in Ejectment was recorded. Defendant ſued for Coſts upon this Statute, and the Plaintiff to ſave his Coſts alleged Inſufficiency in his Declaration, and inſiſted, that by the Words of the Act, the Plaintiff in this Action could not recover his Coſts, by Reaſon of the Inſufficiency of the Declaration, and that therefore the Defendant ſhall not have Coſts againſt him upon Nonfuit in ſuch Action. And upon two Precedents produced, the Court adviſed, and upon Conference with the Juſtices of C. B. reſolved to purſue this Courſe for the future; For they thought it unreaſonable that the Plaintiff ſhould take Advantage of his inſufficient Pleading, and by this Means a Defendant will never have the Benefit of this Statute; becauſe when the Plaintiff has a Mind to be nonſuited, he will relinquish his Pleading; and Coſts are given for the Vexation of Defendant without Cauſe, and that here is Vexation. And per Houghton J. the Word (ſuch) does not mean the ſame Action, but if the Plaintiff ſhould have his Coſts in any other of the ſame Nature; and ſo the Defendant had Judgment. Palm. 14. Mich. 18 Jac. B. R. Dove v. Knap.

9. 7 Jac. 1. cap. 5. Gives double Coſts, where an Action is brought a- In Caſe a-
gainſt a Juſtice of Peace, Mayor, or Bailiff of a Corporation, Headborough, for reſuſing to
Portreeve, Conſtable, Tythingman, or Collector of Subſidies, or Fifteenths, for admit the
any Thing done by Reaſon of their ſeveral Offices, and the Verdict paſs for the Plaintiff to
Defendant, or the Plaintiff be Nonfuit &c. vote at an E-
lection of a

new Mayor the Plaintiff was nonſuited; The Defendant moved for double Coſts, but the Court held this Caſe not within the Intent of the Statute. 2 Lev. 250. Paſch. 31 Car. 2. Herring v. Finch.

10. In *Treſpaſs for a Way* the Defendant pleaded a Plea in Bar which was inſufficient; and afterwards the Plaintiff was Nonfuit; yet it was reſolved by the Court, that the Defendant ſhould have his Coſts againſt the Plaintiff. But if a Default be in the original Writ; and afterwards the Plaintiff is nonſuit, there the Defendant ſhall not have Coſts; becauſe when the Original is abated, it is as if no Suit had been. And ſo was the Opinion of the whole Court. Godb. 220. Mich. 11 Jac. C. B. Laiſton's Caſe.

11. In an Action upon the Caſe, after Iſſue joined, and Notice given by the Defendant of Trial by Proviſo the Plaintiff comes into Court in Perſon the Day before the Trial, and enters upon the Roll a Nolle Proſequi; and now the Defendant prays his Coſts; and the Caſe was argued for the Plaintiff, but no Judgment. Hard. 152. Paſch. 1659. Turner v. Gallillee.

12. 13 Car. 2. cap. 2. Seſſ. 2. S. 3. Enacts that Upon an Appearance to be entered with the reſpective Officer at the Return of the Writ, Bill, or Proceſs, if the Plaintiff does not deliver a Declaration againſt the Defendant in ſome perſonal Action or Ejectment for Lands before the End of the next Term following, then a Nonfuit ſhall be entered againſt ſuch Plaintiff, and the Defendant ſhall recover his Coſts, to be taxed as is provided by the Statute 23 H. 8. 15.

13. 17 Car. 2. cap. 7. S. 2. When any Plaintiff in Replevin ſhall be nonſuit before Iſſue joined in any of the King's Courts at Weſtmiſter, the Defendant making a Suggestion in Nature of an Avowry or Conſuſance for ſuch See Rent.
Rent

Rent to ascertain the Court of the Cause of Distress, the Court upon his Prayer shall award a Writ to the Sheriff to enquire by the Oaths of 12 Men touching the Sum in Arrear at the Time of such Distress taken, and the Value of the Goods distrained; and thereupon Notice of 15 Days shall be given to the Plaintiff or his Attorney of the sitting of such Inquiry; and upon the Return of such Inquiry the Defendant shall have Judgment to recover against the Plaintiff the Arrearages of such Rent in Case the Goods distrained shall amount unto that Value, and in Case they shall not, then so much as the Value of the said Goods shall amount unto together with his Costs, and shall have Execution as the Law shall require. And in Case such Plaintiff shall be Nonsuit after Confessance or Avowry made, and Issue joined, or if the Verdict shall be given against such Plaintiff, then the Jurors shall, at the Prayer of the Defendant, inquire concerning the Arrearages, and the Value of the Goods distrained; and thereupon the Avowant, or he that makes Confessance, shall have Judgment for such Arrearages, or so much thereof as the Goods distrained amount unto, together with his Costs.

14. 4 E 5 W. 3 M cap. 18. If a Person, against whom an Information shall be exhibited for Trespass, Battery &c. in the Crown Office, appear and plead to Issue, and the Prosecutor do not within a Year after Issue joined procure a Trial, or if upon such Trial a Verdict pass for the Defendant, or the Informer procure a Nolle Prosequi to be entered, the Court shall award the Defendant Costs, unless the Judge certifies that there was reasonable Cause for the Information.

15. 8 E 9 W. 3. cap. 11. S. 2. If any Person shall prosecute any Action, Plaint, or Suit, wherein upon a Demurrer Judgment shall be given against the Plaintiff or Demandant, or if after Judgment for the Defendant the Plaintiff or Demandant shall sue a Writ of Error, and the said Judgment shall be affirmed, the Writ of Error discontinued, or the Plaintiff shall be Nonsuit, the Defendant or Tenant shall have Costs, and have Execution for the same by Ca. Sa. Fieri Facias or Elegit.

S. 3. And in all Actions of Waste, Debt, upon the Statute for not setting out Tithes, where the single Value or Damage found does not exceed 20 Nobles, and in Suits upon Writs of Scire facias, and Suits upon Prohibitions, the Plaintiff obtaining Judgment or award of Execution after Plea pleaded, or Demurrer joined, shall likewise recover Costs, and if the Plaintiff be Nonsuit, or discontinued, or a Verdict pass against him, the Defendant shall have Costs and Execution for the same in like Manner.

[For more of Nonsuit in General See Appeal. Audita Querela. Default. Error, and other proper Titles.]

* Non-tenure.

* Non-tenure is an Exception to a Count by saying, That he holdeth not the Land specified in the Count, or at least some Part of it. Reg. Plac. 96. cap. 2.— This is said † 16 Aff. 5. to be either

(A) Pleadable in what Cases or Actions.

1. **I**N Attaint, the Defendant pleaded General Non-tenure, and if found that it be not &c. that they made a good and lawful Oath &c. and this was admitted without Challenge. Br. Nontenure, pl. 35. cites General or Special. Especial, As that he was not Tenant the Day whereon the Writ was purchased. General, That he never was Tenant to the Land in Question. Ibid.

† Ibid.

‡ Ibid. pl. 54. cites S. C. and 6 Aff. 6. — But in *Præcipe* quod reddat the Demandant was barred, and brought *Attaint* against the first Tenant within half a Year after Judgment, and because the Defendant was not Tenant the Day of the Writ purchased nor after, the Writ was abated, but it does not appear that it was pleaded as Non-tenure. Br. Non-tenure, pl. 54. cites 6 Aff. 6.

Non-tenure has been pleaded and admitted a good Plea divers Times in *Attaint*. F. N. B. 107. (G). — S. P. Agreed per Cur. And if the Tenant pleads Non-tenure, the Plaintiff may aver him *Pernour of the Profits*; per Fitzherbert, & non negatur. Br. Non-tenure, pl. 1. cites 26 H. S. 2. — S. P. per Prisot. Br. Non-tenure, pl. 6 cites 35 H. 6. 44.

2. *Attaint* by **Wesford v. Rew** and the petit Jury, inasmuch as Rew had recovered against him in *Ailife* by false Oath, and T. appeared and six of the petit Jury, and the others made Default, and the *Attaint* awarded against them by Default. R. pleaded *Non-tenure generally*. Ash-ton said, that R. brought *Ailife* against T. and others, and T. pleaded *Nul tort*, and found for the Plaintiff falsely, where T. was Tenant, and R. recovered by Judgment, and entered, and this *Action is brought within the Year after the Recovery, and R. made a Feoffment to Persons unknown to defraud him of his Tenant, and averred that R. took the Profits the Day of the Writ purchased*; Judgment if the Writ be not good. Per Newton Ch. J. this is no Plea; For the *Statute* depends upon three Points, viz. That the *Action* shall be brought within the Year, ut supra, and *against Pernour of the Profits the Day of the Writ purchased, and against him who was Tenant of the Frank-tenement the Day of the Writ purchased*; and it appears that he who is now Plaintiff was Tenant of the Frank-tenement at the Time of the *Action* accrued; For the *Recovery* was against him. *Passon Contra*, and that *the Action is not accrued till Execution be had upon the Judgment, and then he who recovered is Tenant, and then the Action* accrued, and not before; and after *Prisot* demurred for the Fault of the third Point supra; but after he said that he did not take the Profits the Day of the Writ purchased; and so to Issue, & sic ad Patriam; and this seems to be by the petit Jury, and not by the Grand Jury; for they shall not go but upon the first Matter in Issue &c. Br. *Parnor*, pl. 7. cites 21 H. 6. 55.

3. Non-tenure in ** Avowry* is no Plea; For *Avowry* is good upon a *Disseisor*, or him in *Reversion*; quod nota bene. Br. Non-tenure, pl. 13. cites 11 H. 4. 28, 29.

S. P. But he may avoid the Seisin alleged by the Defendant,

and this is not any Non-tenure. Br. Non-tenure, pl. 20. cites 8 H. 6. 16, 17. — * S. P. Br. Non-tenure, pl. 53. cites 22 H. 6. 34. And yet Issue was taken, if he upon whom the *Avowry* is made had Fee the Day of the taking or not, For this is a Bar to the *Avowry* in Effect.

4. If the Tenant disclaims in *Avowry* made by his Father in Court of Record, and after the Tenant aliens, a *Writ of Right upon Disclaimer* lies against him who disclaimed, and yet he is not *Tertenant*. Br. Non-tenure pl. 57. cites 18 H. 6. 25. & Fitzh. *Quid Juris clamat*. 11.

5. In *Champerty* Non-tenure shall not abate the Writ. Br. Non-tenure, pl. 17. cites 21 E. 3. 10.

6. Non-tenure is no Plea in *Writ of Descient*. Br. Non-tenure, pl. 45.

7. *Entry sur Disseisin of Rent*; the Tenant said that he is not *Pernour of the Rent, nor Tenant of the Land whereof &c. nor was the Day of the Writ purchased, nor ever after*. The Demandant said, he was seised of the Rent till by the Defendant disseised, and made a *Feoffment of the Land whereof &c. to Persons unknown to defraud him of his Tenant, and averred that he took the Profits after the Disseisin till the Day of the Writ purchased*; and it shall be shewn that the Defendant was *Tertenant* at the Time of the *Disseisin*; and it was admitted good Maintenance of the Writ. Br. *Parnor*, pl. 19. cites 5 E. 4. 35.

8. In *Writ of Error*, per Catesby, *Nontenure* is no Plea; For it shall be brought against the Heir or Party, tho' he be not *Tenant*; For *Writ of Error* shall be brought against him who recovers, and enters, and makes *Feoffment*, or his Heir if he be dead, by Reason of the *Privy*; Br. Non-tenure, pl. 37. cites 42 Aff. 22. S. P. — Non-tenure be

Br. Non-tenure, pl. 37. cites 42 Aff. 22. S. P. — Non-tenure be

was allowed a good Plea in Error to reverse a Fine, and that tho' he was named Tenant in the Writ. Br. Error, pl. 27. cites 47 E. 3. 7.

9. The Issue in Tail, after the Discontinuance of his Father, entered, and made a Feoffment to Persons unknown, and took the Profits, and the Issue brought Formedon within the Year, and he pleaded Non-tenure; The Demandant shall maintain his Writ by the Statute, upon the Matter shewn, yet the Writ shall abate; per Priot; and yet by his Entry the Issue is re-tored to his Action, Br. Parnor, pl. 7. cites 21 H. 6. 55.

10. In Formedon the Tenant pleaded Non-tenure, the Demandant averred him Tenant by Pernancy of the Profits; and per Cur. he shall shew How the Tenant made a Feoffment to Persons unknown, and took the Profits, and shall not say generally that he took the Profits; and the Feoffment to Persons unknown is not traversable, but the taking of the Profits. Br. Parnor, pl. 18. cites 4 H. 7. 9.

And it is only to try the Privy of Blood. Br. Non-tenure, pl. 51. cites

11. Non-tenure in *Nuper obiit* is no Plea; For the Action is in Respect of the Privy of the Blood; per Newton J. Quære. Br. Non-tenure, pl. 18. cites 7 H. 6. 8.

H. 6. 8. Nor is several Tenancy any Plea; per Newton.

12. In Trespass it was said for Law, that in some Actions the Defendant may say that the Plaintiff has nothing in the Tenements; as for Instance in *Partitioe faciend* in *Warrantia Charta*, *Writ of Mesne*, and *Quo Warranto*; but Brook says, it seems that it should be in *Quo Fure*, and not in *Quo Warranto*. Br. Non-tenure, pl. 11. cites 7 H. 4. 15.

13. In *Per que Servitia*, *Quem redditum reddit*, or *Quid Juris clamat*, Non-tenure the Day of the Writ purchased is no Plea, but shall say, That he was not Tenant the Day of the Writ, nor the Day of the Note levy'd; per Newton; *Quod non negatur*. Br. Non-tenure, pl. 20. cites 8 H. 6. 16, 17.

So where he purchases pending the Writ. Br. Ibid.—Contrary if the Land descends to him pending the Writ. Note the Diversity. Br. Ibid.

14. *Præcipe quod reddat*, the Tenant said, that he was not Tenant the Day of the Writ purchased, but brought *Præcipe quod reddat* against A. of Title Ancestrell, and recovered, and sued Execution by Scire Facias pending the Writ, Judgment of the Writ; and because it is his own Act, tho' it be by Action Ancestrell, the Writ was awarded good. Br. Brief, pl. 46. cites 41 E. 3. 5.

15. Writ of *Quid Juris clamat* lies against him who was Tenant *Tempore Finis recogniti*, tho' he be not now Tenant; per Markham. Br. Non-tenure, pl. 57. cites 18 H. 6. 25 & Fitzh. *Quid Juris clamat*. 11.

16. Non-Tenure is no Plea in *Writ of Right of Reasonable Part*; per Briton. Brook says, the Reason seems to be because the Action is to try the Privy of the Blood. Br. Non-tenure, pl. 56. cites F. N. B. 9. (N)

17. Non-tenure of Parcel shall not abate *Scire Facias in toto*. Br. Error, pl. 86. cites 24 E. 3. 24. 43.

Special Non-tenure by Villenage, and Tenure in Villenage the Day of

18. In *Scire Facias upon a Recovery* against a Man it is a good Plea that the Day of the Writ purchased he had nothing in the Land, without affirming the Tenancy in any other; per Wiche. *Quod fuit negatum, quod nota*. Br. Scire Facias, pl. 49. cites *48 E. 3. 14.

the Writ purchased is no Plea in Scire Facias upon Recovery in *Wass*, by the best Opinion; nor in Scire Facias upon Recovery in *Præcipe quod reddat*, without affirming who is Tenant. Br. Non-tenure, pl. 9.—Br. Wast, pl. 51. cites 48 H. 3. 18.—And he who pleads Recovery in *Wass* by Default need not aver the Party Tenant; For Non-tenure in this Action is no Plea. Br. Pleadings, pl. 6. cites 24 H. 3.—Br. N. C. 24 H. 3. pl. 64 S. C. and cites in Marg. 36 H. 6. 29.—* In Br. it is misprinted (88.)

In Scire Facias upon a

19. In *Scire Facias upon a Fine*, the Tenant said, that he had nothing unless

unless for Term of Years, and the Plaintiff averr'd him pernour of the Profits. Br. Non-tenure, pl. 47. cites 5 H. 5. 1. Fine Non-tenure is no Plea, as it is

faid there. Br. Non-tenure, pl. 10. cites 7 H. 4. 12.

Scire Facias of 20 Acres of Land, and 10 s. Rent against Defendant, who said, as to 10 Acres, that J. N. was seised, and incoffed him and W. P. who is alive not named &c. Judgment of the Writ; and to the other 10 Acres that R. was seised and leased to him for 15 Years, the Reversion to R. and so has he nothing in the Franktenement, Judgment of the Writ; And so see special Non-tenure admitted in *Scire Facias*, Contra of General Non-tenure; and to the 10 s. Rent, that it is issuing out of 4 Acres of Land of which J. N. was seised before the Writ purchased, and leased to the Defendant for 11 Years, and so has he only a Term in the Land, the Franktenement being in J. N. Absque hoc, that there is any Pernour of the Rent named in the Writ, Judgment of the Writ. Br. *Scire Facias*, pl. 110. cites 8 H. 6. 32. — Br. Brief, pl. 434. cites S. C.

20. In *Scire Facias*, if the Defendant pleads General Non-tenure, the * Plaintiff shall have Execution at his Peril; but Contra, if the Tenant says that he has only for † Term of Years, and shews certain, and of whose Lease; For this is Special Non-tenure. Br. Non-tenure, pl. 48. cites 9 H. 5. 11. For he who made the Lease to the Tenant, and who the Tenant says was seised in Fee

might have a Release or some Discharge which the Lessee for Years can not have. Jenk. 15. pl. 26.

Non-tenure generally is no Plea in a *Scire Facias*. Br. *Scire Facias*, pl. 107. cites 7 H. 6. 16. — S. P. Br. *Faux. Recov.* pl. 3. cites 14 E. 4. 2. — * S. P. Br. *Nonsuit*, pl. 19. cites 7 H. 6. 16, 17. 25. — † S. P. 3 Lev. 205. Mich. 36 Car. 2. C. B. Barret c. Trotman.

21. *Scire Facias* of Land upon a Recovery in *Scire Facias* against J. N. the Tenant said that J. N. was not Tenant of the Franktenement the Day of the first *Scire Facias* brought, nor ever after, but one A. whose Estate the Tenant has, and so the Recovery void; and it was held a good Avoidance of the Recovery, and yet J. N. in the first *Scire Facias* could not have pleaded Non-tenure generally. And it seems, that the Recovery was by Default; but all is one against this Tenant, who was not Party to the first Writ. Br. Non-tenure, pl. 43. cites 14 E. 4. 2. Br. *Scire Facias* pl. 215. cites S. C.

22. In *Ward*, the Defendant pleaded Non-tenure of the Body, and a good Plea. Br. Non-tenure, pl. 10. cites 7 H. 4. 12. Perk. S. 60.

23. In *Wast quas Tenet* the Defendant said that he had nothing in the Land the Day of the Writ purchased, nor after, Judgment of the Writ; & non Allocatur; For Non-tenure is no Plea in *Wast*; per Finch clearly. Br. Non-tenure, pl. 7. cites 40 E. 3. 33. Br. *Wast*, pl. 33. cites 43 E. 3. 3.

24. Where Damages are to be recover'd, Non-tenure with Disclaimer was no Plea; for he might injure the Demandant, should he be arrcited of his Damages which the Law gives him. G. Hist. C. B. 201. cap. 17.

(B) Pleadings. At what Time it may be pleaded. And after other Plea.

1. **I**N *Præcipe quod reddat*, the Tenant vouched J. S. who came and demanded what he had to bind him to the Warranty, and the Tenant shewed his own Deed, and the Vouchee said that he had nothing the Day of the Writ purchased, nor yet has, Judgment, if he may dereign the Warranty; and the best Opinion was, that because he has demanded the Lien, he cannot say after that he is not Tenant. Br. Voucher, pl. 28. cites 45 E. 3. 2.

2. *Præcipe quod reddat*, the Tenant pleaded Non-tenure; the Demandant said, that at another Time he brought *Præcipe* against the Tenant of the same Land, and he waged his Law of Non-summons, and the Demandant brought this Writ by *Journeys Accounts*; and the Opinion of Prifot and Danby was, that he shall not plead Non-tenure after; For if he was not Tenant at first, he need not wage his Law of Non-summons. Br. Estoppel, pl. 17. cites 33 H. 6. 24. S. P. Br. Non-tenure, pl. 4. cites S. C. — Br. Estoppel, pl. 54. cites 7 H. 4. 8. contra. That the Tenant may plead Non-

tenure, and shall not be estopped; for Non-tenure comes upon the Vint; per Hanke, quod conceditur

Br. Non-tenure, pl. 4. cites S. C.

3. And it is said, that after Grand Cape a Man may plead *Several Tenancy or Jointenancy*, but not *Nontenure*; For if he was not Tenant, the Default cannot grieve him. Br. Ibid.

4. In *Entry in Nature of Assise of Rent*, the Defendant said, that he was not *Pernour of the Rent the Day of the Writ purchased, nor ever after*; and it was held that he shall say, that he was not *Pernour of the Rent, nor Tenant of the Land &c.* out of which &c. Judgment of the Writ. Br. Non-tenure, pl. 39. cites 5 E. 4. 22.

5. In *Formedon in Descender* it was resolved per tot Cur. that *Nontenure of all* is not pleadable after *General Impar lance*. 3 Lev. 54. Mich. 33 Car. 2. C. B. Barrow v. Hagget.

(B. 2.) At what Time it may be pleaded. *After what Plea.*

* Br. Non-tenure, pl. 2. cites 33 H. 6. 2. *Contra*, that this shall estop him to plead Non-tenure in another Writ, as it is said for Law.——Br. Estoppel, pl. 13. cites S. C.

1. IT was said, that in *Præcipe quod reddat*, if the Tenant * wages his Law of *Nonsummons*, by which the Writ abates, and the Demandant brings a new Writ against him, he may plead Non-tenure; For he shall have the View, and this Plea comes upon the View; but *Mirum*, for the Ley-gager affirms him to be Tenant. Br. Non-tenure, pl. 46. cites 7 H. 4. 8.

Br Estoppel, pl. 13. cites S. C.——*But where Præcipe quod*

2. If the Tenant in *Præcipe quod reddat* pleads *Jointenancy*, this shall estop him to plead Non-tenure in another Writ, as it is said for Law. Br. Non-tenure, pl. 2. cites 33 H. 6. 2.

reddat is brought against the Baron and Feme, and they plead Non-tenure, they shall not be estopped to plead it, because another Writ brought against the Baron alone was abated by Jointenancy, and this Writ is brought by *Journeys Accounts*, and they were Tenants the Day of the first Writ purchased; this is no Estoppel to the Feme, who was not Party to the first Writ; and therefore the Demandant passed over, and dar'd not wait the Estoppel. Br. Non-tenure, pl. 3. cites 33 H. 6. 3.

3. In *Cessavit*, *Nontenure of the Moiety* goes to all the Writ, per Littleton and Catesby; For he cannot defend the entire Tenements nor tender the Arrears for the whole. Br. Non-tenure, pl. 44. cites 21 E. 4. 25.

(C) Pleadable. *By whom.*

Contra if he had given Parcel in Fee. Br. Ibid.

1. IN Assise it was agreed, that where there is Lord and Tenant, and the Tenant gives in Tail Parcel of the Land, that the Assise of Mortdancestor brought by the Heir of the Lord against the Feoffor of the entire Rent is well brought; For he is Tenant to the Lord of the entire, and need not to name the Tertenant in Tail. Br. Non-tenure, pl. 30. cites 8 Aff. 35.

2. Non-tenure in *Attaint upon Assise of fresh Force* was awarded a good Plea, if pleaded by one who was Party to the Assise of fresh Force, quod nota. Br. Non-tenure, pl. 16. cites 21 E. 3. 10.

* S. P. Br. Error, pl. 27. cites S. C.——

3. The * Tertenant who is a Stranger to the first Recovery may plead Non-tenure in Writ of Error. Br. Non-tenure, pl. 8. cites 47 E. 3. 7. 8.

Contra of the Heir; For it lies against him, whether he be Tertenant or not. Br. Non-tenure pl. 8. cites 47 E. 3. 7. 8.——† S. P. Br. Error, pl. 27. cites S. C.——So of the Party to the Recovery. Br. Non-tenure, pl. 8. cites 47 E. 3. 7. 8.

4. A Man recovered Land in a Court Baron by Writ of Right, the Tenant brought Writ of false Judgment against the other, and reversed the Judgment, and brought Scire Facias against him who first recovered to have Execution, and he said that J. B. was seised and leased to him for Term of Years, Absque hoc, that he was Tenant of the Franktenement the Day of the Writ purchased, or ever after, Judgment of the Writ. Per Catesby, this Special Non-tenure does not lie for him against whom the Judgment was given, as here; but a Stranger may have the Plea. But per Littleton, he shall have the Plea; For it may be that the Plaintiff has released to J. B. who infeoffed him; For if he should not have this Plea, he would lose his Land without any Answer; For he cannot plead in Bar, because he is not Tenant; quod Danby and Needham concesserunt. Br. Nontenure, pl. 41. cites 8 E. 4. 19.

But Brook says, that it might be, that he who recovered in the Writ of Right, had not Execution, but that J. B. entered, to whom the now Plaintiff has released, which cannot be pleaded by this Termor. Br. Ibid.

5. It was said, that where a Man * recovers by Formedon, and the Tenant brings Attaint against him who recovers, he shall not plead Non-tenure; For he was the same Party who recovered; For he demands nothing but to have Judgment reversed. Quære inde; For he shall recover the Land. But where it is against a Stranger, the Writ shall say qui Terram illam tenet; Contra against Party to the first Judgment. Br. Non-tenure, pl. 41. cites 8 E. 4. 19.

And if a Man recovers in Formedon, and brings Scire Facias against the Tenant, he shall not plead Non-tenure; per

Catesby and Jenny. Br. Ibid.——Contra of the Stranger. Br. Ibid.——* So if a Man recovers by Assise. And Brook says, the Reason seems to be, because he was the same Person who recovered the Land, and it does not appear there, if the Plaintiff in the Assise, who recovered, entered or not, or had other Execution. Br. Non-tenure, pl. 58. cites 31. H. 6. 12.

5. Non-tenure is no Plea in Attaint for him who is Privy to the first Record; per Hare. Br. Non-tenure, pl. 1. cites 26 H. 8. 2. and 31 H. 6. 12.

S. P. Br. Non-tenure, pl. 16. cites 20 H. 8.—— And it seems

where a Man is barred by false Verdict, and brings Attaint against the first Tenant, Non-tenure is no Plea; For he is Privy. Br. Non-tenure, pl. 6. cites 35 H. 6. 44.——Contra of a * Stranger, 19 H. 8. As where the Tenant infeoffs a Stranger after 19 H. 8. Note the Diversity; but Wangford said, that Non-tenure is no Plea in Attaint, and this is to be understood as above, as it seems. Br. Ibid.——* S. P. Br. Non-tenure, pl. 16. cites 20 H. 8.

(D) Pleadable. How. Of all, or Parcel. In what Cases.

1. **I**N Cui in Vita, he who pleads Nontenure ought to say, that he was not Tenant the Day of the Writ purchased, nor ever after; but of Jointenancy, it is sufficient to say, that he held jointly with J. N. not named the Day of the Writ purchased, of the Gift of N. Judgment of the Writ. Br. Non-tenure, pl. 25. cites 37 H. 6. 16.

2. In Mortdancestor, the Tenant pleaded Non-tenure of Parcel in Bar, and the Court compelled him to answer over to the Assise, by which he said, and it found that it be not &c. Br. Non-tenure, pl. 33. cites 12 Aff. 8.——And Brook adds a Nota, that at the Common Law, Non-tenure of Parcel should abate all the Writ, because it was false in Parcel; and now by the Statute of 25 E. 3. De Proditionibus cap. 15. it shall not abate the Writ, but for this Part only; but Jointenancy of Parcel never was but to the Writ for this Parcel; For this affirms the Writ true in this, and in more, and does not falsify the Writ, as in Non-tenure of Parcel; note the Diversity. Br. Ibid.——Ibid. pl. 50. cites 21 E. 3. 28.

But it was thought very hard that a Writ, which was good in Parr, should be totally destroyed by this Plea; and therefore [by the Statute] 25 E. 3. 16. the Writ

was abated only for that Part of which Non-tenure is alleged. G. Hist. C. B. 201. cap. 17.——If the Writ abated in toto at the Common Law, it was because the Tenant could not be summon'd in other Land. Per Frowike. Kelw. 56. b. pl. 5.

3. Formedon

3. *Formedon against Coparceners who pleaded severally, and one said, that where the Demand is of the third Part of the Manor of A. she said that she held so much of the Gift and Feoffment &c. and that a Stranger was seised of two Acres of Land, and three Acres of Meadow Parcel of the same Manor; [and ill] For she ought to shew who is Tenant thereof; and he who pleads Non-tenure of Parcel, shall say who is Tenant thereof; Contra if he pleads Non-tenure of the whole. Br. Non-tenure, pl. 52. cites 19 H. 6. 13.*

But in Dower against Guardian, if he pleads in Bar of Part, and that he is not Guardian to the rest, he need not shew who is Guardian of the rest; For the Writ is not brought against him as Tertenant. Br. Ibid.

So where Non-tenure of the whole Lands is pleaded, the Tenant's Plea will be good, without shewing who is Tenant; for he is brought into Court to answer a Demand which he seems to be no Way Privy to, but utterly disclaims. G. Hist. C. B. 201, 202. cap. 17.

5. *In Præcipe of a Rent the Tenant demanded the View, and had it, and said that the Land put in View, out of which the Rent is supposed to be issuing, is three Mesuages; and as to one Mesuage, he answered as Tenant, and pleaded Hors de son Fee, and to the other two, no Tenant &c. nor Pernour of the Rent named in the Writ, Judgment of the Writ, and did not shew who is Tenant thereof, [and well]; per Prifot and Moyle; For this is of another Thing, which is not in Demand. Br. Non-tenure, pl. 27. cites 36 H. 6. 6.*

* S. P. Ibid. pl. 52. cites 19 H. 6. 13.

S. P. Ibid. pl. 52. cites 19 H. 6. 13. *6. But in Præcipe of Land if the Tenant pleads Non-tenure of Parcel, he shall shew who is Tenant of the rest. Br. Ibid.*

S. P. For they would not suffer a Writ that was good in Part to be wholly destroyed, except the Tenant shewed the Demandant how he might have a better Writ. G. Hist. of C. B. 201. cap. 17.

Contra where he pleads Non-tenure of all. Br. Non-tenure, pl. 27. cites 33 H. 6. 6. — For at the Common Law Non-tenure of Parcel goes to all the Writ. Br. Ibid. — But in Præcipe of Rent, Non-tenure of Parcel of the Land does not go but to the Parcel. Br. Ibid.

7. *But in Præcipe, if the Tenant pleads Non-tenure, and the Demandant avers him Pernour of the Profits, and he says that he did not take the Profits of Part, he need not say who took the Profits; For the Action does not lie against him as Tertenant, but as Pernour; per Prifot and Moyle. Br. Non-tenure, pl. 27. cites 36 H. 6. 6.*

8. *If in Dower the Defendant pleads, That he cannot render the Demandant her Dower, because he is not thereof Tenant, as of the Freehold, nor was at the Day of the issuing forth the original Writ of her the said Demandant, nor at any Time after. Et hoc parat. est verificare, unde per Judic' brevis prædict' &c. The Demandant may reply, that her Writ ought not to be quashed for any Thing before alleged; For that the Day of issuing forth the original Writ of her the Demandant, viz. (Tali Die & Anno) the Defendant was Tenant of the Land &c. as of his Freehold, as by the same Writ is supposed. Reg. Plac. 244. cap. 6.*

But in Præcipe quod reddat of a Manor, if the Tenant pleads a Non-tenure of Parcel all the Writ shall abate, and so it has been adjudged since this Statute, because the Manor is a Thing intire, in which Case the Demandant ought to have a Foreprise in the Writ; and for this Reason the Judges have held, that it is against Reason, that by his Demand of the intire Manor against one who is only Tenant of Parcel of the Manor, he ought to recover, and therefore have expounded the Statute to extend to Writs where the Things demanded are several, as Acres are, and have expounded that it shall not extend to Things intire, which Exposition is merely against the Text; For the Text is, that no Writ shall abate, and sometimes Judges have taken Things by the Equity of the Text contrary to the Text to make it agree with Reason and Equity; per Bromley J. Pl. C. 109 b. Mich. 2 M. 1. in Case of Fulmerstone v Steward — S. P. Pl. C. 205. a. Pasch. 2 Eliz. in Case of Stradling v Morgan.

But in Præcipe quod reddat of a Manor, if the Tenant

pleads a Non-tenure of Parcel all the Writ shall abate, and so it has been adjudged since this Statute, because the Manor is a Thing intire, in which Case the Demandant ought to have a Foreprise in the Writ; and for this Reason the Judges have held, that it is against Reason, that by his Demand of the intire Manor against one who is only Tenant of Parcel of the Manor, he ought to recover, and therefore have expounded the Statute to extend to Writs where the Things demanded are several, as Acres are, and have expounded that it shall not extend to Things intire, which Exposition is merely against the Text; For the Text is, that no Writ shall abate, and sometimes Judges have taken Things by the Equity of the Text contrary to the Text to make it agree with Reason and Equity; per Bromley J. Pl. C. 109 b. Mich. 2 M. 1. in Case of Fulmerstone v Steward — S. P. Pl. C. 205. a. Pasch. 2 Eliz. in Case of Stradling v Morgan.

10. Tho' a Plaintiff cannot destroy, yet he may abridge his Demand. For since the Defendant's pleading Non-tenure as to Parcel was not to abate the whole Writ, but to stand quoad the other Part, therefore if the Plaintiff had entered into Part, and the Defendant had pleaded this Entry to abate the whole Writ, it would not have been a good Plea; for it amounted to more than what the Tenant remained a Tenant to; and when the Plea was overruled, it was of necessary Consequence that the Demandant must abridge; For since the Demandant could not go on with the Remainder of his Writ after such Plea, he may go on originally. G. Hist. C. B. 202. cap. 17.

Thus in Formedon in the Remainder for the Manor of Dale, if the Demandant enters into any Part of it, he reveals the whole Freehold in himself, and con-

sequently the Tenant may plead a Non-tenure in the whole, which abates the Writ since as well as before the Statute. G. Hist. C. B. 202. cap. 17.

But if the Formedon be for 20 Acres, and the Demandant enters into six, this is but an Abridgement of his Demand, and is no more than Non-tenure of six Acres, so that the Writ stands good; and formerly they made this Distinction, that if a Demandant brought a Writ for two several Manors in two several Villis, and entered into one, this abated the whole Writ; For they were looked upon as two several Demands, and the destroying one intire Demand was a Destruction of the whole Writ, being not helped by the Statute, but left as if it was at Common Law. G. Hist. C. B. 202, 203. cap. 17.

But if the Demand was for two Manors in the same Vill, they looked upon them both to be but one Demand, being both but Parcel of the same Place of which the Vill was the Total; and therefore the Defendant could not plead the Entry into one of the Minors in Abatement of the whole Writ; so the Plaintiff might abridge his Demand quoad one of the Manors, and proceed for that only. G. Hist. C. B. 203. cap. 17.

But the better Opinion seems to be, that tho' the Manors be in two several Villis, yet the Plaintiff by entering into one does not abate the Writ, because they took the Demand of the Writ as the Total, and the several Demands of the Writ not as so many independent Demands in the Writ; and then the Entry into one created a Non-tenure of Parcel, which was no good Plea; and therefore the Plaintiff might well abridge his Writ. G. Hist. C. B. 203. cap. 17.

(E) Plea of Non-tenure, avoided How. By Replication.

1. **I**N Scire Facias the Tenant said that the Plaintiff was Tenant the Day of the Writ purchased, and yet is, Judgment of the Writ; Morice said, this amounted to Non-tenure; per Thorp, the Plea is good; For it may be that you disseised the Tenant before the Writ purchased, and continued the same disseisin now, and asked if he had any Thing else to say. The Plaintiff replied, that he was not Tenant the Day of the Writ purchased, nor ever after; and the other e contra &c. Br. Brief, pl. 532. cites 39 E. 3. 28.

2. Upon Non-tenure pleaded, the Maintenance of the Writ is, that the Defendant is Tenant as the Writ supposed, & de hoc ponit se super Patriam &c. and the other the like, and no Abique hoc shall be there. Br. Maintenance de Brief, pl. 42. cites Lib. Int.

3. In Formedon in Remainder the Tenant to Part pleaded Jointenancy, and to the rest disclaimed, the Demandant said, that after the Death of him by whom he claimed the Remainder the Tenant entered and made a Feoffment to Persons unknown to defraud the Demandant of his Tenant, and that he took the Profits the Day of the Writ purchased, and all Times after; and that the Action is brought within the Year after the Action accrued, and this &c. and by the best Opinion, the Averment is not good to maintain the Writ upon Disclaimer; For the Statute serves for Non-tenure in the Land, and for Jointenancy by the Equity, and e contra for Disclaimer; and where this Averment shall take Place, the Tenant ought to be Tenant of the Franktenement at the Time of the Action accrued. Br. Parnor, pl. 20. cites 5 E. 4. 44, 45.

4. In Formedon if the Tenant pleads Non-tenure, the Demandant may say that the Tenant made Feoffment to Persons unknown to defraud him &c. and aver that he took the Profits, and there the Feoffment is not traversable, but the taking of the Profits; therefore this Feoffment is not peremptory but the taking of the Profits. Br. Peremptory, pl. 40. cites 4 H. 7. 9.

5. In *Formedon* the Tenant pleaded Non-tenure, the Plaintiff said that he was Tenant after the Death of his Ancestor, and made a Feoffment to Persons unknown &c. and that he took the Profits, and that he brought his Action within the Year after Title accrued, and need not say when the Alienation was made &c. per Cur. Br. Parnor, pl. 28. cites 7 H. 7. 4.

6. In *Attaint* the Defendant pleaded Non-tenure; and per Fitzherbert, the Plaintiff may aver him Pernor of the Profits; Quod nemo negavit. Br. Parnor, pl. 1. cites 26 H. 8. 62.

7. *Anciently*, in real Actions, there was no Damages given where nothing but the Freehold was in Question; and if the Tenant pleaded upon Tenure and Disclaimer, the Plaintiff could not aver his Writ and say he was Tenant; For by this Plea the Tenant disclaims all Right to the Land, so that he can never put up any Pretension or Demands precedent to his Disclaimer, and the Demandant is immediately put into Possession of his Lands, which was the only Intent of his Writ, & Frustra fit per plura quod fieri potest per pauciora. G. Hist. C. B. 200, 201. cap. 17.

* See (A)
pl. 20.

(F) *Judgment and Execution.* In what Cases after such Plea pleaded the Plaintiff may have Judgment, and sue * Execution at his Peril.

* S. P. The Reason is, because the Scire Facias does not suppose the Tenure in the Tenant, as the Præcipe quod reddat does; For the Scire Facias is brought to execute a Judgment for Land or Rent, or upon a Fine to have Execution of it. Jenk. 15. pl. 26.

1. **I**N Scire Facias, it is said in a Nota, that it is a good Plea to oust the Plaintiff from having Execution at his Peril, to say that the Plaintiff has nothing but a Term of Years, and set forth the Term and Lease in certain, which Term yet continues, and then he shall not have Execution at his Peril, but upon * General Non-tenure pleaded there he shall have Execution at his Peril, and may enter at his Peril. Br. Scire Facias, pl. 84. cites 9 H. 5. 11.

2. In Scire Facias, the Tenant said that J. N. was seized till by M. disseised, who infeoffed the Tenant, and pending this Writ N. had entered; Judgment of the Writ; per Newton this amounts to Non-tenure, and Non-tenure generally is no Plea in Scire Facias, but the Plaintiff shall have Execution at his Peril, which several agreed of Non-tenure general, but this Plea varies much from that as it seems. Br. Scire Facias, pl. 107. cites 7 H. 6. 16.

In Scire Facias against Tertenants Non-tenure was pleaded, and upon the citing this Case prayed that the Plaintiff may take Judgment or reply, and the Court granted the same accordingly, and said that to Special Non-tenure he must reply, and not take Judgment. 3 Keb. 182. Trin. 25 Car. 2. B. R. Sir Henry Journingham's Case.

3. In Scire Facias upon a Judgment in Debt against Terre-tenants, the Sheriff return'd Quod Scire Feci J. B. Tenenti unius Mesuagii &c. And the said J. B. comes and pleads that he is not Tenant against the Return of the Sheriff. Upon Demurrer it was adjudg'd for the Plaintiff to be no Plea, and that the Plaintiff might have Execution at his Peril. Cro. E. 872. Hill. 44 Eliz. Flud v. Penington.

4. Where the Non-tenure was without Disclaimer, the Plaintiff could either aver his Writ, or take Judgment at his Election; For if the Demandant would take upon him, that the Tenant be Tenant to the Freehold, he might put it in Judgment upon that Writ: and the Entry is *Sub Periculo habeat inde Executionem.* G. Hist. C. B. 201. cap. 17.

[For more of Non-tenure in General See **Formedon, Jointenants,** and other proper Titles.]

Nomes [or Names.]

(A) Names of *Men*. By what Name he shall be called.

Fol. 135.

1. **I**F a Man be baptized by one Name and confirmed by another Name, as if he be christened by the Name of Thomas, and confirmed by the Name of Francis, he shall be named in Actions Francis according to the Confirmation, and not according to the Christian Name. *Walsch. 6 Jac. B. 76.* and there said by Coke that this was in *Judge Sawdy's Case* adjudged.

Co. Litt. 3. a.—A Man cannot be named by two Christian Names, as *Evan alias Jehan Loyd, 135. Loyd's*

and a Return of Rescous in such a Manner was for that Reason held naught. *Noy. Cafe.*

2. *Bishop holds Deanry in Commendam*; In all Disputes concerning *Lands of the Dean*, he shall be called Dean and not Bishop. *Lat. 235.* cites *Fitzh. Trial 57.*—So where a Bishop holds *Parsonage*. *F. N. B. 50. (I).*

(B) What are *distinct* and several Names. [*Christian Names*].

1. **P**TERS and Peter are all one Name of Baptism; For it appears by the Statute *Ne quis Occationetur pro Parte aut Reditu Petri Sabeston*, and by the Chronicle of *Holingshead 148.* that sometimes Sabeston is called Piers and sometimes Peter in the same Statute and the same Folio, and so that the Names are all one, tho' it was objected that *Petrus* is the Name in Latin, and *Piers* in French. *Nich. 15 Jac. B. R.* between *Griffith and Middleton*, where the Case was that *Piers Griffith* brought *Audita Querela* against *Middleton* upon a Statute to avoid it, and Defendant pleaded in Abatement that he was outlaw'd by the Name of *Peter Griffith* at the Suit of *J. S.* and that he is the same Person, and adjudged a good Plea for the Reason aforesaid. *Magna Charta 20. Part Sign 46.*

Cro. J. 425. Pich. 15 Jac. B. R. S. C.

2. *Agnes* and *Ann* are several Names of Baptism, and not one Name. *Nich. 15 Jac. B. R.* in *Griffith and Middleton's Case*, agreed per *Curiam*. *Nich. 42, 43 Eliz. B. R.* between * *King and King*, adjudged in Writ of Error. *Dy. 10, 11 Eliz. 279. 9.* between *Turpin and Fuxon*. *H. 18 Eliz. Rot. 738.*

Cro. J 425. S. P in S. C.

* Cro. E. 770. S. C.

3. * *Jane* and *Jone* are but one Name, and not distinct several Names. *Nich. 15 Jac. B. R.* in *Griffith and Middleton's Case* agreed per *Cur.* *Hill. 32 Eliz. in + Hedd and Chaloner's Case.*

* S. P. Cro. L. 425. in S. C. † Cro. E. 176. S. C. by Name of Hedd v. Chaloner.

4. *Saunder* and *Alexander* are not distinct Names of Baptism, but one Name only; For usually *Alexander* is called *Saunder*. *Nich. 15 Jac. B. R.* in *Griffith's Case*, per *Hountague* said, that he had known it to be so adjudged.

S. P. Cro. J 425. in S. C.

5. Habel and Sibel are several distinct Names of Baptism. 1 Ass. 11. adjudged.
6. Garret and Gerard are all one Name. Camden's Remains 71. Verlegan Pasch. 16 Jac. B. R. between *Travers* and *Gerard Malines* it was a Question.
7. And so Gerald is all one Name with those. Camden's Remains 71.
8. Randulphus is not Latin for Randall, but they are divers Names. Dubitatur H. 31, 32 Chz. B. R. between *Balington* and *Balington*; For Ranulphus is his true Name.
9. Randulphus and Randolphus is not one Name but diverse. Mich. 13 Ja. B. R.
10. Randolph and Ranulph is not one Name but divers. Mich. 13 Ja. B. R. between *Lumley* and *Hutton* per Curiam.
11. Sir John Hathwaie bound himself by Obligation in this Manner, Noverint Universi me * Jean. Hathwaie teneri &c. This is a good Obligation; For this Word Jean. shall be taken for an Abbreviation of *Johannem*, and so one and the same Name. Mich. 11 Car. B. R. between *Downes* and *Hathwaie*, per Curiam, adjudged upon a Special Verdict. Intratur Hill. 11 Car. Rot. 195.
- Downes* v. *Hathwaie*, where it is said that the Bond and the Declaration are *Jehn*, and the Roll is *Joes* and *Ibid.* 418. S. C. and it is there said, that the Declaration was *J. Jarnes*, and the Obligation is *Jorem* without any Dash or Stroke over, and reported in both Places to be adjudged for the Plaintiff.
12. Tho' James and Jacob are several Names, yet *Jacobus* is Latin for both, and shall serve for either of them. Mich. 14 Car. B. R. between *Holland* and *Rigley*, per Curiam adjudged; where it was assigned for Error that where the Writ of Summons was returned *Responso Jacobi B.* that there was not any such Sheriff named *Jacobus*, yet the Judgment was affirmed. But before, in the Record, it appears that his Name was *Jacob*, which * throughout the whole Case is *Jacob*, and *Jacobus* is *James*. Intratur Trin. 14 Car. Rot. 629.

* Orig (per
touts Cases)

(C) Names of Dignity. What is, and how to be express'd.

1. **I**N Quare Impedit, it was adjudged that *Provost*, *Abbet* and *Prior* are Names of Dignity, quod *Quere* of *Provost*; For it seems to be a Name of Office, as *Parson*, *Archdeacon* &c. and yet he ought to be named by this Name when any Thing is in Demand belonging to it. Br. Nofme, pl. 25. cites 24 E. 3.
- * S. P. Br. Nofme, pl. 14. cites 14 H. 4. 7. in the written Book; Contra of a *Duke* or *Earle*.
2. * *Parson* or *Priest* is no Name of Dignity; Contra of *Knight*. Br. Nofme, pl. 12. cites 11 H. 4. 40.
- S. P. because it *tantum* counts; For she cannot be late Wife of W. A. Earl, but she must be Countess, unless special Matter be shewn to the contrary. Br. Nofmes, pl. 2. cites S. C.
3. *Wast* against *J. A. late Wife of W. A. Earl of Arundel*; this is as if he had said Countess of Arundel. Br. Misnomer, pl. 62. cites 2 H. 6. 10, 11.
- A *Baron* shall not be impleaded by Name of *Baron*.
4. *Præcipe* quod reddat to *J. L. Knight*. *Fulthorp* said, he is *Lord* not named *Lord*, Judgment of the Writ; and because he was no *Duke* or *Earle*, but a *Baron*, therefore the Writ was awarded good, and so see that * *Knight* is

is a Name of Dignity, and Baron or fuch Lord not. Br. Nofme, pl. 20. cites 8 H. 6. 10. ron: For it is no Name of Dignity,

but *shall be named Knight if he be a Knight, or Efquire if he be no Knight* where Addition is neceffary, and *yet he shall be amerced in the Exchequer as a Baron* when Amercement shall come to be affixed. Br. Nofme, pl. 61. cites 32 H. 6. 29.

* S. P. but *Efquire or Gentleman are Names of Hofhip*; per Newton, which Brook fays feems to be a true Difference. Br. Nofme, pl. 33. cites 14 H. 6. 15

5. *Prebend of O. is charged with an Annuity to J. N. by Prefcription, and the fame Prebend is annexed to the Precentor of E. and yet in the Writ of Annuity it fuffices to name him Prebendary and not Precentor*; For by the Prebend he is charged; per June and Cott. contra per Palton; and if it was appropriated to the Abbot, the Abbot fhall be fued by Name of Abbot; *Quod tuit conceffum*; For it is a Name of Dignity, but none faid that a Precentor is a Name of Dignity. Br. Nofme, pl. 32, cites 14 H. 6. 14.

6. It feems that *Degrees are Dignities, as Duke, Earl, Knight, * Serjeant at Law &c.* For their Writ of Serjeant is *Statum & Gradum Servientis ad Legem fufceptur.* Br. Nofme, pl. 33. cites 14 H. 6. 15. For it feems that Degree contains in it State, but not e contra, and

the State of a Man is as Gentleman, Efquire, Yeoman, Widow, fingle Woman &c. and the Art or Craft of a Man is his Myftery. Ibid.—|| Orig. (Grec).—* S. P. Br. Nofme, pl. 5. cites 35 H. 6. 55.

7. In Trefpafs Defendant faid that he was *Warden of Guild-Hall of London* the Day of the Writ purchafed, not named &c. Judgment of the Writ, & non Allocatur; becaufe it is not a Name of Dignity. Br. Nofme, pl. 21. cites 19 H. 6. 65.

8. Bill of Premunire *againft J. C. Clerk, he pleaded to the Bill, becaufe he was an Archdeacon* not named Archdeacon, Judgment of the Bill, & non Allocatur; For it is * not a Name of Dignity. Br. Nofme, pl. 4. cites 27 H. 6. 5. and P. 25 E. 3. 41. * S. P. Br. Additions, pl. 8. cites 33 H. 6. 9.

9. *Mafter and Doctor are not Names of Dignity.* Br. Nofme, pl. 5. cites 35 H. 6. 55.

10. *Dean* is a Name of Dignity, per Choeke J. contra per Danby Ch. J. and that it fuffices to *name him Clerk.* Br. Nofme, pl. 43. cites 5 E. 4. 106.—And it is noted there in the Margin, that 17 H. 6. is, that Dean is no Name of Dignity. Ibid.

11. *Supremum caput Ecclefie Anglicane* was omitted in the Writ of Summons of Parliament by *Queen Mary*; Refolved by all the Judges of England that the Writ was good; For *it was not part of the Name of the Queen,* but only an Addition. The Word Rex comprehends all the Attributes and Dignities of the King; and the King was *Dei enfor Fidei* in his Kingdom before the faid Statute, as appears by the faid Statute. Jenk. 209. pl. 42. cites 1 Mar. Dyer 98.

12. In a Writ brought the Præcipe was *Edwardo Domino Windfor de London Militi,* and becaufe the Word Miles was put after his Name of Dignity the Writ abated. Mo. pl. 77. 22 Hill. 3 Eliz. Lord Windfor's Cafe. Dal. 27. pl. 3

13. A Commiffion was directed *Thome Domino Pawlett, & aliis ad Examinand' Teftes &c.* Sir William Cecil Knight Lord Burleigh and Great Treafurer of England faid, this is not well directed; For he is not *Ld Pawlett,* but the Direction fhould be *Domino Thome Pawlett,* and not *Thomæ Domino Pawlett,* which in Time to come may be questioned what Pawlett is intended; And the Clerks were commanded to amend this Direction. Sav. 56 pl. 120.

14. A *Duke, Marquess, Earl, Vifcount* may be fued by the faid Names, and a *Baron* by the Name of *Dominus,* not by the Name of *Baron*; For there are Barons of London, Barons of the Cinque Ports, and Barons of the Exchequer. *Judge, Bifhop, Baronet, Knight,* are all Names of Dignity; Writs brought for them or againft them ought to name them fo: *If a Duke, Marquess &c. be a Knight, it is fufficient to name him Duke &c.*

For this *greater Dignity comprehends in it the Knight*. A Grant made to them ought to be by these Names of Dignity; For the Dignity is Parcel of their Names. The Name *King juremunts all additions*. In the King's Grants, his Christian Name with the Word King, is sufficient. Jenk. 209. pl. 42. cites 9 Co. 47. the Earl of Shrewsbury's Case.

12 Mod 185.
187. S. C.
acc. ———
S. P. For
Knight 18 a
Name of
Dignity and
Parcel of a
Man's Name
as much as
his Christian
Name. 2
Salk. 561.
S. C.

15. As the Case was stated upon the Pleadings in C. B. it appeared that a Grant was made to an Esquire by the Name of Knight, whereupon Judgment was there given that the Grant was void; and Error being brought in B. R. it was said by Holt Ch. J. That a Man who was reputed a Knight, but in Truth is not so cannot take any Thing by Way of Grant by the Name of Knight; For such Grant is void, it being a Thing in Reputation, without any colourable Ground for it; But a *Grant to a Duke's eldest Son by the Name of a Marquess, or to the eldest Son of a Marquess by the Name of an Earl* (et sic de Similibus) would be good, because of the Common *Cartely of England, and their Places in Heraldry*; but Rokesby J. contra. But by the three other Judges the Judgment was affirmed; and thereupon a Writ of Error was brought in Parliament, where this Judgment was reversed; For in Truth it was only a Mistake of the Pleader, the Grantee being a Knight at the Time of the Grant made. Carth. 440. Hill. 9 W. 3. B. R. the King v. the Bishop of Chester, als. Sir William Theackstone's Case.

16. An *Indictment* was preferred against two Chairmen for a *Battery upon Thomas Lord Marquess of Carmarthen, [eldest Son of the Duke of Leeds]* who was called up to the *House of Lords by the Name of Lord Osborn*; and it was held by the Ch. J. that there was no such Person, or at least the Duke of Leeds was the Person, and not the Prosecutor. So Complaint was made in the House of Lords against the Marquess of Carmarthen for Breach of Privilege, and the House said there was no such Person: The Defendants were acquitted. 2 Salk. 451. Marquess of Carmarthen's Case.

17. So one was *indicted* at the Old Baily for *stealing the Goods of the Earl of Kingston*, who was the *eldest Son of the Marquess of Derchester*, and the Defendant was acquitted by the Opinion of all the Judges; For he was only Mr. Pierpoint. 2 Salk. 451.

18. Names of Dignity are *Marks of Distinction imposed by publick Authority*; and they always make the very Name of the Person to whom they are given; and they are of *two Sorts*, either of such Marks of Distinction as exclude the Surname, so that the Person may not seem to be of any common Family, and such are the Names of Earls, Dukes &c. that *exclude their Surnames*, and by them the Parties must plead and be impleaded; otherwise the Writ abates. Secondly, They are such Marks of Distinction as are always imposed by the Supreme Power, and are Parcel of the Name it self, but do not exclude the Surname, such as Knight, Baronet, Banneret &c. G. Hist. C. B. 190.

[For more of Nomes [or Names] in General See Abatement, Addition, Grant, Visitation, and other proper Titles.

